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Introduction

Feminist Judgments and the International Criminal Court

Kcasey McLoughlin, Rosemary Grey, Louise Chappell, and Suzanne Varrall

INTRODUCTION

In the past decade, feminist scholars and women's rights activists have reimagined the relationship between law and gender justice using the feminist judgment method, resulting in rewritten 'feminist' judgments from courts in the United States, United Kingdom, Scotland, Ireland, Australia, New Zealand, Canada, and India.[1] Further extending the catalogue, we have seen publication of the international law project,[2] and domestic projects specialising in substantive areas of law.[3] Breaking new ground, this book is the first to apply the feminist judgment method to analyse decisions of the International Criminal Court (ICC), the Hague-based court with power to prosecute war crimes, crimes against humanity, genocide,

[1] 'Special Issue: Rewriting Equality' 18(1) *Canadian Journal of Women and the Law* (2006); R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (London: Hart, 2010); See e.g. H. Douglas et al., *Australian Feminist Judgments: Righting and Rewriting Law* (1st ed., London: Bloomsbury, 2014); K. Sanchi, L. Berger, and B. Crawford, *Feminist Judgments (Feminist Judgment Series: Rewritten Judicial Opinions)* (Cambridge: Cambridge University Press, 2016); M. Enright, J. McCandless, and A. O'Donoghue (eds.), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (London: Bloomsbury, 2017); E. McDonald et al. (eds.), *Feminist Judgments of Aotearoa New Zealand Te Rino, a Two-Stranded Rope* (Oxford: Hart, 2017); S. Cowan, C. Kennedy, and V. E. Munro (eds.), *Scottish Feminist Judgments: (Re)Creating Law from the Outside In* (Oxford: Hart, 2019); C. Aparna, J. Sen, and R. Chaudhary, 'Righting Together: An Introduction to the Indian Feminist Judgments Project' 56(1) *VRÜ Verfassung und Recht in Übersee* (2023) 5–16; V. Munro, 'Feminist Judgments Projects at the Intersection' (2021) 29 *Feminist Legal Studies* 251–261 (discussing the African Feminist Judgments Project (AFJP), which is still in its early conception phase).

[2] See L. Hodson and T. Lavers (eds.), *Feminist Judgements in International Law* (Oxford: Hart, 2019).

[3] In the United States, for example, scholars have extended the project to discrete subject matter disciplines such as corporation law, employment law, immigration law, reproductive justice, tax, torts, trusts, and estates (including those not covered by the original US Project, with its focus on SCOTUS decisions). See https://law.unlv.edu/us-feminist-judgments/series-projects.

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and aggression in over 123 countries. Reflecting an international and intersectional feminism,[4] and drawing inspiration from collections that have enriched the feminist judgment method with indigenous, critical race, and queer perspectives,[5] the book's contributors include nearly fifty authors, of all genders, from almost twenty different countries including from African, Asian, and Middle Eastern countries where the ICC has been active. Bringing their diverse theoretical approaches, professional experience, and cultural backgrounds to the book, these contributors explore the connections between gender, race, nationality, ethnicity, faith, and sexual orientation in relation to the law and practice of the ICC.

Created in 1998 by the Rome Statute, the ICC is responsible for prosecuting those individuals most responsible for war crimes, crimes against humanity, aggression, and genocide.[6] The decisions of the ICC's judges, who are elected by state parties to the Rome Statute, have far-reaching consequences. Not only are these decisions influential within the ICC; they also function as persuasive precedents in other international, regional, and national criminal courts.

Although the terms 'gender-sensitive judging' or 'feminist judging' are not used in the Rome Statute, this treaty provides a firmer foothold for such an approach than the statute of any other international court. Its provisions enumerate a wide range of sexual and gender-based crimes, require that the law be interpreted and applied without adverse diction on gender grounds, and incentivise the election of both female judges *and* judges (of any sex or gender) with legal expertise on violence against women.[7] The Rome Statute is also the first to recognise the crime against humanity of persecution on 'gender' grounds – a crime which the Court has now applied in several situations including Mali and Afghanistan, where women and girls have been stripped of their rights and subjected to forced marriage and other sexual crimes; the Central African Republic and Darfur, in respect of mass killings of civilian men and boys by attacking forces; and Nigeria, where attacks on girls' schools, the use of female suicide bombers, and sex-selective attacks on men and boys have been described by the ICC Prosecutor's Office as gender-based persecution.

The book extends existing gender-oriented analyses of the ICC, which have tended to focus on how *investigation and prosecution* strategies have contributed

[4] K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241–1299.

