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**RAPE AS ‘TORTURE’?  
CATHARINE MACKINNON AND QUESTIONS OF FEMINIST STRATEGY**

**ABSTRACT**

How can we eradicate violence against women? How, at least, can we reduce its prevalence? One possibility offered by Catharine MacKinnon is to harness international human rights norms, especially prohibitions on torture, and apply them to sexual violence with greater rigour and commitment than has hitherto been the case. This article focuses particularly on the argument that all rapes constitute torture in which states are actively complicit. It challenges this feminist strategy, suggesting that we retain the label ‘rape’ due to its gendered meaning and its powerful associations. It is also claimed that we may lose sight of the commonality of rape in calling it torture, as well as obscuring the varied responses of women survivors. Finally, the argument is made that we must preserve the label ‘torture’ for those rapes in which states are either perpetrators, or acquiesced to the offence, or are so heinous, so extreme and hopefully comparatively rare, such as those in the former Yugoslavia or Rwanda.

**KEY WORDS**

domestic violence; feminist strategy; Catharine MacKinnon; rape; torture

**INTRODUCTION**

How can we eradicate violence against women? How, at least, can we reduce its prevalence? Perhaps, more realistically, how can we ensure that all such violence is prohibited by robust substantive laws and how can we make certain that all complaints are taken seriously, effectively investigated, prosecuted and, where relevant, convictions secured? One possibility offered by Catharine MacKinnon is to harness international human rights norms and apply them to violence against women with greater rigour and commitment than has hitherto been the case. This is the focus of MacKinnon’s compelling, and rhetorically powerful, book *Are Women Human? And other international dialogues* (MacKinnon, 2006). One specific focus of her critique is the international prohibition on torture. In particular, she asks: “why is torture on the basis of sex – for example, in the form of rape, battering, and pornography – not seen as a violation of human rights?” (MacKinnon, 2006, p. 17)<sup>1</sup> Her answer is deceptively simple. What fundamentally distinguishes torture, she argues, from domestic violence, rape and abuse, is that “torture is done to men as well as to women (MacKinnon, 2006, p. 21).”

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<sup>1</sup> MacKinnon’s essay, ‘On Torture’, was originally published as ‘On Torture: A Feminist Perspective on Human Rights’, in Mahoney et al (1993).

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MacKinnon, therefore, urges us to reconceive many of the abuses which women face as torture. This would draw on the “recognized profile” (MacKinnon, 2006, p. 17) of torture internationally, garnering national and international recognition of the egregious nature of all violence against women. Further, applying the sobriquet torture, the argument goes, would tap into effective legal sanctions and penalties that are accepted internationally, enforced nationally and which may, therefore, may begin to act as a deterrent. The harms which MacKinnon seeks to reconceptualise as torture are many, including domestic violence, trafficking, pornography and rape. It is the latter which is the particular focus of this article. Specifically, I consider whether beyond the rhetorical, there is value in relabeling and reconceiving all rapes as torture.

### RAPE AS ‘TORTURE’?

Catharine MacKinnon makes a powerful argument that rape is torture and should, legally, be conceived of as such (MacKinnon, 2006). MacKinnon begins by noting that the “generally recognized” purpose of torture is to “control, intimidate or eliminate” those who challenge a regime and thus is seen as “political” (MacKinnon, 2006, p. 18). She then goes on to contrast this with three stories of horrific domestic violence, including repeated rapes. MacKinnon then makes her point:

“In all these accounts, all the same things happen that happen in Amnesty International reports and accounts of torture – except they happen in homes in Nebraska or in pornography studios in Los Angeles rather than prison cells in Chile or detention centres in Turkey” (MacKinnon, 2006, p. 21).

The key difference, however, as MacKinnon goes on to note, is that the legal responses to these various situations differ, with the ‘political’ violence being labeled torture. She continues that what is at work is a “double standard”: what fundamentally distinguishes torture, she argues, from the events of the women describes is that “torture is done to men as well as to women” (MacKinnon, 2006, p. 21). She argues that when the abuse is sexual or intimate, especially when it is sexual and inflicted by an intimate, it is “gendered” and not considered a human rights violation. This differs from torture which is regarded as “politically motivated; states are generally required to be involved in it” (MacKinnon, 2006, p. 21). What needs asking, MacKinnon says: “is why the torture of women by men is not seen as torture, specifically why it is not seen as political, and just what the involvement of the state in it is” (MacKinnon, 2006, p. 21).

