VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW

Since the mid-1990s increasing international attention has been paid to the issue of violence against women; however, there is still no explicit international human rights treaty prohibition on violence against women and the issue remains poorly defined and understood under international human rights law.

Drawing on feminist theories of international law and human rights, this critical examination of the United Nations' legal approaches to violence against women analyses the merits of strategies which incorporate women's concerns of violence within existing human rights norms such as equality norms, the right to life, and the prohibition against torture. Although feminist strategies of inclusion have been necessary as well as symbolically powerful for women, the book argues that they also carry their own problems and limitations, prevent a more radical transformation of the human rights system, and ultimately reinforce the unequal position of women under international law.

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PREFACE

In the 1990s I began working for the United Nations High Commissioner for Refugees (UNHCR). My first assignment was in Sarajevo, Bosnia and Herzegovina, at the end of the violent conflict there. It was at a time when feminist scholarship was becoming particularly interested in women's rights under international humanitarian law in the context of war. This was my first encounter of working with women who had survived the horrors of armed conflict during which the worst traits of humanity are exhibited, and as later conflicts continue to show, violence against civilians occurs with increasing regularity. Part of my job was to find protection solutions for the Kosovo Albanian and Roma refugees who had sought asylum in Bosnia, in particular the many victims of rape and sexual violence. These solutions included finding resettlement places for them and their families in third countries. Most of the women and girls I met had been subjected to rape and other forms of physical and sexual assault, often multiple times, held as sex slaves, and deprived of their liberty.

In order to provide protection to these women and to offer them durable solutions in the form of resettlement, we first had to establish that they were 'refugees' and that they had been 'persecuted' according to the definition of a 'refugee' under Article 1A(2) of the Convention relating to the Status of Refugees 1951.[1] We began framing their cases as incidents of torture, an approach that was later supported by feminist writings around that time. It was not yet accepted practice to proceed directly from the violence they had suffered to a finding of 'persecution'; rather one had to travel indirectly via an explicit human rights provision. This was because rape and sexual violence committed against women in times of war was still seen as an unfortunate consequence of war, or as personal rather than political and, consequently, not within the boundaries of international law. With this political background in mind, we relied

[1] Convention relating to the Status of Refugees 1951, GA res. 429 (V), 14 December 1950, 189 UNTS 150; entered into force 22 April 1954.

primarily on expanded interpretations of the torture prohibition to apply to various acts of violence perpetrated on women, but we also referred to the right to liberty and security of person, to privacy, and to the prohibition on slavery. In other words, in order for women's experiences of the war to be recognised as being of international concern and for these women to be viewed as 'refugees', we needed to construct our interventions in the language of the state, and as human rights violations. This was necessary because we could not point to a particular line in any human rights text that directly applied; meanwhile, the accepted understanding under international law of 'persecution' remained mostly confined to instances of torture and inhuman treatment carried out against political dissidents by public authorities in state custody, and not to victims of rape that took place in their homes, in hotels turned into rape camps, or on military bases.

Our strategy proved effective, largely owing to the fact that enough sympathy and guilt had been generated by the Bosnian and Kosovan conflicts, and the inability of the West and the United Nations to halt the war, that resettlement countries were prepared to accept my submissions without question. I found myself asking, though, why there was no international prohibition on violence against women, when clearly it was one of the most horrific violations committed in wartime. This also led to further questions about violence against women in peacetime, when international humanitarian law does not normally apply.[2] This book is very much inspired by my questions at that time, and seeks in some ways to provide answers to them.

Although the International Criminal Tribunals for the former Yugoslavia and Rwanda began developing jurisprudence on these questions, the drafters of the Statute of the International Criminal Court realised that express provisions on rape, sexual slavery, enforced pregnancy, enforced prostitution, or other sexual acts of comparable gravity were needed, at least as a way of removing any remaining doubt that such acts can constitute war crimes or crimes against humanity.[3] In contrast,

[2] Although crimes against humanity may be committed in peacetime, it is rarely invoked and there has never been an international decision on the same.

[3] See, Articles 7(1)(g) and 8(2)(b)(xxii), Rome Statute of the International Criminal Court 1998, UN Doc. A/CONF.183/9, 17 July 1998, 2187 UNTS 90; entered into force 1 July 2002. The inclusion of these crimes within the Rome Statute has not, of course, resolved the issue of a lack of implementation and other problems associated with attaining justice for women who are victims of such acts. See, e.g., *Prosecutor* v. *Lubanga*, ICC, Case No. ICC-01/04–01/06, Appeals judgment, 7 December 2009, on legal characterisation of the facts (case arising out of the failure to indict Lubanga for crimes of sexual slavery and

neither international human rights law nor international refugee law have followed this approach of treaty amendment, although new human rights treaties have been developed at the regional level. These areas of law are thus out of touch with other international legal developments. The institutions supervising international human rights law are, therefore, still forced to adopt various strategies of inclusion via interpretation, with mixed success. The strategies of these institutions are very much like my arguments used for refugee resettlement purposes in Sarajevo in the 1990s, and they form the focus of this book.

