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Domestic violence through a human rights lens

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Introduction

Whilst it might seem clear to many today that domestic violence is an abuse of the human rights of its victims, for a long time, international human rights law was deemed inappropriate for dealing with domestic violence cases. The principal reason for this was the supposed incompatibility between the “public” sphere of international human rights, and the “private” sphere of the home or family in which domestic violence occurs. Whilst human rights law was developed to protect individuals from abuses by the State (Thomas & Beasley, 1995), domestic violence as a manifestation of abuse not by the State but by another individual was thus outside the remit of human rights law (Bettinger-Lopez, 2008). Today, in great part thanks to feminist mobilizations, domestic violence has been recognized as a human rights issue and is explicitly addressed in various international human rights laws and conventions. There has thus been a clear advance in the international normative framework for protecting victims of domestic violence (Joachim, 2007). However, despite this recognition in international human rights laws and norms, we can argue that women's human rights to be free from domestic violence are still not being realized due to a range of factors, including both a continuing reticence by States to acknowledge domestic violence as a human rights issue, especially when this comes into conflict with other political priorities and policies, and by procedural and other barriers that prevent victims of domestic violence from accessing justice through the mobilization of human rights law. Further, it can be argued that the move itself to place the issue of domestic violence at the centre of universal human rights discourse can lead to the de-historicization and de-territorialization of this violence by imposing a universal model drawn from the experience of women in the Global North, and that the universalist tendencies of human rights can also mask inequalities between women within States. In this chapter we will first trace the way in which domestic violence came to be considered an issue for human rights, before addressing some of the issues which arise from the use of human rights norms and discourse to tackle domestic violence, and some of the barriers which still exist to the protection of victims of domestic violence under human rights law. We will use the case studies of domestic violence in conflict and post-conflict, and domestic violence as a form of gender-based persecution in asylum claims to illustrate some of the limits to the human rights framework for claiming protection for victims of domestic violence.
Discussion and analysis

Putting domestic violence on the human rights agenda

The recognition that domestic violence is a human rights issue arrived relatively late within the institutionalization and globalization of normative human rights instruments. In fact, we can argue that the recognition of domestic violence as a breach of human rights has only been assured since the early 1990s as a result of widespread feminist mobilizations and lobbying of international human rights bodies. The reasons for this late adoption of domestic violence (or more widely violence against women or gender-based violence) as an international human rights issue can be attributed to three interlinked factors. Firstly, the widely entrenched division between the public and the private, and the belief that international human rights law should deal with public relations amongst States, and protection of citizens from public breaches of rights carried out by the State. Within this framework, domestic violence which by definition occurs in the private or domestic sphere was not considered a proper object for human rights laws or conventions. Secondly, human rights law has traditionally granted a privileged position to civil and political rights, at the expense of economic, social and cultural rights (although there is a formal recognition that all of these rights are interdependent). And as Sullivan explains:

The liberal ideology underlying much of civil and political rights discourse views the law, principally as a means of regulating State intervention in private life, generally without acknowledging the role of the State itself in constructing the separation of public from private life.

(Sullivan, 1995, p. 127)

The privileging of civil and political rights thus leads human rights law to focus more on constraining the power of the State than on affirming its duties to ensure rights (Sullivan, 1995). Thirdly, we can point to the importance of norms regarding the family and the protection of the family and its privacy. This centrality of the family as a unit, which should be protected, leads to the ignoring or neglecting of abuses which are committed within the family itself. To quote Sullivan again, “Because the family is the site of many of the most egregious violations of women’s physical and mental integrity, any blanket deference to the institution of the family or privacy rights within the family has disastrous consequences for women” (Sullivan, 1995, p. 127). These three constraints meant that it took a large-scale feminist mobilization to put women’s rights onto the human rights agenda, and in particular to argue for the recognition of domestic violence as a human rights issue.