[5] E.g. N. Watson and H. Douglas (eds.), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (London: Routledge, 2021); K. M. Mutcherson (ed.), *Feminist Judgments: Reproductive Justice Rewritten* (Cambridge: Cambridge University Press, 2020); N. Ferreira, M. Federica Moscati and S. Raj, 'Queer Judgments Project', available at www.queerjudgments.org/.

[6] Rome Statute, Art. 5.

[7] R. Grey, K. McLoughlin, and L. Chappell, 'Gender and Judging at the International Criminal Court: Lessons from Feminist Judgment Projects' 34(1) *Leiden Journal of International Law* (2021) 247–264.

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to the ICC's initial failure to secure convictions for sexual and gender-based crimes, and its more recent advances in this regard.[8] Building on that work, our book focuses on a relatively under-examined dimension to ICC scholarship by examining the role that *judges* have played, and can play, in adjudicating those crimes. In this way, the book draws lessons from the extensive research on gender-sensitive judging in domestic courts,[9] bringing together insights from feminist scholarship in both national and international law.[10] By distilling the lessons learned from previous feminist judgment projects, this book illuminates new possibilities for feminist interventions in international criminal law.

In addition to being the first book to apply the feminist judgment method to a range of ICC cases,[11] it also advances and adapts the method for use in an *international* court that serves a global constituency and includes features of both common law and civil law systems. At times, taking a feminist perspective also compels our contributors to venture beyond the tasks ordinarily performed by ICC judges (interpreting and applying law, and making findings of fact), in order to discuss the shortcomings in international criminal law itself. Such critical reflections on law, while rare in real-life judicial analysis, are not unheard of,[12] and provide a

[8] See, for illustrative examples: L. Chappell, 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court' 67(1) *Political Research Quarterly* (2014) 183–196; L. Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford: Oxford University Press, 2016); N. Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' in W. Schabas, Y. McDermott, and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law* (Farnham: Ashgate, 2013) 7; R. Grey, 'ICC's First "Forced Pregnancy" Case in Historical Perspective' 15(4) *Journal of International Criminal Justice* (2017) 905–930; R. Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (Cambridge: Cambridge University Press, 2019); V. Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law' 24(3) *William & Mary Journal of Women and the Law* (2018) 1–15; K. O'Smith, 'Prosecutor v Lubanga: How the ICC Failed the Women and Girls of the Congo' 54(2) *Howard Law Journal* (2010–2011) 467–504; S. SáCouto and K. Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' 17(2) *American University Journal of Gender, Social Policy and Law* (2009) 337–359.

[9] R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010).

[10] L. Hodson and T. Lavers (eds.), *Feminist Judgements in International Law* (Oxford: Hart, 2019).

[11] Although no previous work has applied the feminist judgment to the ICC on the scale of this book, the method has been applied to certain discrete ICC judgments. See Y. Brunger, E. Irving, and D. Sankey, 'The Prosecutor v Thomas Lubanga Dyilo' in L. Hodson and T. Lavers (eds.), *Feminist Judgements in International Law* (Oxford: Hart, 2019) 409–444; see also K. Gooding, 'How Can the Methodology of Feminist Judgment Writing Improve Gender Sensitivity in International Criminal Law' 5 *LSE Law Review* (2020) 115–152 for a thoughtful feminist rewriting of *Ongwen*.

[12] An example from our own jurisdiction is Justice Bell's dissent in the 2012 decision in *PGA v. The Queen*. She concluded that the historic common law immunity for marital rape was still in force at the time of the offending, but also expressed her view that this doctrine was 'demeaning to women'. *PGA v. The Queen*, 245 CLR 355 per Bell J § 246.

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thought-provoking counterpoint to the more conventional feminist judgments in this collection.

STRUCTURE OF THE BOOK

The book commences with a foreword by Navi Pillay, former judge of the International Criminal Tribunal for Rwanda (ICTR) and ICC, which anchors this collection in real-world judicial experience. Among other things, Pillay reflects on being a judge in the first case to confirm that sexual violence can be an act of genocide (the ICTR's *Akayesu* case), and on accusations of bias that were levied against her and other judges who brought a conspicuous gender-sensitivity to their work. Following the foreword, Maxine Beneba Clarke's poem 'The Hope of a Thousand Small Lights' serves as the preface to this book. Beneba Clarke envisions the ICC as both the mechanism for, and barrier to, justice. This chapter sets out the book's contents and explains some of the editorial decisions we have taken, reflecting on questions of inclusion and exclusion.

