Taking Up the Challenge of Gender and International Criminal Justice: In Honor of Judge Patricia Wald

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Women and International Criminal Law*
Dedicated to the Honourable Patricia M. Wald

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*) The Co-Editors-in-Chief of this special issue are Diane Marie Amann, Jaya Ramji-Nogales, and Beth Van Schaack; Executive Editor is Kathleen A. Doty. For generous support of the October 29, 2010, IntLawGrrls-sponsored roundtable at which many articles in this issue were presented, the editors thank the American Society of International Law, the California International Law Center at the University of California, Davis, School of Law (Martin Luther King, Jr. Hall), the Santa Clara University School of Law, and the Temple University Beasley School of Law. Also deserving thanks are Elizabeth Andersen, Morten Bergsmo, Diane Orentlicher, Michael Surgalla, and David P. Stewart, our colleagues who served as roundtable moderators. We thank too law students John Thyken and Michael Wiesner of Santa Clara University School of Law and Joanna Cuevas Ingram and Erika Morris of the University of California, Davis, School of Law, who provided invaluable editorial assistance. Finally, our thanks to International Criminal Law Review Editor-in-Chief Michael Bohlander, who invited us to undertake this issue in honour of a person to whom we in international criminal law owe immense gratitude, Judge Patricia M. Wald.
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How sobering to realise that even as international responses to mass and atrocious violence increase and improve, women remain behind. In conceptualisation and prosecution of crimes, in the very use of criminal justice as a dominant response, in the persistent absence of women as judges and prosecutors, and in the criticism of the few women present, even in admirable efforts to redress the worst harms human beings to do one another, we have failed to ensure equal regard for women. Facing often unique or disproportionate violations, women risk the further abuses in failures of redress. How utterly terrific, then, that Judge Patricia Wald, one of the most distinguished and brilliant judges of the United States, chose to devote two years of service as a judge at the International Criminal Tribunal for the former Yugoslavia – and how splendid that she has inspired much work since in advocacy and scholarship addressing ongoing gender disparity.

It is a particular honour and pleasure for me to introduce this new volume of essays generated to honour Judge Wald. As a law student, I learned of and found deep encouragement in her lawyering for the poor, for juvenile offenders, for persons with mental disabilities, and for drug users. I was thrilled when President Jimmy Carter appointed her to the U.S. Court of Appeals for the District of Columbia Circuit, and I had the extraordinary opportunity as a law clerk there to watch her step gracefully and powerfully into the role of judge. Quickly she became a model of incisiveness and fairness, and ultimately she served, magnificently, as chief judge. When she accepted the two-year appointment to serve at the ICTY, it was far from clear that the ad hoc tribunal would succeed. In no small part due to her own contributions, it truly has served as a landmark in the development of international criminal justice and societal responses to horrors of human violence.

The thoughtful contributions collected here in honour of Judge Wald significantly increase and deepen existing research and reflections on gender and legal
responses to mass violence. Although some commentators have expressed concerns about carving out the topic of women and the Holocaust, the authors writing here make clear how failure to attend to women’s experiences leaves international criminal justice truncated, both in failing to respond to the past and in failing to establish the predicate for peace and stability. These authors also identify particular distortions engendered by the absence of women as key figures in the design and operation of international criminal law. Each of these areas deserves close study and comment.

1. The “Woman Question” in Concepts of International Criminal Law

Early in the efforts for accountability before the ICTY, brave advocates pressed for consideration of the experiences of women who had been tortured and raped. Jadranak Cigelj and Nusreta Sivac presented their own experiences and gathered reports from more than 400 other women in the Bosnian conflicts, and their efforts directly influenced indictments and prosecutions; yet nearly all of those charged ultimately avoided punishment. The landmark decision finding that rape had been used as a war crime emerged from the ad hoc International Criminal Tribunal for Rwanda, in the case of Prosecutor v. Jean-Paul Akayesu, and later, the ICTY followed with similar decisions. Academic commentators subsequently questioned whether sex crimes receive adequate – or excessive – attention in the international tribunals. In this context, four contributions to this issue are particularly useful. Margaret deGuzman examines jurisprudential foundations for sex crime prosecutions in the international context and identifies their expressive and restorative justice dimensions. Katie O’Byrne reviews the developing case law in the ICTY, the ICTR, and the International Criminal Court, and advocates a shift to requiring proof of coercion rather than proof

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of nonconsent. Attending to burdens of proof is just one way to offer improvements to the administration of international criminal justice in order to promote accountability for gender-based violence. Laurie Green turns to how the operational details of charging and sentencing affect the treatment of gender violence crimes in her critique of rejections of cumulative charging by the ICC.

Yet a focus on gender violence crimes poses its own risks. Several of the authors analyse dangers that come with focusing international criminal justice work on crimes specific to women. These include risks to the stature of women judges and prosecutors, argues Leila Nadya Sadat, as well as dangers for the projects of restoring peace and of addressing the complete range of losses and violations experienced by women in zones of war and international conflict, suggest co-authors Fionnuala Ní Aoláin, Naomi Cahn, and Dina Haynes.