In asking this question, MacKinnon challenges three aspects common to definitions of torture in international human rights instruments.<sup>2</sup> The first relates to the required level of

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<sup>2</sup> There is no uniform definition of torture internationally. MacKinnon’s focus is on international human rights norms, which determine state responsibility, paradigmatically the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, GA Res 39/64, which defines torture as follows: Article 1: ‘For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or

violence or harm for conduct such as rape to come within the scope of torture: defined as 'severe pain and suffering' in the UN Convention Against Torture.<sup>3</sup> Here MacKinnon does an excellent job of highlighting the serious harm of domestic abuse and rape. Having set out the kinds of practices that are generally accorded the sobriquet 'torture', she then contrasts this with examples of systemic violence, abuse and rape of women at the hands of their partners, such domestic abuse equally involving the imprisonment, violence and degradation that constitutes torture. The parallels are strong. MacKinnon clearly draws attention to conduct which might hitherto have been considered 'private' or 'just' rape and has not been recognised as the serious harm that it is. She also notes the fact that "[w]hen women break under torture, we are said to have consented, or the torturer could have thought we did" (MacKinnon, 2006, p. 24). "Few say .... Everybody breaks under torture" (MacKinnon, 2006, p. 24). Rape and domestic violence are, therefore, sufficiently serious harms to pass the torture threshold.

MacKinnon then goes on to challenge the notion that torture is political, but women abuse is not. She refers here to the law's general assumptions about who are torturers (errant state officials), where it takes place (state detention) and the reasons for it (part of a political struggle). This is the general picture of the male prisoner of conscience. MacKinnon counters such perceptions stating that the systemic abuse and violence, including rape, which women suffer, is political. It is 'neither random nor individual' and the "fact that you know your assailant does not mean that your membership in a group chosen for violation is irrelevant to your abuse" (MacKinnon, 2006, p. 22). This abuse, she states, is "still systemic and group-based" and "defined by the distribution of power in society" (MacKinnon, 2006, p. 22). However, it is the suffering of men has the "dignity of politics and is called torture" (MacKinnon, 2006, p. 22).

And this is where the role of the state comes in. State participation or acquiescence is generally the sine qua non of international legal definitions of torture.<sup>4</sup> The rape of one private individual by another does not immediately come within this concept of state participation. MacKinnon responds that, on the contrary, the state is "typically deeply and actively complicit in the abuses under discussion, collaborating in and condoning them" (MacKinnon, 2006, p. 23). To confirm this, she gives examples relating to gendered violence generally, such as the police not being interested in domestic crimes, of the prevalence and protection through free speech of pornography, of the lack of defences for abused women who kill their abusive partners. In specific relation to rape, she argues that the defence of mistaken belief in consent in rape is a "state atrocity" and offers this as an example of rape law being written for men giving them, in effect, impunity for most rapes (MacKinnon, 2006, pp. 24-25). All these laws are "affirmative state acts or positive omissions" (MacKinnon, 2006, p. 27). The abuse she describes is "not official in the

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intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' This differs from individual criminal liability under international criminal law for which the requirement of state participation is not the same. For a detailed discussion, see Edwards (2006).

<sup>3</sup> Ibid.

<sup>4</sup> The exception is in international criminal law: see Edwards (2006).

narrow sense at the time it happened, but its cover-up, legitimization, and legalization after the fact are openly so” (MacKinnon, 2006, p. 25). In other words: “The abuse is systematic and known, the disregard is official and organized, and the effective governmental tolerance is a matter of law and policy (MacKinnon, 2006, p. 25).” Thus, MacKinnon argues, while the individual perpetrator may not be a state official, there is no denying the state’s complicity. MacKinnon’s argument, therefore, is that rape should come within definitions of torture: it is of sufficient harm, is political and the state is responsible.

