

## STRATEGIES TO PROMOTE WOMEN’S PARTICIPATION IN SHAPING INTERNATIONAL LAW AND POLICY IN AN ERA OF ANTI-GLOBALISM

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There is a saying, “Those who cannot remember the past are condemned to repeat it.”<sup>1</sup> Most of you “young people” in the room have pursued your careers in international law in a period of its growing recognition as a relevant force in global policy, even on occasion to a degree worthy of incorporation into our own national law. Not to dwell on the old order, but when I went to law school at Yale, there was one optional course in international law and relatively few takers (I was not one even though Raphaël Lemkin, the father of genocide law, taught there). Decades later in 1979, when as a new federal appellate judge I went to “baby judges’ school,” we learned zilch about international law.

Over the past few decades that has changed for the better, beginning with the cascade of U.S. lawyers traveling to Eastern Europe in the early nineties after the Soviet breakup to advise and assist on creating democratic institutions and policies in the newly emerging independent Eastern European countries. In that transfusion, we learned about other countries and international law as much as they learned about us. This interchange was accelerated by the emergence during the same time of the ad hoc international courts: the International Criminal Tribunal for the former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR);

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<sup>1</sup> GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (1905).

the Special Court for Sierra Leone (SCSL); the Extraordinary Chambers in the Courts of Cambodia (ECCC); the Special Tribunal for Lebanon; and the Kosovo Relocated Specialist Judicial Institution, all of which were staffed in part by American judges who not only had to learn about and apply international and other countries' laws, but who also infused significant facets of our own law into international law.

Organizations like IntLawGrrls, the American Society of International Law (ASIL), International Association of Women Judges (IAWJ), and the American Bar Association's Central and East European Law Initiative Institute (now the Rule of Law Initiative) joined forces promoting international law as something American lawyers should know.<sup>2</sup> Law schools joined in, colleges attracted increasing numbers of majors in international relations, and exchange students from other countries multiplied. The Federal Judicial Center created a bench course for federal judges in what they needed to know about international law.<sup>3</sup>

There was—it must be said—a strain of concerted opposition to this movement from the Federalist Society and some judges. In 2010, my old colleague on the D.C. Circuit, Robert Bork, wrote a book about the systematic campaign of international activist judges seeking to replace our purist American law with bastard strains from less enlightened countries around the world.<sup>4</sup> But in that same decade, Justice Kennedy, in groundbreaking decisions, extended human rights protections. In a case involving juveniles, he wrote: “It is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”<sup>5</sup> In another, he concurred in expanding protections for mentally disabled persons.<sup>6</sup> And with regard to gays, he wrote: “The right . . . has been accepted as an integral part of human freedom in many other countries,” and cited international declarations of human rights for their “persuasive,” though not “precedential,” value.<sup>7</sup> Justice Scalia, however, condemned the practice as a “fad,” a “fashion,” and “a 20th century invention of internationalist law professors and human rights advocates.”<sup>8</sup> Again on the other side, Justice Breyer recently wrote a book strongly

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<sup>2</sup> See INTLAWGRRLS, now published at <http://www.intlawgrrls.com/>, and previously at <http://www.intlawgrrls.com/>; American Society of International Law, <https://www.asil.org/>; International Association of Women Judges, <http://www.iawj.org/>; ABA Rule of Law Initiative, [https://www.americanbar.org/advocacy/rule\\_of\\_law.html](https://www.americanbar.org/advocacy/rule_of_law.html).

<sup>3</sup> See Federal Judicial Center, <https://www.fjc.gov/>.

<sup>4</sup> ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 10–12, 17 (2010).

<sup>5</sup> *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

<sup>6</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>7</sup> *Texas v. Lawrence*, 539 U.S. 558, 577 (2003).

<sup>8</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004).

encouraging the trend toward looking at relevant international law sources for their persuasive value in improving our own jurisprudence.<sup>9</sup>

Why go into all this history, which the law professors here know so well, in a strategic panel on insuring vital participation by women, in what could be an era of global disengagement by our national government? Again, a look back on recent history is in order.

