The Feminist Expansion of the Prohibition of Torture: Towards a Post-Liberal International Human Rights Law?

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International human rights law (IHRL), discourse, and activism have been the subject of well-known critiques. Two categories of critique are closely linked to the liberal ideology underlying the human rights project, and limit the project’s ability to further profound change. The “critique of justification” exposes the field’s formalist argumentative practices, which struggle to justify proposed normative solutions. The “critique of representation” highlights the narrow ways in which injustice and violence are portrayed, denounced and addressed in international human rights discourse. These weaknesses are all the more troubling in the contemporary populist authoritarian era. Yet contrary to many critical scholars who advocate abandoning the human rights discourse, this article argues that it is possible to transform the discursive practices of IHRL so as to be more convincing and better address structural inequalities. It does so by analyzing the discursive practices of the feminist campaign to frame domestic violence as a form of torture, an explicit attempt to release the prohibition of torture, a central norm of IHRL, from the constraints of liberalism. While the discourse of domestic violence as torture reproduces some of the problematic features of better-known feminist engagements with international law, it also suggests IHRL’s potential for profound reform, both at the level of justification and representation.

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In the wake of the 2008 financial crisis and the populist-authoritarian turn in global politics, a number of scholars have launched efforts to reform international human rights law (IHRL) so as to develop more persuasive strategies and address deep-rooted forms of injustice. Notably, Professor Philip Alston calls for the human rights community—human rights lawyers and scholars—to abandon the framing of human rights issues as concerned primarily with the most marginalized populations.¹ This framing, according to Alston, has alienated broad swaths of the electorate in many societies from human rights struggles.² He further urges human rights lawyers to consider ways to address economic inequality, the factor which in the view of many is fueling the current populist-authoritarian turn.³ The fact that Alston, an elite international practitioner who has sharply rebuked critical scholars,⁴ is engaging in this sort of reflection is indicative of the state of crisis in which the international human rights community finds itself, and of the strong sense that some sort of profound change to IHRL is needed.

Yet reforming IHRL might require more than the shift in topics and strategies suggested by Alston. If we are to listen to critical scholars, we must contend with the claim that deep-seated features of IHRL as a discursive practice limit the ability of the human rights community to persuade and promote profound social change. Among the numerous critiques voiced against IHRL,⁵ two categories of critique, closely linked to the liberal ideology underlying the international human rights project, are particularly relevant.

The first, which I call the “critique of justification,” is a critique of the argumentative practices employed by international human rights lawyers.

2. Id. at 6, 9-10.
3. Id.
4. Id. at 13.
5. A partial list would include the fact that “human rights are vague and unenforceable; their content is infinitely malleable; they are more symbolic than substantive; they cannot be grounded in any ontological truth or philosophical principle; in their primordial individualism; they conflict with cultural integrity and are a form of liberal imperialism; they are a guise in which superpower global domination drapes itself; they are a guise in which the globalization of capital drapes itself; they entail secular idolatry of the human and are thus as much a religious creed as any other.” Wendy Brown, “The Most We Can Hope For . . .”: Human Rights and the Politics of Fatalism, 103 S. ATLANTIC Q. 451 (2004). For a typology of scholarly critiques of human rights, see Frédéric Megret, Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes, in NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES 3–40 (David Kennedy & José Maria Beneyto eds., 2012).
The apolitical pretenses of the international human rights discourse lead lawyers to produce a form of argumentation that is formalist and lacking in good faith, in particular when human rights professionals attempt to use existing categories of human rights to address new problems. Bad faith affects persuasiveness: stretching existing concepts beyond what states agreed to in treaties often requires less-than-rigorous reasoning. Moreover, formalist, purportedly apolitical modes of argumentation are incapable of adjudicating between conflicting rights, and therefore of providing convincing justifications to proposed normative solutions.

The second critique, which I call the “critique of representation,” is a critique of the narrow way in which injustice and violence are portrayed, denounced, and addressed in IHRL. The liberal privileging of individual agency over structure, of abstract personhood over lived experience, and of procedure over distribution have meant that on any given topic IHRL obscures and fails to address structural foundations of violence and inequalities, and this is despite a recent “explanatory turn” in IHRL seeking out “root causes” of abuses. Thus, Susan Marks shows that even when discussing the causes of poverty and food crises, reports prepared by human rights bodies at the U.N. typically emphasize faulty state policies and procedures instead of the organization of the global economy. While in the critique of justification the target is apoliticism as formalism (the inability to put forward a substantive vision of justice), the critique of representation faults IHRL more specifically for its lack of attention to patterns of material distribution and other forms of structural injustice (defined by Iris Young as “large-scale systemic outcomes of the operations of many institutions and practices that constrain some people at the same time that they enable others”).

In the critical perspective adopted here, IHRL thus serves both as an argumentative practice and a site of knowledge-production. In both functions, the field’s apolitical pretenses stemming from its liberal roots impose significant limitations on the ability to persuade opponents and to address the structural causes of injustice. There is a serious risk that taking on new topics such as economic inequality might not only be unpersuasive; it might also produce an impoverished understanding of the problem of inequality and its causes.

Is it possible to reform IHRL in more profound ways than suggested by Alston? Can we develop an alternative human rights discourse that will

9. Marks, supra note 8, at 63–64.
10. Id. at 69.
not suffer from these flaws of liberalism? A discourse that speaks in terms of substantive justice not form, and that represents injustice as structural?

Ben Golder has warned against attempts to redeem human rights from liberalism.\footnote{Ben Golder, Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought, 2 LONDON REV. INT’L L. 77, 111–12 (2014).} In his view, such attempts are doomed to fail for they ignore the constraints within which the human rights discourse operates. Drawing a parallel with the form/substance distinction, Golder claims that:

\[\text{[E]very attempt to redescribe the substantive human of human rights (as, for example, more ethically responsive or more multiculturally diverse) is mortgaged to the particular form of human right . . . And, of course, the human rights form is still an abidingly liberal one: the human rights holder emerges as an abstract, formally equal juridical subject confronting a state which is envisioned simultaneously as the guarantor and most likely infringer of those rights.}\footnote{Id. at 112.}

But what if we attempted to reform the very form of human rights—the modes of justification and representation within the human rights discourse? Could we not harness existing human rights institutions to struggles for profound change?

mark” in IHRL and has been referred to by many international and regional human rights bodies, torture was initially understood to relate to the exercise of public power, the Convention requiring the involvement of an official, and the presence of some purpose typically linked to the state (such as obtaining a confession). In the past two decades, however, prodded in part by feminist lawyers, international and regional human rights institutions have addressed domestic violence committed by private individuals as a form of torture or CIDT, finding states in breach of their international obligations when failing to prevent and punish domestic violence. The meaning of torture was significantly expanded, from a primarily liberal conception concerned with political freedom to one also concerned with structural gender equality. Moreover, in expanding the prohibition of torture, lawyers, judges, experts, and scholars have produced a new sub-discourse within IHRL, exhibiting a shared vision of the world, arsenal of arguments, and preferred courses of action. I call this discourse the Domestic Violence as Torture discourse (“DVT discourse”). This Article analyses the practices of justification and representation prevalent in the DVT discourse and argues that they suggest that it is possible to develop new forms of human rights discourse that offer convincing justifications for normative solutions and structural representations of violence.

