

**WOMEN, FEMINISM AND INTERNATIONAL HUMAN  
RIGHTS LAW - METHODOLOGICAL MYOPIA,  
FUNDAMENTAL FLAWS OR MEANINGFUL  
MARGINALISATION?**

**SOME CURRENT ISSUES**

**ANDREW BYRNES\***

**A. Introduction**

*I. Criticism of the "Mainstream"*

The last two decades have seen the emergence of a vast body of writing about women and the international system from a great variety of perspectives. Not surprisingly, this has included a proliferation of writing about women, women's rights and human rights in an international context.<sup>1</sup> Much of that literature, fuelled by the energy that led to and was subsequently generated by the activities of the United Nations Decade for Women,<sup>2</sup> focused on the new norms, institutions and programs established during this period which addressed in a focused way the concerns of women.

A number of writers also turned a critical eye on the response of the international system for the protection of human rights to the concerns of women and found it deficient in major respects. Two salient criticisms were made: issues of central concern to women found little place on the "mainstream"<sup>3</sup> agenda and the institutions and procedures concerned with "women's issues" were the poor cousins of the "real" human rights organs and procedures. These critics charged that the "mainstream" "human rights" community largely ignored or neglected blatant violations of women's human dignity, refusing to perceive them as gross

---

\* University of Hong Kong

1 See eg the bibliographies on international law and the right to sexual non-discrimination prepared by Cook R in (1989) 14 Yale JIL 161 and in (1992) NYJ Int Law and Politics (forthcoming).

2 See generally Fraser A, *The UN Decade for Women: Documents and Dialogue* (1987); Pietila H and Vickers J, *Making Women Matter: The Role of the United Nations* (1990).

3 For a description of how I use the term "mainstream", see below p 207 ff.

violations of fundamental human rights. Such issues were left to be taken up, if at all, as social and humanitarian issues in marginalised, procedurally weak fora dealing with women's issues.<sup>4</sup> These perceptions gave rise to demands not only that the women's institutions be strengthened but also that greater attention be given to issues affecting women in the mainstream organs.

Implicit in these critiques was the assumption that it is both possible and desirable to deal with many of these violations of women's human dignity within the established human rights framework, in particular the civil and political rights framework. However, apart from some fairly general explanations of the reasons for the alleged exclusion of women's experiences from the dominant practice, these critiques did not explore the conceptual, doctrinal and institutional hurdles which need to be overcome if this goal is to be achieved.

## 2. *A Resurgence of Interest*

The concern to ensure a greater prominence for violations of "women's rights" in the human rights "mainstream" appears to have gathered momentum in the last couple of years (particularly in North America, but elsewhere as well).<sup>5</sup> The slogan "women's rights are human rights" has been invoked frequently and there have been a number of conferences and seminars exploring the relationship between "women's rights" and "human rights".<sup>6</sup> This interest has come not only from women's groups; increasingly feminists or those sensitive to feminist issues in "mainstream" organisations or who are working within a more traditional framework have begun to address the issue in earnest.<sup>7</sup> Under pressure from such groups, governmental bodies have also begun to address the issue.<sup>8</sup>

---

4 See eg Reanda L, "Human Rights and Women's Rights: The United Nations Approach" (1981) 3 Hum Rts Q 11; Fran Hosken, "Introduction" in *ibid* 1; Galey M, "International Enforcement of Women's Rights", (1984) 6 Hum Rts Q 463.

5 For a recent restatement and development of a number of the criticisms, see Bunch C, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights", (1990) 12 Hum Rts Q 486.

6 See eg Symposium on Women and International Human Rights, in (1981) 3 Hum Rts Q 1-135; conference on International Human Rights and Feminism, New York, November 1988; "International law and feminism", final day of the conference on The Role of Consent and the Development of International Law at the End of the Twentieth Century, Canberra, August 1990; Consultation on International Human Rights Law and Women, Toronto, August 1992.

7 See eg Charlesworth H, Chinkin C and Wright S, "Feminist Approaches to International Law", (1991) 85 AJIL 613 (drawing on North American work on feminist jurisprudence, earlier writing on international law and women, and women in development literature).

8 For example, in 1990 the US State Department's country reports (for the year 1989) on human rights practices contained for the first time a special section on violations of women's human rights in response to a Congressional directive that these be included. See International League for Human Rights, *Human Rights Abuses Against Women: A Worldwide Survey - A Compilation of Excerpts from the US State Department's 1990 Country Reports on Human Rights* (1990). The Subcommittee on

Despite this interest, there has so far been relatively little exploration of the implications from an international human rights law perspective of attempting to give greater prominence to gender in the mainstream discourse.<sup>9</sup> Much still needs to be done to define the terms used in the discussion, to document in detail the inclusion or exclusion of violations of women's human rights within the dominant discourse, to ascertain the reasons for this, and to develop strategies to ensure that greater account is taken of these issues in mainstream fora. This paper is intended to contribute to that process. Much of it is tentative, suggesting areas for further research and action, rather than stating definitive conclusions.

### 3. *Objectives of this Article*

The objectives of this article are thus:

1. to give an indication of some of the issues relating to the role of gender in international human rights law and practice which have been attracting considerable attention in the international human rights/feminist communities;
2. to identify a number of areas in which additional research is needed to further our understanding of the role that gender plays in the definition of human rights violations and institutional responses to them within the international human rights regime;
3. to examine briefly one area, that of violence against women, and to ask why the "mainstream" human rights discourse has not (yet) adequately responded to that problem and what, if anything, can be done about that failure within existing institutions and conceptual frameworks.

### 4. *Looking at the "Mainstream": Definition and Justification*

This paper focuses on the so-called "mainstream" of international human rights practice and seeks to place issues of the violation of women's human rights in that context. The concept of "the mainstream" requires definition and the decision to focus on it justification.

---

Human Rights and International Organizations of the Committee on Foreign Affairs of the U.S. House of Representatives also held hearings on human rights violations against women in 1990.

- 9 This assessment, originally made in mid-1990, has begun to be overtaken by events and there is now an increasing body of literature in which these issues are taken up. See eg Charlesworth H, "The Public/Private Distinction and the Right to Development in International Law" p190; Chinkin C, "A Gendered Perspective to the International Use of Force" p279; Gardam J, "A Feminist Analysis of Certain Aspects of International Humanitarian Law" p265; Wright S, "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions" (1992) p241 in this volume.

The "mainstream" has institutional, substantive and geographical dimensions. I use the term "mainstream" to refer to those institutions entrusted with responsibility for "general" human rights matters -- within the United Nations system, primarily the Geneva-based political and expert bodies; within the regional systems, the organs charged with responsibility for the administration and enforcement of human rights such as the Strasbourg organs and the Inter-American Commission of Human Rights and the Inter-American Court. They may be contrasted with those bodies which have a "specialist" jurisdiction in relation to "women's issues", such as the Commission on the Status of Women and the Inter-American Commission of Women.

Substantively, the term is used to refer to human rights guarantees contained in the "general" human rights instruments, in particular the two International Covenants and the European Convention (as well as the American Convention and the African Charter).<sup>10</sup>

However, it is also clear that within the human rights "mainstream" as defined above traditional civil and political rights have enjoyed and continue to enjoy a particularly privileged position -- much of the attention, resources and activities of those involved in the mainstream is devoted to these issues. They accordingly receive prominence (as always) in this paper.

Focusing on the "mainstream" in contrast to the "women's rights" bodies has its problems: for instance, talking about the mainstream and recognising its dominant role reinforces its conception of itself as the centre and the marginalisation of those that it defines as on the margins. Nonetheless, the practice relating to the major civil and political rights catalogues is in many respects a privileged and powerful discourse, reinforced by a considerable allocation of institutional resources and the reality is that these institutions have the prestige, resources and perhaps the power to bring about change.

The existence of a privileged dominant practice and a "specialised" marginal one presents a strategic dilemma in this area, as in many areas where the goal is to bring about the advancement of women: how does one ensure that feminist perspectives are incorporated within the dominant discourse while maintaining the separate focus which is apparently necessary to ensure that these issues are not submerged or overwhelmed. In strategic terms any attempt to increase the attention given by the "mainstream" to gender issues in human rights must therefore also be accompanied by steps to strengthen the existing "women's rights" rights institutions and to lessen their marginalisation.

---

10 The categories are by no means watertight: there is an interplay of geographical and institutional location with substantive norms which, for example, arguably "elevates" some of the "specialised" conventions such as the Racial Discrimination Convention into the mainstream, since that convention is part of the Geneva-based human rights configuration.