Women played an important role in the evolution of international law during its most recent formative period, especially in the explosion of new law on war crimes, crimes against humanity, and genocide that came to the fore in the war crimes courts set up in the past few decades. It was often key women judges and prosecutors who insisted that sexual assaults be investigated and indicted as international law crimes, along with the more traditional international crimes, rather than hidden under rubrics like “crimes of honor” or ignored altogether. New international criminal law defined rape for the first time in a progressive vein drawn from the best national practices,<sup>10</sup> and furthermore expanded the reach of sexual assault into new areas, such as being forced to view or participate in the rape rituals of other victims. These crimes against women were acknowledged—again for the first time—as also being crimes against humanity and as being an element of genocide.<sup>11</sup> Forced marriage and sexual slavery became the subjects of indictments, as well.<sup>12</sup>

I do not suggest that the process of integrating women as upfront participants in international courts, let alone the inclusion of the crimes most commonly committed against women as worthy subjects of international criminal law jurisprudence, has been completed. More accurately, these developments had just gotten off to a reasonable start at the moment that global politics seem to have begun to shift toward a so-called anti-globalist populism. My central point, therefore, is that we must strategize in the face of a desired, yet elusive future. I propose three such strategies.

First, our strategizing for the elusive future must include the basic goal of insuring that international law continues to be a vibrant element of our educational system—taught in law schools, colleges, and even in middle school civic courses.<sup>13</sup> It also must include exchange programs, with foreign

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<sup>9</sup> See STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

<sup>10</sup> GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 723 *passim* (2005); Prosecutor v. Furundžija, ICTY Trial Chamber, Case No. IT-95-17/1, ¶ 185, Dec. 10, 1998.

<sup>11</sup> See Prosecutor v. Akayesu, Trial Judgement, Case No. ICTR-96-4-T, Sept. 2, 1998.

<sup>12</sup> See Prosecutor v. Charles Ghankay Taylor, Appeals Judgment, ¶ 260, Case No. SCSL-03-01-A, Sept. 26, 2013.

<sup>13</sup> Notable among those who have tried to bring such education to younger students is the first woman ever to have served as a U.S. Supreme Court Justice, Sandra Day O'Connor. See

students coming here and our own students going abroad. This kind of intellectual and one-on-one exposure to the role of international law in our own constitutional system should not be allowed to wither in the dry season we may be entering. The loss of interest in and engagement with international law carries with it an inevitable and imminent loss in women's critical role in developing that law, as well as in building the pool of future women internationalists. These losses stand apart from, and compound, the deleterious effect that global disengagement would have on entire future generations of American students. We hear much about how the deficit of our students in math, science, and engineering poses a threat to our future national security and commercial leadership in the world; how much more of a threat is an ignorance of the basis on which the rest of the world conducts its international relations—an ignorance of what the world expects of us?

In an “America First” administration<sup>14</sup> we may expect reduced national government funding for the scholarships, tax benefits, and grants that contribute to the support of our universities, both public and private, and even to our public schools. Programs oriented toward international law and foreign relations could suffer disproportionately, not only from funding loss, but also from overt discouragement. If these events occur, they must be stoutly resisted by women internationalists at both the local and national levels; private philanthropies need to be enlisted to help fill the slack in funding. Women lawyers need to continue to cite relevant international law in their briefs, articles, and blogs, and judges need to do the same in their opinions. The acknowledgment of the preeminent role of international law in our jurisprudence cannot be allowed to “go dark.” Alliances must be forged between private groups like IAWJ, IntLawGrrls, and ASIL to beat the drum for continued presence of international law in our educational systems, in our courts, and in our legislatures.