From the 1990s onwards the recognition that domestic violence is a breach of human rights has been substantiated by the adoption of a range of international norms and standards around violence against women including domestic violence. Feminist mobilizations around international conferences gradually led to the acknowledgement that violence against women, including domestic violence, is an international human rights issue. To gain this recognition, activists used the argument that States’ failure to protect women from violence is in itself a human rights violation, and that States must exercise “due diligence” not only in not perpetrating violence against their citizens, but in actively protecting these citizens from abuse (Bunch, 1990; Thomas & Beasley, 1995). Due diligence can be explained as the principle that a State “bears the duty of preventing, protecting, investigating, and compensating for wrongs committed by the state, its agents, and more recently nonstate actors” (McWilliams & Ni Aolain, 2016). Led by the Center for Women’s Global Leadership, based in the USA, a massive mobilization
around the 1993 UN Conference on Human Rights in Vienna was organized. This mobilization involved a worldwide petition calling for violence against women to be considered as a central issue of the conference (Friedman, 1995), and for the recognition of “gender violence as a universal phenomenon which takes many forms across culture, race and class . . . as a violation of human rights requiring immediate action” (Cited in Bunch & Frost, 2000). The Vienna Declaration issued at the conclusion of the Conference was hailed as a milestone in recognizing violence against women as a breach of human rights. Article 18 of the Declaration states that:

The human rights of women and the girl child are an inalienable, integral and indivisible part of human rights. . . . Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.

As Kelly remarks, the use of the strongest human rights language was a sign that gender-based violence including domestic violence was finally being taken seriously as a human rights issue (Kelly, 2005).

The Vienna Conference also called for the appointment of a special rapporteur on violence against women, and the drafting of a declaration on the elimination of violence against women (Engle Merry, 2006). The UN Declaration on the Elimination of Violence Against Women (DEVAW) was duly adopted in 1993 and the following year, in 1994, the UN Commission on Human Rights appointed a special rapporteur as requested. The role of the Special Rapporteur is to investigate the issue of violence against women and to suggest measures to be taken by governments, regional and international organizations to prevent such violence and bring remedies to victims.

International feminist mobilization meant that the issue of violence against women was also introduced into other international human rights conventions. Whilst the issue of violence against women was a notable omission from the original CEDAW Convention (1979), “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” (Edwards, 2011, p. 8). The CEDAW Committee’s General Recommendation No. 19 (1992) thus states that violence against women constitutes discrimination against women and impairs or nullifies women’s enjoyment of human rights and fundamental freedoms. General Recommendation No. 19 also underlined States’ active responsibility for protecting women, affirming that:

Discrimination under the Convention is not restricted to action by or on behalf of Governments. . . . Under general international law and specific human rights covenants, States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

And more recently, General Recommendation No. 35 (2017) updates the previous recommendation and includes a recognition of the structural causes of violence and notably “the ideology of men’s entitlement and privilege over women”. General Recommendation No. 35 also calls for recognition of the impacts of multiple and intersecting forms of discrimination on women’s experiences of violence.
In addition to these international commitments on violence against women, there are also regional conventions including the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (also known as the Belem Convention), and the Protocol to the African Charter on Human and People’s Rights on the Human Rights of Women of 2003 (also known as the Maputo Protocol). Most recently, in 2011, the Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) was adopted by the Council of Europe. The Istanbul Convention has been seen as particularly significant by women’s rights activists because unlike other soft law conventions, it is legally binding on States (McQuigg, 2017). A monitoring mechanism called the GREVIO (the Group of Experts on Action Against Violence Against Women) has been set up to monitor States’ adherence to the Convention and to report regularly on this. Perhaps most significantly the Istanbul Convention has been praised for the way in which it links violence against women to underlying structures of gender inequality and defines violence against women as both a cause and a consequence of gendered power relations. The Convention thus states explicitly that the elimination of violence against women requires a holistic approach, incorporating the attainment of gender equality. And whilst other Conventions have tended to subsume the question of domestic violence in the wider issue of violence against women or gender-based violence, the Istanbul Convention has a specific definition of domestic violence in its Article 3 which affirms that:

“Domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.

