available on the basis of non-discrimination,[142] and by a number of provisions which are gender-specific.

Specific protections for female combatants were included in the 1929 Geneva Convention relating to the Treatment of Prisoners of War, with Article 3 of the Convention demanding that 'women shall be treated with all consideration due to their sex' and Article 4 allowing for differential treatment of women prisoners of war. The Third Geneva Convention of 1949 requires female supervision for and separate accommodation and sanitary conveniences from those of male prisoners to be provided for female prisoners of war,[143] while punishments in excess of those applicable to male prisoners of war may not be imposed on women prisoners.[144] Additional special protection is provided in Article 76(2) of Protocol I to prisoners of war who are pregnant or mothers of dependent infants whose cases are to be considered with 'utmost priority' with the object of early release and repatriation.

The Fourth Geneva Convention and the two Additional Protocols specifically prohibit any attack upon the 'honour' of non-combatant women, who are to be 'especially protected … in particular against rape, enforced prostitution, or any form of indecent assault',[145] issues addressed in the 1974 Declaration on the Protection of Women and Children in Armed Conflict[146] which requires States to make all efforts to spare women from the ravages of war, including torture and degrading treatment and violence.[147]

Violations of international humanitarian law engage the international responsibility of the State. The Fourth Geneva Convention in Article 146 and 147 and its First Protocol in Articles 85 to 90 characterise certain violations in international, but not civil, war as 'grave breaches'. Characterisation of a violation as a grave breach not only imposes individual criminal liability on those who commit such a breach, but imposes responsibility on contracting parties to enact legislation to provide effective penal sanction for those ordering or committing grave breaches, as well as an obligation to search for such persons, irrespective of their nationality, and to bring them before the courts.

The definition of a grave breach, although encompassing wilful killing, torture or inhuman treatment, unlawful confinement, wilful causing of great suffering or serious injury to body or health, does not specifically incorporate gender-based violations. Thus, although it is highly likely that gender specific abuses, particularly sexual assault, during international conflicts, fall within the concept of grave breach, such a conclusion remains a matter of legal interpretation. It is unclear whether the United Nations considers that rape in international war amounts to a grave breach. Certainly, the United Nations Human Rights Commission has condemned, in the context of the former Yugoslavia the 'abhorrent practice of rape and abuse of women and children … which, in the

142 The four Geneva Conventions and their Protocols all contain an identical prohibition on 'any adverse distinction founded on sex': Article 12, Geneva I; Article 12, Geneva II; Article 16, Geneva III, which also provides in Article 14 that women shall in all cases benefit by treatment as favourable as that granted to men; Article 27, Geneva IV; Article 75, Protocol I and Article 4, Protocol IV.

143 Articles 14(2), 29(2), 97 and 108 of Geneva III and Articles 75(5) and 5(2)(a), protocol I.

144 Geneva III, Article 88(3).

145 Article 27(2) Geneva IV; Articles 75 and 76 of Protocol I and Article 4, Protocol II.

146 GA Res 3318 (XXIX) 14 December 1974.

147 Paragraph 4.

circumstances constitutes a war crime'.[148] Similarly, the Vienna Programme of Action in paragraph 38 condemned systematic rape, sexual slavery and forced pregnancy in armed conflict and indicated that they required a 'particularly effective response'. In neither case, however, was a clear statement made that rape in war amounts to a grave breach. Whether rape in war amounts to 'torture' is also an issue of interpretation.

In 1992, the Special Rapporteur on Torture affirmed orally that rape of women in detention is a form of torture,[149] thus clearly suggesting that rape in war must also constitute torture. The International Committee of the Red Cross has, however, stated that rape and any other attack on a woman's dignity constitutes an act 'wilfully causing great suffering or serious injury to body or health' and accordingly falls squarely within the definition of grave breach within Article 147, a conclusion supported by *Cyprus v Turkey* where the European Commission concluded that rape of Cypriot civilian women by Turkish soldiers constituted inhuman treatment and thus contravened Article 3 of the European Convention on Human Rights and Fundamental Freedoms.