The DVT discourse offers a unique opportunity to examine the possibilities of developing a post-liberal IHRL. There are of course other examples of efforts to rethink IHRL beyond liberalism. In advocating for the elaboration of indigenous rights, indigenous activists have also challenged the liberal, individualist framework of IHRL. However, the principal instruments establishing indigenous rights—I.L.O. Convention 169 and the U.N. Declaration on the Rights of Indigenous People—were negotiated between employer representatives and states. These documents, which are the product of compromises, have watered down the collective aspects of indigenous rights, and in particular strong forms of self-determina-

16. Nigel S. Rodley, The Definition(s) of Torture in International Law, 55 CURRENT LEGAL PROBS. 467, 474 (2002).

17. The earlier U.N. Declaration against Torture, adopted in 1975, also contains the requirements of public official involvement and public purposes. G.A. Res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex, art. 1(1) (December 9, 1975) (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.”). Though the Inter-American Convention to Prevent and Punish Torture adopted in 1985 does not require the involvement of a public official or a particular public purpose in its definition of torture (article 2), it reflects the same understanding of torture as related to the exercise of public power in article 3 which limits the crime of torture to public servants or employees or people acting at the instigation of a public servant or employee.

They have also set aside material questions of distribution in favor of procedural consultation mechanisms typical of neo-liberal approaches to governance. The DVT discourse, in contrast, was developed not in negotiations around the drafting of a treaty or declaration, but incrementally through reinterpretation of existing treaties prohibiting torture. It attempts not to create a new human right but to reconceptualize one of the central norms of IHRL so as to overcome the limitations of liberalism.

Indeed, as will be described below, the DVT discourse draws explicitly on a critique of the liberalism of IHRL and attempts to reform IHRL from a substantive and structural approach to injustice. This is not to say that the DVT discourse is a pure instance of leftist radicals entering the field of IHRL. Some of the promoters of the DVT discourse were key players in other feminist engagements with international law, engagements that have been lamented for abandoning issues of material distribution and bolstering criminal justice—a legal tool that emphasizes individual agency rather than deep-rooted causes of violence. As will become clear in this Article, the DVT discourse reproduces some of these highly problematic features of contemporary transnational legal feminism. I aim to show, however, that the DVT discourse, especially as practiced by feminist advocates at the margins of the discourse, constitutes a departure from mainstream human rights advocacy and that as such it suggests IHRL’s potential for profound reform, both at the level of justification and of representation.

Specifically, I will show, first, that the DVT discourse is persuasive as it is able to adjudicate between conflicting rights. This is because it draws on a structural understanding of power relations as providing a basis for legal intervention. Second, I will show that some actors engaging in the DVT discourse attend to structural causes of domestic violence in the course of legal argumentation. While international human rights treaty bodies and the leading advocates of the DVT discourse offer the simplistic story of a universal attack of men on women and emphasize criminal justice as primary solution, feminist advocates operating within NGOs from both the global North and South produce complex representations of domestic violence that attend to material distribution, and do so within the legal framework of the prohibition of torture and CIDT.

This does not mean that the DVT discourse is free of problems or that it should serve as a model. However, it does suggest that it is possible to transform the justificatory and representative practices of IHRL beyond their liberal constraints. This is because crucially, the improvements identified here with respect to justification and representation in comparison with more familiar forms of human rights discourse result not only from the structural feminist approach underlying the DVT discourse; they were also enabled by institutional features of IHRL itself: the soft law and par-

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19. Id. at 141.


21. See infra notes 27–29 and accompanying text.
The Feminist Expansion of the Prohibition of Torture

The Feminist Expansion of Torture

A. Background

The expansion of the definition of torture and CIDT in IHRL to include domestic violence can be seen as the latest stage in a series of feminist engagements with international law since the early 1980s, when transnational women’s networks formed around U.N. conferences. These networks brought a wide range of issues including domestic battery, rape, female genital mutilation, and the torture of political prisoners under the newly-framed category of “violence against women.” The appeal of this category, according to commentators, lay in its evocative reference to violence as well as its ability to bridge cultural and geographic differences, mitigating tensions between women’s groups from the global North and global South. One of the main conceptual innovations of this new framework was that it brought violence in the private sphere into the purview of international human rights. Women’s networks’ intense activism led to the formal recognition of “the importance of working towards the elimination of violence against women in public and private life” in the Vienna Declaration adopted at the UN World Conference on Human Rights in Vienna in 1993. In the 1990s, a number of international declarations and treaties set out states’ obligations to prevent and punish acts of violence against women, whether perpetrated by the State or by private persons. During the same period, in the nascent field of international criminal law, women’s groups successfully campaigned for the recognition

23. Id. at 170–71.
24. Id. at 172.
of sexual violence as a tool of mass atrocity.  

While women’s groups of various ideological bents took part in the campaigns for the recognition of violence against women as a human rights violation and sexual violence as an international crime, in both cases the dominant feminist approach has been a form of what Janet Halley terms “power feminism,” a structuralist approach which focuses single-mindedly on male domination and female subordination, and views sexuality as the locus of the male/female hierarchy.  

What is more, both campaigns reflect a turn to criminal law as preferred vehicle for reform.  

Power feminism is also at the intellectual roots of feminist efforts to expand the definition of torture in IHRL to include domestic violence. In a speech given in 1990 in Banff, Canada, Catharine MacKinnon juxtaposed descriptions of official torture with personal accounts of the unbearable suffering of women in private settings, and this to critique IHRL’s focus on state action and its neglect of violence suffered primarily by women. In a highly influential article published in 1994, Rhonda Copelon, co-founder and then Director of the CUNY Clinic, argued for the recognition of domestic violence as a form of torture, based on the understanding that:

platform for action, the fourth world conference on women, ¶ 124(b), U.N. Doc. A/CONF.177/20 (Sept. 15, 1995).


28. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 41–79 (2006); Janet Halley, Which Forms of Feminism Have Gained Inclusion?, in Governance Feminism: Notes from the Field 23, 35–39 (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds., 2018). Halley has extensively documented the successes of this approach in international criminal law. See, e.g., Halley, supra note 27. Karen Engle argues that this approach also dominates feminist approaches to human rights concerned with violence against women. See Karen Engle, Feminist Governance and International Law: From Liberal to Carceral Feminism, in Governance Feminism: Notes from the Field (Janet Halley, Prabha Kotiswaran, Rachel Rebouché & Hila Shamir eds., 2018).