Instead, however, what we have is the co-existence of international guarantees of sexual equality with “massive rates of rape and battering and traffic in women through pornography” (MacKinnon, 2006, p. 25). MacKinnon recognises that there have been some changes. Rape has been found to constitute torture when it happens in official state custody.<sup>5</sup> Thus, a woman’s human rights are more likely to be “deemed violated when the state can be seen as an instrumentality of the rape” (MacKinnon, 2006, p. 25). Yet, she goes on, “the regular laws and their regular everyday administration are not seen as official state involvement in legalized sex inequality” (MacKinnon, 2006, p. 25), but they should be. MacKinnon concludes: “If, when women are tortured because we are women, the law recognized that a human being had her human rights violated, the term ‘rights’ would begin to have something of the content to which we might aspire (MacKinnon, 2006, p. 27).”

### **QUESTIONS OF FEMINIST STRATEGY: RAPE AS RAPE?**

Catharine MacKinnon makes a powerful argument that rape is torture and should, legally, be conceived of as such. Similar arguments have been made regarding domestic violence by Rhonda Copelon who has also highlighted the parallels between both forms of violence, the purpose of the violence and the role of the state (Copelon, 1994b). Copelon writes that her primary goal is to ‘challenge the assumption that intimate violence is a less severe and terrible form of violence than that perpetrated by the state’ (Copelon, 1994b, pp. 139-140). MacKinnon too demands that the world open its eyes to the gravity and endemic nature of sexual violence against women, including rape, and the complicity of states in its continuation.

Ultimately, both MacKinnon and Copelon are making a strategic argument. They seek to tap into the symbolism of the term ‘torture’ and the stringent legal demands and requirements that come with it (Edwards, 2006). And they are right that, in practice, the grant of the status of torture to rape or domestic violence would bring with it more demanding legal requirements at the international level and greater condemnation of acts nationally. But this underlines that the argument is rhetorical: the broader aim is to ensure recognition of these harms against women. This is a powerful rhetorical strategy. It demands that we consider the extent of state complicity in gender-based violence. It is also a strategy with a history. Edward Peters notes that in the late nineteenth century, as the word torture was being used to describe ever more acts, a pamphlet written by Frances Power Cobbe about domestic violence was entitled *Wife Torture* (Peters, 1996,

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<sup>5</sup> *Aydin v Turkey* – see further

pp. 151-152). He rightly notes that the use of the term torture was “arresting and unambiguous” and notes that the title was “astutely chosen and created a perspective upon the problem that must have focused a great deal of hitherto diffused attention” upon the subject matter (Peters, 1996, pp. 151-152). The term torture, Peters argues, was being used in an “honourable and just cause”.<sup>6</sup> MacKinnon’s conceptualization of all rapes as torture and of the state being ‘complicit’ in all rapes is rhetorically powerful, also in pursuit of an ‘honourable and just cause’. But there are potential disadvantages in seeking the adoption of torture as a synonym for rape.

### *Rape as a gendered crime*

Domestic abuse and rape are gender-based crimes. They are predominantly carried out against women and continue due to the unequal status of women in society. To term these harms and crimes ‘torture’ may actually obscure this reality. The term rape, on the other hand, is widely accepted as describing a harm against women by men. While it does, and should, encompass the rape of men, it must also not be forgotten that this is primarily a crime by men against women.<sup>7</sup> Thus, while the word ‘torture’ has huge symbolic value, so does ‘rape’. To classify an act as rape raises it in society’s mind to an act which is especially grave and serious. It is sometimes argued that it is just this symbolic nature of the term which may be a factor in the high number of acquittals at court: the jury, so the argument goes, may perceive the acts of the defendant as wrong, as even criminal, but they may not wish to label him a ‘rapist’. It is also why, when debating law reform of sexual offences, many reject the removal of the term rape and its replacement with, say, ‘sexual assault’ (Temkin, 2002, pp. 177-178). In other words, rape is rape. It may sometimes constitute torture, but not always, which takes us to the next issue.