On a number of occasions the international community has established tribunals to determine whether parties to war have complied with their international human rights and humanitarian obligations. Following Second World War the International Military Tribunal was invested with jurisdiction to investigate and determine responsibility for 'crimes against peace', 'war crimes' and 'crimes against humanity'. Such crimes were, again, defined gender-neutrally, although, clearly, war crimes and crimes against humanity, which included enslavement and inhumane acts against the civilian population,[150] could be interpreted to include gender-specific abuses.

More recently, the UN Security Council has established an *ad hoc* international tribunal for former Yugoslavia[151] as an enforcement measure under Chapter VII of the UN Charter. This tribunal is mandated to prosecute for grave breaches defined by the Geneva Conventions and crimes against humanity. These latter are defined to include enslavement, imprisonment, torture and, in order to avoid any likely argument with regard to the matter, rape which is committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Although it is heartening that the tribunal has been specifically mandated to examine gender-based violations, the formulation in the statute concerning rape might serve to exclude rape which cannot be proven to be part of such a widespread or systematic attack. Currently, Member States of the United Nations are considering a draft statute to establish a permanent international criminal court which would have jurisdiction over war crimes, crimes against humanity and crimes against peace. No gender-specific crimes are incorporated within the present draft,[152] thus the issue of the jurisdiction of the proposed court of such crimes remains, as with the questions of grave breaches and torture, a matter for interpretation.

148 UN Commission on Human Rights, Rape and abuse of women in the territory of the former Yugoslavia, Report on 49th Session, 1 February–12 March 1993, ECOSOC Suppl No 3, E/CN4/1993/122.

149 UN Doc E/CN4/1992/SR.21, para 35.

150 Charter of the International Military Tribunal Annexed to the London Agreement, 8 August 1945, Article 6(b) and (c).

151 (1993) 32(4) ILM 1192–1194.

152 Article 20 of the draft statute of the International Law Commission.

To a large extent, international legal regulation governs the determination of those who meet the definition of refugee status and the protections which are available to such individuals.[153] Like most international regulation, international refugee law is gender neutral. Accordingly, although women are entitled to seek refugee status on the same basis as men and such status will confer on refugee women the same protections as on refugee men, the definition of such status and the protections afforded thereby do not incorporate any gender specific elements.

In order to qualify for refugee status in international law, a woman, like a man, must establish that she is a person who:

> … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence (as a result of such events), is unable or, owing to such fear, is unwilling to return to it.[154]

Women seeking refugee status because of physical, sexual or psychological violence or because they fear such violence because, for example, they have contravened a society's cultural norms, are faced with two hurdles in meeting this definition. First, whether such violence amounts to 'persecution' and second, if this violence can be characterised as persecution, whether it can be linked to race, religion, nationality, membership of a particular social group or political opinion. Legal and policy directives within UNHCR suggest that, certainly, sexual violence and forced female genital mutilation can amount to persecution and thus provide the basis for a claim to refugee status.[155] The Executive Committee of the UNHCR has also adopted, in the light of a decision of the European Parliament in 1984, a conclusion to the effect that women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of the Convention definition. Despite the optional nature of the views of UNHCR on both these matters, governments of countries admitting refugees have increasingly, although not uniformly, recognised that sexual and other forms of violence against women can be used as an instrument of persecution, thereby providing valid grounds for refugee status. Some have also been prepared to conclude that women who have suffered or who have a well-founded fear of suffering sexual and other forms of violence form part of a particular social group and deserve the protection of

153 The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the OAS Cartegena Declaration incorporate a definition of refugee which is less problematic for women. The former, which is similar in terms to that of the Cartegena Declaration extends the definition to encompass '… every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

154 1951 Convention and 1967 Protocol Relating to the Status of Refugees; Statute of the UNHCR 1950.

155 Executive Committee of the High Commissioner's Programme, Subcommittee of the Whole on International Protection, 22nd Meeting, note on 'Certain Aspects of Sexual Violence Against Refugee Women', EC/1993/SCP/CRP.2, 29 April 1993, para 29. Forced female genital mutilation combined with absence of state protection is considered to be persecution owing to membership

asylum. Most notable in this respect is Canada, whose Immigration and Refugee Board issued guidelines relating to women refugee claimants fearing gender-related persecution on 9 March 1993. The Canadian guidelines provide that where a woman can establish a well-founded fear of persecution, gender can be included in the definition of social group. As refugee status is an individual remedy, however, a claimant seeking refugee status on gender-related grounds must show she has genuine fear of harm, that gender is the reason for the fear of such harm, the harm is sufficiently serious so as to amount to persecution, that there is a reasonable possibility for the feared persecution to occur if she returns to her country of origin and she has no reasonable expectation of adequate national protection.