(Council of Europe, 2011, Article 3b)

There has thus been great progress made in enshrining the issue of domestic violence within human rights laws and norms. However, the fact that much of this remains in soft law is problematic in that it relies on the will of individual States to implement international human rights norms at the national level. As McWilliams and Ni Aolain argue,

Norm development is merely a starting point. The contemporary challenge clearly lies in enforcement, preventing a backlash to the normative rules, and closing off avenues for cultural relativism to be used as a rationale at the national level to prevent these rules from becoming operative.

(McWilliams & Ni Aolain, 2016, p. 10)

The non-binding nature of much of this normative framework means that national governments may feel free to ignore it when other political priorities arise. In a report for the UN, for example, it was found that out of a sample of twenty States, none had fulfilled their obligations of timely submission of reports to the international treaty monitoring bodies (McQuigg, 2011). International human rights norms can be used for “naming and shaming” to attempt to force national governments to take action on certain issues, and they are also a useful tool for local activists to help them put the issue of domestic violence on the national political agenda, and to claim international legitimacy in doing so. But barriers still remain. In the following section we will explore the question of universalism of international human rights, and whether this undermines the legitimacy and efficacy of these norms.


Problems of universalism

Whilst the acceptance that domestic violence is a human rights issue, and its incorporation into international human rights law has been widely welcomed, this use of international laws and norms could also be argued to be problematic, in that it has led in some cases to the imposition of a universalist framework which is in fact based on norms from the Global North, into other contexts where this framework may not in fact be suitable. Engle Merry (2006) has discussed at length the problems of vernacularization of international human rights norms into local and national settings and the difficulties that this engenders. Amongst several “conundrums” she highlights in “applying human rights to local places”, is the problem that “human rights law is committed to setting universal standards using legal rationality, yet this stance impedes adapting those standards to the particulars of local context” (Engle Merry, 2006, p. 5).

Some post-colonial feminist activists contend that feminists from the Global North arguing from a position of supposed “universalism” are in fact guilty of “othering” women in the Global South, painting them as “victims” of essentialized gendered and cultural models (Razack, 1995; Kapur, 2002). These universal models are applied without consideration of how varying local cultures construct their norms and ideas on family, marriage, law or violence, for example (Morgaine, 2007). As Razack argues, the issue of violence against women has played a central role in the “women’s rights are human rights” campaign by providing a universal signifier of woman, often de-historicized and de-territorialized, and neglecting the various systems and forms of oppression, violence and inequality which exist between North and South (Razack, 1995). Proponents of universal rights have in some cases portrayed their defence of women’s human rights and the fight against domestic violence as a struggle against cultural relativism which they argue justifies impunity for perpetrators of domestic violence on the grounds of the defence of culture or tradition. But in doing so there is a risk of essentializing “other” cultures as bad for women, whilst ignoring the aspects of cultures in countries of the Global North which also facilitate or exacerbate the incidence of domestic violence.

Concerns about the universalizing nature of human rights discourse on violence against women are explored in Hajjar’s analysis of the interactions of Islamic family law and human rights discourse on violence against women in Muslim societies (2004). She argues that contrary to some feminist arguments, engaging seriously with religious beliefs and practices does not equate with condoning cultural relativism and thus justifying violence against women. Instead she advocates a comparative analysis which focuses on the central role the State plays in struggles over religion and women’s rights as they come to bear on issues of domestic violence. This type of comparative analysis allows us to escape from the dichotomy between universalism and cultural relativism, and to perceive that in all States there are to different degrees struggles over these issues, and that in each case local contextualization is important to understand how the struggle against domestic violence can be understood as part of a wider struggle to ensure that the State protects the rights of all of its citizens.