29. See HALLEY, supra note 28; Engle, supra note 28.


For Copelon, the recognition of domestic violence as a human rights violation in United Nations declarations was a valuable symbolic move but was not sufficient. An expansion of the definition of torture under the Convention Against Torture was now needed to provide an enforceable legal tool to impose state responsibility and to de-trivialize the violence suffered by women in their homes.32

To do so would require dismantling the public/private dichotomy prevalent in IHRL. For this, Copelon referred to a companion article by Celina Romany, who had co-founded the CUNY Clinic with her. In her article, also published in 1994, Romany offered a sharp critique of the liberalism of IHRL which had produced the public/private dichotomy and as a result systematically failed to protect the life, integrity, and dignity of women.33 This dichotomy was rooted in the liberal myth of the social contract, “... that narrative based on natural freedom and agreement, which stems from a conception of the self-deemed autonomous and free and which immunizes the state from implication in the genesis of a system of gender subordination.”34 Having laid out her radical critique, Romany, like other power feminists intervening in those years in international law, advocated reform through a turn to the state and to criminal law: states should be held responsible for “private” male violence against women, either for failing to provide protection to women from private actors, or for failing to prevent and punish violence against women in a nondiscriminatory fashion.35

Two doctrinal developments made this reformist program legally arguable. First was the recognition of rape as a form of torture in international law. From the late 1980s, rape began to be recognized in IHRL as a torture technique when perpetrated by public officials.36 In addition, rape was in the late 1990s found to constitute the war crime of torture by the International Criminal Tribunal for the Former Yugoslavia.37 Second, in the landmark decision Velásquez-Rodríguez in 1988 concerning disappearance by paramilitary forces in Honduras, the Inter-American Court of Human Rights held that a state could be held legally responsible for a human rights violation even if committed by a private person because of the state’s lack of due diligence to prevent the violation or respond to it.38 Feminists harnessed these two developments, bringing them together to argue that

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34. Id. at 91.
35. Id. at 99.
rape and other forms of violence against women when committed by private individuals trigger state responsibility for torture. 39

B. Doctrinal Expansion

The story of how exactly power feminists succeeded in expanding the definition of torture/CIDT to include domestic violence has not yet been written and is the subject of my ongoing research. 40 A lawyer examining today the state of the prohibition of torture and CIDT in IHRL will find that the state can be held responsible under the rubric of torture or CIDT for failing to prevent or punish domestic violence. Many cases and documents establishing this expanded understanding of torture involved the advocacy of affiliates of the CUNY Clinic and other women’s rights’ advocates. In this subsection, I present the principal doctrinal developments and cases and their links to feminist advocacy.

I. U.N. Treaty Bodies

In 1996, Radhika Coomarswamy, then U.N. Special Rapporteur on Violence against Women, Its Causes and Consequences, published a report in which she considered categorizing domestic violence as torture under IHRL. Clearly influenced by power feminism, the report explained that “domestic violence exists as a powerful tool of oppression,” and emphasized the need to move beyond the public/private distinction in IHRL to impose responsibility on the state for tolerating such violence. 41

This approach was also adopted by the two principal U.N. bodies monitoring the implementation of treaties prohibiting torture: the Committee Against Torture (“CeeAT”), with respect to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), and the Human Rights Committee (“HRC”) with respect to the International Covenant on Civil and Political Rights (“ICCPR”). By the early 2000s, both bodies routinely expressed concern, in their concluding observations to state reports, about the prevalence of domestic violence, and urged states to adopt measures to combat it and offer support to vic-

39. Each of MacKinnon, Copelon, and Romany refers to Velasquez-Rodriguez in the texts referenced above, and Copelon invokes the recognition of rape as a form of torture when committed by public officials, as well as the recognition of rape as an element of crimes against humanity in discussions about the former Yugoslavia.


The CeeAT typically does so without specifying whether domestic violence falls under Article 1 of CAT prohibiting torture or Article 16 prohibiting CIDT. Neither does the HRC distinguish between the two categories when addressing domestic violence, categorizing this form of violence as a violation of Article 7 of ICCPR which prohibits both.

However, the CeeAT has clarified that it views domestic violence as a form of torture in its General Comment No. 2, published in 2007. That General Comment addresses the implementation of Article 2 of CAT, which relates to torture specifically. While the General Comment discusses torture primarily in situations of detention or institutional control, it establishes that states bear international responsibility in “contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.” Specifically, it clarifies that states bear responsibility where officials have knowledge or reasonable ground to believe such violence is being committed, such as in cases of domestic violence:

[W]here State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with this Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.

The General Comment illustrates how domestic violence came to be included in the definition of torture through an expansion of the concept of “acquiescence” set in Article 1 of CAT, to include knowledge or reasonable grounds to believe and a failure to prevent, investigate, prosecute, and punish. The expansion in the definition of torture is also achieved through a capacious understanding of discrimination, one of the purposes required for violence to be categorized as torture, to include any violence that is gender-based. This understanding borrows from the work of the Committee on the Elimination of Discrimination Against Women.

44. Id. ¶ 15.
45. Id. ¶ 18.
46. Id.
(“CEDAW”), which in its General Comment No. 19 in 1992 recognized violence against women as a form of discrimination. In its section on discrimination, the Committee on the Elimination of Discrimination Against Women’s General Comment No. 2 expressly mentions domestic violence as a form of violence discriminatory against women. According to Lisa Davis, current co-director of CUNY Clinic, several generations of CUNY Clinic staff and interns, and in particular Rhonda Copelon herself, provided “expert commentary” to CEDAW while it was drafting the General Comment.

The introduction of domestic violence as a form of torture/CIDT required fewer radical changes before the HRC. As early as 1982, before the Convention against Torture was adopted, the HRC had published General Comment No. 7 stating that “it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.”

General Comment No. 7 was replaced in 1992 by General Comment No. 20 which similarly indicated that states bear responsibility under Article 7 when the acts were inflicted by persons acting in their personal capacity, though without referring to gender issues. It further clarified in General Comment No. 31 in 2004 that states bear responsibility for failing to exercise due diligence in preventing and addressing human rights abuses committed by private persons. Though General Comment No. 31 is not gender-specific, it states that it should be read together with General Comments 18 and 28 concerning non-discrimination, the latter of which, adopted in 2000, states that “[T]o assess compliance with Article 7 of the Covenant . . . the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence


48. Id. ¶ 22 (“State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor, which intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which women are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes.”).


50. The U.N. Declaration against Torture had been adopted at the time. See supra note 17.

51. The International Covenant on Civil and Political Rights (ICCPR), General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (May 30, 1982).