No special regard is paid in international refugee law to the specific needs of refugee women, with women, again, being proferred protection in gender neutral terms. The issue of violence against refugee women has, however, as we have seen, been the concern of UNHCR which has issued policy directives and codes of practice for the treatment and protection of refugee women with the particular aim of adverting the risk of gender-based violence. These policy directives do not have the force of law and are, of course, not binding on States ...[156]

Problems with current strategies

The previous sections have canvassed current strategies that have been used to confront those forms of violence against women recognised by national governments. As has been noted, in most countries, forms of violence against women are addressed discretely, with few regarding these various manifestations as inter-related or inter-linked in any way. In most countries, further, responses have been law centred and have predominantly concerned law reform. The legal responses which have been applied to the various forms of violence against women are open to individual criticism. A general criticism of these legal responses is also pertinent: legal responses which are employed to confront violence against women and reforms that have been introduced are based on a model of gender-neutrality in a gender-specific area and do not take into account the reality of victimisation and the systemic inequalities in society. Very frequently, also, the laws which are applied are based on a perception that the law is neutral, but, in fact, perpetuate outdated sexual stereotypes and result in unfair and unequal treatment of women. Further, legal response has usually been piecemeal so that although useful legislative reform has been introduced, its effectiveness has been undermined by other laws or provisions which impact on the particular issue. For example, increased penalties for trafficking and better implementation of controls against trafficking are rarely accompanied by reforms which protect illegal immigrant women who have been the victims of trafficking. Where legal response has been concerned, also, there has been significant stress on criminalisation, which although of symbolic and rhetorical value, is that area of the law which is most informed by gender stereotypes and whose system is sympathetic in the context of crimes against women. Again, even where useful reform has been put in place, there has often been insufficient effort applied to harmonise law and practice, to implement the law and to monitor its implementation. Certainly, in many cases, key actors in the implementation of the law have received training, but this has been based on a misconception that training can change deep seated attitudes and beliefs about women.

156 *Violence Against Women*, pp 1–24.

The central difficulty with current strategies, however, is that, as yet, countries have been wary of allocating sufficient resources to create a harmonised and integrated response. It has been more convenient to concentrate on legal measures, where costs are few and rhetorical gains are high. Lack of resources, combined with competing values and beliefs about women, their place in the family, the community and society have been sufficient to dictate that the achievements so far, even in those countries where violence against women has been a priority concern for some time, are that individual women have been able to achieve individual resolution of their particular problems, but little substantial or substantive change has occurred. Countries must go beyond formalistic legal provisions and reach a deeper consensus and sustainable commitment to the eradication of violence against women. Violence must be made as costly to its perpetrators as it is to individuals, the community and to the State.

Strategic objectives

The ultimate goal of the international community and Member States must to be prevent violence against women in all its forms and in all contexts. This requires confronting the material reality of violence in women's lives, the particular conditions that facilitate its existence – family, economic dependency, lack of alternatives and, fundamentally, the way societies organise their beliefs and institutions to sustain gender violence.

As violence against women is ultimately linked to male privilege and public and institutional arrangements which serve to maintain that privilege, the central strategic objective must be to effect fundamental change in the social, political and economic structures that maintain the subordination of women, which must be considered and pursued in the context of overall efforts to promote equality for women and human rights for all. Relating abuse of women to their unequal status in society and societal beliefs, attitudes and values that condone violence against women leads, thus, to the inevitable conclusion that effective solutions to the problem must involve altering the status of women and traditional values that structure gender relations. Here notions of maleness and masculinity which incorporate the domination of women must be examined and revised. So also, the role of violence in dispute resolution generally, and in intimate relations in particular, must be addressed and reconstructed.