In three distinctive articles, contributors Jennifer Leaning, Lucy Reed, and Jaya Ramji-Nogales draw on diverse sources to urge the identification and condemnation of forced migration as an actionable harm, whether as a crime under international humanitarian law or a violation of human rights or other norms. Beth Van Schaack's timely article assesses how the drafting process defining the crime of aggression could help or harm the interests and claims of women. The work, then, of protecting women victimised by mass atrocity can include defining new

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crimes that affect men as well as women and yet may be neglected or inadequately developed without attention to women's experiences. In a similar spirit, Rachel Harris and Katharine Gelber examine a recent decision from Australia's High Court in order to explore how domestic law prohibiting slavery can be used on behalf of women subjected to sex trafficking.\textsuperscript{11}

Further examining the resources and limitations of domestic law in addressing international gender-based violence, Karima Bennoune studies the effort to use the Alien Tort Claims Act in the United States on behalf of Algerian women seeking redress for the murders, hijackings, and terrorising by fundamentalist armed groups. This lawsuit ultimately failed in court; nonetheless, argues Bennoune, the suit offered a meaningful avenue for the victims to fight and be heard.\textsuperscript{12}

Considering what to do when law fails, then, becomes an important theme in the analyses of many of the authors writing in honour of Judge Wald. Doris Buss articulates limits of international criminal justice as a vehicle for meeting women's concerns and needs.\textsuperscript{13} After examining the shortfall of law in general and the constraints on victims' participation in particular, Rama Mani argues for greater roles both for woman in peace-building and for on-the-ground transitional justice initiatives that will enable women to create and act affirmatively.\textsuperscript{14} Recognising the needs and desires of victims complicates the processes of transitional justice. Victims will not all agree, and real participation means that new tensions – between men and women, old and young, individuals and individuals – will emerge.\textsuperscript{15} Yet only with such participation are survivors treated with equal respect.

Whether criminal law affords a responsible societal answer to mass atrocity remains a searing question, and David Luban turns to the work of Hannah Arendt to offer philosophic and biographical treatment of assessments of Israel's trial of Adolf Eichmann.\textsuperscript{16} In the eyes of many, Arendt offers foundational as well as provocative thinking on the subject, and her concerns about the incommensurability of the Holocaust and criminal trials remain vital in this era of renewed

\textsuperscript{13} Doris Buss, ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’, infra at
international criminal legal treatments of mass atrocity. As one of the most significant women philosophers ever to write in English, Arendt herself wrote with considerable ambivalence about whether her gender mattered to her work.\(^ {17} \) The importance of who does the work is central to the remaining contributions in this volume.

2. Differences Made by Who Is There

The Nuremberg trials following World War II stand as predicate for and contrast to the current work of international criminal tribunals, so it is fitting that Diane Marie Amann’s essay profiles Cecelia Goetz, the only woman to deliver an opening statement at the Nuremberg Trials.\(^ {18} \) Playing a key role in the *Krupp* trial, Goetz was one of only a few women who served as lawyers at the Nuremberg Tribunal; other women were researchers and typists.\(^ {19} \) These women paved the way for other women serving key roles in international criminal justice institutions. As Nienke Grossman analyses in her contribution, the presence – and absence – of women judges and lawyers in current international criminal tribunals affect the appearance of justice, perception of bias, and perhaps also the actual attention to particular dimensions in investigations and judgements.\(^ {20} \)

What difference can a woman make to international criminal justice? Justice Ruth Bader Ginsburg, Jenny Martinez, and Kelly Askin each provide striking accounts of the difference made by Judge Patricia Wald’s participation at the ICTY.\(^ {21} \)

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\(^ {19} \) Sally Falk Moore studied law at Columbia Law School and worked for a year on Wall Street before Telford Taylor recruited her to be one of the first attorneys to engage in research preparing for the trials at Nuremberg. See ‘Nuremberg Remembered Biography: Sally Falk Moore’, in *Facing History and Ourselves* (2011), <www.facinghistory.org/node/774>, 26 February 2011. She later became a leading legal anthropologist, teaching at Harvard College and Harvard Law School. For a further exploration of these women, see Diane Marie Amann, ‘Portraits of Women at Nuremberg’, in Elizabeth Andersen and David M. Crane (eds.), *Proceedings of the Third International Humanitarian Law Dialogs* (American Society of International Law, Washington, D.C., 2010), pp. 9-30.


But perhaps it is no surprise that Judge Wald’s own essay presents the most memorable and incisive comments. Judge Wald does not shy away from advising women judges in the international courts to be assertive while acknowledging that they are criticised for being so; she identifies lingering gender bias in the comments and treatment of other judges and prosecutors. Looking to the long-term goal of building the capacity of nation-states to implement international criminal justice norms and ultimately to promote peace and safety, Judge Wald emphasises that at present, there simply are not enough women judges qualified and able to provide the independence and effort crucial for this vision, and that only with much more advocacy and proceedings in national courts can the accountability and deterrence envisioned by international criminal norms take root. Challenging readers even further, Judge Wald points to the urgent threats to women’s safety that, though they occur outside of war and international conflict, should nonetheless summon vigorous commitments around the world. The greatest tribute to Judge Wald lies ahead, as the next generation takes up the challenge she so effectively articulates.