52. The International Covenant on Civil and Political Rights (ICCPR), General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (Mar. 10 1992).

against women, including rape.”54 The HRC appears to set a broader scope of state responsibility than the CeeAT, as it does not require actual knowledge that domestic violence is being committed.55

2. Regional Human Rights Courts

The Inter-American and European human rights systems have also issued rulings attributing state responsibility in cases of domestic violence under the rubric of the prohibition of torture and/or CIDT. Notably, in the Cotton Field case, the Inter-American Court of Human Rights (“IACHR”) held in 2009 that the state of Mexico was responsible for the abuse and murder of eight women and girls whose bodies were found in a cotton field, as it had failed to protect the women and properly investigate their deaths.56 Referring to Inter-American Convention on the Prevention of Violence against Women,57 General Recommendation No. 19 of the CEDAW and various other international documents providing for a state obligation to prevent and address violence against women even when committed by private actors, the Court held the state responsible, inter alia, under Article 5(2) of the Inter-American Convention on Human Rights prohibiting torture and CIDT.58 However, it did not expressly classify the abuses as torture, an omission which Judge Cecilia Medina Quiroga explained in a separate opinion as the possible result of a mistaken belief by her colleagues “that a State could not be found responsible for an act of torture if there was no evidence that it had been perpetrated by State agents or that it had been carried out when a public servant or employee.”59 The case, brought by Mexican and Latin American women’s rights organizations and supported by amicus curiae briefs from a dozen international and Mexican human rights organizations, scholars, and practitioners, has been lauded for giving legal recognition to femicide (the killing of women because they are women), a concept developed by Mexican feminists and invoked by grassroots Mexican human rights organizations to develop the state’s due diligence obligations.60

The European Court of Human Rights (“ECHR”) for its part has considered domestic violence as a violation of article 3 of the European Convention on Human Rights prohibiting torture and inhuman or degrading treatment or punishment in at least 17 cases.61 It has found a breach of article 3 in numerous cases, in addition to findings of a breach of article 3

54. The International Covenant on Civil and Political Rights (ICCPR), General Comment No. 28: Article 3 (The Equality of Rights between Men and Women), ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (March 29, 2000).
55. Edwards, supra note 40, at 374.
in conjunction with article 14 prohibiting discrimination. Such was the case in Opuz v. Turkey, where Turkey was held responsible under, inter alia, articles 3 and 14 for failing to protect the applicant and her mother from repeated assaults from their spouses, leading to the mother’s murder, despite the women having filed complaints with the police regarding death threats and numerous assaults.62 Notably, in the case of Valiuliené v. Lithuania, the Court insisted that domestic violence be addressed under article 3 and not article 8 protecting privacy as suggested by the respondent state.63 In that case, Lithuania was held responsible for failing to properly prosecute the applicant’s former partner who had beaten her on five occasions over the course of one month.64 The Court does not however clearly distinguish between torture and inhuman or degrading treatment or punishment in its decisions regarding domestic violence.

The principal human rights bodies interpreting the prohibition of torture and CIDT in IHRL have thus dramatically expanded this prohibition through a similar set of doctrinal and discursive tools: the expansion of state action to include a failure to exercise due diligence, the expansion of discrimination to include gender-based violence, and a rich practice of referencing the CEDAW, declarations produced in U.N. conferences, and other texts establishing violence against women perpetrated by private actors as a human rights violation, in addition to cross-referencing among themselves. Some scholars and judges have expressed dissatisfaction with the extent of the changes. They advocate a clearer classification of domestic violence as torture, as distinct from the less grave category of CIDT;65 they lament the CeeAT’s requirement of knowledge or reasonable grounds to believe a specific act of violence is about to be committed in order to trigger an obligation to protect;66 or they insist, for expressive reasons, on a gendered analysis in all cases of domestic violence.67 This means that this area continues to experience argumentation, in addition to the argumentation countering states’ continued claims that the prohibition of torture/CIDT does not cover domestic violence. It is to these discursive and argumentative practices that this paper now turns.

II. The Domestic Violence as Torture Discourse

In expanding the prohibition of torture, lawyers, judges, experts, and scholars have also produced a new sub-discourse within IHRL, which I call the DVT discourse. In this part I analyse the practices of justification and representation prevalent in the DVT discourse and argue that they suggest that it is possible to develop new forms of human rights discourse that offer more convincing justifications for normative solutions and more

64. Id. at 33.
65. McQuigg, supra note 61.
66. Edwards, supra note 40, at 374.
67. Valiuliené, Concurring Opinion of Judge Pinto de Albuquerque.
structural representations of violence. I begin with a methodological note. I will then show that while the DVT discourse bears significant and problematic markers of power feminism, it also suggests possibilities for a post-liberal human rights discourse.

A. Methodological Note

In order to understand the DVT discourse, I analysed legal documents that have been identified by commentators as key in this area: CeeAT’s General Comment No. 2, the Cotton Field decision, briefs submitted in support of the petition of Jessica Lenahan to the Inter-American Commission on Human Rights (“IACmHR”), ECHR decisions in Valiuliené and Opuz, as well as the briefs submitted in those two cases. In addition, a key practice within this field is the process of examination of state reports by CeeAT and HRC. I therefore analysed a sample of concluding observations, namely all concluding observations issued by CeeAT and HRC in the year 2016. That year was chosen as it offers a window onto the “latest word” in the field. In addition, only for very recent years does the online database containing the concluding observations also contain the “shadow reports” submitted to these two committees by nongovernmental organizations (“NGOs”). When I found a mention of domestic violence in concluding observations, I searched the shadow reports filed in the period preceding the concluding observations in order to study NGOs’ discursive practices on this topic. Due to the large volume of shadow reports, I randomly picked four states examined by the HRC and three states examined by CeeAT and analyzed a dozen shadow reports. Finally, I analyzed the shadow report submitted to CeeAT by the Human Rights Law Centre of Australia in 2014 on behalf of over 70 Australian NGOs, as the inclusion of domestic violence within the CeeAT’s examination of Australia had been vehemently protested by that state. In addition to legal documents, I analyzed academic commentary on these legal developments by authors who self-identified as writing from a feminist perspective: Lisa Davis, current co-director of the CUNY Clinic, human rights practitioner and academic Alice Edwards, and human rights scholar Katharine Fortin.

In these texts I gave particular attention to the discourse produced by

68. In that case the Inter-American Commission found the United States responsible for the murder of the petitioner’s three daughters by her ex-husband. However, contrary to the briefs submitted by the petitioner and amici, the Commission did not find a violation of the right to humane treatment. Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

69. CeeAT issue 16, of which 12 address domestic violence and HRC 20, of which 12 address domestic violence.


71. Davis, supra note 25.

72. Edwards, supra note 40.

73. Fortin, supra note 42.
“norm entrepreneurs”; those lawyers, NGOs, experts, and (sometimes dissenting) judges who advocate broad state responsibility and a gendered analysis when considering domestic violence as torture/CIDT. While their efforts do not appear to have been as coordinated as feminist participation in the drafting of the Rome Charter establishing the ICC, these actors produced texts reflecting a shared arsenal of claims, arguments, and vision of the world. Crucially, my analysis of shadow reports also opened a window onto the discourse produced by advocates at the periphery of IHRL.