Critical areas for action

Different manifestations of violence against women, as well as the different contexts where such violence occurs call for discrete strategies. The section which follows, which draws on the recommendations of the United Nations Expert Group Meeting on Measures to Eradicate Violence against Women held in October 1993, outlines a number of these discrete strategies.

It is unlikely, however, that any strategy introduced to confront any manifestation of gender-based violence against women, in whatever context it occurs will be successful if violence against women is not confronted in an integrated and coherent way. Further, even in the context of an integrated approach, it is unlikely that any strategy – be it short, medium or long term – will succeed unless gender violence is made an issue of critical concern to everyone: women, men, the public, institutions and the state, as well as the individual community. Such an approach presents challenges at the individual level and creates a larger pool of people who are seeking solutions, as well as creating a base of political support that functions to pressure for change at the structural level both nationally and internationally.

A number of general challenges confront the construction of any integrated strategy to combat gender based violence against women. In the area of human

rights, first, although the Vienna Declaration and Programme of Action explicitly mentioned women and gave recognition to violence against women and other types of abuses as violations of human rights, it and the UN Human Rights Conference did not effect significant expansion of the human rights framework so as to mandate the structural changes required for implementing its recommendations. The international community is thus faced with the challenge of determining how best to transform the current framework of human rights so as to take fully into account and address violence against women. Related to this is the fundamental challenge of the private, the domain in which women, in most societies exist and function. The private has served to insulate the most common, private forms of violence against women. The construction of the private has served to limit the effectiveness of human rights law as a strategy to confront violence against women and has States and their agents, including law-makers, judges and the police to ignore violence which occurs, particularly in the family context. Strategies must be developed, thus, to deconstruct the public/private dichotomy and make States accountable for violations of women's rights in all spheres. In this process, government responsibility for violations in the public must be remembered, so that States are held truly responsible for violence involving government agents and entrench effective measures to prevent public violence. Here the international community and Member States must face the challenge of specific risk groups: female political activists; refugees and women caught up in conflict and tension.

Two further general challenges face the international community and Member States. Firstly to move the definition and approaches to violence against women beyond a focus on violence against women in the family, while at the same time supporting the family as an egalitarian institution. Secondly, to see law reform as one aspect of the process of preventing violence against women, rather than the only aspect. States must be aware that although laws may establish a benchmark which formalises values of respect for women and intolerance of violence, no existing legislation deals adequately with the problem of violence. Indeed, in many cases laws that are currently in place are not only ineffective to stop violence, they perpetuate inequality and thus undermine any new strategies to address violent conduct. Laws, further, are only as effective as those who implement them, thus leaving States with the final challenge of the achievement of effective law enforcement.[157]

INTERNATIONAL PROTECTION OF FAMILY MEMBERS' RIGHTS[158]

Geraldine Van Bueren[159]

The extent of domestic violence against women was highlighted in a United Nations study on violence against women in the family.[160] The United Nations described this violence, which is regarded as universal, as follows: '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 …

157 *Violence Against Women*, pp 54–56.

158 [1995] 17 *Human Rights Quarterly* 732.

159 Reader in Law, Queen Mary and Westfield College, University of London; Director of the Programme on International Rights of the Child.

160 See *Violence Against Women in the Family* (United Nations Division for the Advancement of Women, 1989).

condoned.'[161] In *Velasquez-Rodriguez v Honduras*[162] the Inter-American Court of Human Rights (Inter-American Court) specifically commented on State tolerance of human rights violations and stressed that '[what is decisive is whether a violation of rights recognised by the [American] Convention [on Human Rights] has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without measures to prevent it or to punish those responsible'. Thus, the court's task is to determine whether the violation is the result of a State's failure to fulfil its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention. Importantly, the Inter-American Court determined that an illegal act which breaches human rights and is not directly imputable to the State (because it is an act of a private person or because the person responsible has not been identified) can lead to international State responsibility. This State responsibility does not derive from the act itself, but from the State's failure 'to prevent the violation or to respond to it as required by the [Inter-American] Convention'.[163] Furthermore, the Inter-American Court elaborated on the preventative obligation on states, explaining that this obligation included all means of a 'legal, political, administrative and cultural nature'. The Inter-American Court also concluded that where human rights violations by private parties are not seriously investigated, the parties are, in a sense, aided by the government making the State responsible under international law.

