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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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Taking up the Challenge of Gender and International Criminal Justice: In Honour of Judge Patricia 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.¹ Although some commentators have expressed concerns about carving out the topic of women and the Holocaust,² 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.³ 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*,⁴ 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.⁵ 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

¹ On Rhonda Copelon's pioneering advocacy for women victimised by political violence, see Dennis Hevesi, 'Rhonda Copelon, Lawyer in Groundbreaking Rights Cases, Dies at 65,' *New York Times*, 9 May 2010, p. A25. For some earlier scholarly discussions, see, e.g., Ruth Rubio-Marin (ed.), *What Happens to the Women?: Gender and Reparations for Human Rights Violations* (Social Science Research Council, 2006); Fionnuala Ní Aoláin, 'Sex-Based violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law', 12 *Yale Journal of Law & Feminism* (2000) 43-84; Martha Minow, 'Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice', 32 *New England Law Review* (1998) 967-981.

² Dalia Ofer and Lenore J. Weitzman (eds.), *Women in the Holocaust* (Yale University Press, New Haven and London, 1999).

³ See Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Atrocity* (Beacon Press, Boston, 1998), pp. 6-7, 15-16.

⁴ *Prosecutor v. Jean Paul Akayesu*, 2 September 1998, International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, <www.un.org/ictt/english/judgements/akayesu.html>, 14 January 2011.

⁵ Margaret deGuzman, 'Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda', 11(3) *International Criminal Law Review* (2011) 515-528, this issue.

of nonconsent.⁶ 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.⁷

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.⁸

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.⁹ 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.¹⁰ The work, then, of protecting women victimised by mass atrocity can include defining new

⁶ Katie O'Byrne, 'Beyond Consent: Conceptualising Sexual Assault in International Criminal Law', 11(3) *International Criminal Law Review* (2011) 495-514, this issue.

⁷ Laurie Green, 'First Class Crimes, Second Class Justices', 11(3) *International Criminal Law Review* (2011) 529-541, this issue.

⁸ Leila Nadya Sadat, 'Avoiding the Creation of a Gender Ghetto in International Criminal Law', 11(3) *International Criminal Law Review* (2011) 655-662, this issue; Fionnuala Ní Aoláin, Naomi Cahn, and Dina Haynes, 'Criminal Justice for Gendered Violence and Beyond', 11(3) *International Criminal Law Review* (2011) 425-443, this issue. For skeptical analysis, critical of the role of feminists in defining gender-based crimes in international criminal law, see Janet Halley, 'Rape at Rome: Feminist Inventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (2009) 1-123; Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict', 9 *Melbourne Journal of International Law* (2008) 78-124. A target of Halley's inquiry is Catharine MacKinnon, whose own recent work includes extending international criminal law developments back into domestic treatment of gender-based violence. See Catharine A. MacKinnon, 'Women's September 11th: Rethinking the International Law of Conflict', 47 *Harvard International Law Journal* (2006) 1-31. For further commentary, see Tracey E. Higgins, 'Are Women Human? and Other International Dialogues by Catharine A. MacKinnon', 18 *Yale Journal of Law & Feminism* 523 (2006) 523-544 (book review).

⁹ Jennifer Leaning, 'Enforced Displacement of Civilian Populations in War', 11(3) *International Criminal Law Review* (2011) 445-462, this issue; Lucy Reed, 'Assessing Civil Liability for Harms to Women During Armed Conflict: The Rulings of the Eritrea-Ethiopia Claims Commission', 11(3) *International Criminal Law Review* (2011) 589-605, this issue.; and Jaya Ramji-Nogales, 'Questioning Hierarchies of Harms: Women, Forced Migration, and International Criminal Law', 11(3) *International Criminal Law Review* (2011) 463-476, this issue.

¹⁰ Beth Van Schaack, 'The Crime of Aggression and Humanitarian Intervention on Behalf of Women', 11(3) *International Criminal Law Review* (2011) 477-493, this issue.

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.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.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.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.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.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.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

¹¹ Rachel Harris and Katherine Gelber, 'Defining 'De Facto' Slavery in Australia, High Court of Australia', 11(3) *International Criminal Law Review* (2011) 561-578, this issue.

¹² Karima Bennoune, 'The Paradoxical Feminist Quest for Remedy: A Case Study of *Jane Doe v. Islamic Salvation Front and Anouar Haddam*', 11(3) *International Criminal Law Review* (2011) 579-587, this issue.

¹³ Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law', *infra* at

¹⁴ Rama Mani, 'Women, Art and Post-Conflict Justice', 11(3) *International Criminal Law Review* (2011) 543-560, this issue.

¹⁵ See Leslie Dwyer, 'Building a Monument: The Politics of 'Reconciliation' in Post-1965 Bali', in Alexander Laban Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, Piscataway, NJ, 2010), p. 227-248.

¹⁶ David Luban, 'Hannah Arendt as a Theorist of International Criminal Law', 11(3) *International Criminal Law Review* (2011) 621-641, this issue.

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

¹⁷ See Bonnie Honig, 'Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity', in Joan B. Landes (ed.), *Feminism, the Public and the Private* (Oxford University Press, Oxford, 1998).

¹⁸ Diane Marie Amann, 'Cecelia Goetz, Woman at Nuremberg', 11(3) *International Criminal Law Review* (2011) 607-620, this issue.

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.

²⁰ Nienke Grossman, 'Sex Representation on the Bench and the Legitimacy of the International Criminal Courts', 11(3) *International Criminal Law Review* (2011) 643-653, this issue.

²¹ Ruth Bader Ginsburg, 'Remarks in Honor of Patricia M. Wald', 11(3) *International Criminal Law Review* (2011) 371-373, this issue; Jenny Martinez, 'International Law at the Crossroads: The Role of Judge Patricia Wald', 11(3) *International Criminal Law Review* (2011) 391-400, this issue; Kelly Askin, 'Tribute to Patricia Wald', 11(3) *International Criminal Law Review* (2011) 375-381, this issue.

But perhaps it is no surprise that Judge Wald's own essay presents the most memorable and incisive comments.²² 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.

²² Patricia M. Wald, 'Women on International Courts: Some Lessons Learned', 11(3) *International Criminal Law Review* (2011) 401-408, this issue.