Part I: *Conceptual Approach*

This introduction is followed by a series of chapters which set out the book's key concepts. These chapters frame the book's central provocation – how might the ICC's judgments have been different if a commitment to gender equality, and an awareness of gendered power relations, were at the forefront of the judges' minds? In the first of those framing chapters (Chapter 3), lead editor Kcasey McLoughlin asks, 'Do Feminists Believe in Fairytales?' as we seek to make the case for another feminist judgment project, interrogating the role of imagination in judgment and pondering the possibilities and dilemmas of judgment writing as feminist method. This chapter is followed by two 'in conversation' pieces. In the first, Patricia Sellers, the ICC Prosecutor's Special Advisor on Slavery Crimes, engages in a thought experiment with co-editor Rosemary Grey, reimagining what the ICC's jurisprudence on slavery crimes might have looked like had relevant cases in previous international criminal tribunals been decided differently (Chapter 4). By exploring those jurisprudential 'gaps', Sellers posits that recent decisions at the ICC, but also within previous international criminal tribunals, are hamstrung by the reticence and failures of past jurists to identify and label crimes accurately. The second 'in conversation' piece, between human rights lawyer Angela Mudukuti and co-editor Louise Chappell, highlights the lived experience of a practitioner navigating the implementation and tenuous shifting understandings of international criminal law (Chapter 5). Mudukuti emphasises the central importance of taking an intersectional approach to gender justice at the ICC, and the challenges that remain in achieving that aim.

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The book turns to two reflections on the importance of intersectional gender analysis in the ICC, one by political scientist Jarpa Dawuni (Chapter 6) and another by international criminal lawyer Priya Gopalan (Chapter 7). As Gopalan argues in her piece, 'intersectionality can make visible other pertinent factors and structural inequalities, alongside gender, that are often disregarded or overlooked'. In Chapter 6, Dawuni explores the merits and demerits of intersectionality as a tool for feminist judgments. Questioning 'whose feminism', she argues that in engaging in feminist reimagination 'we must begin from a place of a feminist recasting of the challenges, social hierarchies, barriers, constraints, and opportunities that give rise to, maintain, and advance the multiple discriminations, exclusions, and erasures some groups of people face in societies across the world'.

Part II: *ICC Judgments Reimagined*

The second part of the book includes the rewritten ICC judgments. Each rewritten judgment begins with a brief outline, added by the editorial team, to orient readers. Some comments about the way that ICC cases are organised will assist readers to navigate this part of the book.

The ICC's proceedings are organised into 'situations' (a matter with jurisdictional boundaries both temporal and geographic, such as the situation concerning war crimes and crimes against humanity allegedly committed in Uganda since 2002) and 'cases' (proceedings against a particular person or persons, such as the case against former Lord's Resistance Army commander Dominic Ongwen). Rewriting judgments from every 'situation' that has come before the ICC was not feasible. However, in an effort to achieve broad coverage, the book's contributions address nine ICC situations: Afghanistan, Bangladesh/Myanmar, Central African Republic (I and II), Côte d'Ivoire, Democratic Republic of Congo, Mali, Sudan, and Uganda (Table 2.1).

These nine situations include crimes allegedly or proven to be perpetrated by nationals of African and Asian countries, as well as crimes allegedly committed by members of America's Central Intelligence Agency (CIA). This selection is intended to reflect the fact that in reality, although past and present ICC proceedings have focused primarily on perpetrators from the Global South, they have also implicated, to varying degrees, state officials and military personnel from the United States, United Kingdom, Israel, and Russia.

Within these nine situations, each of the cases is enormous, when compared with most criminal proceedings in domestic courts. Before a case is even opened, there may be need for a judicial decision to authorise an investigation by the Office of the

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TABLE 2.1 *Rewritten judgments in this book, by situation and case*