Linked to the already mentioned concerns with the pretend universalism of human rights norms, and the need for contextualization, is the way in which States may discriminate between citizens not only on the basis of gender, but on that of race, religion, social class, etc. In particular, there are questions to be asked about whether or not States guarantee the right to protection from domestic violence to all women equally, or whether indigenous and migrant women are in general less protected than others (Kelly, 2016). Grewal, for example, points to the importance of the critique by black feminists in the US who have challenged the mainstream women’s human rights movement for their failures to employ a comprehensive and culturally sensitive framework and analysis which would consider the situation of black women (Grewal, 1999).
Similarly, research on domestic violence against indigenous women has shown the necessity of not assuming a universal rights framework, and of considering the violence not only of gender, but of race, post-colonialism, and of being a minority with less access to all social, economic and political resources (Andrews, 1996). These critiques do not completely negate the importance and role of international human rights in fighting domestic violence but do show the necessity of a nuanced and complex view which understands the way in which global rights must be contextualized within different national and local contexts.

**Domestic violence in conflict and post-conflict**

A focus of international human rights interventions concerning violence against women in recent years has been on the prevalence of violence in conflict and post-conflict. In 2000 the UN Security Council passed Resolution 1325 on Women, Peace and Security, a move that was hailed by the transnational feminist community as a great step forward in addressing gender issues and gender-based violence in international policies as it was in fact the first time that the Security Council had discussed and passed a resolution on women’s rights and gender issues. As with previous international conventions and declarations on the elimination of violence against women, the placing of the question of gender-based violence on the international agenda must be welcomed (especially considering its long absence). However, there have also been criticisms of the way in which the question of gender-based violence has been framed in international political discussion, as well as some of the ways in which States and international organizations have designed programmes and activities on the ground to prevent violence and support “victims”. One of the issues which arises is that the focus on sexual violence during conflict and post-conflict, and specifically sexual violence committed by armed groups, might obscure the question of domestic violence which is also prevalent in conflict and post-conflict settings. The widespread prevalence of rape and sexual violence during the Rwandan genocide or during ongoing conflicts in the Democratic Republic of Congo or Sudan, for example, have drawn international attention and have led to the creation of initiatives such as the Preventing Sexual Violence in Conflict Initiative (PSVI) launched by the UK Government in 2013, an initiative which has been criticized for the ways in which it has framed the issue of sexual violence in conflict (Kirby, 2015). Although this global public and political attention to the issue of sexual violence and rape in conflict can be welcomed if it brings a greater response to the problem, it can also be argued that the focus has been switched entirely to this sub-section of the range of different forms of violence against women which has diverted attention and action away from the fight against other forms of violence including domestic violence in the countries concerned. Targeting the elimination of rape in conflict has narrowed the focus of actions even further to target rape and sexual violence committed as a direct result of armed conflict, that is committed by soldiers or armed groups, ignoring other forms of violence which result from or are exacerbated by conflict. Research in the Democratic Republic of Congo, for example, has shown that increased attention to and funding for initiatives to prevent rape and sexual violence and to support victims of such violence, have resulted in a decrease in attention paid to other forms of violence such as domestic violence (Douma & Hilhorst, 2012; Freedman, 2015a). This neglect is particularly worrying as domestic violence has been shown to have increased during the conflict and post-conflict period in the country.

Thus, although there has been much research on sexual violence in conflict, there is far less that explores other forms of gender-based violence such as domestic violence which occurs during or as a result of conflicts. As a result, there is very little evidence about the ways in which conflicts may cause or exacerbate different forms of violence such as domestic violence.
Incidents of domestic violence, for example, may thus be masked by the high attention paid
to sexual violence in conflict situations (Stark & Ager, 2011; Hossain et al., 2014) although
there is evidence that conflict increases rates of perpetration of violence against women in the
home (Stark & Ager, 2011; Horn et al., 2014). Sexual violence by non-combatants may also
be overlooked although there is evidence that this also increases during times of armed conflict
(Kaufman & Williams, 2015). Existing research suggests that those working to prevent violence
against women need to spend more time advocating at legal and policy levels for stronger
mechanisms for the prevention of violence within the home (Stark & Ager, 2011).