### *Are all rapes equally heinous?*

There is another possible reason why naming all rapes as torture may not be the most appropriate feminist strategy. We should recognise that while all rapes are serious crimes, the circumstances and context of some rapes may make them even worse than others. As Christine Chinkin has said, ‘rape and sexual violence occurs along a continuum of seriousness’ (Chinkin, 1994, p. 339).<sup>8</sup> In saying that some rapes are more serious and heinous than others simply reflects common understandings of the different degrees of crimes committed, for example resulting in differential sentencing. This does demand a more nuanced approach to degrees of gravity, than has hitherto been the case in relation to rape. It does not mean that stranger rape is worse than acquaintance rape, that rape with physical violence is worse than rape with psychological violence. But I am arguing that, on a continuum, the systemic, life-threatening and mass nature of the rapes committed in conflicts such as Rwanda or the former Yugoslavia should be recognised as

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<sup>6</sup> Though Peters rejects using the torture to describe domestic violence, he does accept that it is a powerful rhetorical tool (Peters, 1996, pp. 151-152).

<sup>7</sup> It is less obvious that the term ‘domestic violence’ is gender specific, but it generally remains understood as such.

<sup>8</sup> This is also the important insight of Liz Kelly in highlighting the seriousness of all acts of sexual violence, including so-called ‘flashing’: Kelly (1988).

among the most heinous crimes and among the worst atrocities to have faced women. This is why, of course, these crimes have been found to constitute crimes against humanity, genocide, torture and other war crimes. Indeed, MacKinnon does deploy the term “genocidal rape” to describe such situations (MacKinnon, 2006, pp. 180-195).<sup>9</sup>

Using such terminology seems to imply that for MacKinnon some rapes are more serious than others.<sup>10</sup> And this is my argument in relation to torture: all rapes are injurious, but some rapes which constitute torture or genocide are arguably more extreme and more demanding of international condemnation. Is ‘genocidal rape’ not indeed worse than many other rapes at the political and legal level? Clearly the individual woman who survives rape may challenge the idea that what she experienced is not as harmful as other rape situations, but genocide is about the destruction of a race, about the killing and death of a whole culture and people.<sup>11</sup> This is worse, at the societal and political level, than an instance of individual rape which is not genocidal.

There is a danger that the consequence of this argument is that “lesser” rapes “may still be committed with impunity” (Chinkin, 1994, p. 340) and are treated less seriously. But such claims must be challenged and rejected. Copelon does argue that the reason why rape, and other crimes of sexual violence, should be mainstreamed into international criminal law, such that rape constitutes torture, is that “history teaches us that there is an almost inevitable tendency for crimes that are seen simply or primarily as crimes against women to be treated as of secondary importance” (Copelon, 2000-2001, p. 234). This is true. But there is also the danger that were all domestic violence and rape to be subsumed under the term ‘torture’, that they would be more easily forgotten and ignored, and less easily recognised as gender-based.

### *The mundanity of rape*

While each rape is extremely serious and must be treated as such, rape is also mundane in its everyday nature, in the ordinariness of the men who commit it. This is a further argument for keeping rape as rape. Recent studies have suggested that in the UK alone there are anywhere between 47,000 and 61,000 rapes each year.<sup>12</sup> Rape occurs all the time and everywhere. The men who commit rape are not demons, monsters and psychopaths, though undoubtedly some are. They are ordinary brothers, fathers, sons, friends, colleagues, teachers, doctors and the like. We should keep the term torture for what is generally understood as torture – extreme acts in exceptional circumstances. This is not to suggest that torturers are not ordinary men (and women) because they are. Nor is it to suggest that torture is as rare as we would like to think or are led to believe it is. But

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<sup>9</sup> The use of the term ‘genocidal rape’ is contested among feminists. For a discussion, see further: Engel (2005).

<sup>10</sup> Though she does later state that “what rape does in genocide is what it does the rest of the time: ruins identity, marks who you are as less, as damaged (MacKinnon, 2006, p. 230)”.

<sup>11</sup> See, for example, the challenge to such an argument from the organisation Women in Black writing regarding genocide in Bosnia: “A victim is a victim, and to her the number of other victims does not decrease her own suffering and pain (quoted in Engle, 2005, p. 788)”.