## B. The Importance of Method

### 1. *A feminist approach or method? "Asking the Woman Question"*<sup>11</sup>

A characteristic feature of feminist inquiry has been the insistence that women's experiences be the starting point for analysis:

One of the methodological devices feminists have introduced into the study of human societies and of political and social theory has been to keep at the forefront questions such as: What about the women? What are women's lives like in such a society? How is their work assessed and valued? What are the prevailing attitudes about women? What notions are there of "women's nature"?<sup>12</sup>

One distinctive feature of feminist research is that it generates its problematics from the perspective of women's experiences. It also uses these experiences as a significant indicator of the "reality" against which hypotheses are tested.<sup>13</sup>

This method of inquiry -- asking where women are in the dominant account of the way things are and whether dominant standards and models reflect the reality of women's perspectives -- has had a major impact on many disciplines, in some cases transforming basic concepts and undermining established truths.<sup>14</sup> In a number of areas feminist scholarship has moved "from simply adding women into existing schemes of knowledge into more fundamental reconstructions of the concepts, methods and theories of the disciplines".<sup>15</sup>

- 
- 11 For a description of "the woman question" and its origins, see Bartlett K, "Feminist Legal Methods", (1990) 103 Harv LR 829, 837.
  - 12 See eg Spelman E, *Inessential Woman* (1989) p 47; Wishik H, "To Question Everything: The Inquiries of Feminist Jurisprudence", (1985) 1 Berkeley Women's LJ 64; Kamarck Minnich E, *Transforming Knowledge* (1990).
  - 13 Harding S, "Introduction: Is There a Feminist Method?", in Harding S (ed), *Feminism and Methodology* (1987) pp 1, 7.
  - 14 For discussions of the impact that feminism has had on the (North American) academy generally and on specific disciplines, see Fowlkes D and McClure C, *Feminist Visions: Towards a Transformation of the Liberal Arts Curriculum* (1984); Langland E and Gove W (eds), *A Feminist Perspective in the Academy: the difference it makes* (1983); Spender D (ed), *Men's Studies Modified: The Impact of Feminism on the Academic Disciplines* (1981); Treichler P, Kramerac C and Stafford B, *For Alma Mater: Theory and Practice in Feminist Scholarship* (1985); Howe F, "Feminist Scholarship: The Extent of the Revolution" in Bunch C and Pollack S (eds), *Learning our way: Essays in Feminist Education* (1983).
  - 15 A number of stages have been identified by those who have sought to describe the process of rethinking and redefining curricula and the boundaries of established disciplines (though these stages are not necessarily linear -- some or all may be going on at the same time). See eg Andersen M, "Changing the Curriculum in Higher Education", (1987) 12 Signs 222, 234-238, who identifies the following stages:
    - a. The stage of male or womanless scholarship -- male experience and formulations are accepted as universal;

This article is a modest attempt to apply this technique of inquiry to international human rights law. Its focus is thus relatively narrow.<sup>16</sup> It raises questions about international human rights law and its capacity for responding to women's concerns (varied as they are). However, it does not attempt to address some of the broader issues that feminist analysis has given rise to and which are of relevance to international human rights law and international law more generally. They include such questions as whether the dominant concerns of human rights practice elevate norms which stress autonomy and aggressive individualism and, if so, whether this is problematic; what impact a greater attention to rights which emphasise community and communal values above individual rights would have on women; whether it is worth worrying about "rights" at all,<sup>17</sup> let alone rights established by an international system which can apparently do little to ensure that the rights are enjoyed in practice. Or whether a focus on legal instruments and procedures gives the law a primacy which diverts energies from campaigns which may be able to make a more significant impact on women's oppression.<sup>18</sup> Or why one should look only at the area of "human rights" when analysing the contribution of the international system to improvement of women's conditions, when there are arguably many far more important institutions in which decisions are made which have a much greater

- 
- b. The realisation that women are missing from the picture and the attempt to add data about women (on male terms and in terms of male categories of what is relevant);
  - c. The realisation that women as a group may be or have been oppressed and excluded;
  - d. The realisation that the data about women do not quite fit the accepted conceptualisations and generalisations; and
  - e. Rethinking accepted categories and developing new modes of thought/categorisation that work from women's experiences up.

See also Wishik H, above note 12, 67.

- 16 Its primary orientation is what has been termed "feminist empiricism" or the "rational/empirical position": see Harding S, *The Science Question in Feminism* (1986) pp136-162; K Bartlett, above note 11, 868-872; Hawkesworth M, "Knowers, Knowing, Known: Feminist Theory and Claims of Truth", (1989) 14 *Signs* 533, 535. Sandra Harding writes in "Conclusion: Epistemological Questions" in Harding S (ed), *Feminism and Methodology* (1987) p 182:

"Feminist empiricists argue that sexist and androcentric biases are eliminable by stricter adherence to the existing methodological norms of scientific inquiry; it is 'bad science' or 'bad sociology' etc, which is responsible for these biases in the results of research."

Both Harding (1986) at 162 and (1987) at 183 and Bartlett at 870-871 note the far-reaching impact that, despite its limitation, a feminist empiricist approach may have by undermining the assumptions of the traditional empiricism.

- 17 See eg MacKinnon C, *Toward A Feminist Theory of the State* (1989) pp160-164. Cf Bartholomew A and Hunt A, "What's Wrong With Rights?", (1990) 9 *Law and Inequality* 1.
- 18 Cf Smart C, *Feminism and the Power of Law* (1989).

impact on bringing about the conditions under which women are more likely to enjoy more fully their human rights.

2. *The Importance of Method in Relation to Women and Human Rights Violations*

A failure to be aware of the relevance of gender can result in a distorted picture of patterns of human rights abuses, and can lead to an androcentric definition of substantive norms. Furthermore, an awareness of the role that gender may play in a given context may alert one to the need to adopt a particular response tailored to that context.

A failure to realise that women may have suffered violations whose form has been influenced by the fact that they are women and to inquire specifically about such violations may mean that certain types of human rights violations which have a gender-specific cause or form are not detected. For example, in the area of refugee law,<sup>19</sup> women refugees are frequently subjected to various forms of sexual abuse which may form part of the persecution from which they have fled or which they may have experienced while travelling or while living in refugee camps. The failure to be aware of the possibility of such violations and the fact that women will often be reluctant to talk about them, particularly to male interviewers, can mean that not only may a woman's claim to refugee status never be uncovered but the need for appropriately formulated medical or other programs to address the results of gender-specific violations may not be perceived.

Similarly, if women prisoners or detainees are being subjected to regular sexual abuse in special women's prisons, this is more likely to be uncovered if issues of gender are specifically considered by those inquiring into the existence of torture in a country rather than as the result of general inquiries about the maltreatment of detainees in prisons.<sup>20</sup>

Another important aspect of sensitivity to gender is that it can have an impact on the content of substantive norms by leading to their reinterpretation in a way which reflects women's perspectives. The question here might be, for example, whether particular forms of conduct amount to degrading treatment violative of various guarantees. It is well accepted that some of the answers to that question may vary according to the cultural context; they may also vary according to sex within that cultural context. Similarly, with refugees, an awareness of the particular forms of persecution from which women are fleeing may lead to the

---

19 See generally Johnsson A, "The International Protection of Women Refugees: A Summary of Principal Problems and Issues", (1989) 1 IntJ of Refugee Law 221.

20 Byrnes A, "The Committee Against Torture" in Alston P (ed), *The Human Rights Organs of the United Nations* (forthcoming 1992).

reinterpretation of the grounds of persecution to include those forms of persecution.<sup>21</sup>

Thus, by being aware of gender issues, one is more likely to uncover the full range of violations in a particular context, as a result of which one may need to reinterpret previously accepted substantive interpretations of rights guarantees in order to reflect adequately the experiences of women, as well as to devise different strategies for addressing problems.

Quite simply, if you are not looking for something (or at least aware that it might exist), then your chances of finding it are significantly reduced. The importance of being aware that sex and gender may be significant, asking what the position of women is and whether that is reflected in universal norms and taken into account in designing responses to social problems has been demonstrated time and time again.<sup>22</sup> However, in the area of human rights abuses it appears that too often this dimension of a situation may not be explored thoroughly, and such examination as there may be is limited to the relatively formalistic invocation of androcentric standards of non-discrimination.

### C. **The Accusations of Neglect and the Extent of the Inclusion of Women's Human Rights Issues in the Mainstream**

#### 1. *Nature of the critique*

The major human rights instruments all grandly proclaim that women are entitled to enjoy the rights guaranteed on a basis of equality with men.<sup>23</sup> The charges laid at the door of the mainstream human rights community by feminist critics vary in the extent of their denunciation of the system for its failure to promote the realisation of this entitlement. The more sweeping ones argue that these guarantees of equal enjoyment of rights are little more than empty rhetoric and that women are neglected entirely within the mainstream practice, while more moderate critics argue that there is a low level of awareness of these issues and that the attention paid to them is insufficient.

---

21 See generally Greatbatch J, "The Gender Difference: Feminist Critiques of Refugee Discourse", (1989) 1 *Int J of Refugee Law* 518; Neal D, "Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum", (1988) 20 *Columbia Hum Rts LR* 203.

22 For a classic case from the discipline of history, see Kelly J, "Did Women Have a Renaissance?", in Kelly J, *The Essays of Joan Kelly* (1984) p19. See generally the works referred to above note 14.

23 For an interesting contrast in assessing the significance of these guarantees in the case of the Universal Declaration of Human Rights, see Morsink J, "Women's Rights in the Universal Declaration", (1991) 13 *Hum Rts Q* 229 and Bequaert Holmes H, "A Feminist Analysis of the Universal Declaration of Human Rights" in Gould C, *Beyond Domination: New Perspectives on Women and Philosophy* (1984) pp250-264.



Some of the important criticisms that have been voiced are allegations that:

- even those violations suffered by women that appear indistinguishable from those suffered by men are not adequately taken cognisance of within the "mainstream";
- the failure to be aware that sex and gender are important determinants of human rights violations means that gender-specific variants of violations may be missed or not adequately responded to;
- standard interpretations of particular rights and of the entitlement to equal enjoyment of those are androcentrically biased;
- the public/private distinction that underpins the traditional civil and political rights framework has the effect of rendering gross violations of women's rights at the hands of private individuals largely invisible;
- the prevailing preoccupation with civil and political rights at the expense of economic and social rights diverts resources away from areas in which they could more effectively be used to promote the advancement of women;
- gender is also largely neglected in the interpretation of economic, social and cultural rights, despite the fact that considerable effort is now being devoted to exploring the detailed substantive content of those rights.

These charges appear to have a large measure of truth in them. Many issues of importance to women have been consigned to marginalised and less powerful institutions within the United Nations human rights system. The violations suffered by women are a relatively minor concern of the mainstream human rights community, unless they happen to fall into a small number of narrowly defined categories. Otherwise, there is considerable evidence of sex/gender blindness or myopia within that system.