These parts of the *Velasquez-Rodriguez* decision were unanimous and reinforced the normative strength of a general recommendation of the Committee on the Elimination of Discrimination Against Women (CEDAW) that States Parties should take steps 'to overcome all forms of gender-based violence, whether by public or private act'.[164] However, before the *Velasquez-Rodriguez* principle of State accountability can be applied, the State must engage in some conduct that implies non-performance of an international duty. Therefore, domestic intra-familial violence must be analysed to consider whether it qualifies as a breach of international human rights.

Intra-familial violence includes battering, sexual abuse of children, dowry-related violence, marital rape, and female genital mutilation. In *Velasquez-Rodriguez*, the Inter-American Court was specifically concerned with the disappearance of Manfredo Velasquez and whether his disappearance could be linked to an official practice of disappearances in Honduras (either executed or tolerated by the Honduran government). The comments of the Inter-American Court are particularly apposite because violence within the family, whether of a sexual nature or otherwise, shares many of the characteristics of disappearances highlighted by the court, such as the suppression of information and the concealment of facts. The Inter-American Court specifically held that 'circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterised by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim'.[165] Additionally, the Inter-American Court criticised disappearances

161 *Ibid*, p 11.

162 Case 4, Inter-Am CHR OASC (1988).

163 *Ibid*, p 154.

164 UN GAOR Commission on the Elimination of Discrimination Against Women, 11th Session, Agenda Item 7, p 3, UN Doc CEDAW992.1. 15 (1992).

165 *Velasquez-Rodriguez supra* at 135.

because they were 'a means of creating a general state of anguish, insecurity and fear …'.

Women and children victims of intra-familial violence testify that they experience similar feelings of insecurity, both physical and mental. Such feelings are contrary to the right to a sense of physical privacy as protected by international human rights law. Thus, States Parties to treaties that enshrine the protection of privacy have an emerging duty to prevent intra-familial violence where there is an established pattern of domestic violence that comes within the *Costello-Roberts* sufficiency test.[166] Furthermore, States Parties are obliged to investigate and punish those violations that do occur.

Whether domestic violence will amount to a breach of privacy; torture; or cruel, inhuman, or degrading treatment will depend upon the severity of the violence in each case. In *Soering v United Kingdom*, the European Court reiterated that the assessment of the minimum level of severity failing within the prohibited scope of torture, inhuman and degrading treatment, and punishment depends on all the circumstances of the case, including the gender and age of the victim.[167] However, taking the jurisprudence of both the Inter-American Court and the European Court together, there does appear to be a way forward in preventing and punishing domestic violence. Arguably, privacy in the sense of physical integrity offers greater latitude for countering forms of domestic violence less extreme than torture. This idea is again reinforced by dicta of the European Commission in *X and Y v Netherlands*. Although the European Commission did not consider it necessary to establish whether the particular mental suffering inflicted on Y was of such a nature and had reached such a degree of intensity as to bring it within the scope' of Article 3,[168] the Commission did observe that 'sexual abuse and inhuman or degrading treatment – even though they may overlap in individual cases – are by no means congruent concepts'.[169] This allows for two possibilities: first, in specific cases where the mental suffering might have passed the necessary threshold, such abuse (whether sexual or otherwise) will amount to inhuman or degrading treatment; and second, such abuse still might fall within the protection of an individual's private life, even if it does not amount to inhuman or degrading treatment. Hence, in States that do not investigate a persistent pattern of severe forms of domestic violence and that lack adequate civil remedies and criminal prosecutions, victims of such violence might have a cause of action under human rights treaties. These individuals might be able to petition international bodies to redress breaches of their right to be free from inhuman and degrading treatment and their right to privacy. Such an approach is consistent with the European Court's approach that the European Convention 'is a living instrument' that 'must be interpreted in the light of present day conditions,' because contemporary conditions have revealed the extent of domestic violence.

166 See G Van Bueren, 'Combating Child Sexual Abuse and Exploitation', in D Pearl and R Pickford (eds), *The Frontiers of Family Law* (1995).