<sup>12</sup> Myhill and Allen (2002) extrapolated from their study an annual incidence for rape of 61,000 rapes. Walby and Allen (2004) estimated an annual incidence of 47,000.

it is to argue that torture is comparatively rare. Rape is not rare. Rape is commonplace. We need to establish this understanding in our society, and to label it as torture may in fact reinforce assumptions about what constitutes a 'real' rape, about the types of men who carry out rape and about penalties for rape.<sup>13</sup>

*A 'fate worse than death'?*

Finally, while for many rape survivors, the rape has ruined their lives, threatened their livelihood through wrecking their well-being and destroyed the security and comfort that they took for granted in their lives; for others, it is serious, harmful, painful, but they move on. Over-generalising the trauma of rape may add to the perception of rape as exceptional, as especially dreadful and to be feared: to be a 'fate worse than death'. While this may be the perception of some women, many others do survive and move on.<sup>14</sup> For example, Germaine Greer, in advocating the use of the term 'sexual assault' instead of 'rape', argues that doing so may ensure that 'attacks on children would be seen as far worse than penetration of a grown woman' (Greer, 2007). She seeks to de-emphasise the significance of rape in the canon of harms against women. Similarly, Karen Engle suggests that in finding that rape per se constitutes the harm required for torture, reinforces the 'understanding that women are not capable of not being victimized by the rapes' (Engle, 2005, p. 813). Again, my point is not to downplay the significance of rape. But is it to suggest that relabeling rape as torture would ratchet up the perception of harm to a level which may be unhelpful for some women in overcoming rape and may distract us from focusing on the variety of ways in which women are discriminated against in society.

## CONCLUSION

Catharine MacKinnon powerfully demonstrates the international community's disinterest in violence against women. She challenges us to ask why this is so, pointing to the gendered nature of crimes against women and the factual similarities between such crimes and traditional ideas of torture. She makes us face up to the disingenuous nature of so many international statements, call them platitudes, condemning gender based violence. But beyond the rhetorical, what would her argument about rape and torture mean in practice? To see the state as complicit in all rapes means either naming the state as the actual perpetrator, which MacKinnon does reject (MacKinnon, 2006, p. 25), but she goes on nonetheless to argue that the legitimisation, legalisation and lack of effective remedies for rape are state acts or omissions (MacKinnon, 2006, p. 25). If this was to be translated into legal accountability for torture, it would have to mean that the state has acquiesced to all rapes and is accordingly legally responsible.<sup>15</sup>

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<sup>13</sup> There is an argument that juries find it difficult to convict defendants for rape due to the seriousness of the label 'rapist'. Arguably, this would be even more so were the label 'torturer' to then be applied.

<sup>14</sup> Copelon (1994b) makes this argument in respect of survivors of domestic violence, though she still argues that domestic violence should be recognised as torture.

<sup>15</sup> See the definition of torture, above in Article 1 of the UN Convention Against Torture.

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But, to say that the state acquiesces to all rapes is to place too much focus on the role of states in determining the prevalence and continuation of rape. Rape is a broad cultural phenomenon that does not just exist because of state action or inaction. It is maintained by education, media, politics, economics, culture and a wide array of other facets of society. Law and the state play a significant role but cannot alone be responsible. MacKinnon's analysis suggests we demand more of states and indeed we could and should. Few governments do enough to prohibit rape, to punish it and to try to prevent it. But whether this means that there is state complicity in every rape, in the legal sense of state complicity to torture, is not so clear. State complicity, as a trope for our understandings of rape, is valid and arresting and makes us think again about the role of the state and what could be done. But state complicity cannot extend to meaning that every rape is torture in the sense that it is committed by the state or that the state is complicit and therefore legally responsible. To hold otherwise would be to say that all men are acting on behalf of the state when raping.

The existence and prevalence of rape is political, any solutions need to be political. But this does not mean that every act of rape is political in the same sense of an individual being raped to secure a confession, or to provide information, or as part of a programme of ethnic cleansing. The latter political purposes are direct and result in the direct infliction of the harm on rape on the individual. The political realities of gendered violence which MacKinnon discusses are less direct and cannot in reality be attributed to every perpetrator of every rape. Rape does happen because of gender inequalities and the political process is the means by which to try to change this; but the holding that each and every rape is torture will not bring us nearer to achieving this purpose. MacKinnon's analysis is valuable in reminding us that rape, generally, is political, but perhaps we need to recognise that not every rape is individually political.

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