Nevertheless, both the terms of the charges themselves and their accuracy need to be examined in greater detail if the indictment is to be made to stick and a convincing case made for change. In general terms the following are the questions which need to be addressed:

- a. To what extent have women's experiences been included within the purview of mainstream human rights practice at the international level and why have the particular violations that have been addressed been taken up in preference to others?
- b. What are the reasons for the limited extent to which women's experiences have been included within that discourse?
- c. Is it possible for that neglect to be remedied within the established conceptual framework? What changes would be needed and what limits are there?

2. *"Violations" of "Women's Rights" or of "Women's Human Rights"*

In order to assess the accuracy of the charges of neglect and bias made against the "mainstream" it is necessary to examine in more detail the terms of the debate. Reference is made to "violations" of "women's rights", "women's human rights", "gender-specific human rights violations", and "human rights violations against women". It is important initially to define some of these terms and to delineate the nature of the experiences and perspectives which, it is argued, are not adequately taken into account in the dominant institutions.

The term "violation(s)" (of "women's rights" or of "women's human rights") is not used by the critics in a merely technical international law sense, but refers to serious infringements of human dignity suffered by women, whether or not they would constitute a violation of human rights guarantees under accepted interpretations. These "violations" include violations that fall within the classical categories of civil and political rights violations (such as torture and maltreatment in detention), with or without a gender-specific element; violations suffered at the hands of the State or its officials, or at the hands of private individuals acting in a private capacity; denials of access to social and economic benefits on a discriminatory basis; and a disproportionate denial of access to social benefits and opportunities because of the use of models or definitions derived from male experience and life patterns.

Women suffer violations of their human dignity for many different reasons and in many different ways.<sup>24</sup> In some cases the reason for the violation and the form it takes may appear indistinguishable from those leading to violations against men in similar circumstances. In other cases their sex or gender may be the occasion for or determine the form which the violation takes. In many other cases there may be a complex interaction between sex/gender, race, class, political activities or some other factor in explaining the origin and form of human rights violations from which women suffer.

The types of violations which have been frequently referred to as of particular significance to women or which are determined to a significant extent by gender include:<sup>25</sup>

- rape by State officials or by private individuals
- dowry deaths
- family and domestic violence
- forced prostitution and trafficking in women

---

24 For discussion of some of these violations see Neuwirth J, "Towards a Gender-Based Approach to Human Rights Violations", (1987) 9 Whittier LR 399 and Gaer F, "Introduction" in International League for Human Rights, *Human Rights Abuses Against Women: A Worldwide Survey - A Compilation of Excerpts from the US State Department's 1990 Country Reports on Human Rights* (1990).

25 See generally Amnesty International, *Women in the Front Line: Human rights violations against women* (1991) and Gaer F, above note 24.

- denial of equal rights to participate in political life (including denial of the right to vote)
- harassment of politically active women
- denial of inheritance and property rights
- sexual surgery/ female circumcision
- denial of reproductive rights
- discriminatory provisions in nationality law both as to the acquisition and transmission of nationality
- unequal access to health care and unequal enjoyment of the right to life and right to adequate food
- discrimination against women refugees
- persecution of women because of their family relationships
- denial of access to land and economic opportunities.

The terms "*violations of women's rights*" and "*violations of women's human rights*" frequently appear in the discussion. However, there is some lack of clarity as to the scope of each of those terms.<sup>26</sup> The first term is apparently intended to refer to "gender-specific" violations, that is, violations which may be suffered only or predominantly by women or which appear to be based on sex or gender (for example, rape, female circumcision, forced prostitution, trafficking in women, discrimination in nationality laws). The second term is broader in its coverage, encompassing human rights violations where women "just happen to be the victims", that is, the violations are not gender-specific and men are or could equally well be victims of essentially similar violations (for example, persecution of politically active women, discrimination against members of an ethnic minority, forced evictions).<sup>27</sup>

It is easy to see that it may be difficult to assign particular violations unambiguously to one of these categories, a fact which reflects the interplay of sex, race, class and other factors in the form a human rights violation may take. Even in cases in which the reason for the persecution of a woman is her political activities, the form the violation takes may be influenced by her sex and gender.<sup>28</sup>

---

26 Oñate A, "Women's Rights in the context of Human Rights: a neglected issue" (unpublished paper, 1989). At least part of the reason for that lack of clarity is that some of those involved in the debate are attempting to redefine the content of some of the terms.

27 When used by some critics, the term would also include those violations included in the category of "violations of women's rights".

28 See eg the case of the women in various Latin American countries who mobilised in protest against the "disappearance" of members of their families: Schirmer J, "Those Who Die for Life Cannot be Called Dead": Women and Human Rights Protest in Latin America", (1988) 1 Harv Hum Rts YB 41.

However, the institutional allocation of responsibility for "human rights issues" and "women's issues" within a system such as the UN human rights system may make it important to ask whether every human rights violation suffered by a woman is "violation of women's rights" or whether the fact that race, class or political opinion are the determinative factors in many human rights violations against women, perhaps to the exclusion of sex and gender, means that women "just happen to be the victims" of them and gender plays no significant role and, if so, which ones they are.

Criticism of the "mainstream" practice is that it fails to take adequate account of "human rights violations against women", as well as "violations of women's rights". More prominence has been given to the latter in the debate, but both categories require investigation. The point is that in both cases there is a danger that the gender dimension of a human rights abuse may not be perceived if one is not looking for it -- the failing is one of method, but one which affects questions of substance.

An evaluation of the criticisms made of the "mainstream" thus requires an examination of how human rights violations against women in all their forms are dealt with, not just clear cases of gender-related violations but also cases of violations in which "women just happen to be the victims".<sup>29</sup>

#### D. Silences/Omissions/Myopia: Is Gender on the Agenda?

It is not difficult to point to instances in which gender appears to have been neglected when its inclusion is of considerable importance. The practice of the Human Rights Committee, widely regarded as the leading human rights treaty body within the UN system, provides a number of examples. The Committee, in addition to its function of considering individual complaints under the First Optional Protocol to the International Covenant on Civil and Political Rights, has adopted the practice of issuing general comments dealing with the articles of the Covenant. These are intended to be an authoritative exegesis of the content of the rights guaranteed by the ICCPR and they identify what the Committee considers to be the most important dimensions of those rights.<sup>30</sup>

In these interpretive comments there is virtually no recognition that sex or gender can be a significant dimension in defining the substantive content of individual rights or that it can affect the choice of methods that must be adopted by States to ensure that all individuals within their jurisdiction enjoy those rights equally.<sup>31</sup>

---

29 This article focuses primarily on "gender specific" violations.

30 The general comments of the Committee are consolidated in UN Docs CCPR/C/21/Rev 1 and Add 1 and Add 2.

31 The only significant exception is the general comment on non-discrimination: *General comment 18 (37)*, UN Doc CCPR/C/21/Rev 1/Add 1 (1989).

In its general comment on the right to privacy,<sup>32</sup> for example, there is not even a passing reference to the importance that this right has assumed in the struggle of women in many countries for control over their reproductive lives; traditional concepts such as the inviolability of the home and restrictions on the use of sensitive personal information by governments and others are the major preoccupations of the Committee. Similarly, the Committee's view of the scope of the right of a person to fair and non-discriminatory treatment by the legal system<sup>33</sup> is expounded without any suggestion that the relationship of women to the criminal justice system as victims of crime and as defendants raises important issues of fairness that differ in many ways from those that arise in relation to men.<sup>34</sup>

Similarly, the Committee's general comments on the right to bodily integrity<sup>35</sup> and the right to life<sup>36</sup> give not the faintest intimation that women face major, different threats to their enjoyment of these rights than do men or that this fact may have important implications for the obligations assumed by governments under the Covenant to ensure equality in the enjoyment of these rights. In many parts of the world women are at a considerably higher risk of death from avoidable causes than are men.<sup>37</sup> The reasons for this include horrifyingly high levels of maternal mortality, preferential treatment of men and boys in providing access to food and health care, and the perpetuation of traditional practices such as genital mutilation of young girls. The differences in the nature and level of threats to the enjoyment of their rights to life and to bodily integrity that women and men face justify the conclusion that women and men do not enjoy these rights on an equal basis, which is the promise held out to women by the major human rights instruments.

The Human Rights Committee is not atypical in the lack of importance it gives to gender as a component of the definition of human rights;<sup>38</sup> this pattern

---

32 *General comment 16 (32)*, UN Doc CCPR/C/21/Rev 1, p 19 (1989).

33 *General comment 13 (21)*, UN Doc CCPR/C/21/Rev 1, p 12 (1989).

34 See eg "The situation of women as victims of crime", Report of the Secretary-General, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/CONF.112/16 (1985); "The fair treatment of women by the criminal justice system", Report of the Secretary-General, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/CONF.112/17 (1985).

35 *General comment 7 (16)*, UN Doc CCPR/C/21/Rev 1, p 6 (1989); *General comment 9 (16)*, UN Doc CCPR/C/21/Rev 1, p 8 (1989).

36 *General comment 6 (16)*, UN Doc CCPR/C/21/Rev 1, p 4 (1989).

37 Cook R, "Human Rights and Infant Survival: A case for Priorities" (1986-87) 18 *Columbia Hum Rts LR* 1, 22-24; Cook R, "Reducing maternal mortality: a priority for human rights law", in McLean S (ed), *Legal Issues in Human Reproduction* (1989) p185; Sen A, "More Than 100 Million Women Are Missing", *New York Review of Books*, 20 Dec 1990, 61.