There are useful potential partners outside the law in this preservation strategy. Women artists and writers have long been instrumental in mobilizing popular opinion in favor of international women's causes: Harriet Beecher Stowe struck a blow against slavery in *Uncle Tom's Cabin*, and more recently, Margaret Atwood in *The Handmaid's Tale*, depicting the

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Natasha Singermarch, *A Supreme Court Pioneer, Now Making Her Mark on Video Games*, N.Y. TIMES (Mar. 27, 2016), <https://www.nytimes.com/2016/03/28/technology/sandra-day-oconnor-supreme-court-video-games.html>.

<sup>14</sup> See David E. Sanger, *With Echoes of the '30s, Trump Resurrects a Hard-Line Vision of 'America First,'* N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/trump-resurrects-dark-definition-of-america-first-vision.html?mcubz=3&r=0> (quoting inaugural speech of newly elected U.S. President, Donald J. Trump).

subjugated role of women in an autocratic futuristic society.<sup>15</sup> Sympathetic religious leaders can attest to the immorality of wrongs visited upon vulnerable victims of misbegotten policies against women here and abroad; former women leaders in our own government can speak to the alternatives they would have chosen in current crises. Some are already doing it, and their views should be published widely. Women resistance fighters here and abroad should be encouraged to speak out about their experiences and techniques of dealing with bad policies.

A second, closely allied strategy in preserving women's participation in international law and policy lies in protecting the venues in which women have had significant impact; specifically, venues like the international ad hoc courts in which high-level military and civilian officials have been held accountable for their own and their subordinates' atrocities against women victims. The new administration has already signaled its opposition to the International Criminal Court (ICC) by way of denying any funding directly or indirectly to it.<sup>16</sup> This could go above and beyond the policy followed by the Obama Administration and the late years of the Bush Administration: although they did not support U.S. membership or direct funding of the court by the United States, they did follow a course of "constructive engagement" with it when such engagement worked to their advantage;<sup>17</sup> for example, exchanging information about wrongdoers whom both the United States and the ICC sought to capture and prosecute. It is as of yet unclear whether the new administration seeks to return to the John Bolton days of advocating that the ICC wither on the vine.<sup>18</sup>

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<sup>15</sup> See HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (1852); MARGARET ATWOOD, *THE HANDMAID'S TALE* (1985). On the significance of these pathbreaking novels, see, e.g., JULIE CARLSON, *UNCLE TOM'S CABIN AND THE ABOLITIONIST MOVEMENT* (2004); Margaret Atwood, *Margaret Atwood on What 'The Handmaid's Tale' Means in the Age of Trump*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/books/review/margaret-atwood-handmaids-tale-age-of-trump.html>.

<sup>16</sup> See *ICC Urges Supporters to Rally if Trump Pulls Support*, VOICE OF AMERICA (Jan. 26, 2017), <https://www.voanews.com/a/international-criminal-court-urges-supporters-rally-trump-pulls-support/3695055.html>.

<sup>17</sup> John Cerone, *The Politics of International Justice—U.S. Policy and the Legitimacy of the Special Tribunal for Lebanon*, 40 DENV. J. INT'L L. & POL'Y 44, 51 (2011–2012) (referring to these administrations' "constructive engagement" approach).

<sup>18</sup> In 2002, it was Bolton who wrote the letter repudiating the previous U.S. signing of the ICC treaty. See Letter of John R. Bolton, Under Secretary of State for Arms Control and International Security, to U.N. Secretary General Kofi Annan, May 6, 2002, *quoted in* Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. SUPP. 381, 381 n.4 (2002). See also Stevenson Swanson, *Bolton Throws a Wrench: Envoy's 750 Proposals to Reshape Reforms May Thwart UN Plans*, CHI. TRIB., Sept. 14, 2005, at 3, 2005 WLNR 23493578 (writing of Bolton, then the U.S. Ambassador

