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Introduction

On the concluding day of the Fourth World Conference on Women in Beijing in 1995, the then Secretary-General of the United Nations declared: 'The movement for gender equality the world over has been one of the defining developments of our time.'[1] He added that, despite progress having been made, 'much, much more remains to be done'.[2] This book explores how the international human rights legal system has been affected by the campaign for women's equality; and conversely, what this campaign means for women's human rights. Specifically, it assesses the legal responses of the international human rights system to violence against women.

Its principal focus is on the work of the United Nations human rights treaty bodies owing to their role as the main monitoring mechanisms that oversee the implementation of international human rights treaties by states parties.[3] However, it also considers the most important jurisprudence of various other international and regional human rights and criminal law tribunals, commissions, and courts due to their influence on the work of the international treaty body system as well as international law more broadly. My focus is on the way these international human rights institutions have responded to the issue of violence against women in light of the absence of any explicit human rights prohibition at the level of international human rights law. For the purposes of this book, 'violence against women' is understood as encompassing, but is not limited to, any act, omission, or threat to life or of physical, sexual, or psychological harm or suffering perpetrated against women, as well as their structural and economic manifestations.[4]

[1] Statement of the UN Secretary-General, Boutros Boutros-Ghali, on the concluding day of the Fourth World Conference on Women, Beijing, 15 September 1995, 'Introduction' to *Platform for Action and the Beijing Declaration*, UN Dept. of Public Information, 1996, 2.
[2] *Ibid.*
[3] The treaty bodies and their mandates are explained in Chapter 3.
[4] This definition is explained further in section B2 below.

In order to understand how international human rights law responds to the issue of violence against women, I draw on four feminist critiques of international law and human rights. Even though these critiques have different theoretical roots and are sometimes in tension with each other, they remain important sources of analysis. These critiques are discussed in Chapter 2. My aim is to connect feminist *theories* to the *jurisprudence* of various international decision-making bodies. I do so by critically examining the two main strategies employed by the human rights treaty bodies (and many other human rights institutions) to incorporate violence against women within their mandates and 'jurisprudence'[5]: the first strategy conceptualises violence against women as a form of sex discrimination, while the second relies on creative reinterpretations of existing human rights so that the experiences of women are included. Discussion of the latter strategy centres on the right to life and the right to be free from torture and other cruel, inhuman, and degrading treatment or punishment. This type of analysis has been undertaken elsewhere primarily in relation to sexual violence perpetrated against women in armed conflict,[6] and rape in domestic criminal law.[7]

Over the past twenty years there has been extensive feminist analysis of international law. By feminism or feminist theory, I mean the body of literature, ideas, and concepts that emerged in the mid to late 1980s and which attempted to explain women's exclusion from human rights mechanisms and doctrine. This body of literature has more recently become known as 'feminist international legal scholarship'.[8] The central issue of much of this scholarship concerns why the international legal system has not done more to address the inequality and oppression of women.[9] International feminist legal scholarship is explicitly concerned with and engaged in the ways in which women have been 'excluded, marginalised, silenced, misrepresented, patronised, or victimised by [international]

[5] Throughout this book, when I refer to 'jurisprudence' of the human rights treaty bodies, I mean the authoritative (quasi-judicial) statements of the treaty bodies, including their concluding observations on state party reports, General Comments or General Recommendations, and 'views' (decisions) on individual communications. See Chapter 3.

[6] See, e.g., R. C. Carpenter, *'Innocent Women and Children': Gender, Norms and the Protection of Civilians* (London: Ashgate, 2006) and N. N. R. Quénivet, *Sexual Offenses in Armed Conflict and International Law* (Ardsley, NY: Transnational Publishers, 2005).

[7] Although see, C. McGlynn and V. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge-Cavendish, 2010).

[8] For a discussion about whether a subdiscipline of the same name has emerged in international discourse, see D. Buss and A. Manji, 'Introduction', in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005) 1.

[9] *Ibid.*, 2.

institutions that reflect and represent the perspectives of their fore-*fathers* and their male progeny'.[10] Scholars have examined a number of areas of the international legal system, from the use of force and collective security to environmental law, self-determination, trade law, humanitarian law, refugee law, and human rights law. A common thread in these analyses is that international law privileges the realities of men's lives, while ignoring or marginalising those of women.