For all texts I engaged in two forms of analysis. The first is an analysis of legal argumentation guided by the critiques emitted by Kennedy and Koskenniemi against international human rights and international legal discourses respectively. The purpose of this analysis was to examine whether the DVT discourse can avoid the critique of justification: bad faith and the inability to provide convincing justifications for proposed normative solutions. The second focuses on the representation of violence that emerges from the texts. I asked whether in the DVT discourse the violence was represented in more structural or episodic terms, whether structural factors such as economic inequality were discussed, and whether the solutions advocated are primarily agency- or structure-based (e.g., criminal prosecution of perpetrators vs. material redistribution to women).

B. Justification

The DVT discourse, in its attempts to stretch an existing legal category to new forms of abuse, suffers from a substantial dose of bad faith in argumentative practices. Yet at the same time it avoids the inability of the human rights discourse to adjudicate between conflicting rights. This is because it draws on a structural understanding of power relations as providing a basis for legal intervention. In other words, it advances structural inequality (between men and women) as a severe and substantive problem requiring urgent treatment, over and above conflicting rights such as the right to privacy and family life. This political conception of rights has significant persuasive power in that it appeals to substantive justice while avoiding neutrality among conflicting rights. I first explain the bad faith of argumentation in the DVT discourse and then argue that it nevertheless offers a political and thus persuasive conception of rights.

1. Bad Faith

Examining feminist interventions in international criminal law, Janet Halley pointed to the challenge for advocates of reforming the law while invoking legal precedent. In order to argue that sexual violence should be recognized as a war crime, feminist advocates adopted what Halley terms a “see-saw approach,” reasoning that criminal trials at Nuremberg...
and Tokyo offered a precedent for convicting individuals who had supervised troops who raped women, all the while arguing that the state of the law was insufficient as sexual violence had not stood alone as a ground for conviction.\footnote{77. Id.} A similar shift from open critique of the law to slipshod legal argumentation can be clearly seen in the DVT discourse, where norm entrepreneurs point, sometimes in the same paragraph, to both the need for “breaking the classical public-private divide” and the “broad and long-lasting consensus [that domestic violence is a human rights obligation] as a principle of customary international law, binding on all States.”\footnote{78. Valiuliené v. Lithuania, App. No. 33401/02 Eur. Ct. H.R. (2013), Concurring opinion of Judge Pinto de Albuquerque, at 28.}

This challenge is addressed through a number of techniques in the DVT discourse. First, some advocates refer to a “[m]isuse of the public/private dichotomy” as the main obstacle to be overcome.\footnote{79. Opuz v. Turkey, 2009-III Eur. Ct. H.R. 107 (2009), Written Submissions of Interights, ¶5 (2007).} Second, advocates combine the doctrine of due diligence in torture jurisprudence with the principle of state responsibility for domestic violence outside the area of torture, to declare that the state bears responsibility for domestic violence under the rubric of torture. For instance, in its shadow report to CeeAT, the Human Rights Law Centre, to counter the Australian government’s view that domestic violence does not fall under the scope of CAT, argued that:

\[\text{International law clearly establishes that a State can be found responsible for the conduct of a private actor where it has not acted with due diligence to prevent or respond to the violation. Acting with due diligence requires that governments take reasonable and effective measures to prevent, investigate, punish and redress domestic violence.}\footnote{80. Joint NGO Report Australia, \textit{supra} note 70.}

In support of this assertion the report refers to \textit{Velásquez Rodríguez}, the CeeAT’s decision in \textit{Dzemajl v. Yugoslavia}, CEDAW General Recommendation 19, and a report of the Special Rapporteur on Violence against Women. None of these texts refers specifically to domestic violence as a form of torture, yet each provides a piece of the puzzle that DVT discourse norm entrepreneurs assemble to argue that domestic violence is a form of torture.

A third common technique is the focus on rape as a torture technique while ignoring the social context in which rape is committed (the home vs. the prison). Contrary to Rhonda Copelon’s 1994 article which openly criticized IHRL while identifying doctrinal hooks for feminist intervention in order to address the “egregious in the everyday,” the principal academic texts commenting on the recognition of domestic violence as form of torture from a declared feminist perspective do not single out domestic violence as torture.\footnote{81. See generally Rhonda Copelon, \textit{Recognizing the Egregious in the Everyday: Domestic Violence as Torture}, 25 \textit{COLUM. HUM. RTS. L. REV.} 291 (1994).} Rather, their overarching framework is rape as torture

or gender violence. They present legal texts recognizing as torture the rape of women by state officials in public institutional contexts such as prisons as part of the same legal development as the recognition of domestic violence as torture, eliding the significant jump being made when the prohibition of torture comes to regulate violence in the home.\footnote{See, e.g., Davis, supra note 25; Edwards, supra note 40.} This single-minded gender focus is undoubtedly a manifestation of these scholars' ideological commitment, namely power feminism. Yet it also serves the strategic purpose of eliding the differences in social context between torture in the public institutional context and in the context of domestic violence, and hence the extent of the change they advocate in positive law.

Analysing the feminist campaign in the 1990s for the recognition of violence against women as a human right, Annelise Riles argues that the shift from the critique of rights to rights advocacy need not be viewed as incoherent, as feminist advocacy built on the critique for its reformist project.\footnote{Annelise Riles, The Virtual Society of Rights: the Case of ‘Women’s Rights are Human Rights’, in TRANSNATIONAL LEGAL PROCESSES 425–34 (Michael Likosky ed., 2002).} Moreover, both critique and advocacy had a common enemy: formal legal reasoning.\footnote{Id. at 432.} Yet when in more recent years feminist advocates zeroed in on the legal regulation of torture and produced the DVT discourse, they adopted some elements of formal legal reasoning, appealing to precedent as seen above in a less-than-convincing way. In fact, the second technique discussed above—the blending of legal doctrines from torture jurisprudence with the recognition that domestic violence is a subject of concern for IHRL—can be seen as a variation on what Duncan Kennedy calls “public law neoformalism”: a mode of argumentation grounded in outrage that assumes that constitutional or, more relevantly here, universal values on the one hand and positive law on the other, are aligned.\footnote{Duncan Kennedy, Three Globalizations of Law and Legal Thought, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 64–65 (David Trubek & Alvaro Santos eds., 2006) (‘Public law neoformalism rebels in the name of ‘absolutes’ outraged in a particular context. Neoformalism is unreflective in a way diametrically opposite to policy analysis. The argument that the closed shop violates the Mexican Constitution’s guarantee of freedom of association, or that the failure to criminalize clitoridectomy violations the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), or that affirmative action in U.S. university admissions violates equal protection, or that any judge in any country might authorize the detention of Pinochet for human rights abuses in violation of international law, all presuppose either a mystical union of natural and positive law or the mode of deduction from abstractions effectively trashed by the early social theorists.’).}