167 See *Soering v United Kingdom* 161 Eur Ct HR (Ser A) (1989).

168 Report of the European Commission of Human Rights in the *X and Y v Netherlands* at 95 (5 July 1983).

169 *Tyrer v United Kingdom* 26 Eur Ct HR (Ser A) (1978), p 31.

The Children's Convention also reinforces State responsibility for intra-familial abuse. First, Article 19 of the Children's Convention clearly brings the concepts of 'child' and 'intra-familial' into the public sphere. Second, the Children's Convention extends the States' duties beyond prevention, investigation, and prosecution, to rehabilitation. Rehabilitation under the Children's Convention has a much broader application than is found in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), which only places a duty on State Parties to provide 'as full rehabilitation as possible' for acts that amount to torture; cruel, inhuman, and degrading treatment; and punishment as defined by the Torture Convention.[170] The duty incorporated in the Children's Convention is for any form of neglect, exploitation, or abuse. The Women's Convention has adopted an approach similar to that taken in the Children's Convention, specifically recommending that rehabilitation and support services be provided for women who have been victims of violence and abuse within the family.

The cumulative significance of this international legislation and jurisprudence, along with the recent adoption by the General Assembly of the Declaration on the Elimination of Violence against Women and the appointment of a Special Rapporteur on Violence Against Women, reinforces the duty upon States, as a matter of international law, to establish an effective legal system that does not tolerate assaults that threaten family members' physical integrity and life.

Such a reconceptualisation of intra-familial violence is already beginning to occur with regard to female circumcision. Within the framework of the Children's Convention, the abolition of traditional practices prejudicial to the health of the child implicates a prohibition on female circumcision. Such a prohibition is a specific facet of the right of the child to the highest attainable standard of health. The right to health traditionally has been classified by States as a social right, such that the States' only duty is to implement the right progressively. Hence, although States Parties are obliged to take 'all effective and appropriate measures' these measures are significantly weakened by the qualifier 'with a view to abolishing' such 'traditional practices'. A more effective approach would have States placed under an immediate duty to prohibit such practices. In an attempt to establish such a duty, female circumcision has been classified as genital mutilation and conceptualised as torture. Unfortunately, the definition of torture enshrined in the 1984 Convention on Torture and the Elimination of Cruel, Inhuman and Degrading Treatment or Punishment incorporates the notion of intentional infliction of severe mental or physical pain for specific purposes. Within such a restrictive and traditional definition, it is impossible to include every female circumcision (many of which are not inflicted with such an intent nor directly linked to the State), because they traditionally are performed by private individuals with the consent of the family (and sometimes with the consent of the girls).[171] Although it might be possible to invalidate the consent by adopting a psychoanalytic approach and arguing that the child has internalised her culture, this strategy has obvious dangers for those seeking to augment the autonomy of children. Because of these and other factors, female

170 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14(1) adopted 10 December 1984, GA Res 396, UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1985) reprinted in (1985) 23 *ILM* 535.

171 However, State responsibility might arise if girls are circumcised in State hospitals or by State health officials.

circumcision is not classified as 'torture' by the Inter-African Committee on Traditional Practices Affecting Women and Children (who have set the goal of eradicating female circumcision by the year 2000), nor is it conceptualised as torture under the African Children's Charter.

Those who argue that female genital mutilation should be included within the definition of torture and cruel and inhuman treatment do so because the health consequences and the intensity of the pain and suffering are comparable to those experienced by torture victims. Therefore, the existing international protection machinery should be forced to confront the practice which the World Health Organisation estimates has affected 80–100 million women (of whom 15 million have been infibulated). In some States, such as Djibouti, Somalia, Eritrea, Ethiopia, Sierra Leone, and Sudan, more than 80% of girls have been circumcised'.[172] In addition, the issue of consent does not always arise because some girls suffer genital mutilation as early as the age of two.

Some female circumcisions, however, clearly come within the prohibition on torture. When girls are circumcised against their will, such circumcisions will clearly come within torture and other cruel, inhuman, and degrading treatment, and as such will be subject to immediate prohibition as a fundamental violation of a human right. Furthermore, when a girl flees her country because it is the only way to avoid circumcision, the *Conseil d'Etat* has accepted, as a matter of principle, that she will be entitled to refugee status on the grounds that she has a well-founded fear of being persecuted for reasons of membership in a particular social group. The same status would appear to be accorded to men who flee forced circumcisions and might be applicable to victims of other traditional practices.