38 It should be pointed out in fairness to the Committee that its general comments are only one aspect of its work and that it does spend a certain amount of its time when reviewing reports submitted by States parties in considering issues of sex

appears regularly in the work of publicists, activists and other bodies concerned with the implementation of the major civil and political rights catalogues.<sup>39</sup> For example, a collection of essays which is the major work on the ICCPR in English and which is authored exclusively by males ignores the relevance of gender in its elaboration of the normative content of the Covenant, except in cases where the subject of women is forced upon it by the specific language of the Covenant.<sup>40</sup>

Similarly, a recent major treatise on torture and international law<sup>41</sup> runs to several hundred pages without any discussion of the way in which sexual violence against women is a major component of the practice of torture. Nor does it even address the question of the inadequacies of the international law definition of torture which, by restricting its scope to acts committed by or at the instigation of State officials, excludes from the purview of international law major areas in which women suffer similar treatment at the hands of non-State officials.<sup>42</sup> United Nations Rapporteurs preparing studies of particular human rights,<sup>43</sup> thematic reports on human rights violations or reports on individual countries where one would expect some discussion of well-known violations of the rights of women, often compile reports which make no reference to the fact that women suffer not only many of the same violations as men but different

---

discrimination. However, these discussions are largely inaccessible when compared with the general comments which enjoy a much wider circulation and use.

- 39 For example, the Committee Against Torture has given little consideration to the role that gender may play in relation to torture and other forms of cruel, inhuman or degrading treatment or punishment: Byrnes A, above note 20.
- 40 See Henkin L (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981).
- 41 Rodley N, *The Treatment of Prisoners under International Law* (1987).
- 42 Charlesworth H, Chinkin C and Wright S, above note 7, pp627–629.
- 43 For example, two recent detailed UN studies in areas in which gender is an important dimension in determining the level of enjoyment of the rights considered have made little or no specific reference to women or to the gender dimensions of the topic. See United Nations, *Right to adequate food as a human right* (New York: United Nations, 1989), UN Sales No E.89.XIV.2 (authored by Asbjorn Eide, Special Rapporteur of the Sub-Commission on the right to adequate food as a human right) and United Nations, *Elimination of all forms of intolerance and discrimination based on religion or belief*, (New York: United Nations, 1989)(authored by Elizabeth Odio Benito, Special Rapporteur of the Sub-Commission on religious intolerance), UN Sales No. E.89.XIV.2. The latter study makes only passing reference to women and religion, suggesting that the matter, along with other issues, be the subject of a study by the Sub-Commission (para 221). The author discusses the work of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination (pp 68–70), but, rather surprisingly, makes no mention of the activities of the Committee on the Elimination of Discrimination Against Women, in which the issue of religion and its relationship to women's status has been considered. See Byrnes A, "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women" (1989) 14 *Yale J Int L* 1, 54 n 195.

ones as well.<sup>44</sup> And many traditional NGOs are simply not interested in exploring the gender dimensions of human rights violations, although there have been some encouraging developments in recent years.<sup>45</sup>

### 1. *Nature of the Inclusion*

Yet the more extravagant critiques of the "mainstream", that women are completely ignored, go too far. First, despite the apparently pervasive disregard of gender, a number of gender-specific issues *are* addressed within the mainstream; secondly, it is clear that attention is given to women who are victims of classical human rights violations (where the victims "just happen to be women").<sup>46</sup> For example, issues of discrimination on the basis of sex,<sup>47</sup> torture or arbitrary imprisonment of women, and practices of particular importance for women (such as trafficking in women, forced prostitution<sup>48</sup> and female genital mutilation<sup>49</sup>) have a place on the agenda of "mainstream" bodies.

There have been some indications in recent years that some of the human rights bodies are becoming more aware of the issue of gender and are attempting to respond to it, though how wide-ranging these responses will be remains to be seen. For example, the Committee on Economic, Social and Cultural Rights in its *General comment No. 4 (1991)* on the right to adequate housing contained in article 11 (1) of the International Covenant on Economic, Social and Cultural Rights noted:<sup>50</sup>

---

44 See eg Report on the human rights situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr Reynaldo Galindo Pohl, appointed pursuant to resolution 1986/41, UN Doc E/CN.4/1987/23 (28 January 1987)

45 See below note 90.

46 See the discussion above pp 215–216.

47 See eg the contribution of the Human Rights Committee to the international law of non-discrimination under the First Optional Protocol to the ICCPR and its *General comment 18 (37)* on non-discrimination.

48 See Reanda L, "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action", (1991) 13 Hum Rts Q 202–228; Tretter H, "Entwicklung und gegenwärtige Bedeutung der internationalen Sklavereiverbot", in Nowak M, Steurer D, and H Tretter (eds), *Fortschritt im Bewusstsein der Menschenrechte: Festschrift für Felix Ermacora* (1988) p527.

49 Trafficking in women and forced prostitution are on the agenda of the Working Group on Contemporary Forms of Slavery of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities; the issue of female genital mutilation has been the subject of an ongoing study by a Special Rapporteur of the Sub-Commission (dealing with "traditional practices affecting the health of women and children). However, the mere fact that they are included on the agenda is not guarantee of vigorous action. It is perhaps telling that the various anti-slavery conventions (including those which cover trafficking and forced prostitution) have a weak, almost non-existent supervisory and enforcement mechanism: see UN Docs E/CN.4/Sub.2/1988/37 (1989) and E/1990/33.

50 UN Doc E/C.12/1991/4, Annex III, para 6.

6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.

Apart from this passage, the Committee does not develop its analysis of right to housing with explicit reference to gender dimensions of the right.<sup>51</sup> Nonetheless, it does incorporate within its discussion issues which may be of particular importance to women rather than men in a number of societies (for example, the availability of potable water, energy for cooking, sanitation and washing facilities and food storage<sup>52</sup>).

Despite this sort of example, one may perhaps be justifiably sceptical about the significance accorded to these issues within the "mainstream" and the effectiveness of the monitoring and enforcement procedures or the manner in which those issues are handled. One might also ask about the cases of "classical" violations against women which are not being noticed because of the use of flawed methods which do not explicitly take gender into account.

However, the question then becomes not whether violations of women's human rights are dealt with but the terms of the inclusion (and the exclusion). How much is included and what is left out? What are the terms and extent of the inclusion (are only those violations that conform to an androcentric model taken cognisance of)? Are the issues that are dealt with important issues, or relatively minor issues, thus distracting attention from more fundamental issues? How are these matters disposed of -- are effective responses devised (and are they in accordance with the women whose interests are affected)? What level of resources and institutional support is given to this work? Is there a real commitment (as evidenced by effective procedures and enforcement mechanisms) to addressing these problems?

To date many of these questions have only been examined briefly -- much of the discussion has been fairly descriptive -- and provide fertile ground for further research. They are important questions to address because, whenever one raises the question of what the "mainstream" is doing to address violations of the human rights of women, in particular gender-specific violations, one is referred to the work of bodies which have these issues on their agenda. The task then

---

51 For a study of the gender dimensions of housing in the Australian context, see Watson S, *Accommodating Inequality: Gender and Housing* (1988).

52 UN Doc E/C.12/1991/4, Annex III, para 8 (b).



becomes one of evaluating the extent to which issues of real importance to women are covered and the effectiveness of the substantive work and the monitoring procedures which are in place -- and then upon close examination these may turn out to be less impressive than portrayed.

For example, "mainstreamers" frequently point to the body of international case law which has dealt with issues of particular importance for women (including sex discrimination and reproductive rights issues) and cases in which women have been successful in vindicating their rights as evidence of the contribution being made by the mainstream to the promotion of women's human rights.<sup>53</sup>

While these cases are significant, it is also important to be aware of their conceptual limitations. Furthermore, it is instructive to see exactly what claims of women have been addressed and to ask why others have not been raised in these fora.

The international cases in which women figure as authors of complaints (or in which issues of sex discrimination otherwise arise) fall into a number of broad categories:<sup>54</sup>

1. Those in which women suffer violations which are basically identical to those suffered by men.
2. Those involving claims of non-discrimination in which women are claiming an entitlement to the same treatment, rights or privileges as men.<sup>55</sup>

---

53 For brief summaries of international cases raising sex discrimination and other relevant issues, see Cook R, "International Human Rights Cases Relating to Women: Case Notes and Comments", (1990) 23 *Vanderbilt J Transnat L* 779 and the two bibliographies referred to above note 1. See generally Council of Europe, *Sexual Equality in the European Convention of Human Rights: A Survey of Case Law* (1989); Buqicchio-de Boer M, "Sexual Discrimination and the European Convention on Human Rights", (1985) 6 *Hum Rts LJ* 1; T Opsahl, "Equality in Human Rights Law With Particular Reference to Article 26 of the International Covenant on Civil and Political Rights", in Nowak M, et al (eds), *Fortschritt im Bewusstsein der Menschenrechte: Festschrift für Felix Ermacora* (1988) 51-67.

54 See *id.* These categories, formulated primarily in terms of the claims themselves, are somewhat unsatisfactory as the situations which have arisen in the cases can be characterised in a number of ways.

55 Claims to the same entitlements in relation to immigration or nationality law for foreign husbands as husbands enjoyed in respect of their foreign wives: *Abdulaziz, Balkandali and Cabales v U.K.*, European Court of Human Rights, Judgment of 28 May 1985, Ser A, No 94, 81 ILR 139; 7 EHRR 471; *Aumeeruddy-Cziffra v Mauritius*, Communication No 35/1978, *Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, vol 1 (1985) 67, 67 ILR 285, 2 HRLJ 139; *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Ser A No 4, 79 ILR 282, 5 HRLJ 161. Same entitlements to social security benefits as similarly situated men: *Broeks v Netherlands*, Communication No 172/1984, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol 2 (1990) 196; *Zwaan de Vries*, *ibid* 209. Same

3. Those involving claims by women of an entitlement to have control over their reproductive capacity or claims by others to attempt to limit that control.<sup>56</sup>

The first category of cases in practice involves no particular recognition that sex or gender can be an important factor in the definition, cause, or form of violations of bodily or psychic integrity. The second and third categories do involve some recognition that sex and gender can play a role in the definition of what constitutes a human rights violation, particularly in cases which do not turn on a simple discrimination point because there is no male comparator.