I find these feminist concepts, methods, and theories extremely useful for illuminating the processes at play in the context of international human rights law. They can help uncover the dynamics in a given situation. Applying feminist methods and theories to examine the work of international human rights bodies is, however, complex because these bodies may not directly or consciously apply feminist concepts or methods, and in general they offer very few signals as to how they arrive at their conclusions (see Chapter 3). For example, the terms of sex or gender are rarely explicitly mentioned in the documentation of the human rights treaty bodies; if they are referred to, they are often used interchangeably and without explanation.

The two strategies employed by the human rights treaty bodies outlined above in respect of violence against women correspond to the broader UN strategy of 'gender mainstreaming', which is explained further below. This is because there remains no universally agreed binding treaty norm explicitly prohibiting violence against women.[11] Calls have therefore been made by feminist scholars and human rights activists to reinterpret existing laws so they include women's experiences generally and of violence in particular. Underlying these strategies is an intention to benefit from the symbolic labels of such peremptory norms as the prohibition against torture and the right to life (dealt with in Chapters 5 and 6 respectively), as well as to address underlying causes of such violence by recourse to outlawing discrimination on the basis of sex and inequality between men and women (Chapter 4).

This book is interested in whether the so-called 'defining development of our time'[12] of gender equality has resulted in any real progress

[10] V. Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Feminist Debates in Feminist Theory* (Oxford: Hart Publishing, 2007), 12 (emphasis in original).

[11] Note that there are some binding treaty rights at the regional level: see, in particular, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994, 33 ILM 1534, 6 September 1994; entered into force 3 May 1995 (IA-VAW). Also note that many women's rights activists and NGOs have promoted the agreement of separate instruments, at the same time as working within the framework that is available.

[12] Statement of the UN Secretary-General, 'Introduction' to *Platform for Action and the Beijing Declaration*.

in the practical application of international human rights law to women, especially in the area of violence against women. Has the widely pursued strategy of rereading existing human rights norms to cover some of the experiences of women produced any real results for women, or has it bolstered the myriad feminist critiques of the international system? What are the costs, if any, of these strategies of inclusion? Are women in a better position under international human rights law today than at its inception?

This book finds that the responses of international human rights institutions to women's lives in the context of violence against women have been mixed and, at times, arbitrary, superficial, and inconsistent. Although there has been a dramatic increase in the number of references to both 'women' and 'violence against women' in international jurisprudence, the analysis of women's lives has been largely 'rhetorical'[13] rather than structural. For example, women's representation on international decision-making bodies has not improved lineally, and further they are still primarily found in the specialist treaty bodies on women and children. Despite some attempts to dismantle the public/private dichotomy (discussed in Chapter 2), major hurdles to women gaining access to human rights mechanisms remain. Many norms continue to be constructed and understood around the life cycle of men, with occasional 'add on' references to women and girls. Moreover, the process of 'gender mainstreaming' as it has been pursued by the treaty bodies, women's rights activists, and some feminist theorists and reflected in international law has reinforced the feminist paradox, namely that the more that women's *specific* concerns of violence are raised in human rights institutions, the more women become reduced to essences and are marginalised. In this way, international human rights law and 'gender mainstreaming' strategies can play into the way in which women are stereotyped as victims or rendered as mothers or the 'Exotic Other Female'.[14] At the same time, harm perpetrated against men is viewed as an exclusively male preserve and, thus, similar or identical treatment faced by women is not registered as an issue of international priority.

As pragmatic responses to gaps in the law, it must be acknowledged that these strategies have been both conceptually and substantively powerful for the advancement of women's rights, not least because they

[13] See, also, C. Chinkin, S. Wright and H. Charlesworth, 'Feminist Approaches to International Law: Reflections from Another Century', in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005) 23.

[14] K. Engle, 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1992) 26 *New England L. Rev.* 1509.

put the rights of women onto the international human rights agenda.[15] However, rereading existing provisions so they can also, or equally, apply to the specific circumstances of women has had mixed results, carries its own problems and limitations, and ultimately serves to continue to treat women unequally under international law, albeit unintentionally. A common thread of the treatment of the three rights studied in this book is that women's experiences are seen as an exception to the main or general understandings of those particular provisions. That is, women are seen as a deviation from that standard and as an exception to the rule, rather than as equal beneficiaries of the human rights protection system. The practical effect of holding women to the same standards as men *de jure* is to impose additional burdens on women de facto. At issue is the fact that women need to convince international bodies that what has been done to them is *worthy* of international attention. Women are thus not yet equal under international law.

