Feminists in International Human Rights: The Changer and the Changed*

By
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In composing an Afterword for this symposium, I have often had the feeling expressed by Justice Arbour: that I am here under false pretenses.[1] As a feminist theorist whose focus is largely domestic, I am more like a student of the riveting international developments described here than an informed commentator on them. In my comments, however, I will try to use this domestic perspective as a lens through which to assess the emergence of international human-rights norms that address crimes against women. These norms can be understood, in part, as the product of domestic feminist efforts to expose the prevalence and significance of gender-based violence. But, while this development is cause for satisfaction, feminists must recognize that we need to learn from, as well as contribute to, the domain of international human rights.

It is heartening, from a feminist perspective, to see many of the norms for which feminist advocates have struggled in a range of domestic contexts emerging as constitutive norms of international human rights. The notion, so thoughtfully explored by Kelly Askin[2] and Sherrie Russell-Brown,[3] that international tribunals should understand rape as an instrumentality of genocide is one powerful example. Askin and Russell-Brown suggest that we should view rape not simply as a "spoil of war"—that is, as a lamentable product of male exigencies—but also as a violation of the integrity of the victim and as a means to the destruction of the community through the debasement of the individual. This approach builds on the insights developed in feminist struggles with intranational systems of criminal justice.[4] Similarly, the idea that the plight of the

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* The title evokes the album by Cris Williamson, an icon of late second-wave feminism, whose deployment in the context of discussing new iterations of hard-won feminist insights seems appropriate. *See* CRIS WILLIAMSON, THE CHANGER AND THE CHANGED (Olivia Records 1975).

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1. Justice Louise Arbour, Stefan A. Riesenfeld Award Lecture, 21 BERKELEY J. INT'L L. 196 (this issue).

2. 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).

3. Sherrie Russell-Brown, *Rape As an Act of Genocide*, 21 BERKELEY J. INT'L L. 350 (2003).

4. *See, e.g.*, SUSAN ESTRICH, REAL RAPE (1987); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF

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Korean "comfort women," which Carmen Argibay so aptly describes,[5] can be recharacterized, not as an expedient to foster Japanese military efficacy, but as a deeply troubling episode involving deception and coercion applied against young Korean women and their families, owes a great deal to feminist efforts in a range of domestic contexts.[6] Even the emerging international valuation of the integrity of the family, vividly explored by Sonja Starr and Lea Brilmayer,[7] reflects one longtime focus of feminist analysis and inquiry, though its protection may also come into conflict with other feminist norms.[8]

It is also gratifying to see that, in bringing their analyses to the realm of international human rights, feminists have avoided some of the conceptual and procedural errors that marred their earlier approach to similar problems. Russell-Brown notes, for example, that Catharine MacKinnon has highlighted the intersectional character of the genocidal rape of Muslim women in the former Yugoslavia: this rape is both ethnically based and a form of genocide directed specifically at women.[9] This characterization reflects movement from the earlier positions of MacKinnon and other feminists, whose analysis suggested that one could disentangle gender from (and privilege it over) factors such as race and ethnicity.[10] A similar point can be made about the procedural and administrative features of these human-rights prosecutions. Justice Arbour notes that a point of ongoing contention among her colleagues at the International Criminal Tribunals was whether the prosecution of sexual violence should be undertaken by a separate unit or "normalized" among other prosecutions of human-rights violations.[11] The value—and cost—of distinct, separately trained sexual violence units are questions to which feminist scholars and advocates have become attuned only gradually, over many years of domestic violence and rape prosecu-

DOMESTIC ABUSE (Martha A. Fineman & Roxanne Mykitiuk eds., 1994); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

5. Carmen Argibay, *Sexual Slavery and the "Comfort Women" of World War II*, 21 BERKELEY J. INT'L L. 375 (2003).

6. *See, e.g.*, Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999).

7. Sonja Starr & Lea Brilmayer, *Family Separation As a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003).

8. *Compare* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (describing reconceptualization of the family around the "caregiving dyad" as a crucial feminist innovation central in achieving women's equality), *with* Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (criticizing feminist legal theorists for a focus on reproductive sexuality or sexual danger, to the exclusion of any systematic exploration of sexual pleasure).

9. Russell-Brown, *Rape As an Act of Genocide*, *supra* note 3, at 365.

10. For an example of this privileging, see, e.g., Catharine MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63, 68 (1987) ("the aspiration of women to be no less than men . . . is an aspiration indigenous to women across place and across time. . . ."). For critiques of MacKinnon's failure to come to terms with the interpenetrating, mutually constructive character of race and gender, see Martha Mahoney, *Women and Whiteness in Theory and Practice: A Reply to Catharine MacKinnon*, 5 YALE J. OF L. & FEMINISM 217 (1993); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

11. Arbour, Stefan A. Riesenfeld Award Lecture, *supra* note 1, at 203.

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tions.[12] There is a learning curve here, and feminist advocates are working our way up it; this permits us to commence later efforts with greater sophistication and expertise.