Both the first and second categories embody essentially androcentric models of women's entitlements: if men are entitled to a particular benefit and women claim an identical benefit or if they put forward a claim sufficiently analogous to those of men, then the mainstream may take cognizance of it.<sup>57</sup>

The third category has been far more problematic from women's point of view with rather mixed outcomes if one is concerned to have an international endorsement of women's control over their own reproductive capacity.

Nearly all the leading international cases involving issues of sex discrimination in which a claim has been successful have been relatively "easy" ones in analytical terms. While the outcome of a number of cases may have had important political and economic consequences and required the rejection of traditional or stereotyped ideas, giving to women the identical privileges (in most cases at a formal legal level) as are enjoyed by men does not involve a major theoretical reorientation.<sup>58</sup> While important in what they do achieve, one should not overestimate their significance -- they do not undertake the rethinking that is necessary if one approaches the area with a feminist perspective of even moderately radical ilk.

In summary, while there is still much detailed work to be done to determine the extent to which human rights violations against women and violations of

formal legal rights to legal personality: *Ato del Alvellanal v Peru*, Communication No. 202/1986, *Report of the Human Rights Committee in 1989*, A/44/40, Annex X.C, 196.

56 See eg in relation to the permissibility of restricting access to abortions, *Brüggeman and Scheuten v Federal Republic of Germany*, Application No 6959/75, European Commission of Human Rights, Report of 12 July 1977, 10 D&R 100, (1977) 3 EHRR 244; the permissibility of abortions in the light of the right to life, *Baby Boy case*, Inter-American Commission of Human Rights, case 2141 (United States of America), Resolution No 23/81, 6 March 1981, (1981) 2 HRLJ 110; alleged rights of father of child to prevent woman from obtaining an abortion: *Paton v United Kingdom*, Application No 8416/78, European Commission of Human Rights, decision on admissibility of, 13 May 1980, 19 D&R 224, (1980) 3 EHRR 408. See generally Shelton D, "International law on protection of the fetus" in Frankowski S and Cole G (eds), *Abortion and the Protection of the Human Fetus: Legal Problems in a Cross-Cultural Perspective* (1987) p1.

57 Cf MacKinnon C, *Toward A Feminist Theory of the State* (1989) pp215-234.

58 For an overview, see Opsahl T, above note 53.

women's rights are dealt with by the "mainstream", one gains a firm initial impression that by and large there is relatively little acknowledgment that gender is an important dimension in defining the substantive content of rights, in particular those rights that do not refer specifically to women or that embody a guarantee of non-discrimination, and that equal enjoyment of rights is defined in terms of a male-centred model. The corollary of this is that there is also little recognition that a State's obligation to ensure equal enjoyment of a right by women may entail the taking of measures quite different from those which may be necessary to ensure that men enjoy that right.

**E. Reasons for the Limited Recognition of the Role of Gender in Defining and Responding to Human Rights Violations**

Thus, while there remains much work to be done in further documentation of the extent to which human rights violations against women are dealt with in the "mainstream", there are certainly strong indications that the relevance of gender to the definition of human rights violations and responses to them is much neglected within that "mainstream", rendering invisible many violations of women's human dignity.

Why is this so? A number of reasons for this neglect have been suggested.<sup>59</sup> They include the overwhelmingly male membership of the bodies charged with the implementation and interpretation of these instruments, the apparent reluctance historically of human rights groups and women's human rights groups to insist that these issues be addressed in the mainstream, the institutional separation between the bodies concerned with "human rights" and those concerned with "women's issues", and the conceptual framework of traditional civil and political rights analysis.

Despite the rhetoric about the interdependence and indivisibility of human rights, traditional civil and political rights have received the lion's share of the attention of the international human rights community. Many of the violations suffered by women are bound up with the disadvantages they suffer in the economic and social field, and the lack of attention devoted to these economic, social and cultural rights has accordingly involved a neglect of areas important for the facilitation of the advancement of women. Furthermore, violations of "women's human rights" are often regarded neither as pressing nor as important as the other violations of human rights being perpetrated in many parts of the world or as too sensitive to deal with in light of possible accusations of cultural imperialism.

There is a certain reluctance within the civil and political rights world to address social and economic inequalities of a structural nature which effectively negate the possibility of the exercise of guaranteed civil and political rights. Much of current human rights practice has concerned itself, quite

---

<sup>59</sup> See eg Gaer F, "Human Rights at the United Nations: Women's Rights are Human Rights", *In Brief*, No 24, November 1989 (International League for Human Rights). The issue of method has already been referred to, above p216.

understandably, with symptoms rather than the underlying causes of human rights violations. To respond to clear cases of gross violations of human rights where victims are suffering in a direct and visible way and where one can point to the perpetrator of the violation and demand that the perpetrator desist from its conduct is in some ways easier than attempting to respond to violations of human rights arising from social and economic arrangements which can only be addressed by fundamental changes in those relations (such as starvation of a large proportion of a country's population unnecessarily). However, even those institutions which have attempted to focus on the conditions giving rise to gross violations of human rights do not see gender or violations against women as an identifiable area requiring urgent study.<sup>60</sup> Nor do some clear cases of gross violations against women attract the same attention as some which are seen not to raise "sensitive" issues of culture and tradition which so often spell "hands off" in relation to violations of women's rights. Two prominent examples are the practice of female circumcision or female genital mutilation<sup>61</sup> and the position of women in various religions (in particular under some interpretations of Islam).<sup>62</sup>

One other reason why mainstream bodies may not be paying adequate attention to gender-related issues may be the nature of their information-gathering techniques. Many of the United Nations human rights bodies, for example, obtain a great deal of their independent information about human rights violations from the many non-governmental organisations which form part of the Geneva or U.S. based human rights community. While there are certainly women's organisations which are part of that community, many of them have traditional human rights concerns or agendas or are not particularly interested in pursuing women's issues in "mainstream" human rights terms. The many networks of women's organisations which are working in the area of gender-specific violations know little about or have limited access to these international fora and do not appear to be sought out by those responsible for gathering

---

60 For example, the Netherlands-based organisation, PIOOM ("Projects for the Interdisciplinary Study of Root Causes of Human Rights Violations"), which focuses on the causes of gross violations of human rights, recently drew up a list of research topics suitable for graduate theses. Of the 64 topics suggested, none specifically mentions sex or gender, proposes that gender be the focus of a study or identifies an area of gross violations of human rights of particular importance to women: PIOOM Newsletter and Progress Report, vol 2, no 2, Autumn 1990, 11-13.

61 Brennan K, "The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study", (1989) 7 *Law and Inequality: A Journal of Theory and Practice* 367; Slack A, "Female Circumcision: A Critical Appraisal", (1988) 10 *Hum Rts Q* 437; Koso-Thomas O, *The Circumcision of Women: A Strategy for Eradication* (1987); Hosken F, *The Hosken Report: Genital and Sexual Mutilation of Females* (1982).

62 See Sullivan D, "Advancing Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination", (1988) 82 *AJIL* 487; Arzt D, "The Application of International Human Rights Law in Islamic States", (1990) 12 *Hum Rts Q* 202; Rahman A, "Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law", (1990) 28 *Columbia J Transa L* 473.

information. A further factor is the location in Vienna of the UN bodies with primary responsibility for "women's issues", the Commission on the Status of Women and the Committee on the Elimination of Discrimination Against Women, while the other human rights bodies are based in Geneva.<sup>63</sup> This means that the Geneva-based NGOs are often not aware of what is happening in Vienna.<sup>64</sup>

Another feature of the "mainstream's" treatment of gender issues has been the rather limited notion of the concept of equality and non-discrimination in the enjoyment of rights. To date, the main model used has been a largely androcentric one -- if men are entitled to something, then women should be entitled to the same thing; whereas true equality may involve the reworking of the core concept of the right to ensure that women enjoy that right fully.

But perhaps the most important reason has been the conceptual framework of the "mainstream" with its public/private split,<sup>65</sup> which has obscured many of the violations of human dignity suffered by women at the hands of private individuals. In the next section some of the ramifications of this public/private distinction are explored and in the following one the conceptual structure of the "mainstream" civil and political rights framework is examined in the context of violence against women.

#### **F. The Public/Private Distinction: State Responsibility Arising out of the Acts of Private Individuals**

The theoretical framework of traditional human rights analysis<sup>66</sup> has been a major contributor to the neglect of violations of particular concern to women; it also poses a number of serious obstacles which need to be overcome if women's legitimate claims in relation to the right to life and the right to bodily integrity are to be addressed within that framework. These problems arise from a focus on direct State violations of individual rights, an acceptance of a division between

---

63 Reanda L, above note 4.

64 An illustration of the effects of this separation is the *Human Rights Monitor*, a publication produced by the International Service for Human Rights which contains an excellent coverage of the UN human rights bodies in Geneva, but does not report on the work of the CSW or CEDAW.

65 See eg Pateman C, "Feminist Critiques of the Public/Private Dichotomy" in Benn S and Gauss G, *Public and Private in Social Life* (1983) pp281-303; Elstain J, *Public Man, Private Woman* (1981).

66 There have been many feminist critiques of the sexism and androcentrism of Western social and political theory and philosophy, which raise considerable doubts as to whether theoretical frameworks which are based on the exclusion of women from public life or assumptions about the roles that women can and should play can be modified so as to respond to feminist critiques. See for example, Okin S, *Women in Western Political Thought* (1979); Grimshaw J, *Philosophy and Feminist Thinking* (1986); Thiele B, "Vanishing acts in social and political thought: Tricks of the Trade" in Pateman C and Gross E (eds), *Feminist Challenges: Social and Political Theory* (1986) pp30-43; Clark L and Lange L (eds), *The Sexism of Social and Political Theory* (1979).

public and private spheres of social life, and a reluctance to address the existence of economic and social conditions which affect the ability to exercise the basic civil and political rights guaranteed.