In order to obtain the protection of international human rights law, the strategies referred to in this book require women *either* (a) to equate their experiences to harm normally perpetrated against men, *or* (b) to justify why their experiences 'deserve' the establishment of an exception to the rule. The first route reinforces the sexual hierarchies of the existing system, while the second route exceptionalises the experiences of women and thereby 'essentialises' her (discussed further in Chapter 2). Although the system of international human rights law may no longer exclude women entirely, it is set up to continue to treat them unequally. By doing so, the gender bias in the system is supported and any deeper transformation is prevented. For women, this can only be described as the 'conundrum'[16] of international human rights law. These strategies reinforce many of the feminist critiques of the international system (outlined in Chapter 2), rather than respond to them, even though they arose out of feminist activism and the desire to give women an equal voice and place within the existing system.

[15] For background on developments in international law and violence against women, see section A below.

[16] Otto observes that her 'conundrum' is that she is uncertain that it is possible to imagine 'women's full inclusion in universal representations of humanity … so long as the universal subject (the "standard") continues to rely for its universality on its contrast with feminized particularities (the "other")', see: D. Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law', in A. Orford (ed.), *International Law and Its Others* (Cambridge University Press, 2006) 318, at 321. My 'conundrum' is that in arguing that the international human rights system continues to treat women

The paradox is that the more that we work within the system, the more the inequalities in the system are reinforced. So what do we do, faced with this dilemma? As a pragmatist and practitioner at heart, I do not advocate a complete overhaul of the existing legal framework. The language of human rights can still be a powerful force for change, representing as it does a (relatively) universal language in which to frame grievances. Moreover, the ethos of 'gender mainstreaming', despite the many criticisms it has faced in relation to implementation rather than in its conceptualisation,[17] is now a well-established policy of the United Nations, has made some important breakthroughs (although this needs to be furthered), and any change of direction could be counter-productive. In the specific context of domestic violence, Bonita Meyersfeld has also argued, for example, that international law can improve the way we understand and respond to such violence in two main ways: by its 'expressive value' and by its 'implementing capability'. In relation to its expressive value, she refers to the processes of naming harms within existing normative arrangements, facilitating the creation of new norms, and expanding the legal categories of objectionable conduct. In relation to implementing capability, she refers in particular to the alignment of national laws with international standards.[18] However, I do make a number of recommendations for reform relating to the structures, procedures, and concepts of the existing system, including calling for the agreement of a protocol on violence against women. These are dealt with in Chapter 8.

A final word in this Introduction is that this book is focused on law. It is nonetheless cognisant of the many complementary and important non-law-based or quasi-legal approaches to violence against women, such as policy discourse, monitoring, and advocacy, and local non-legal remedies and improvements in women's education, health, and socio-economic development; and political empowerment.[19] These non-law-based or quasi-legal approaches are not, however, considered in this book.

unequally, I am partially rejecting the very system that is available to bring about other forms of equality, even if it is arguably only formal or partial equality.

[17] See, below, section B3.

[18] B. Meyersfeld, *Domestic Violence and International Law* (Oxford and Portland, OR: Hart Publishing, 2010), 266.

[19] See, e.g., J. Fitzpatrick, 'The Use of International Human Rights Norms to Combat Violence Against Women', in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University Pennsylvania Press, 1994) 532, who questioned the utility of a human rights approach at all, and whether the issue of violence against women may not be better dealt with through criminalisation or social policy. See, also, S. Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006).

A Violence against women under international law: progress to date

Despite women's entitlement to equality before the law and equal protection of the law being recognised as a right in all the major human rights treaties since 1945,[20] it was not until the 1990s that violence against women featured seriously on the agenda of the international community. The mid-1990s was arguably the watershed for attention to be paid to the serious violations of women's rights at the level of international law, especially in relation to violence committed against women within the context of armed conflict. The conflicts in the former Yugoslavia and Rwanda, in particular, in which women were routinely raped, sexually assaulted, incarcerated, and forcibly impregnated as part of deliberate military and political strategies to debase and humiliate them and others (including their husbands, sons, and brothers sharing the same ethnicity), attracted international condemnation and outrage, albeit belatedly. These assaults also gave rise to a number of significant judicial decisions, in which rape and sexual violence were first characterised as forms of genocide, torture, and other serious war crimes.[21]

Prior to the 1990s, however, violence against women was not seen as a major issue; and if it was recognised as an issue at all, it was considered an issue for national governments (and criminal law) rather than international law. Early international instruments relating to violence against women focused on trafficking of white women for the purposes of sexual enslavement. These date from as early as 1905, but have been heavily criticised in terms of their protective rather than empowering character, and for their racist undertones. Post-Second World War international instruments on humanitarian law took a similar approach.[22] Even during the 1975 and 1980 global women's conferences, violence against women was at most a peripheral issue.[23] Nonetheless a number of acts of violence

[20] See, further, Chapter 4.