Situation	Case (if applicable)	Rewritten decisions
Afghanistan	N/a	2019 decision on the Prosecutor's application to open an investigation
Bangladesh/ Myanmar	N/a	2019 Pre-Trial Chamber decision on the Prosecutor's application to open an investigation
Central African Republic I and II	*Bemba* case	2008 Pre-Trial Chamber arrest warrant decision 2009 Pre-Trial Chamber confirmation of charges decision 2016 Trial Chamber sentencing decision 2018 appeal judgment
	Yekatom case	2020 Pre-Trial Chamber decision on Prosecutor's application to amend the charges
Côte d'Ivoire	*(Simone) Gbagbo* case	2012 Pre-Trial Chamber arrest warrant decision 2014 Pre-Trial decision on admissibility of the case
Democratic Republic of Congo	*Lubanga* case	2015 Appeals Chamber decision on reparations
	Ntaganda case	2017 Trial Chamber decision on jurisdiction over Counts 6 and 9 (sexual crimes against child soldiers) 2019 trial judgment
Mali	*Al Mahdi* case	2016 Trial Chamber judgment and sentencing decision 2017 Trial Chamber reparations order
	Al Hassan case	2018 Pre-Trial Chamber arrest warrant decision
Sudan	*Al Bashir* case	2010 Pre-Trial Chamber arrest warrant decision (genocide) 2019 Appeals Chamber decision on head-of-state immunity
	Abd-al-Rahman case	2021 Pre-Trial Chamber confirmation of charges decision 2021 Pre-Trial decision on appointment of victims' legal representatives
Uganda	*Ongwen* case	2021 trial judgment 2021 Trial Chamber sentencing decision

Prosecutor.[13] This was necessary in relation to the Myanmar/Bangladesh and Afghanistan situations, for example. Once an investigation has been conducted and suspects have been identified, a typical ICC case will often run for over a

[13] If the situation was referred to the ICC Prosecutor by a state party or the UN Security Council, the Prosecutor can open an investigation provided that the statutory criteria of jurisdiction, admissibility, and interests of justice are satisfied. But if the Prosecutor has initiated proceedings *proprio motu* (on his/her own motion), authorisation from the Pre-Trial Chamber is needed before the investigation can proceed. See Rome Statute, Arts. 13, 15, and 53.

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decade, and will include hundreds (if not thousands) of judicial decisions. For example, every case includes first-instance decisions (and often appeal decisions) on whether to issue an arrest warrant, whether to confirm the charges, and whether those charges have been proven beyond reasonable doubt. In the event of a conviction, there are further sentencing and reparations decisions. Most cases also include decisions about whether the case is already being adjudicated in a national court, whether fresh evidence is admissible, and whether the fair trial rights of the accused are being upheld.

Because ICC cases are so large, each of the rewritten decisions in this book focuses on just one issue of law, fact, or procedure that was addressed in the original judgment (some of which were identified by the contributors, and some suggested by the editors). This 'single-issue' approach is sensible because ICC judgments tend to be highly complex and lengthy (some exceeding 1,000 pages), with the result that rewriting the entire judgment would not be feasible.

We organised the rewritten judgments by situation and chronologically. Thus, we begin with the Democratic of Congo, which in 2004 became the first situation under investigation by the ICC, and we end with Afghanistan, which despite being under preliminary examination since 2007, did not progress to a formal investigation until 2020. Each situation is preceded by what we have termed as 'reflections' that introduce the relevant conflict, place the rewritten judgment within the context of the original judgment, and then critically reflect upon the reimagined work. Each reflection writer was also asked to consider how they might envision a different outcome, within or outside the bounds of the law, thus highlighting both opportunities for and constraints on transforming the ICC's practice.

The final intervention in Part II is not a rewritten ICC judgment, but a poem. Sara Saleh's compelling piece, 'The Checkpoint', evokes the daily realities of life in Palestine, drawing links with other colonised, indigenous, and subjugated peoples. By including Saleh's poem as the final contribution in the 'judgments' section, we hope to inspire readers to consider the future potential and work of the ICC, and to reflect on the lived experience of those affected by conflict but who are rarely seen or heard by international criminal law.

Part III: *Conclusion*

The book's conclusion reflects on the feminist judgment methodology and the ICC's legacy after two decades in operation. We observe that one of the major themes to emerge from this collection is the need for judges to make decisions from the perspective of the context and lived experiences of those suffering from international crimes. We argue that this book demonstrates the enormous transformative potential of judges, and the opportunity to enhance gender justice in the ICC, while

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also recognising the challenges confronting the Court given the destabilising real-politik of the current historical period.

EDITORIAL DECISIONS: COLLABORATION, CONTEXT, AND OMISSIONS

It is important to contextualise and explain some of our editorial decisions regarding the selection of situations, judgments, and contributors.