The United States has however been a significant player to different degrees in funding and providing personnel to ad hoc war crimes courts like the ICTY, the ICTR, the SCSL, and the ECCC. The problem is that all of these courts are currently in an exit strategy and will be gone within a few years. What that means is that if the ICC is boycotted as well, there will be no international court to continue the jurisprudence created in the ad hoc courts—including the progressive law on gender crimes. Although it is not known precisely what the Trump Administration's attitude toward any new ad hoc court would be, it seems more likely than not that it would oppose joining, or even aiding, any such court. This new administration's initial leaning appeared to be toward resurrecting the black sites, enhanced interrogations, and prolonged detention that marked the immediate U.S. response to the terrorist attacks of September 11, 2001, and using military commissions rather than civilian courts, but harsh criticism in Congress and from bipartisan foreign policy and international law experts caused them to retreat somewhat.<sup>19</sup>

The only alternative forum for atrocity crimes would be in national courts, many of which are in poor, unstable, or war-torn countries which lack justice systems adequate to provide full and fair trials according to international law. Provision of tangible help to underequipped national courts would of course be one answer, but whether that would happen is extremely problematical.

What is at stake for women if international forums for accountability for the worst atrocities, including those visited upon women and children, disappear? Women and children have always been the majority of war crimes victims: witness the abhorrent bombing including poisonous gas of innocent civilians in Syria, the massacres in the marketplace in Sarajevo, the kidnapping of the girls in Nigeria by Boko Haram.<sup>20</sup> Where will accountability be played out for the perpetrators of such mass atrocities if and when they are apprehended? Indeed, the very concept of justice and

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to the United Nations, "Over the years, he has criticized the UN with scathing rhetoric, saying at one point that if the Secretariat building on the East River lost 10 floors, no one would notice.").

<sup>19</sup> See Charlie Savage, *White House Pulls Back from Bid to Open C.I.A. 'Black Site' Prisons*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/politics/black-site-prisons-cia-terrorist.html>.

<sup>20</sup> See, e.g., Chris Stein, *21 Girls Kidnapped From Chibok School Released by Boko Haram, Nigeria Says*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/world/africa/boko-haram-nigeria.html>; Anne Barnard, *Doctors in Aleppo Tend to Scores of Victims in Gas Attack*, N.Y. TIMES (Sept. 7, 2016), <https://www.nytimes.com/2016/09/08/world/middleeast/syria-attack-peace-plan.html>; *Horror Again Fills Sarajevo's Market*, N.Y. TIMES (Aug. 29, 1995), <http://www.nytimes.com/1995/08/29/world/horror-again-fills-sarajevo-s-market.html>.

accountability for war crimes is being reargued currently, seventy-five years after Justice Robert H. Jackson's famous opening statement at the Trial of the Major War Criminals at Nuremberg: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."<sup>21</sup> In a recent article in *Daedalus*, General Mark Martins, Chief Prosecutor under the Military Commissions Act, after discussing the pros and cons of whether war crimes trials do more harm than good, concluded they do good "sometimes," if they follow established law and procedures and are not outweighed by concerns that they will exacerbate ongoing conflicts.<sup>22</sup> It is a modest endorsement, at best. Before Nuremberg there had been no nonmilitary formal accountability forum or process for mass atrocities, and it took fifty years after Nuremberg for the first international court to be created. If the ad hoc courts go away without replacement, that lapse could happen again.

Apart from the moral imperative of accountability for perpetrators of terrible crimes on women, it bears noting that more women prosecutors and judges have served on these courts than on military commissions, and far more crimes involving women have been prosecuted in these international courts than in military commissions. Military commissions are less transparent as well, so the details of crimes are not as likely to come to public attention. Further, the U.S. Military Commission Act specifies that certain parts of it may not be applied in a way that depends on a "foreign or international source" (whatever that means).<sup>23</sup> Thus the useful advances in gender crimes jurisprudence formulated in international courts may be ignored or fall into disuse if there are no venues for their utilization. International women's groups should keep their eyes both on the accountability debate and on the new administration's policies vis-à-vis accountability for war crimes—especially as the Syrian tragedy comes to a close and the perpetrators of crimes against civilians fall due to account—if they want to ensure that women's gains in this important area of international law do not go by the wayside.

