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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 questions whether a feminist strategy to reconceptualise rape as torture should be pursued, suggesting that we retain the label 'rape' due to its gendered meaning and 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 article canvasses the idea that we recognise the different circumstances and contexts in which rape takes place, which may mean different criminal offences for different rapes; for example, preserving the label 'torture' for those rapes in which state officials are participants.

KEY WORDS: Catharine MacKinnon, feminist strategy, international criminal law, international human rights, rape, torture

Introduction

There can be few topics other than rape which elicit passionate responses from all sorts of people, governments and across all forms of media (no matter how low level). As well as rape being an everyday occurrence, it is also a daily topic of media, government and academic debates. This clamour for answers (why do so many men rape so many women?) and solutions (how can we better bring perpetrators to justice?) seems relentless, yet no further towards resolution. While the topic of rape has not polarised feminists in the way that, say, pornography has (all feminists condemn rape; some feminists are pro-porn), it remains a divisive topic, dealing as it does with ideas of women's agency, autonomy, male domination, the use of law and questions of feminist strategy. In order to continue to play a part in these broad debates regarding rape, feminist legal scholars must continue to be open to challenging and possibly controversial ideas.

As part of this on-going debate, this article engages with the proposal that we should reconceive all rapes as torture. Catharine MacKinnon first made this suggestion in 1993 (MacKinnon 1993) at a time when the international community was facing up to the realities of mass rape in the former Yugoslavia. Feminists were mobilising against what was perceived to be the lack of interest in bringing perpetrators to justice and the apparent failure to recognise the systemic, harmful nature of rape.[1] MacKinnon argued that all rapes should be reconceived as 'torture', with the consequent positive impact this would have on legal recognition of the harms and international commitment to the prosecution and eradication of rape. Nearly fifteen years on, MacKinnon's essay has been republished in a collection of her work on international human rights (MacKinnon 2006).[2] MacKinnon's arguments demand revisiting; not least because while rape has been found to constitute torture in some very limited circumstances,[3] rape remains a phenomenon in respect of which all legal systems appear to be incompetent. We are still searching for legal strategies to deal with rape. This article considers whether, in terms of feminist strategy, MacKinnon's advocacy of 'rape as torture' should be operationalised and what the effects of this might be. It is an article seeking to spark debate about different feminist strategies, raising questions for further debate and analysis, rather than a rejection of specific reforms or the provision of definitive answers.

Rape as 'Torture'?

MacKinnon's compelling, and rhetorically powerful, book *Are Women Human? And Other International Dialogues* (2006), in which the 1993 essay "On Torture" is republished, advocates harnessing international human rights norms and applying them to violence against women with greater rigour and commitment than has hitherto been the case. One specific focus of her critique is the international prohibition on torture. In particular, she asks: "why is torture

[1] Results did flow from this feminist campaigning, with the establishment of international criminal courts attuned to the needs of women victims and sexual crimes, but feminists were also deeply divided over how to conceptualise the mass rapes and therefore strategise against them (Engle 2005).

[2] For reviews of the book, see *inter alia* Munro (2006), Higgins (2006) and Palevich (this volume; doi:10.1007/s10691-007-9082-x).

[3] *Sukran Aydin v. Turkey* (1998) 25 E.H.R.R. 251; see also Edwards (2006).

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) 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).

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, 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.

MacKinnon does make a powerful argument that rape is torture and should, legally, be conceived of as such. She begins by noting that the "generally recognized" purpose of torture is to "control, intimidate or eliminate" those who challenge a regime and it is thus 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 between these different accounts, as MacKinnon notes, is the legal responses to these various situations, with the 'political' violence being labelled torture. She continues that what is at work is a "double standard": what fundamentally distinguishes torture, she argues, from the events of the women described 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" (2006, p. 21).

In asking this question, MacKinnon challenges three aspects common to definitions of torture in international human rights instruments.[4] The first relates to the required level of violence or harm for conduct such as rape to come within the scope of torture: defined as "severe pain and suffering" in the U.N. Convention Against Torture.[5] 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 the abuse of women is not. She refers here to the law's

[4] There is no uniform definition of torture internationally. MacKinnon's focus is on international human rights norms, which determine state responsibility, paradigmatically the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, G.A. 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 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).

[5] Ibid.

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 that 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, the exception being international criminal law (Edwards 2006). 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" (2006, p. 23). To confirm this, she gives examples relating to gendered violence generally, such as the police not being interested in domestic crimes, the prevalence and protection through free speech of pornography, and 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 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" (MacKinnon 2006, p. 25). MacKinnon notes that since she first wrote her essay in 1993, certain human rights courts have recognised that rape does constitute torture, but only in specific, narrowly drawn, instances where the nexus with the state is clear (MacKinnon 2006, p. 291).[6] Accordingly, with the exception of international criminal law which has largely dispensed with the state actor requirement (Edwards 2006),[7] it remains the case that 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). And yet, MacKinnon continues, "the regular laws and their regular everyday administration are not seen as official state involvement in legalized sex inequality" (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" (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 (1994b) who has also highlighted the parallels between both forms of violence, the purpose of the violence and the role of the state. 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" (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.