The primary orientation of civil and political rights analysis has been direct violations of the rights of individuals by the State. These violations have generally taken one of two forms: the adoption of legislation or practices which discriminate against particular groups or unjustifiably limit the exercise of rights, or the actions of State officials directed against individuals which violate their rights – classic cases being torture, wrongful imprisonment and summary or arbitrary executions.

Women do, of course, suffer serious violations of their rights directly at the hands of the State and, as indicated above, sex and gender may play a role in the instigation of such violations and the particular form they take.<sup>67</sup> However, women also suffer major violations of their physical integrity at the hands of private individuals. The extent of State involvement and complicity in these violations is its responsibility for the maintenance of a legal and social system in which these violations occur and may legitimate such violations or allow them to pass unpunished. However, the liability of the State for such "complicity" under international human rights law is far from self-evident.

Further, the conceptual framework of civil and political rights is built on a separation of public and private realms.<sup>68</sup> The cordoning off of particular activities from direct State intervention by adopting the notion of a sphere of private life (the very area in which women suffer many infractions of their rights at the hands of men) renders the vindication of these rights difficult within that framework.

### 1. *State Responsibility Arising out of The Acts of Private Individuals*

Despite the achievements of the international human rights movement in bringing about a situation in which it can be said that States owe duties to their own citizens, our present system of international law is still fundamentally a State-centred one of reciprocal rights and obligations enjoyed and borne by States among themselves. International law has had difficulty in dealing with the question of the liability of States in relation to the acts of private individuals

---

67 See generally Amnesty International, *Women in the Front Line: Human rights violations against women* (1991).

68 Charlesworth H, Chinkin C and Wright S, above note 7, pp625–628.

which cause damage to other individuals and States.<sup>69</sup> It is still a relatively undeveloped subject in the area of international human rights.<sup>70</sup>

The major exploration of the issue in general international law has been in relation to the liability of governments for harm caused by individuals within their territory to nationals of another country or to their property. Diplomats and other foreigners within the jurisdiction of a State who suffer physical or material damage at the hands of private individuals have been the two basic categories with which international law traditionally concerned itself. In such cases, depending on the circumstances and the status of the individual who suffers damage, the position has been that a failure to take reasonable steps to prevent harm to aliens or, at the very least, the failure to provide a legal system within which claims for redress can be pursued by private individuals or are pursued by public authorities can amount to a violation of international law by the authorities of the host State. This is so even though the State was not directly responsible for the original actions of the private individuals who caused the damage.

Thus, even where private individuals have violated others' rights in the first instance, the host State has been held liable for a failure to take reasonable steps to prevent these violations or for the failure to have an appropriate system of laws and institutions to punish or remedy such transgressions. Under some circumstances, then, international law requires a State not to just stand idly by while private individuals infringe the rights of other individuals; they must take positive steps to stop those violations or to offer redress for them.

2. *The Obligation of the State to Prevent or Provide a Remedy for Infringements of Rights by Private Individuals*

While the traditional liberal conception of human rights guarantees was protection against the direct exercise of State power against a private individual, it has become increasingly accepted at the international level that the interests protected by human rights guarantees may in many cases be encroached on by private individuals as well as government, and that this has implications for the responsibility of the State under international law.

As a result, there has been an expansion of the traditional content of States' obligations in the area of protection of human rights, with parallels being drawn from the more traditional doctrines of the law of State responsibility. Under the general human rights treaties (as well as other treaties), the State is considered to

---

69 See generally the discussion in the context of the International Law Commission's consideration of its *Draft Articles on State Responsibility* in [1972] II *Yearbook of the International Law Commission* pp95–125. See also Christenson G, "The Doctrine of Attribution in State Responsibility", in Lillich R (ed), *State Responsibility for Injuries to Aliens* (1983) pp321–360.

70 Under a number of international treaties States adopt the explicit obligation to prevent or punish particular discriminatory acts by private individuals: See eg Racial Discrimination Convention and the Women's Discrimination Convention.

be under an obligation not only to refrain from taking direct action which infringes individual rights but also to take positive steps to ensure that individuals actually enjoy those rights. This latter aspect of the obligation includes in certain circumstances a duty to take appropriate measures to protect individuals against violation of those rights by private persons. This approach has been adopted under the ICCPR, the European Convention and the American Convention on Human Rights.<sup>71</sup>

The textual basis for these positive obligations has been the obligations assumed by the State under the treaties to take appropriate measures to ensure that individuals actually enjoy the rights guaranteed to them. For example, the obligations of the State under the ICCPR extend to ensuring in some circumstances that the rights of individuals are not infringed by other private persons or that adequate remedies are provided or appropriate punishment imposed if such rights are infringed.<sup>72</sup>

As one commentator puts it:<sup>73</sup>

The obligation "to ensure" these rights encompasses the duty "to respect" them, but is substantially broader. . . . the provision implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of those rights. . . . as regards some rights in some circumstances, it may perhaps require the state to adopt laws and other measures against private interference with enjoyment of rights, for example against interference with the exercise of the right to vote and other political rights.

This approach to the general obligation to respect and ensure the enumerated rights against infringement by private persons has also been taken by the Inter-American Court of Human Rights when interpreting the similar language of the American Convention on Human Rights.

71 See generally Meron T, *Human Rights and Humanitarian Norms as Customary Law* (1988) pp155-171; Roht-Arriaza N, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", (1990) 78 Cal LR 449.

72 This obligation has been derived from a number of provisions of the ICCPR, in particular the general undertakings in article 2:-

2(1) "to respect and to ensure . . . the rights guaranteed in the [Covenant]"

2(2) "to take the necessary steps . . . to adopt such . . . measures as may be necessary to give effect to the rights recognized in the [Covenant]"

2(3) "to ensure that any person [whose rights are violated] shall have an effective remedy".

73 Buergethal T, "To Respect and to Ensure: State Obligations and Permissible Derogations" in Henkin L, *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), pp72, 77-78 (footnotes omitted). See also Kabaalioglu H, "The Obligation to 'Respect' and to 'Ensure' the Right to Life" in Ramcharan BG (ed.), *The Right to Life in International Law* (1985) pp160, 164-66.



In *Velasquez Rodriguez v Honduras*,<sup>74</sup> a case involving "disappearances" in Honduras, the Court accepted that the Honduran government could be liable internationally if it failed to take appropriate steps to prevent or punish private individuals who caused others to "disappear". The Court discussed the extent of the obligation in article 1 of the American Convention "to respect" and "to ensure" the full and free exercise of the rights guaranteed in the Convention. It concluded that, while the obligation clearly extended to violations of rights carried out by the act of a public authority or by persons who use their position of authority:<sup>75</sup>

172. . . . [T]his does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.<sup>76</sup>

---

74 Inter-American Court of Human Rights, Ser C, No 4, Judgment of 29 July 1988, (1989) 28 ILM 291.

75 Ibid paras 172, 174-75; 28 ILM 291, 325.

76 While the Human Rights Committee has not articulated its understanding of article 2 of the Covenant in such detail, it is clear that it adopts an interpretation substantially similar to that adopted by the Inter-American Court. See eg *Herrera Rubio v Colombia*, Communication No 161/1983, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol 2 (1990) p192 (State liable for its failure to take appropriate measures to prevent the disappearance and subsequent killing of victim and to investigate effectively responsibility for his murder).

The position is similar under the general language of the European Convention. See van Dijk P& van Hoof GJH, *Theory and Practice of the European Convention on Human Rights* (2nd ed 1990) pp15-20. For a useful discussion of violations of human rights by non-governmental agents, see Forde M, "Non-governmental interferences with human rights", (1985) 56 BYIL 253, 271-78.

The general obligation "to respect" and "to ensure", the obligation to prevent, remedy or punish violations by private individuals has been examined in the context of a number of specific rights under the general human rights treaties.

For example, at the time the ICCPR was drafted, it was contemplated that the State had the obligation not merely to refrain from taking life under circumstances not consistent with the Covenant, but that the obligation to ensure enjoyment of that right included a duty to protect life against the actions of private persons.<sup>77</sup> The Human Rights Committee has expressed a similar view.<sup>78</sup> The European Commission of Human Rights has also recognised that the guarantee of the right to life under the European Convention requires the State in certain circumstances to take positive measures to protect the right to life against violations by private individuals.<sup>79</sup>

Both the European Court of Human Rights and the European Commission of Human Rights have recognised in a number of cases that effective guarantees of the enjoyment of individual rights require that the State protect individuals against the actions of other individuals infringing on those rights. One example is a case brought against the United Kingdom in which the Court held that the right of freedom of association includes the right not to be a member of a trade union. The Court also held that the failure of United Kingdom legislation to prevent an employer from discriminating against an employee on the ground of a refusal to join a union was a failure on the part of the United Kingdom to fulfil the obligation it had assumed under the Convention to "secure to everyone within its jurisdiction . . . the rights and freedoms" defined in the Convention.<sup>80</sup>

The general position under that Convention has been expressed by the Commission in the following terms:<sup>81</sup>

It is true that the Convention fundamentally guarantees traditional freedoms in relation to the State as the holder of public power. This does not, however, imply that the State may not be obliged to protect individuals through appropriate measures taken against some forms of interference by other individuals, groups or organizations. While they themselves, under the Convention, may not be held responsible for any

---

77 *Annotations on the text of the Draft International Covenants on Human Rights*, UN Doc A/2929 (1955), p 30, para 4.

78 See *General comment 6 (16)*, UN Doc CCPR/C/21/Rev 1 (1989), para 3 ("States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces").

79 *W v U.K.*, Application No 9360/81, European Commission of Human Rights, decision on admissibility of 28 February 1983, 32 D&R 211, 213; *X v Ireland*, Application No 6040/73, 44 CD 121, 122.