The private sphere should not be eliminated completely in the field of international human rights law; however, States should no longer be permitted to claim non-interference as a defence to their failure to protect victims of intra-familial violence. The private/public distinction possibly bears some responsibility for the inequality in the societal power distribution, but the private/public distinction does not bear full responsibility for the failure of the international human rights legal system to protect women and children within the family. Rather, the failure to protect women and children results from the devaluation of the private sphere and the mistaken presumption of consent within the private realm. Women and children represent the majority of the world's population, but the international human rights legal system has failed to protect them; therefore, the boundaries of the private sphere must be reassessed. The historical origin of international human rights law should not predetermine its scope ...[173]

The Implementation of Family Members' Rights

The complexities inherent in protecting the rights and responsibilities of family members require sensitive decision-making and monitoring mechanisms. International obligations, which are difficult to supervise in any event, are even more difficult to monitor within the family. Although international substantive law is developing in order to protect more effectively family members' rights,

172 The World Health Organisation estimates that over 100 million girls and women have suffered female genital mutilation. It is common practice in 28 African states. Approximately 75% of the victims live in Nigeria, Ethiopia, Egypt, Sudan and Kenya.

173 *International Protection of Family Members' Rights*, pp 750–56.

such progress is being restrained artificially by the lack of accompanying developments in implementation procedures.

Although the family serves as the basic unit of society, international human rights law fails to enforce the rights of family members because its procedural focus is on the rights of individuals. Many of the obstacles to women's and children's equality within the family are structural. Civil and political rights, and economic, social, and cultural rights must be integrated, as a number of human rights instruments (including the Children's Convention, the Convention on the Elimination of All Forms of Discrimination Against Women, and the African Children's Charter) have done to better achieve equality for women and children. Clarence Dias correctly observes that civil and political rights have become justiciable and the focus of international human rights advocacy, while economic, social, and cultural rights remain mostly in the sphere of international development assistance. However, there is nothing inherent in these rights that necessitates this false dichotomy. A report on the implementation of economic, social, and cultural rights might reveal an underlying disparity of access that is based on gender or religious grounds, thus transforming an apparently economic, social, or cultural issue into a civil rights issue.

The real problem, as the prohibition on female circumcision demonstrates, is not the terminology, but rather the artificial distinctions in implementation. Prohibiting female circumcision through the drafting and adoption of national legislation requires minimal resources. Thus, it is difficult to defend the approach of international human rights law that States Parties have only a progressive (as opposed to an immediate) duty to prohibit female circumcision. The only resource demands would be for educational programmes that would accompany the implementation of such legislation. As long as protection from exploitation, be it sexual or economic, is classified as an economic or social right, the remedy for the victim is very indirect. In general, only violations of civil and political rights give rise to individual causes of action. Perhaps the reason for the division is fear: fear of opening perceived floodgates (if domestic violence, why not inadequate supplies of life support machinery?). However, the floodgates argument does not justify resisting reform. On the contrary, it justifies providing sufficient resources so that effective human rights machinery can function efficiently. Hence, the international human rights system should do more than simply 'mobilising shame', which is the objective of the reporting procedures. Even treaties that enshrine resource limitation clauses, such as 'to the maximum extent of their available resources, refer to resources that are unconstrained by concepts such as finances and economics. As James Himes notes, resources also include human resources, although this ought not justify placing a greater burden on the heads of households, frequently women.[174]

Although the international human rights legal system's reliance on the State nexus as the basis for responsibility has been criticised because it reflects men's subjugative experiences, the experiences of women and children are not necessarily excluded. The Committee on the Rights of the Child and the Commission on the Status of Women have attempted to integrate children's and women's rights into the mainstream. However, attention also should be focused on improving the implementation mechanisms for children's and women's rights.

174 The 'UN Convention on the Rights of the Child: More Than a New Utopia?' in James Himes (ed), *Three Essays on the Challenge of Implementation* (1993).