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# Many Roads to Justice for Women: A Foreword to the Symposium Issue of the *Berkeley Journal of International Law*

By  
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In 1979, at the age of twenty, Neris Gonzalez was captured by the Salvadoran National Guard. She was eight months pregnant at the time. She was a catechist with the Catholic Church, at that time under the leadership of Archbishop Oscar Romero, an advocate of the church working closely with the most disenfranchised. One of Neris' projects was to teach *campesinos*, (*peasants*) how to count. Learning to count was an important way to empower farm workers, as they would be able to calculate how much money they were owed by the landowners who often exploited them.

During over two weeks of detention, Neris was tortured constantly, in ways that defy human imagination. She was raped repeatedly and subject to other forms of sexual violence. When her broken body was dumped at the side of a road, she was near death. Her baby was born prematurely and died two months later. She was nursed back to health by a compassionate woman, and later she came to the United States in search of true sanctuary. But how was Neris to find justice in all of this? Although the authorities may have broken Neris' body, they were unable to affect her courageous and passionate spirit, and she decided to fight back.

The Alien Tort Claims Act of 1789 allows victims of torts "in violation of the law of nations" to seek civil damages against the perpetrators or their commanders for gross human rights abuses.<sup>1</sup> In the summer of 2002, two Boalt Hall law students, Mary Beth Kaufman and Daniela Yanai, and I worked on behalf of Neris and two other Salvadoran refugees against that country's Minister of Defense and Director of the National Guard, who were now living in Florida.<sup>2</sup> Ultimately, a jury awarded the plaintiffs over \$54 million. The verdict was not only a milestone in ending the impunity of commanders for the actions of their subordinates, but established a public space where the three plaintiffs became

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1. Judiciary Act, 28 U.S.C. § 1350 (1789).

2. *Romagoza Gonzalez and Mauricio v. Garcia and Vides-Casanova*, No. 77 Civ. 99-8364 (District. Date).

the voices of not only themselves, but also of the 83,000 murdered or disappeared civilians in El Salvador.

I heard Neris' voice as I read the set of articles for this special issue of the *Berkeley Journal of International Law*. And it became clear to me that this symposium, like Neris' court action, is not about abstract concepts in law. What resounded throughout this issue of the *Journal* were the voices of the lived realities of women and the pain caused by the purveyors of war, the architects of the destruction of the minds, bodies, and spirits of women. This symposium is about real lives, real experiences, real witnessing, real testimony, real risk-taking, and real courage. The bravery of the "comfort women," of the Bosnian and Rwandan women survivors who sit in courtrooms facing their persecutors, of the mothers who are forced to leave children and husbands because of war, cruelty and famine, all of this resounds throughout this issue.

This issue of the *Journal* not only testifies to the experiences of specific women, but also pushes out the frontiers where women and their advocates struggle for justice. Just as Neris' fundamental human rights were advanced by tort law, this symposium links women's rights to other types of law—international criminal law, humanitarian law, immigration law, and family law. The intersection of these branches of law with the concerns of international human rights marks a crucial synergy. And the *Journal* has done a "mitzvah"<sup>3</sup> in devoting, for the first time, an issue to women. This focus, on the convergence of human rights and other types of law, could not be more timely. The work of international bodies, like the international tribunals and UN sub-agencies, regional organizations and international women's human rights organizations have put these issues front and center on the international stage. International law has been transformed forever.

Boalt Hall was honored to have The Honourable Madam Justice Louise Arbour address the symposium. Justice Arbour's leadership at the Prosecutor's Office of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTFY/ICTR) greatly advanced the thinking about criminal prosecution of sexual violence. In her talk, Justice Arbour connected her own experiences investigating allegations of brutality in a Canadian women's prison with her work with the two tribunals. For her, one of the most crucial aspects of this work was bringing to light the dark terrors that women historically have had to endure in silence. She credits domestic movements against violence on women with assisting in that transformation. Now, the gauntlet has been picked up on the international level as well. Justice Arbour interestingly raised the debate within the prosecutor's office about setting priorities for prosecutions. She noted that her office selected prosecutions that could advance a determination of high command culpability. But she queries whether this strategy is appropriate for sexual violence since there might be benefit in prosecuting actual perpetrators, "the Mr. Nobodies that are actually out there committing the crimes."<sup>4</sup> She

3. A "mitzvah" is a good deed in the Jewish tradition.

4. Justice Louise Arbour, *Stefan A. Riesenfeld Award Lecture—Crimes against Women under International Law*, 21 *BERKELEY J. INT'L L.* 196, 203 (2003).

displayed enormous sensitivity to the Bosnian and Rwandan victims of sexual violence by noting how difficult it is for them to testify, especially given the lack of reliable supportive infrastructures in their own countries. In closing, Justice Arbour emphasized that the work of the Tribunals was built on the foundation of the advocacy work for protection of women from sexual violence. Reciprocally, recent work to expand universal jurisdiction and to create the International Criminal Court has been built on the foundational work of the Tribunals. Justice Arbour, in no small measure, contributed to that reality.