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<sup>21</sup> Opening Statement of Supreme Court Justice Robert H. Jackson, Chief Prosecutor for the United States, Nov. 21, 1945, *reprinted in* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98 (1948).

<sup>22</sup> Mark S. Martins & Jacob Bronsther, *Stay the Hand of Justice? Evaluating Claims that War Crimes Trials Do More Harm than Good*, 146 DAEDALUS 83 (2017).

<sup>23</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(2), 120 Stat. 2600, 2632 (stating that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated" in the War Crimes Act, 28 U.S.C. 2241(d)).

There is yet a third strategic priority I would urge on this and other internationally oriented women's organizations interested in their less fortunate sisters across the globe. That is providing essential information about overseas activities financed by direct U.S. contributions, or through activities of the United Nations which help finance and that do, or should, directly benefit women abroad. We already know that programs involving reproductive rights or family planning are off the table for this administration,<sup>24</sup> but there are many other aid and educational programs that can benefit women that need to be monitored to ensure that the needs of those women are not ignored entirely or denied their fair share. To name a few: education for girls; microloans for women starting small commercial enterprises; the plight of women prisoners whose numbers have risen disproportionately over the past few years, some for "moral" crimes like extramarital sex or coerced involvement in drug trafficking; and the conferral of tax benefits to private foundations that purport to serve the poor and needy abroad. The U.N. Millennium Development Goals reports that women do 66 percent of work in the world but 1.3 billion women—the largest demographic bloc—live in poverty, and a major part of them are illiterate.<sup>25</sup>

A few years ago, former President Jimmy Carter issued an important, if undernoted, book titled *Call to Action*, which set out priorities for raising the status and conditions of women around the world.<sup>26</sup> It spoke to globally relevant remedies for gender prejudice, discrimination, violence, distorted interpretations of religious texts, physical and mental abuse, and poverty and disease. The book concluded: "Many of the other abuses of women and girls . . . can be reduced only if women of this view have more access to information about the international, national and local agencies that are responsible for publicizing and ending such abuses."<sup>27</sup> Advocating for more women in policy-making positions in running women-related programs may be possible even in a Trump Administration, and should be encouraged by IntLawGrrls and like-minded blogs and advocacy organizations. Providing access to practical information to women—about educational opportunities, rights to land ownership and profits, how to start a small business, how to farm efficiently, how to participate in voting or run for office, and about

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<sup>24</sup> See, e.g., Somini Sengupta, *Trump Revives Ban on Foreign Aid to Groups That Give Abortion Counseling*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/world/trump-ban-foreign-aid-abortion.html>.

<sup>25</sup> JIMMY CARTER, *A CALL TO ACTION: WOMEN, RELIGION, VIOLENCE, AND POWER* 86 (2014), citing U.N.D.P. Millennium Development Goals Report of 2011.

<sup>26</sup> See *id.*

<sup>27</sup> *Id.* at 87.

legal rights to divorce or separation—is indispensable to women's welfare and progress.

How can American women help fill this informational void, and why can't we expect government officials to tell us what they are doing in these areas? There are, unfortunately, preliminary indications that the Trump Administration plans to keep a tight rein on government agencies about what they say or print publicly; one might predict the reins will be tightest where the information might reflect negatively on the administration. We here in the United States do have the benefit of the Freedom of Information Act<sup>28</sup> to seek relevant information about government programs, and much can be gleaned even by the arduous process of reading bulletins and draft regulations issued by government agencies. A kind of daily watch for agency actions that affect women's interests abroad and their implications could be a valuable aid to insuring that the government programs that remain in effect do what they should for women's causes. Alliances with organizations like the IAWJ can also help to publicize and incentivize judges abroad to ensure that the laws which do exist are applied fairly to women. In sum, there is much we can do to protect our hard-won gains in the international law sphere and to keep the path clear for a better future.

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<sup>28</sup> Freedom of Information Act, 5 U.S.C. § 552 (2012).