Drawing on feminist theories of international law, this book critically examines how women's lives, particularly the violence they face, have been understood and responded to in international human rights jurisprudence. Essentially international human rights bodies have adopted two main pragmatic strategies to include violence against women within the existing human rights framework: the first, to conceptualise violence against women as a form of sex discrimination and second, to creatively reinterpret existing human rights provisions so that they apply to the experiences of women. In this book I centre my discussion of the latter strategy on the rights to life and to be free from torture and other cruel, inhuman, or degrading treatment or punishment. Just as we used the tools at our disposal in Sarajevo, international human rights bodies have been developing similar strategies owing to the fact that there remains no universally agreed binding treaty norm explicitly prohibiting violence against women. The UN's 'gender mainstreaming' agenda has also made interpretative inclusion rather than textual amendments the preferred practice.

'Around the world at least one woman in every three has been beaten, coerced into sex, or otherwise abused in her lifetime. Most often the abuser is a member of her own family.'[4] The statistics are staggering and indicate that the phenomenon of violence against women is universal in scope. One of the manifestations of women's inequality is violence. Whether we ought to label that violence as sex discrimination or some

cruel/inhuman treatment committed against women within the context of the conflict in the Democratic Republic of Congo. Victims' rights advocates criticised the failure to do so and a legal challenge was made to change the nature of the crimes on the indictment, which ultimately failed on appeal due to the fact that no details on the elements of the offences to be considered were included, nor was there any analysis on how such elements might be covered by the facts described in the charges.)

[4] L. Heise, M. Ellsberg and M. Gottemoeller, *Ending Violence against Women* (John Hopkins School of Public Health and the Center for Health and Gender Equality, 2000), Editor's Summary, available at: www.infoforhealth.org/pr/l11edsum.shtml.

other prohibited conduct rather than violence per se is a central question this book confronts. So, too, I query whether calling certain forms of violence against women 'torture' is an appropriate, even adequate, label or response to this issue. This book investigates the jurisprudential practices of the United Nations human rights treaty bodies in particular, as well as other international and regional human rights courts as far as they have adopted complementary practices.

The starting (and ending) point of this work is the recognition of the value of international human rights law as a common language reflecting universal values, and as a shared legal system that articulates basic standards of a life with dignity. This is despite the many contradictions and concerns of human rights law, notably those highlighted by feminist theory and discourse, which I discuss in Chapter 2. In the past I have written on the possibilities and merits of reinterpreting statutes and treaties in order to include the particular harms and risks women face.[5] In most of this work I was challenged as a lawyer to articulate new arguments for women's inclusion. I have spent many hours revisiting statutes and arguing that they are broader or narrower than how they first appear. I still find this approach analytically exciting, as well as crucial to the recognition of the abuses committed daily against women. I continue to believe that women and their advocates should be free to pursue any strategy available to them in order to have their rights recognised and their concerns raised on the international agenda. However, this book is about more than that, and it is broader than my usual work. It is about the merits of these strategies in the long term. I take a step away from being the 'black letter' lawyer, and towards being a critical legal theorist. I am interested here in what these strategic choices actually mean for women – conceptually, structurally, and procedurally. The study is confronted, time and again, by the ultimate paradox of international human rights law and these so-called inclusion or 'gender mainstreaming' strategies for women: that the more that women work within the structures of existing law and institutions, the more the power and sexual inequalities inherent in the system can be reinforced.

As pragmatic responses to gender gaps in the law, I acknowledge that these feminist strategies have been both conceptually and substantively powerful for the advancement of women's rights, including putting

[5] See, e.g., A. Edwards, 'Age and Gender Dimensions in International Refugee Law', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), 46.

violence against women on the international human rights agenda. However, I also note that rereading existing provisions to apply them to the specific circumstances of women has had mixed results, carries its own problems and limitations, and, ultimately, and most strikingly, serves to continue to treat women unequally under international law. 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.

This observation is not merely theoretical. The practical effect of holding women to the same standards as men *de jure* is to impose additional burdens on women de facto. This is because in order to be heard, women need to convince international decision-making bodies that what has been done to them is worthy of international attention, by *either* (a) equating it to harm normally perpetrated against men and incorporating their experiences into provisions designed with those of men in mind, *or* (b) justifying why their experiences 'deserve' the establishment of an exception to the rule. The first strategy reinforces sexual hierarchies, while the second exceptionalises and 'essentialises' the experiences of women, with its attendant negative consequences for women's agency. I argue that the effect of these processes is, therefore, to treat women unequally under international law; and in turn to support the gender bias in the system and to prevent any deeper transformation. International human rights law has shifted from a period of excluding women from mainstream human rights, an exclusion that characterised its first fifty years, to a stage of rhetorical inclusion, albeit one of continuing inequality.

Yet despite this paradox, I conclude, too, that women must continue to fight for women's rights within the mainstream. Unfortunately, I do not find a suitable path out of this dichotomy, only some incremental improvements to the system as a whole. Women must therefore continue to play by men's rules, all the time slowly chipping away at the walls of the house around them and questioning the system from within. No other strategy has succeeded for any other minority group. The grace of the powerful few is a necessary, albeit unfair, prerequisite to recognition within their system. Nonetheless, while women continue this fight inside the system – including here within both the mainstream and women-specific institutions – they must also be cognisant of the broader picture, and the limitations of their strategies, in the hope of being able to elaborate, in time, better strategies for the future. The benefits of international law are there. It has been sufficiently flexible to accommodate the claims

of many diverse groups – women, children, racial minorities, indigenous groups, persons with disabilities – although its work is not yet done. This book hopes to highlight that there is scope for improving the human rights house, while acknowledging the conundrums of the many rooms within the system around which women must navigate as less than equal participants; or to put it another way, as visitors to rather than owners of the house.

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