Yet while the human-rights victories documented here may yield a sense of satisfaction, they also offer grounds for caution. Human rights violations such as "rape as genocide" or the coercive conscription of the "comfort women" may be easier cases in which to frame a feminist response because they are normatively unambiguous. One can argue, as Justice Arbour suggests, about who should be held liable for particular atrocities, or about what states should be accountable in what fora,[13] but there is little that can be said to contest the culpability of the acts, and certainly little that resonates with feminist understandings. Far more difficult, in this sense, are the cases explored by Starr and Brilmayer, in which feminist norms—and often feminists—come into conflict. The issue of family separation speaks to feminists more ambivalently: Women are deeply invested in and powerfully constructed through their familial roles, yet the norms on behalf of which separation is often undertaken—ranging from gender equality in the case of polygamous marriages to physical security in the case of intimate violence—also make strong claims on feminists' normative sensibilities. Such issues require difficult line-drawing—such as whether countries should exclude polygamous families prior their immigration but not afterward, for example[14]—and solutions that have the contingency and irresolution of necessary compromises. They may also require of feminist advocates more careful observation and more unsparing self-scrutiny than some have been able to muster in the past.

In these more difficult contexts, which also include female genital surgeries and the kinds of "cultural" defenses critiqued by Professor Susan Okin,[15] the path of feminist intervention has not always run smooth. Western feminists have sometimes assumed a position of leadership, when what was needed was collaboration or dialogue; we have sometimes been too quick to assume the singularity or stasis of those cultures we have sought to critique; and we have often been reluctant to place in question their own understandings of feminism or of the women it seeks to represent.[16] The vehicles for remediation this symposium explores—international bodies and international law—may mitigate these problems to some degree by requiring collaborative, often institutionalized processes of formulation and enforcement. But particularly feminists who seek

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12. *See, e.g.*, CASSIA SPOHN & JULIE HONEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT (1992) (addressing the organization of separate sexual violence units as one factor bearing on the efficacy of rape law reform from a social science perspective).

13. Arbour, Stefan A. Riesenfeld Award Lecture, *supra* note 1, at 203.

14. *See* Starr & Brilmayer, *Family Separation As a Violation of International Law*, supra note 7, at 254.

15. Susan Moller Okin, *Is Multiculturalism Bad for Women? in* IS MULTICULTURALISM BAD FOR WOMEN? 9-24 (Joshua Cohen, Matthew Howard & Martha Nussbaum eds., 1999).

16. *See, e.g.*, IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 15; Colloquium, *Bridging Society, Culture and Law: The Issue of Female Circumcision*, 47 CASE W. RES. L. REV. 263 (1997), especially Leslye A. Obidora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997).

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to apply our insights in new contexts must learn to be more careful observers of unfamiliar cultures; as scholars such as Homi Bhabha[17] and Leti Volpp[18] have reminded us, we must be as attentive to "internal differences" and as astute in observing the "less formalized institutions and spheres of social life"[19] in distinct cultures as we are within our own. Feminists must also be more consistently willing to call our own cultural assumptions and histories into question. The hesitation, by some feminists, to place our own self-understandings under scrutiny, to ask what might be learned from our encounter with new and unfamiliar contexts, is referenced, at least obliquely, in the work of Starr and Brilmayer. They observe that contested episodes of family separation to which human-rights norms might be applied have occurred not only in Australia's encounter with aboriginal peoples and France's with polygamy, but in the United States' approaches to the children of Indian tribes and to poor families of color.[20] Starr and Brilmayer's article challenges us to think of our own culture and polity not only as the source of corrective insight but as the site of potential human-rights violations.

The starker contexts of rape as genocide and sexual slavery might offer similar lessons for American feminists. As I was preparing this Afterword, I had the opportunity to attend a lecture by Professor Adrienne Davis, a legal scholar whose work has focused on the gendered dimensions of U.S. slavery.[21] One of Davis' central arguments is that slavery entailed a "sexual economy": the same legal and cultural regime that constructed human beings as property also purposefully authorized the white slaveholding men's unencumbered reproductive and sexual access to enslaved African American women.[22] This sexual abuse was directed not only "against enslaved women as individuals, but as a weapon of racial terror. Sexual authority over enslaved women was intimately bound with racial, economic, and political authority over all black workers."[23] Moreover, it was a form of abuse into which white men routinely drew their wives, who vented their pain and humiliation on the enslaved women, often through the separation and sale of enslaved families. I was struck forcefully by the fact that this single practice, deeply enmeshed in our own history and culture, implicated all the wrongs addressed (in culturally distant contexts) by the articles in this symposium: sexual slavery, rape with a genocidal impetus, and the forced separation of families. Has the feminist-inspired naming of these

17. Homi K. Bhabha, *Liberalism's Sacred Cow*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 15, at 79-84.

18. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

19. Bhabha, *Liberalism's Sacred Cow*, *supra* note 17, at 81.

20. *See* Starr & Brilmayer, *Family Separation As a Violation of International Law*, *supra* note 7.

21. Adrienne D. Davis, talk based on *Slavery As Sexual Harassment* (Oct. 17, 2002), *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 8 (Catharine MacKinnon & Reva Siegel eds., forthcoming 2002) (manuscript available at http://www.law.berkeley.edu/faculty/abramsk/288.5_page.html).

22. Davis observes that white men regularly raped enslaved women, "because of entitlement, to achieve sexual dominance, for personal pleasure, and to discipline women as workers and as women." *Id.* (manuscript at 8).

23. *Id.* (manuscript at 10).

abuses as human-rights violations incited us—as American feminists or Americans more broadly—to reconsider our own context of a longstanding sexualized chattel slavery with continuing legacies for Americans of all sexes and races? Has it affected our own domestic dialogues about questions such as reparations or race-conscious remedies? It is not clear from the articles presented whether this reconsideration has begun in earnest. But it is only when feminist activists begin to see what can be learned from, as well as taught in, the domains of international human rights, when we come to see ourselves not only as the changer but the changed, that we will have reaped the fruit of this new effort.

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