80 *Young, James and Webster v U.K.*, Judgment of 26 June 1981, Ser A, No 44, para 49, 62 ILR 359, 4 EHRR 38.

81 *National Union of Belgian Police case*, Report of the Commission, Ser B, No 17, para 59 ((1976).

such acts which are in breach of the Convention, the State may, under certain circumstances, be responsible for them.

In *Case of Plattform Ärzte für das Leben v Austria*, a case involving the disruption of anti-abortion demonstrations in Austria by those who supported the wider availability of abortion, the Court also recognised that the State may be under a duty to take steps to ensure that the rights of freedom of assembly of some groups can be exercised without excessive interference from opposition groups.<sup>82</sup> The Human Rights Committee has also recognised that the classical civil and political rights impose some positive obligations on States to prevent infringements by private individuals,<sup>83</sup> as has the Inter-American Court of Human Rights in the context of freedom of expression.<sup>84</sup>

Thus, the State is required in certain circumstances to take positive action to ensure the enjoyment of those rights against interference by other private individuals. This action will generally include the enactment of laws and the fashioning of administrative and other arrangements so that individuals can actually enjoy the rights guaranteed by the relevant treaties. The various human rights bodies have recognized that positive obligations are implied in many of the classical civil and political rights and have begun to explore the extent of those rights. What is surprising is that the issue has barely been formulated in terms which raised issues of particular concern to women, either by complaints lodged by individuals or by the interpretive bodies themselves on their own initiative.

The next section examines the problem of violence against women in its various forms, both State-inflicted and privately inflicted, and illustrates some of the general arguments made above, as well as exploring some of the implications of trying to bring "invisible violations" within the "mainstream" framework by drawing on some of the developments described in the previous section.

---

82 Judgment of 21 June 1988, Ser A, No 139, para 32, 13 EHRR 204 (freedom of assembly and a hostile audience; guarantee "sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be"). See also *X and Y v Netherlands*, Judgment of 26 March 1985, Ser A, No 91, para 23, 8 EHRR 235, 81 ILR 103 (right to privacy violated by sexual assault; State's failure to provide for criminal prosecution in particular case violated obligations under the Convention), discussed below p 237.

83 See eg *General Comment 16* (32), UN Doc CCPR/C/21/Rev 1, p 19, paras 9-10 (1989) (right to privacy). In *S.S. v Norway*, *Selected Decisions under the Optional Protocol* (1985), vol 1, 30, both the Norwegian government and the Committee appeared to accept that a failure by the State to take appropriate steps to prevent the invasion of a person's privacy by other individuals could amount to a violation of Article 17 of the Covenant.

84 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of 13 November 1985, Ser A, No 5, para 48, 75 ILR 30, 5 EHRR 165, 7 HRLJ 74, [1985] IAYBHR 1148

## G. Violence Against Women

### 1. *Types of Violence Against Women and its Extent*

That violence against women in many forms is a widespread phenomenon throughout the world has been documented time and time again; the problem has been recognised in some international fora as one of the major human rights violations to which women are subject on account of their sex.<sup>85</sup>

The forms of violence to which women are subject include violence at the hands of the State -- as detainees, victims of genital mutilation in State hospitals,<sup>86</sup> or of forced sterilisation or abortion -- as well as widespread violence at the hands of private individuals, in many instances at the hands of their male relatives, including pervasive domestic violence throughout the world, "dowry deaths", and sexual assault and harassment.<sup>87</sup>

### 2. *The Legal Categories and the "Sighting"/"Siting" of Violence Against Women*

#### A. *State-Inflicted Violence*

The use of violence against women by the State does not cause particular theoretical problems for attributing the acts of violence to the State -- under normal principles of State responsibility the State would be liable for the acts of its officials. If the violence inflicted contravenes an established human rights guarantee (such as Article 7 of the ICCPR), then the State will be liable for having violated that guarantee.<sup>88</sup>

---

85 See eg "Efforts to eradicate violence against women within society and the family and society", Report by the Secretary-General, UN Doc E/CN.6/1988/6 (1987).

86 The issue of genital mutilation seems to have remained largely beyond the purview of the "mainstream" human rights bodies, although the Sub-Commission has been doing work in this area (slowly): see Warzazi, Report on Traditional Practices Affecting the Health of Women and Children, UN Doc E/CN.4/Sub.2/1989/42 and Add 1.

87 See generally Heise L, "Crimes of Gender", *Worldwatch*, March/April 1989, vol2, no 2, 12; United Nations, *Violence Against Women in the Family* (New York: United Nations, 1989), UN Sales No E.89.IV.5; Statement of Jane Roberts Chapman, Editor of *Response to the Victimization of Women and Children* to the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs of the U.S. House of Representatives, March 21, 1990; and the periodical *Women's International Network News* (section on Women and Violence).

88 See eg *Cyprus v Turkey* (1976) 4 EHRR 482, 62 ILR 4, paras. 358-74 (European Commission on Human Rights)(rape by Turkish soldiers constituted inhuman treatment under article 3 of the European Convention).

*B. Reluctance Within the Mainstream?*

Although some aspects of violence against women have been addressed in the "mainstream" community, in certain quarters there still appears to be a lack of awareness of the importance of gender in this context or an unwillingness to address it. One example of this is the relatively new Committee Against Torture, established pursuant to the UN Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. This Convention provides opportunities for imaginative members who are sensitive to violations of bodily integrity that women as well as men suffer in many areas of life to ensure that those patterns of violence and maltreatment are addressed.

To date, however, despite a certain amount of prodding, the Committee has failed to take up the issue even within the context of the traditional framework of the Convention by, for example, asking states to provide data about detainees disaggregated by sex and seeking to discover the extent of torture or other ill treatment that may be sex-specific or have a gender dimension. The more ambitious task, of extending the scope of the conduct for which a state is liable under the Convention to address problems such as violence against women by private individuals, the Committee has shown no interest in addressing as yet.<sup>89</sup>

*Recent Actions by "Mainstream" Human Rights NGOs*

It seems that until recently issues of sex and gender in the area of State violence against women were treated by human rights groups in a fairly haphazard way. Certainly, such incidents were noted, including cases where a women's sex or gender was patently related to the cause of the victimisation or influenced the form it took, but one did not get the impression that the gender dimension was analysed in any systematic way or that such violations were seen as (potentially) significantly different from similar violations inflicted on men.

One also suspects that much may have been missed. On the whole, traditional human rights organisations are not particularly well networked with women's groups, which are an important source of information about human rights violations against women.

In recent years a number of human rights groups have considered the question whether sex and gender should be incorporated more explicitly within their activities or whether they should have a special focus on violations of women's human rights. A number of projects, not confined to violence against

---

89 See Byrnes A, "The Committee Against Torture" in Alston P (ed), *The Human Rights Organs of the United Nations* (1992). Of the approach taken by CEDAW in 1989 in *General recommendation 12 (eighth session), Report of the Committee on the Elimination of Discrimination Against Women on its 8th session*, UN Doc A/44/38 (1989), p 81, in which it "read into" the Convention of the Elimination of All Forms of Discrimination Against Women an obligation to take steps in relation to violence against women, although the Convention does not explicitly refer to violence against women.

women but with a broader mandate focusing on women and human rights, have been considered and in a number of cases are underway.<sup>90</sup> At this stage Amnesty's work appears to have progressed the farthest. The coverage of its concerns is reflected in material it has published in recent years.<sup>91</sup>

While Amnesty's decision to focus explicitly on gender issues represents a departure from the traditional practices of such organisations, the framework within which the issue of gender has been considered has nonetheless been a traditional one. The concern has been to identify and highlight cases of violations directly inflicted on women by public authorities, both in ways in which men also suffer violations but also identifying violations which take a particular form because of the sex or gender of the victim.<sup>92</sup>

The Watch Committees have taken the matter somewhat further in a report dealing with violence against women in Brazil.<sup>93</sup> The report examines the extent of domestic violence against women and documents the failure of the government to take reasonable steps to prevent such violence or to punish those who commit it. The report thus moves away from a focus on violence inflicted directly by State officials to examine the responsibility of the State for failure to respond to violations by private individuals.

---

90 In addition to Amnesty International, the Watch Committees have embarked upon a project focusing on State violence against women. The Lawyers Committee for Human Rights considered a project of this type some years ago but eventually did not go ahead with it. The International League for Human Rights has also been developing a project on women's rights as human rights. I would like to thank Felice Gaer, Donna Sullivan, Maryam Elahi and Dorothy Thomas, with all of whom I have discussed the work of their respective organisations in this area and all of whom have provided me with useful information and material.

91 In 1991 Amnesty published a report entitled *Women in the Front Line: Human rights violations against women* (1991), which was a general survey of the different types of violations suffered by women which fall within Amnesty's mandate. Earlier material published by Amnesty includes: "Focus: Women and human rights", *Amnesty International Newsletter*, March 1990, vol. XX, No. 3; "Focus: Ill-treatment of women in detention", *Amnesty International Focus on Women* (1988); Amnesty International, *Iran: Women Prisoners of Conscience* (May 1990), AI Index MDE 13/05/90; Amnesty International, "Caught between two fires", *Peru Briefing* (1989), AI Index AMR 46/72/89, 10-11; Amnesty International USA also publishes *Interact: A Human Rights Bulletin About Women Prisoners of Conscience*.

Amnesty also produced material for the 1985 Nairobi conference and has produced other material on women as victims of human rights violations. See eg *Women: Victims and Fighters* (December 1986), AI Index ACT 71/02/86.

92 In Amnesty's case, this focus on State-inflicted violations is justified by reference to Amnesty's mandate, which has been consistently interpreted as restricted to that domain. See Articles 1 and 2 of the *Statute of Amnesty International*, reproduced in *Amnesty International Report* 1990, pp277-78. Of course, mandates can, and are changed, if the issue is considered to be important enough.