**Public versus private violence: domestic violence in refugee
law and policy**

An illustrative example of the barriers that exist to the utilization of human rights for protection
of victims of domestic violence is that of the consideration of domestic violence as a grounds
for protection under international refugee law. The 1951 Convention on the Status of Refu-
gees, like many international conventions of its time, does not consider gender as a grounds
for granting refugee status. A refugee is defined under the 1951 Convention, Article 1(A)2 as
a person who

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

Whilst there have been ongoing debates on whether gender should be added as a sixth ground
of persecution under the Convention, the favoured solution advanced by the United Nations
High Commission for Refugees (UNHCR) is that in States’ application and interpretation
of the Convention they should take gender-related forms of persecution, including domestic
violence, into account under one of the other five grounds of persecution. In practice, this
means that most cases related to gender-based violence including domestic violence are cur-
rently treated under the category of a “particular social group”, and that women who flee from
domestic violence and seek asylum in another country have to prove that they are members of
such as “particular social group”. As argued earlier, one of the main reasons for the late integra-
tion of domestic violence into international human rights conventions was the belief that this
was a “private” matter which was not a suitable domain of intervention for international laws
or norms. This belief that domestic violence is a private or family matter persists in many States
with regard to their application of refugee laws and constitutes a barrier to women’s claims for
this reason (Freedman, 2015b).

As domestic violence is considered as a private or family matter in many countries and fre-
quently remains invisible, even if it is reported to the police, no action is taken (Boyd, 2018).
Many women do not, therefore, even contemplate seeking protection from their own national
authorities, let alone fleeing to seek international protection in another State. But for those that
do try and claim asylum on the grounds of domestic violence, there are many obstacles. These
are exacerbated by the fact that in all of the States which grant asylum, domestic violence is
also widespread, and in these States as well there may be a lack of effective action to protect
women nationals from this type of violence. The normalization of domestic violence is thus so pervasive that it is often not registered as being a proper ground for claiming asylum. One of the most famous cases in which a woman attempted to claim asylum on the grounds of domestic violence was that of Rodi Alvarado, a Guatemalan woman, who sought asylum in the US to escape brutal beatings and violence from her husband. The immigration authorities in the US admitted that the violence she had suffered was “heinous” and acknowledged that although she had sought protection from the Guatemalan police, she had received no help from them. They found, however, that because her husband’s actions were “private” and “independent”, her treatment could not be qualified as persecution under the terms of the Geneva Convention (Heyman, 2005).

This evocation of a public-private division means that in practice domestic violence is a type of violence often dismissed as “irrelevant” to asylum claims, even when the women who experience domestic violence can expect no help or protection from the police or State authorities in their country of origin. Because this type of violence takes place within the family, and is indeed perpetrated by family members, it is somehow perceived as less severe than other types of violence which are experienced in the public sphere (Copelon, 1994). A woman who is severely beaten by her husband or father can thus expect less recognition from immigration officials and judges than one who is beaten by the police in her country of origin. Crawley, for example, recounts the experience of two women from Ghana who sought asylum in the UK. They had both suffered severe domestic violence at the hands of their husbands. One of the women recounts the violence thus:

My husband started chasing girls after my son was born. He wouldn’t come home. If I said something about it he would beat me, with his hands, his belt. I had a very swollen face. He beat me for three years. He said if I tried to stop him he would cut me with knives and kill me. He didn’t want me to divorce and his family has to divorce me.

(Ghanaian woman, cited in Crawley, 2001, p. 318)

Although the abuse this woman and her compatriot suffered was so severe that they both fled the country without their children, their asylum claims were described as “frivolous”. The adjudicator at the appeal hearing of one of the women claimed that as far as he understood the law, “being beaten up by your husband is not a ground for asylum however deplorable it might be” (cited in Crawley, 2001, p. 319). This type of official reaction shows the way in which violence which takes place within the home is still considered less “serious” and less worthy of official attention by immigration officials than other forms of violence, even though a woman who is beaten in her home every day by her husband or intimate partner may under other criteria of judgement be considered just as much a victim of “persecution” as a political prisoner who is beaten by a guard in his prison cell. The continuing failure of States to interpret refugee law in a way which gives adequate protection to victims of domestic violence can be seen as a result of the “securitization” of migration policy and the general reluctance of richer States in the Global North to admit refugees. The idea of widening protection to victims of domestic violence goes against this political will to limit migration, including asylum and refugee migration. Thus, the advances in international law recognizing the “due diligence” of States to offer adequate protection against violence have not been fully incorporated into the area of refugee law. This remains one area where the human rights of victims of domestic violence are not fully respected, and the international protection that is offered remains weak.
Conclusions