Now that the DVT discourse has succeeded and there is clear institutionalization of the expanded prohibition of torture, we can expect less appearances of bad faith forms of argumentation. Today, advocates can simply point to CeeAT’s General Comment 2 and the regional human rights courts’ case law. However, the point I want to make in this Part II goes further: even in its early years, despite less than rigorous legal argumentation, the DVT discourse was overall convincing precisely due to the outrage it voiced against domestic violence. That outrage was accompa-
nied by a lack of critical reflection, and I did not find any honest engagement by feminists with the possible downsides of advocating for the recognition of domestic violence as torture. Yet as discussed in the section below, outrage allowed the DVT discourse to avoid the pitfalls of the traditionally apolitical human rights discourse.

2. A Political Discourse of Rights

The primary justification advanced by advocates in the DVT discourse for inclusion of domestic violence in the prohibition of torture is neither state consent to a particular legal regime nor deduction from legal texts but a situation of structural inequality between men and women that produces horrible injustice. In other words, normativity in the DVT discourse is not purely legal but derives from a political conception (i.e. a conception attuned to the distribution of power in the real world) of gender relations. By emphasizing the political dimension of human rights, the DVT discourse offers a substantive vision of justice that has appealing power and is able to adjudicate among conflicting rights.

The view of domestic violence as a manifestation of women’s structural subordination to men runs throughout the texts constituting the DVT discourse and is deployed to justify the imposition of a legal obligation on the state in a variety of ways. For instance, in Opuz, the Court, before discussing the state’s due diligence obligation to prevent domestic violence, set out in a section titled “The United Nations’ position with regard to domestic violence and discrimination against women,” the CEDAW Committee’s view of domestic violence as both an expression of women’s subordinate role in many societies as well as a factor contributing to “maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.” In Valiulienė, the Court, though finding a breach of article 3 of ECHR, disagreed with the applicant that the fact that she was a woman automatically placed her in the category of “vulnerable persons,” one of the court’s criteria for determining whether ill-treatment rises to the level of Article 3. Judge Pinto de Albuquerque, in a concurring opinion, deplored the lead opinion’s failure to engage in a gendered analysis of the case and provided this analysis himself. He argued that “the full effet utile of the [ECHR] can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual ine-

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86. E.g., Fortin, supra note 42, at 162, asked whether the turn to the prohibition of torture might not have costs from a feminist perspective, but concluded that “the definition of torture is perfectly able to respond to female experiences of torture at the hands of both State actors and non-State actors. As a result, the categorization of rape as torture under human rights law has the potential to be a protection triumph for women.” Edwards, supra note 40, warns that excessive focus on women’s human rights violations may ironically end up essentializing or stereotyping women. However, these authors do not ask whether feminist engagements with IHRL might not harm men, for instance by bolstering justifications for carceralism.


qualities between women and men and the way they impact on women’s lives.” 89 From such a perspective, he continued, “it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at . . . . It is precisely this intrinsic element of humiliation that attracts the applicability of Article 3 of the Convention.” 90

In Lenahan, the American Civil Liberties Union and their co-counsel from the Columbia Law School’s Human Rights Clinic on behalf of the petitioner invoked the systematic, society-wide nature of domestic violence in support of their argument for the imposition of responsibility on the U.S. for the violation of the petitioner and her daughters’ right to life and to humane treatment as a sign of the state’s systematic failure to investigate domestic violence cases. 91 In the same case, an amici curiae brief authored by Rhonda Copelon among others, on behalf of the CUNY Clinic and the Center for Constitutional Rights, states that while there are many bases for holding the U.S. responsible under relevant international law, the petitioners wish

to emphasize that by likewise recognizing the treatment of Ms. Gonzales as torture and ill-treatment in violation of Article I of the American Declaration, the Commission would appropriately underscore the gravity and non-derogability of domestic violence as well as the urgency of a firm response from the United States and the American States in general to prevent and redress this epidemic violence against women and thereby the elimination of one of the cornerstones of the long-standing subordination and discrimination against women. 92

The amici brief also argues that gender-based discrimination constitutes the impermissible purpose of discrimination listed in CAT as an element of torture, referring to CeeAT’s General Comment 2 for the proposition that gender is a key factor placing women at risk of torture. 93 Feminist academics applauding the expansion of torture to include domestic violence similarly explain the need for a new approach involving the imposition of state responsibility as grounded in the fact that gender-based violence is “part of a historical power imbalance between men and women” reflecting and perpetuating “structural inequality.” 94

The DVT discourse thus advances a form of legal argumentation that is attuned to systemic power imbalances, invoking them to justify legal intervention. By providing a substantive sense of injustice, this political approach to human rights is not only more persuasive than legal formalism

89. Id. at 29 (footnote omitted).
90. Id.
93. Id. at 25–26.
94. Davis, supra note 25, at 325.
as a reason for action; it also has the potential to adjudicate among conflicting rights. Recognizing domestic violence as a form of torture, explain the norm entrepreneurs, requires recognizing the social, public nature of this form of violence, and thus dismantling obstacles deriving from the right to privacy or family life. Having targeted a substantive, structural problem and identified the obstacles to its dismantling, it is easier to prioritize conflicting rights than if one proceeds from a formalist stance.

Such an approach is not free of problems, and this article does not advocate a purely political conception of human rights law. Though he criticizes the lack of justificatory power of formal reasoning, Martti Koskenniemi recognizes that there is a "slippery slope from anti-formal reasoning to human rights violation." In the context of the DVT discourse, one obvious risk is that the substantive sense of outrage driving norm entrepreneurs might endanger individual defendants’ right to a fair trial. Since purely instrumental reasoning is not a viable approach, Koskenniemi suggests seeing international law as an oscillation between instrumentalism and formalism and promotes a different kind of formalism in which the interests of all members of a community would be taken into account.

My point here is simply to show through the example of the DVT discourse that it is possible to argue about IHRL in a mode that is not purely formalist and that incorporates a substantive sense of injustice.

Yet if a structural gender perspective allows the DVT discourse to avoid apoliticism as pure formalism, it does not necessarily offer a political vision of justice in the sense of a project addressing structural inequalities. To the contrary, the adoption of gender as primary lens through which to examine domestic violence might obscure its economic foundations. In the next section, I will show that while central actors in the DVT discourse confine the “political” to gender relations, many others at the margins go further and promote broader structural representations and solutions to domestic violence.