93 Women's Rights Project and Americas Watch, *Criminal Injustice: Violence Against Women in Brazil* (1991).

While these developments are extremely important and go some way towards redressing long-standing myopia or haphazard coverage of such violations, they are still limited in their theoretical outlook and practical impact. They reproduce a traditional liberal public/private split, focus mainly on traditional civil and political rights violations, and are in many cases reactive rather than proactive.<sup>94</sup>

C. "Private" Violence

The widespread problem of violence against women which is not directly attributable to the State is more problematic for the human rights "mainstream". A recent United Nations study on violence against women in the family context described its dimensions:

Research indicates that violence against women is not confined to violence perpetrated by strangers. Indeed, it has become clear that women are more often at risk from those with whom they live and many of them live constantly with the threat of "domestic violence", whether battery, rape, incest or emotional abuse.

In all countries and cultures, women have frequently been battered, sexually abused and psychologically injured by persons with whom they should enjoy the closest trust. This maltreatment has gone largely unpunished, unremarked and has even been tacitly, if not explicitly, condoned.<sup>95</sup>

The issue of violence against women has been at the forefront of the critique of the "mainstream's" failure to recognise violations of women's human dignity. The assertion frequently made by feminists (admittedly in some cases as an attempt to change perceptions rather than as a statement of the existing legal position) that "rape is a human rights violation" is met with the response from traditional human rights groups and the "mainstream" that this is only the case if it is carried out by officials of the State (for example, the rape of women prisoners by prison guards).

This example highlights the conceptual difficulties that the established framework of international human rights law has in recognising that pervasive patterns of private violence against women may involve a failure by the State to respect the human rights of women.

Yet the gulf between the two positions is by no means completely unbridgeable. While international law is traditionally reluctant to recognise the acts of private individuals as acts of the State, the discussion above<sup>96</sup> has made

---

94 For a recent, good overview of the stance of Amnesty, see *Prepared Statement of Amnesty International USA*, Hearings on Human Rights Abuses Against Women, Hearing before the Subcommittee on Human Rights and International Organizations, Committee on Foreign Affairs, U.S. House of Representatives, 21 March 1990.

95 United Nations, *Violence Against Women in the Family*, above note 87, 3.

96 See above pp 226-227.

clear that States are under an obligation in certain circumstances to take preventive or punitive measures against violations of the rights of individuals by private parties.<sup>97</sup>

To date, little has been done to explore the implications for violence against women of the recent developments in the area of State responsibility arising out of the acts of private individuals, despite the fact that considerable attention has been paid to that latter issue in other contexts. It is an important area well deserving of further work.

The Committee on the Elimination of Discrimination Against Women recently addressed the issue of violence against women in a general recommendation adopted at its 1992 session. In its *General recommendation No. 19* the primary aim of the Committee was to clarify the extent to which different forms of violence against women were in its view covered by the Women's Convention (in which the term "violence" does not appear). Another, related goal of the general recommendation was to emphasise the overlap between the obligations which States Parties to the Women's Convention had assumed in relation to violence against women and the obligations which States Parties to other human rights treaties had assumed in relation to such violence.

In its discussion the Committee characterised violence against women as a form of "discrimination against women" as defined in article 1 of the Convention and noted that the Convention obliged States Parties to eliminate all forms of discrimination, whether perpetrated by public officials or private individuals:

7. This definition of discrimination [in article 1 of the Convention] includes gender based violence – that is violence which is directed against a woman because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

#### *Gender Based Violence Violates Human Rights*

8. Gender based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include, *inter alia*

– the right to life,

---

97 See eg the change in attitude adopted in the US State Department's 1990 *Country Reports on Human Rights* (see above note 8), which reflects the stance that government tolerance of systematic violence and abuse directed at women engages the responsibility of the State.



- the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment,
- the right to the equal protection of humanitarian norms in time of international or internal armed conflict,
- the right to liberty and security of person,
- the right to the equal protection of the law,
- the right to equality in the family,
- the right to the highest standard attainable of physical and mental health, and
- the right to just and favourable conditions of work.

*The Convention Covers Public and Private Acts*

9. The Convention applies to violence perpetrated by public authorities. Such acts of violence may also breach that State's obligations under general international human rights law, and under other conventions, in addition to being a breach of this Convention.

10. It should be emphasized, however, that discrimination under the Convention is not restricted to actions by or on behalf of Governments (see articles 2.e, 2.f and 5). For example, under article 2.e the Convention calls on States to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation.

11. States parties should take appropriate and effective measures to overcome all forms of gender based violence, whether by public or private act.

*Absence of Complaints in International Fora*

There appear to have been virtually no cases at the international level in which violence against women has been explicitly raised by complainants. The closest instance seems to be *X and Y v Netherlands*,<sup>98</sup> a case under the European Convention in which a challenge was made to Netherlands law under which for various technical reasons a criminal prosecution could not be brought against a person who had sexually abused a mentally handicapped woman.

In that case, the European Court and Commission held that the failure of Netherlands law to provide for the possibility of criminal proceedings for this

---

98 European Court of Human Rights, Judgment of 26 March 1985, Ser A, No 91, 8 EHRR 235, 81 ILR 103.

type of sexual violation while providing such remedies for others was a failure to fulfil its obligation to ensure that persons in the victim's position could enjoy the right to respect for their private life guaranteed by the Convention. In so holding, the Court stated its view that, while the object of the guarantee of the right to privacy was "essentially that of protecting the individual against arbitrary interference by public authorities", it did not stop there; it may impose positive obligations on the State which "may involve the adoption of measures designed to ensure respect for private life even in the sphere of the relations of individuals between themselves".

In view of this approach to positive obligations, one must ask why it is that there have been no international cases in which women have alleged violations against States whose legal systems fail to make marital rape a crime or which provide inadequate administrative and legal preventive and remedial measures for rape and acts of violence committed against women.<sup>99</sup> A number of possible explanations suggest themselves. One is that many of the groups active in combatting violence against women may know little about the international procedures that are available to them. A second reason may be that these international procedures are largely ineffectual in terms of producing practical results which benefit those whose rights are being violated or, at least, that there are more productive ways in which human, financial and material resources can be utilised than in pursuing international complaint procedures. It may also be that the track record of these institutions to date in cases involving issues other than fairly straightforward discrimination is not so promising that one could presume that the outcome of any such case would serve women's interests.

If such cases were brought, what sort of positive steps could be required of a State internationally to ensure that it carries out its obligation to ensure women's rights to freedom from violation of their bodily integrity? Plainly they would include the requirement that a State have in place criminal legislation or some appropriate substitute to punish serious violations of women's physical integrity. They would presumably also include an obligation on State officials to take active steps to protect women against such violence where that is reasonably feasible, as well as punishing those who commit such crimes. Thus far, we are in well-charted territory internationally.

There appears to be no reason why the obligation could not be extended further to impose on the State an obligation to undertake major education and training programs for women and men in relation to domestic violence or even to do something about some of the social structures which promote violence against women (assuming one can reach agreement on what the causes of the violence

---

<sup>99</sup> In general, apart from a number of discrimination cases under the European Convention and the First Optional Protocol there has been little use made of international complaint procedures to advance women's human rights claims. See generally the report of the Secretary-General on the operation of the communications procedure of the Commission on the Status of Women: UN Doc E/CN.6/1991/10 (the draft of which was prepared by the present author).

are).<sup>100</sup> These requirements would involve an extension beyond the range of measures which is normally suggested as appropriate in cases involving infringements of the right to physical integrity. Nonetheless, they have parallels in obligations imposed by the Racial Discrimination Convention and the Women's Discrimination Convention<sup>101</sup> and the types of measures which States undertake to adopt in the area of economic and social rights.

There are, of course, other problems which need to be addressed in this context, among them the ambiguity of the role of the State from a feminist perspective and the dangers of imposing duties on a State where the performance of those duties may encroach upon the enjoyment of other rights which are valuable for women. Nonetheless, the issues need to be further explored.

## H. Conclusion

This paper has attempted to survey some of the current issues of concern to those who are seeking to ensure that major violations of women's human dignity are recognised by the international human rights community as violations of human rights in the technical sense and that the institutions concerned with the promotion of human rights give greater attention to these issues in their work.

There are many issues which still need further detailed examination as part of this effort. They include more concerted efforts to identify the role of sex and gender in constituting all human rights violations of which women are the victims, further in-depth examination of the extent to which human rights violations against women are dealt with within the "mainstream" (and what is

---

100 See generally *Violence Against Women in the Family* above note 87, pp97-106.

101 *In General recommendation 19* (1992), CEDAW recommended:

1. That States take all legal and other measures which are necessary to provide effective protection of women against gender based violence, including, *inter alia*:
  - (a) effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including *inter alia* violence and abuse in the family, sexual assault and sexual harassment in the workplace;
  - (b) preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
  - (c) protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.
2. That States report on all forms of gender based violence, and that such reports include all available data about the incidence of each form of violence, and about the effects of such violence on the women who are victims.
3. That States reports include information about the legal, preventive and protective measures which have been taken to overcome violence against women, and on the effectiveness of such measures.

excluded and why), and further consideration of the reasons for the apparent lack of receptivity to these issues in order to develop strategic responses. In particular, more attention needs to be given to the developments in the law of State responsibility arising out of the acts of private individuals and to explore how those developments may be turned to advantage in furthering the promotion of the human rights of women internationally.

One suspects that the permeability of the "mainstream" to these issues may be limited; this makes it all the more important not just to infiltrate or utilise the "mainstream", but also to strengthen those existing institutions which address the problems facing women -- and to increase the awareness, in both directions -- of the work being done in the "mainstream" and "on the margins".