The previous examples show that despite progress in ensuring that domestic violence is recognized as an international human rights issue, the fact of including domestic violence in international human rights laws and conventions has not in itself guaranteed greater protection for the victims of such violence. Moreover, it seems clear that some victims of domestic violence are far more able to avail themselves of international human rights norms in this respect than others, depending on their geographical location, and their social, economic and political situation. One of the ongoing problems is the non-binding nature of much of the normative human rights framework, and the difficulties in ensuring the implementation of human rights law, meaning that as Copelon remarks: “the international human rights system still operates more in rhetoric than in reality” (Copelon, 2003). This is evident in the example of the (non)protection of women claiming asylum when fleeing domestic violence as discussed earlier.

To make human rights norms effective in fighting domestic violence and in seeking redress for victims, it is thus necessary to push national governments to take more responsibility for protecting the human rights of their citizens. It is also vital that the issue of domestic violence be considered in a wider context of gender inequalities which are situated within an unequal global system, and to realize that victims of domestic violence are situated within specific local contexts which must be taken into account when thinking about their human rights. When thinking about domestic violence it is thus necessary to theorize about its place within wider structural gender inequalities – economic, political and social. Therefore, to make any real inroads into combating and eventually eliminating domestic violence, it is vital to tackle the basic structural gender inequalities which underlie it, and to analyze and take action on institutionalized forms of economic and gender inequality at national and international levels. Measures such as land reform to allow women access to and ownership of land, economic and employment opportunities to reduce economic inequalities between men and women, and measures to increase women’s political participation and representation, can reduce these structural gender inequalities and provide the basis for a more gender equal society. Recognition that women’s experiences of physical and sexual violence are inextricably linked to these other forms of social, economic and political inequality, means that to be effective, responses to violence must also be holistic and address all of these forms of gender inequality. This focus on wider structural gender inequalities, including global inequalities based on relations of violence and domination between the Global North and South, should allow for a more situated vision of domestic violence and of the way in which universal human rights discourse can be challenged to take into account the lived situations of women in their local contexts. Reilly argues for forms of cosmopolitan feminism which are at once committed to international human rights laws, but at the same time take into account the “intersectionality of different forms of oppression, across economic, social, cultural, and political domains” (Reilly, 2007, p. 194). This is a prerequisite for harnessing the full power of human rights in the global struggle to eliminate domestic violence and to seek justice for victims of this violence.

Critical findings

- Despite progress in ensuring that domestic violence is recognized as an international human rights issue, the fact of including domestic violence in international human rights laws and conventions has not in itself guaranteed greater protection for the victims of such violence.
Through a human rights lens

- Campaigning and implementation of human rights norms for victims of domestic violence has sometimes been hampered by the dichotomies created by the debates over universalism versus cultural relativism.
- The ability to benefit from international human rights norms and conventions as a protection from domestic violence depends to a great extent on the identity and the location of the person concerned. Asylum seekers, refugees and migrants, indigenous women, women living in conflict zones, for example, find it much harder to access justice.

Implications

- The main challenge that exists today is ensuring that global norms recognizing domestic violence as a human rights violation are enforced at local and national levels.
- To do so it is important to overcome oppositions between feminists over universalism versus cultural relativism and to understand the ways in which global rights must be contextualized within different national and local contexts.
- It is also vital to recontextualize debates over domestic violence within the wider global context of gender inequalities, including global inequalities based on relations of violence and domination between the Global North and South.
- International human rights laws and conventions can only be effectively implemented locally if they take account of the intersectionality of various forms of oppression and violence.

References