C. Representation

The DVT discourse undeniably bears some of the problematic markers of power feminism. The theory underlying this discourse appears to be what Halley termed “feminist universalism”: the notion of a universal war of men on women—here in the everyday context. Indeed, Halley attributes the most articulate statements of this theory in the context of international criminal law to Rhonda Copelon, the founder of the CUNY Clinic who as we have seen was also a leading norm entrepreneur in the DVT discourse. In the DVT discourse, this theory can be seen clearly in the

97. Id.
99. Id. at 13.
argument that all violence against women is a form of gender discrimination100 and norm entrepreneurs’ characterization of domestic violence as an “epidemic violence against women and . . . one of the cornerstones of the long-standing subordination and discrimination against women.”101

From a critical perspective, this approach is problematic as it elides the socio-economic inequalities that provide a fertile ground for domestic violence and thus draws attention away from structural causes of that violence. This narrow approach also has implications for avenues of action. As Cynthia Bowman shows in her discussion of approaches to intimate partner violence in Africa, many researchers and activists now privilege non-legal solutions such as community education programs and perpetrator treatment in light of the ineffectiveness of legislation criminalizing domestic violence.102 Yet in the DVT discourse, the primary reform advocated is criminalization, such that states comply with their duties under IHRL if they adequately investigate and prosecute men who commit domestic violence. For instance, concluding observations issued by HRC and CeeAT concerning domestic violence typically emphasize criminal law, recommending that state parties “ensure that all such cases are thoroughly investigated, perpetrators are prosecuted,” and that awareness be raised among law enforcement personnel.103 In this turn to criminal law, the DVT discourse reflects worrisome trends not only in power feminism—whether on the international stage or domestic104—but in international human rights activism more broadly, where “anti-impunity” has become a rallying cry.105 This discourse thus carries the risks associated with the turn of progressive causes to criminal law: portraying domestic violence in simplistic terms, focusing on one causal factor (gender subordination) in abstraction from economic problems, and reinforcing the repressive powers of the state primarily against (usually) economically disadvantaged men.

Yet there is more to the DVT discourse than a blend of “carceral feminism”106 with the anti-impunity discourse of IHRL, and it is these additional elements of the DVT discourse that hold hope for a new form of international human rights discourse. Far from what Aya Gruber described in the context of the United States’ increased criminalization of

100. E.g., Opuz, ¶¶187–91 (citing various sources for the proposition that violence against women is per se a form of discrimination and hence “that the State’s failure to protect women against domestic violence breaches their right to equal protection of the law.”).
domestic violence, the DVT discourse does not represent domestic violence as the sole product of perpetrator agency. Rather, in this discourse, domestic violence is portrayed as a societal problem deriving from a combination of cultural norms, lack of effective state policy (beyond the criminal justice system), and for many NGOs employing the DVT discourse, socio-economic inequalities. Accordingly, the remedies advocated include educational campaigns, the provision of social services, and the tackling of economic and ethnic inequalities.

Contrary to international and domestic criminal law which target individual responsibility, IHRL addresses the responsibility of the state. In order to establish state responsibility for domestic violence, it is thus necessary to connect the acts of violence committed by private actors to state action or inaction. International human rights bodies and advocates respond to this challenge not only through a doctrine of due diligence that requires effective state investigation and prosecution, but also by explaining domestic violence as the state’s failure to devise and implement effective educational and social policies to combat cultural stereotypes and norms detrimental to women. States are thus required, in addition to criminal prosecution, to provide emergency relief to victims, and conduct public awareness campaigns, and train social workers.

NGOs have requested states to devise national plans to combat domestic violence that go well beyond criminal justice. Thus, a shadow report filed before the HRC by a number of Jamaican NGOs emphasized the need for a national plan of action, including awareness raising for teachers, health-care, social workers, and the media in order to challenge “the deeply entrenched patriarchal system prevalent in Jamaican society.” A group of Australian NGOs filing a shadow report to CeeAT explained that the government’s due diligence obligations under CAT “include effective policy formulation based on an understanding of the demographics, patterns and risk factors of domestic/family deaths; and the translation of those policies

108. E.g., CeeAT called on Kuwait to “ensure that victims of domestic and gender-based violence benefit from protection and have access to medical and legal services, including psychosocial counselling, and to redress, including rehabilitation, as well as to safe and adequately funded shelters and to a free permanent State-funded helpline.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding observations on the third periodic report of Kuwait, U.N. Doc. CAT/C/KWT/CO/3 (Sept. 5, 2016).
109. E.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding observations on the second periodic report of Saudi Arabia, U.N. Doc. CAT/C/SAU/CO/2 (June 8, 2016).
110. E.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding observations on the fourth periodic reports of Turkey, U.N. Doc. CAT/C/TUR/CO/4 (June 2, 2016).
into practical initiatives."\footnote{112} In a third-party brief in Opuz, Interights similarly insisted that:

Due diligence obligations require not only immediate measures of protection but also broader measures of prevention that effectively combat the gender-based stereotypes and socio-cultural patterns of behaviour that permit domestic violence and perpetuate a climate of impunity. The Inter-American Commission has noted that part of the due diligence obligation "requires action in different arenas, including legislation; the criminal justice sector; economic and social policies; services; awareness-raising and education"... Recommended measures include public education through media campaigns and adjustment to curricular challenging sex-based stereotypes...\footnote{113}

What is more, many NGOs emphasize structural factors contributing to domestic violence, in particular economic and racial inequality as well as lack of political participation of disadvantaged groups in the design of state policy. NGOs submitting shadow reports to the HRC have emphasized the economic dependence of women on their partners,\footnote{114} one NGO from Morocco arguing that the definition of domestic violence should include the practices of “economic violence” such as non-payment of alimony or forfeiture of salary, and “legal violence” such as child marriages.\footnote{115} Moving beyond gender inequalities, in the brief filed on behalf of Jessica Lenahan to establish the United States’ responsibility for the murder of her three children by her ex-husband, the American Civil Liberties Union and Columbia Law School Human Rights Clinic included a lengthy section titled “Background and Patterns” giving an overview of domestic violence in the United States and linking that violence to couple poverty. It explains that:

Not all women in the United States are equally likely to experience domestic violence. While domestic violence occurs at all income levels, poor women experience victimization by intimate partners at much higher rates than women with higher household incomes; between 1993 and 1998, women with annual household incomes of less than $7,500 were nearly seven times as likely as women with annual household incomes over $75,000 to experience domestic violence. Data indicate that women are at much greater risk of domestic violence when their partners are experiencing job instability or when the couple reports financial strain.\footnote{116}

A similar linking of domestic violence to structural inequalities other than gender can be seen in the shadow report to CeeAT filed in 2014 by the Australian Human Rights Law Centre and associated Australian NGOs.