[21] See, e.g., *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96–4-T (Judgment, 2 September 1998); Case No. ICTR-96–4-T (Appeal Court) (Judgment, 1 June 2001); *Prosecutor* v. *Kunarac, Kovac and Vukovic*, ICTY Case No. IT-96–23-T and IT-96–23/1-T, 22 February 2001; upheld on appeal, Case No. IT-96–23 and IT-96–23/1, 12 June 2002; *Prosecutor* v. *Anto Furundzija*, Case No. IT-95–17/1-T, 10 December 1998; SC res. 1325 (2000) and 1820 (2008); Articles 7(1)(g), (c) and (h) and 8(1)(b)(xxii), Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, 2187 UNTS 90; entered into force 1 July 2002.

[22] Discussed further below.

[23] Engle Merry, *Human Rights and Gender Violence*, 21.

were identified specifically as human rights violations as early as 1975, including rape, prostitution, physical assault, mental cruelty, child marriage, forced marriage, and marriage as a commercial transaction.[24] A decision at the 1980 global conference on 'battered women and violence in the family' recognised domestic violence as 'an intolerable offence to the dignity of human beings'.[25] An explicit provision outlawing violence against women was not, however, included in the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the principal women's rights treaty, adopted in 1979.[26] This glaring omission was arguably the impetus behind the committee responsible for supervising the treaty's implementation to issue two general recommendations on violence against women. In 1989, and then again in 1992, the committee declared that violence against women is a form of sex discrimination and, therefore, rightly within its mandate over issues of women's equality. This strategy is examined in Chapter 4.

Prior to this subsumption of violence against women under equality law, however, the 1985 Nairobi Forward-looking Strategies, arising out of the 1985 global women's conference and concluding the UN's Decade on Women 1975–1985, identified violence against women as interconnected with the achievement of peace. The conference did not, however, deal with the same in relation to equality or development, the other themes of the 1985 global women's conference.[27]

It has been asserted that violence against women was central to deliberations at the 1993 World Conference on Human Rights,[28] in which women's rights were recognised as human rights.[29] Both public and private forms of violence were included, as well as gender bias in the administration of justice. The Vienna Declaration on Human Rights that arose

[24] World Conference on Women, Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace, Mexico, 1975, para. 28, UN Doc. E/CONF.66/34, 2 July 1975.

[25] World Conference on Women, Equality, Development and Peace, Copenhagen, 1980 UN Doc. A/CONF.94/35, 19 September 1980, 67.

[26] Convention on the Elimination of All Forms of Discrimination against Women 1979, GA res. 34/180, 18 December 1979, 1249 UNTS 13; entered into force 3 September 1981 (CEDAW).

[27] World Conference on Women, Report and Nairobi Forward-looking Strategies for the Advancement of Women, UN Doc. A/CONF.116/28/Rev.1, 1985.

[28] E. Friedman, 'Women's Human Rights: The Emergence of a Movement', in J. Peters and A. Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) 18, at 27–31.

[29] World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, Pt 1, para. 18.

out of the conference specifically called for the drafting of a declaration on violence against women and the appointment of a special rapporteur on the same subject.[30]

In 1993 the UN Declaration on the Elimination of Violence against Women (DEVAW) was adopted[31] and the first Special Rapporteur on Violence against Women appointed.[32]

Unlike the human rights treaty bodies, the mandate of the Special Rapporteur is not circumscribed by ratifications to international treaties or periodic reporting cycles and she, therefore, has a wider mandate to engage in these issues.[33] On the other hand, there is no obligation on the part of states to cooperate with the Special Rapporteur as an extra-treaty measure, and hence her reports and statements fall into the territory of 'soft' law instruments, but they are nonetheless influential. The UN Special Rapporteur on Violence against Women has issued a number of reports on various themes, including violence in the family, trafficking in persons, reproductive rights and violence against women, and the impact of economic and social policies on violence against women.[34]

Still, in 1994 the International Conference on Population and Development, held in Cairo, acknowledged the inter-linkages between women's empowerment and autonomy and protection from gender-based violence.[35]

The following year the Beijing World Conference placed violence against women squarely on the women's rights agenda, identifying it as one of twelve priority areas of concern.[36] Beijing highlighted particular

[30] *Ibid*., Pt II, para. 38.