[6] *Sukran Aydin v. Turkey* (1998) 25 E.H.R.R. 251; *Raquel Marti de Mejia v. Peru* (1996) Case 10.970, Report No. 5/96, InterAmerican Court of Human Rights, O.E.A./Ser..L./V/II. 91, Doc. 7. See further Blatt (1991–1992) and Pearce (2003) for the argument that the international community has been too slow to recognise rape as a form of torture.

[7] *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, Case No. I.C.T.R.-96-4-T, 2 September 1998; on appeal: Case No. I.C.T.R.-96-4-T (A.C.), 1 June 2001.

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 aim is to ensure better recognition of these harms against women and of the extent of state complicity in gender-based violence. It is a powerful rhetorical strategy and one 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, 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".[8] MacKinnon's conceptualisation 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 may be 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', a gender-neutral term, may actually obscure this reality.[9] The term rape, on the other hand, is widely accepted as describing harms 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

[8] Though Peters (1996, pp. 151–152) rejects using the term torture to describe domestic violence, he does accept that it is a powerful rhetorical tool.

[9] Alice Edwards suggests that this approach may be criticised for "playing into the male-gendered international system by seeking to raise the profile of violence against women through equating the seriousness of the harm with male conceptions of torture, rather than as grave human rights violations in their own right" (2006, p. 379).

crime by men against women.[10] 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. While rape may also constitute torture in specific circumstances, as an *additional* harm and crime, each rape is also a rape and there may be advantages to retaining this gendering label.

Are All Rapes the Same?

There is another possible reason why naming all rapes as torture may not be the most appropriate feminist strategy. It may be that we should recognise that while all rapes are serious crimes, the circumstances and context of some rapes may make them different, demanding alternative remedies and as constituting additional criminal and other offences. Most legal systems recognise different forms of rape, for example child (or statutory) rape and rape of adults. Further, most legal systems will recognise the different contexts in which rape takes place in terms of sentencing. In England and Wales, for example, sentencing varies depending on perceived levels of harm, with gang rape, sustained attacks and the presence of others (e.g. family) being among factors which aggravate the offence of rape (Sentencing Guidelines Council 2007). In addition, sentencing and the substantive crime also vary depending on the circumstances and modus operandi of the perpetrator. To take another example from England and Wales, the age of the perpetrator may be relevant to determining which substantive offence is committed and sentencing varies depending on factors such as the offender's history of crime and/or mental capacity, his selection of vulnerable victims, degree of planning, abuse of power or trust, racial or other discriminatory motivation and whether he is operating alone or in a group (Sentencing Guidelines Council 2007). Arguably, the factors relevant to the perpetrator in determining his sentence do not make a difference

[10] It is less obvious that the term 'domestic violence' is gender specific, but it generally remains understood as such.

to the harm that the victim suffers. So it may not matter to the victim whether the offender was a police officer or not, but if he is, the abuse of trust in the act may increase his sentence. The fact that the offender was 17 may not lessen the harm felt by the victim, but the offender may have committed a different offence and may be sentenced differently (less severely) than an adult.

These examples of the different treatment of rape, where the variables relate to the offender and circumstances rather than to the victim, have parallels in the international arena. In international human rights law, as discussed above, a rape will only constitute torture if there is a nexus with the state.[11] In *Aydin v Turkey*,[12] Sukran Aydin was raped by a state official and this was held to constitute torture. Would the harm she suffered have been less had she been raped by a non-state official? We cannot know; though we can say that even were her harm to have been the same, the legal system of the European Convention on Human Rights ranks the rape by a state official as a more egregious crime. In doing so, the victim's perspective is not the sole consideration in determining the specific offence applicable.

A further example is the use of the term 'genocidal rape' to describe the mass rapes in the former Yugoslavia. Rapes were committed by all sides in this conflict, but for Catharine MacKinnon the rapes by Serbian men were different, for which the label 'genocidal rape' was justified:

> If all men do this all the time, especially in war, how can one pick a side in this one? And since all men do this all the time, war or no war, why do anything special about this now? This war becomes a form of business as usual. But genocide is not business as usual – not even for men.[13] (MacKinnon 1994, pp. 186–187)

The use of the term 'genocidal rape', as with torture in the example above, shifts the perspective from the victim, to an extent, to the circumstances of the rape and the status or motivation of the perpetrator. This is one of the reasons why some feminists reject the

[11] International criminal law is an exception, as discussed above. See further Edwards (2006).

[12] *Sukran Aydin v. Turkey* (1998) 25 E.H.R.R. 251.