\footnotetext{112}{Joint NGO Report Australia, \textit{supra} note 70, at 63.}
\footnotetext{113}{Written Submissions of Interights, \textit{supra} note 79, ¶ 22 (footnotes omitted).}
\footnotetext{114}{\textit{E.g.}, \textit{Federation for Women and Family Planning, Campaign Against Homophobia, Women’s Rights Centre, Report to the UN Human Rights Committee in connection with the 6th Periodic Review of Poland} 7 (2009).}
\footnotetext{116}{Petition, \textit{supra} note 91, at 23 (footnotes omitted).}
The report points to the higher incidence of domestic violence in Aboriginal families, explaining it as a result of ongoing failures by the police due to prejudice, but also underreporting by Aboriginal women for fear their children will be removed, in the context of over-representation of Aboriginal children in the care system. In addition, the report laments the “chronic lack of protection measures and cultural and gender-specific services, particularly in vital areas such as housing and legal assistance.” Accordingly, the report recommends that “the Australian Government adopts special measures in consultation with Aboriginal peoples to address the significant ongoing disadvantage of Aboriginal women and children that perpetuates disproportionate rates of family violence . . . [and] [t]hat Aboriginal families and communities are resourced, supported and empowered to provide for the safety of their children.” The report more generally recommends that the state develop an inclusive and transparent consultation mechanism for NGOs and civil society to participate in the implementation of the National Plan to Reduce Violence Against Women and their Children.

Thus, while the DVT discourse espouses feminist universalism and emphasizes criminalization, even the more institutional participants in this discourse (e.g., the HRC) offer a non-agentist representation of domestic violence as a social practice requiring a broad array of solutions beyond criminal justice. What is more, voices on the periphery of IHRL, such as local NGOs from the global North and South, contribute to the DVT discourse, emphasizing the socio-economic disadvantage of both women and the families and communities within which violence occurs and pointing to structural avenues of reform such as social provision and political participation. What does this mean for the possibilities of developing a new human rights discourse beyond the context of DVT?

III. Towards a New Human Rights Discourse?

I showed that the DVT discourse adopts many of the problematic aspects of both power feminism (feminist universalism, carceralism) and the mainstream discourse of IHRL (bad faith, anti-impunity), exhibiting familiar flaws of justification and representation. Yet I identified ways in which the DVT discourse overcomes the critiques of justification and representation by putting forward a substantive vision of justice to address what is identified as a social, structural problem, for some participants a structural problem beyond the gender divide. What can we learn from this case?

I believe that my analysis of the DVT discourse suggests it is possible to successfully operate within IHRL while espousing a structural understanding of injustice that is freed from the liberal constraints of formalism.
and the privileging of individual agency. It is true that by categorizing domestic violence as a form of torture, norm entrepreneurs in the DVT discourse have tethered the struggle against domestic violence to criminal law, while the success of many non-legal, structural approaches to domestic violence appears to depend on the foregoing of criminal prosecution.\textsuperscript{121}

The prohibition of torture is a peremptory norm of international law which, according to the dominant current interpretation of IHRL, requires the criminal prosecution of perpetrators.\textsuperscript{122} However, this interpretation of international law is neither necessary nor normatively compelling.\textsuperscript{123} The DVT discourse shows that it is possible for bodies interpreting IHRL to order a wide range of structural remedies other than criminal prosecution and compensation.

My argument is not only that the positive elements of the DVT discourse are proof that such an approach is possible, but also that institutional features of IHRL actually offer a promising terrain for such endeavors, especially in comparison to international criminal law, the legal arena currently privileged in struggles for global justice. The fact that IHRL ultimately targets state responsibility allows shifting attention and efforts for reform from the individual perpetrator to broader social patterns and structure. In addition, IHRL is primarily a soft-law mechanism. Indeed, both critics and advocates often lament its lack of enforceability.\textsuperscript{124} Yet it is precisely the soft law character of IHRL that enabled more structural representations of domestic violence to be voiced, in two ways:

First, the non-binding character of CeeAT and HRC concluding observations allows these two bodies to issue a broad range of observations and recommendations for state action, including recommendations to conduct public awareness campaigns and train social workers. Such recommendations can be integrated more easily into the outputs of human rights bodies than international courts. Second, the non-binding character of IHRL allows for a plurality of voices—and portrayals of domestic violence—to be heard. The process of examination of shadow reports before human rights bodies and of third-party interveners in regional courts offers numerous openings for NGOs, including small NGOs from the periphery, to present their understanding of domestic violence, its causes, and remedies.

In an ethnographic study of the CeeAT, Tobias Kelly pointed to institutional features of this treaty body that lead it to produce a depoliticized form of knowledge.\textsuperscript{125} He showed how the Committee’s lack of resources and investigative powers have shaped monitoring of state obligations as a second-order process that displaces discussions of the causes and conse-

\textsuperscript{121}. See, e.g., Bowman, supra note 102, at 31–33 (discussing community approaches).


\textsuperscript{123}. See Engle, supra note 105.


quences of violence in favor of a focus on the domestic systems supposed to monitor cruelty.\textsuperscript{126} This approach favors states with formal liberal institutions, thus reproducing inequalities among states before the Committee. Moreover, while in principle any NGO can submit information to the Committee, due to resource constraints it tends to rely more heavily on the information provided by large Western NGOs.\textsuperscript{127} A reformist or redemptive approach to IHRL such as the one proposed here cannot ignore these Western and liberal biases. Yet understanding these constraints does not necessarily imply abandoning international human rights institutions. To the contrary, having identified these biases and their concrete institutional causes, we can try to undo them at the same time as we take advantage of the features of IHRL identified here as favorable to structural representations of violence. For instance, large Western NGOs can collaborate more with small NGOs in the preparation of shadow reports, so as to voice more alternative perspectives.\textsuperscript{128}

For some critical scholars, it is time to move beyond the human rights project.\textsuperscript{129} While alternative languages of justice should no doubt be developed, this paper has tried to show that IHRL is a complex and dynamic field of which the discursive practices can be transformed. Effecting such a reform is not an easy task, given the institutional constraints and biases of the field. However, by further exploring feminist interventions in IHRL, we can better understand the possibilities and limits of such efforts.

\textsuperscript{126} Id. at 786, 789.
\textsuperscript{127} Id. at 787–88.
\textsuperscript{128} The Joint NGO Report Australia, supra note 70, at 112, 118, provides a good example of such fruitful cooperation.
\textsuperscript{129} See, e.g., Golder, supra note 12; Martti Koskenniemi, After Globalization: Engaging the “Backlash,” Lecture given at Tel Aviv University, Nov. 23, 2017 (arguing that the human rights discourse will be rejected in the current “backlash” against international institutions regardless of reforms in the content and form of the discourse, due to the populist rejection of expertise).