[31] UN Declaration on the Elimination of Violence against Women 1993 (DEVAW), GA res. A/RES/48/104, 20 December 1993.

[32] UN Commission on Human Rights (now UN Human Rights Council), Special Rapporteur on Violence against Women, Its Causes and Consequences (SR-VAW), UN Doc. E/CN.4/RES/1994/45, 4 March 1994.

[33] SR-VAW, 15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences: A Critical Appraisal 1994–2009, no UN Doc., 8, available at: www.ohchr.org.

[34] See, e.g., SR-VAW, Ms. Radhika Coomaraswamy, *Cultural Practices in the Family that are Violent towards Women*, UN Doc. E/CN.4/2002/83, 31 January 2002; *A Framework for Model Legislation on Domestic Violence*, UN Doc. E/CN.4/1996/53/Add.2, 2 February 1996; *Trafficking in Women, Women's Migration and Violence against Women*, UN Doc. E/CN.4/2000/68, 29 February 2000; *Economic and Social Policy and Its Impact on Violence against Women*, UN Doc. E/CN.4/2000/68/Add.5, 24 February 2000.

[35] International Conference on Population and Development, Cairo Programme of Action, 5–13 September 1994 (no UN Doc.), Ch. IV.

[36] World Conference on Women, Beijing Declaration and Platform for Action, UN Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), Pt. D.

harms not specifically mentioned in the DEVAW, including systematic rape and forced pregnancy during armed conflict (not, however, during peacetime), sexual slavery, forced sterilisation and forced abortion, female infanticide, and pre-natal sex selection.[37] As follow-up to DEVAW and Beijing, the UN General Assembly called upon the UN Development Fund for Women (UNIFEM) to strengthen its role in eliminating violence against women.[38] The Beijing +5 review further called for the criminalisation of all forms of violence against women[39] and recognised links between gender-related violence and prejudice, racism and racial discrimination, xenophobia, pornography, ethnic cleansing, armed conflict, foreign occupation, religious and anti-religious extremism, and terrorism.[40] Neither the Beijing Conference nor the follow-up meetings have been without constraints, not least disagreements over contentious issues such as abortion.[41]

By the late 1990s, and following developments already mentioned above in international criminal law, rape perpetrated by state officials for the purposes of interrogation or to force a confession from women within state custody had been recognised as a form of torture under international and regional human rights instruments.[42]

In 2000 two other human rights treaty bodies – the Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD) – issued general comments on the gender-related dimensions of human rights violations, recognising in particular that rape is a form of torture.[43] In 2005 the Committee on Economic, Social

[37] *Ibid*., paras. 114–115.

[38] GA res. A/RES/50/166, 16 February 1999, UN Development Fund for Women to Strengthen Its Role in Eliminating Violence against Women, para. 2.

[39] Beijing +5, Further Actions and Initiatives to Implement the Beijing Declaration and Programme for Action, UN Doc. A/RES/S-23/3 (2000), para. 69(c).

[40] SR-VAW, 15 Years of the United Nations Special Rapporteur on Violence against Women, 5.

[41] For more on the world conferences and follow-up to Beijing, see the website of the Commission on the Status of Women (CSW), at: www.un.org/womenwatch/daw/csw/critical.htm.

[42] See, e.g., *Meija v Peru* I-A Comm. HR, Report No. 5/96, Case 10.970, 1996 OAS Doc. OEA/Ser.L/V/II.91; *Aydin* v. *Turkey* (1997) 25 EHRR 251; *Miguel Castro-Castro Prison* v. *Peru*, I-ACtHR, Judgement of 25 November 2006 (Merits, Reparations and Costs); *C. T. and K. M.* v. *Sweden*, CAT 279/2005, decided 17 November 2006.

[43] Human Rights Committee (HRC), General Comment No. 28: Equality of Rights Between Men and Women (Article 3) (2000), UN Doc. CCPR/C/21/Rev.1/Add.10, para. 11; Committee on Elimination of Racial Discrimination (CERD), General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination (2000), UN Doc. HRI/GEN/1/Rev.7.