[13] In a similar vein, she argued that: "These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference" (MacKinnon 1994, p. 190).

term. The feminist anti-war organisation Women in Black stated clearly that: "We refuse the politics of the instrumentalization of victims. 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). Others also criticised the strategy, with Rhonda Copelon (1994a) arguing that rape and genocide are separate atrocities and that eliding them means that international condemnation would be confined to these particular facts and circumstances. The voices of other rape victims would not be heard and there was a risk of "rendering them invisible once again" (Copelon 1994c, p. 198).[14]

The point I am trying to make is this. All rapes are serious crimes and must be treated as such, though almost every legal system fails to do so. Nonetheless, the circumstances of some rapes may mean that the offences committed vary. In the case of Sukran Aydin, her rape was rape, but it was also torture by virtue of her perpetrator being a state official. It was rape *and* torture. In the case of mass rapes of Bosnian women, there were rapes of individual women and arguably also genocide: rape *and* genocide. One further analogy may be useful. An offence may consist of rape and murder, or rape and theft. The two crimes co-exist. So, too, torture can co-exist with rape. The suggestion is that perhaps sometimes we do need to consider the crime from a wider perspective than just the victim's, taking into account societal perceptions of the crime as it fits in with other events (e.g. genocide) and/or of the perpetrator's status (e.g. public official). This may mean that the same label is not given to all rapes. Sometimes a rape is a rape, sometimes it is also torture, but not always. Retaining the label torture, for example, can serve important purposes in highlighting the particularity of some rapes that are different from others, though no less harmful to the victim. There is value, therefore, in holding that rape is rape and that not all rapes should be relabeled as torture.

This argument might be countered with the criticism that, in practice, this means "all rapes are equal but some are more equal than others" and that rape as torture will always be taken more seriously and 'everyday' rapes will continue to be ignored. This is a

[14] As Karen Engle explains, this debate was "not so much about *whether* rape had been used as an instrument of genocide, but whether a focus on genocidal rape functioned to downplay the extent to which all women raped during war were victims" (2005, p. 786).

difficult issue of feminist strategy. I can see that saying rape by state officials constitutes torture, but rape by private individuals does not, may mean that the private rape is ignored (as indeed generally is the case). The question I am raising is whether the alternative argument, to say that all rapes constitute torture, is a more fruitful strategy. I am suggesting that it may not be, in that we should consider whether the context and circumstances of different rapes do in fact require different treatment. Perhaps it is the case that we need a more nuanced approach. So, for example, an argument may be made from a societal perspective, including feminists' perspectives, that while the rape of individual Bosnian women was an egregious harm, the mass rape for genocidal purposes was even worse. Similarly, the rape of a woman by a state official may not be different from a rape by a private individual from the victim's perspective, but from society's perspective it may be worse. The state official is someone specifically responsible for upholding the law, someone to whom women should be able to turn for protection. Further, the consequences of state involvement may be more pernicious, with the possibility that the investigation, prosecution and punishment of the perpetrator is compromised, if not entirely impeded.[15]

There is a danger that the consequence of this argument is that 'lesser' rapes "may still be committed with impunity" (Chinkin 1994, p. 340). But such a situation 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', such harms would be more easily forgotten and ignored and less easily recognised as gender-based, with the attention continuing to be on 'real' torture. We may also lose the language with which to express particular outrage at some extreme acts, which leads to the next point.

[15] This is not to suggest that the feminist criticism of the state actor requirement is not valid. The concepts of state acquiescence and consent should be interpreted much more broadly than they are at present.

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 U.K. alone there are anywhere between 47,000 and 61,000 rapes each year.[16] 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 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.[17]

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, and 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 press on.[18] 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

[16] Myhill and Allen (2002) extrapolated from their study an annual incidence of 61,000 rapes (of women). Walby and Allen (2004) estimated an annual incidence of 47,000 rapes of women.

[17] As noted above, 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.

[18] Copelon (1994b) also makes this argument in respect of survivors of domestic violence, though she does still argue that domestic violence should be recognised as torture.

children would be seen as far worse than penetration of a grown woman'' (2007). She seeks to de-emphasise the significance of rape in the canon of harms against women. Similarly, Karen Engle (2005, p. 813) suggests that 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''. Again, my point is not to downplay the significance of rape. But it is to suggest that relabelling 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 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 rejects (MacKinnon 2006, p. 25), or to suggest that the legitimisation, legalisation and lack of effective remedies for rape are state acts or omissions (MacKinnon 2006, p. 25). If this were 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.[19]

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 and culture. 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

[19] See the definition of torture, above in Article 1 of the U.N. Convention Against Torture.

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. This would amount to saying that all men are acting on behalf of the state when raping. Rape does happen because of gender inequalities, for which states are in part responsible; but the holding that each and every rape is torture may not bring us nearer to reducing the prevalence of rape or to ensuring that more perpetrators are brought to justice.

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