Kelly Askin's article, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, provides a comprehensive review of the changes in international law regarding sexual violence against women.<sup>5</sup> Askin provides an overview of the relevant customary and treaty law norms, particularly within humanitarian law, relevant to her analysis. Focusing on the experiences of women and girls during armed conflict, Askin highlights the ways in which war increasingly is waged against the civilian population; in particular, she emphasizes the systematic and strategic use of sexual violence as "weapons of warfare" and "a core part of the war machine."<sup>6</sup> While Askin recognizes that rape and other gender violence were prohibited, as a matter of law, through the post WWII Tribunals at Nuremberg and Tokyo and the 1949 Geneva Conventions, the International Criminal Tribunals for the Former Yugoslavia and Rwanda have produced the most important jurisprudence on sexual violence. Askin's close reading of the five crucial decisions of the ICTY/ICTR presents a rich and nuanced understanding of the doctrinal evolution.

Askin examines the following concepts: the definition of rape; sexual violence (including non-physical violence) as fulfilling the elements of the definition of torture; rape as a crime against humanity and a war crime; rape as a crime of genocide; the criminal responsibility of superior commanders for war crimes and genocide; sexual violence against men; sexual violence as a grave breach of the Geneva Conventions, "willfully causing great suffering or serious injury to body or health;"<sup>7</sup> sexual slavery as a crime against humanity; sexual violence as "outrages upon personal dignity,"<sup>8</sup> constituting war crimes; and sexual violence, including forced nudity, as prosecutable. Throughout, Askin names what happened to the victims as a way of reinforcing that a victim of sexual violence should not have the shame and stigma imputed to them as a result of the crime committed against them.<sup>9</sup>

Sherrie Russell-Brown further illuminates this subject in her article, *Rape as an Act of Genocide*.<sup>10</sup> Russell-Brown particularly analyzes the *Akayesu*

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5. See Kelly Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003).

6. *Id.* at 297-98.

7. *Id.* at 324 (citing *Celibici* Trial Chamber Judgement, para. 511).

8. *Id.* at 337 (citing *Kunarac* Trial Chamber Judgement, paras. 773-74).

9. *Id.* at 347.

10. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, BERKELEY J. INT'L L. 350 (2003).

*Judgment* of the ICTR as seminal in the doctrinal development of defining rape as an act of genocide. By so doing, the Tribunal navigates through a recurring debate among legal commentators about the intersection of ethnicity and gender in the analysis of rape as an act of genocide. Russell-Brown emphasizes that the acts of rape against individual Tutsi women advanced the genocidal project of Rwanda's *genocidaires*. She further reviews the doctrine on rape as a crime under the Geneva Conventions and Protocols, as violations of the laws of war, as crimes against humanity, and as genocidal acts under the Genocide Convention. Throughout, Russell-Brown exposes the acts of sexual violence as intentional—to make individual Tutsi women suffer and, thereby, to destroy the Tutsis, as a group.

Carmen Argibay reaches back in history to examine the sexual slavery of the “comfort women” of World War II.<sup>11</sup> She first outlines the historical origins of the system of “comfort stations” for Japanese soldiers as a response to the worldwide outrage over the Japanese Army’s invasion and destruction of the city of Nanking. During the course of those actions, Japanese forces systematically raped thousands of young women and girls. This incident became known as the “Rape of Nanking.” As Argibay rightly emphasizes, the Japanese Army was concerned primarily with protecting its “honor” and thus, created a system of sexual enslavement of women to limit the public humiliation of Japan. Argibay documents the patterns of recruitment, forcible abduction, deception, and coercion utilized to force women into the “comfort stations.” She then turns to an analysis of whether this system constituted sexual slavery. Argibay’s analysis focuses on the definitions of slavery extant at the time of the Japanese actions and makes reference both to concepts of chattel slavery and of compulsory labor. Argibay concludes that the situation of the former “comfort” women is most accurately described as “sexual slavery”. Argibay acknowledges the important work of The Women’s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery in advancing this understanding.

Sonja Starr and Lea Brilmayer excavate related but uncharted terrain in their article, *Family Separation as a Violation of International Law*.<sup>12</sup> Their article is a thorough treatment of a subject too often unexplored in international law—the involuntary separation of families. Starr and Brilmayer do not shy away from the contentious issues at the core of the consideration of this question—the definition of a family, methods of accounting for rights-holders’ interests, the role of the state in the protection of families or children, and the underlying cultural assumptions in the concept of family. Starr and Brilmayer review the trajectory of the development of international norms, both customary and treaty-based, related to the protection of children and families, the right to privacy and family integrity, the “best interests of the child” standard, the rights of parents to care for their own children, and the right to marry. Uniquely, they

11. Carmen M. Argibay, *Sexual Slavery and the “Comfort Women” of World War II*, *BERKELEY J. INT’L L.* 375 (2003).

12. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, *BERKELEY J. INT’L L.* 213 (2003).

root their inquiry in the real stories of implementation of policies which lead to family separation. They chose disparate subjects—the Australian government's forcible separation of Aboriginal children from their parents, the French policy of forcibly separating polygamous immigrant families, U.S. immigration policies that lead to the splitting of families, U.S. welfare policies that remove children from homes where they may be abused or neglected, and family separation as a product of other forms of human rights abuse. Their choice of a range of case studies reveals a willingness to struggle through the treacherous waters of this kind of analysis. Their conclusion, a set of general guiding principles, is extrapolated from their legal and case analysis.

This symposium issue is a gift to the world of legal scholarship as a recognition of both the reality of women's experiences and the legal doctrine that has evolved and will continue to evolve from it. Its timeliness and its cutting edge analysis dovetail with the continuing discourse, occurring at the international, regional and local level, about the centrality of women's unique concerns within the broader agenda of expansion and enforcement of human rights protections.