Situations

Between July 2002, when the Rome Statute entered into force, and October 2023, when we completed this book, the ICC had instigated proceedings in twenty-eight situations concerning alleged crimes in twenty-six countries (twelve African states;[14] seven Asia and Pacific states;[15] two Eastern European states;[16] and four Latin American and Caribbean states[17]), and on flagships of Comoros, Greece, and Cambodia. Some of these situations have advanced so far as to include cases against specific individuals, some remain under investigation, and some have gone no further than the initial preliminary examination stage. Mostly, the alleged perpetrators have come from countries in the Global South. But, as shown in Table 2.2, they have included nationals from what the UN calls the 'Western European and Other' (WEOG) bloc.[18]

As feminist researchers, the question of which of these many situations and cases to include was a difficult one. Given our time and resource constraints, it was not feasible to include every possible option. But any decision to include a case necessarily meant a decision to exclude others. In making that choice, we very much wanted to avoid replicating patterns of inclusion and exclusion which, in the real world, mean that crimes committed in certain places, especially in relation to the ICC, in Africa, receive significantly greater condemnation, and significantly more effective responses, than others. This concern has, quite validly, been raised about the ICC's swift response to Russia's 2022 invasion of Ukraine compared with

[14] Burundi, Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Guinea, Kenya, Libya, Mali, Nigeria, Sudan, and Uganda.
[15] Afghanistan, Bangladesh, Iraq, Myanmar, Palestine, the Philippines, and the Republic of Korea.
[16] Georgia and Ukraine.
[17] Bolivia, Columbia, Honduras, and Venezuela.
[18] Those from Israel as well as from Palestine in the Palestine situation, and the matter of Comoran-, Greek-, and Cambodian-registered ships; those from the United Kingdom in the Iraq/UK situation; and those from the United States of America in Afghanistan.

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TABLE 2.2 *ICC situations and cases as of October 2023*

	Situation	Progress to date	States where alleged crimes occurred	States of which suspects/defendants are nationals
1	Afghanistan	Investigation	Asia and Pacific	WOEG; Asia and Pacific
2	Bangladesh/ Myanmar	Investigation	Asia and Pacific	Asia and Pacific
3	Bolivia	Preliminary examination	Latin American and Caribbean	Latin American and Caribbean
4	Burundi	Investigation	African	African
5	CAR I	Cases	African	African
6	CAR II	Cases	African	African
7	Columbia	Preliminary examination	Latin American and Caribbean	Latin American and Caribbean
8	Côte d'Ivoire	Cases	African	African
9	DRC I	Cases	African	African
10	DRC II	Preliminary examination	African	African
11	Comoros, Greece, and Cambodia	Preliminary examination	African; WEOG; Asia and Pacific	WEOG
12	Gabon	Preliminary examination	African	African
13	Georgia	Cases	Eastern European	Eastern European
14	Guinea	Preliminary examination	African	African
15	Honduras	Preliminary examination	Latin American and Caribbean	Latin American and Caribbean
16	Iraq/UK	Preliminary examination	Asia and Pacific	WEOG
17	Kenya	Cases	African	African
18	Libya	Cases	African	African
19	Mali	Cases	African	African
20	Nigeria	Preliminary examination	African	African
21	Palestine	Investigation	Asia and Pacific	WEOG; Asia and Pacific
22	Philippines	Investigation	Asia and Pacific	Asia and Pacific
23	Republic of Korea	Preliminary examination	Asia and Pacific	Asia and Pacific
24	Sudan	Cases	African	African
25	Uganda	Cases	African	African
26	Ukraine	Cases	Eastern European	Eastern European
27	Venezuela I	Investigation	Latin American and Caribbean	Latin American and Caribbean
28	Venezuela II	Preliminary examination	Latin American and Caribbean	Latin American and Caribbean

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its slower response to humanitarian crises in Africa, Asia, and the Middle East,[19] but it is a perennial problem that preceded the Ukraine crisis. With this in mind, we were committed to selecting situations concerning crimes including in the part of the world where we are situated (the Asia-Pacific), with some alleged perpetrators from the WEOG region even though they remain under-represented in the ICC's caseload to date.

Alongside that consideration, we were also committed to selecting cases that would enable our judgment writers to grapple with a wide range of legal issues. 'Not only rape cases', we said, echoing other feminist scholars and lawyers who have called for a gender analysis in international criminal law that includes but goes *beyond* the issue of sexual crimes against female victims.[20] This is not to suggest that there is no more to say on that particular issue; to the contrary, there is great scope for ICC judgments to more sensitively and more fairly adjudicate crimes of sexual violence, as many of the rewritten decisions in this book show. But we also wanted to explore the possibilities for gender analysis on issues that remain on the fringes of feminist scholarship in international law. This motivated us to include judgments on the ICC's complementarity principle, on immunity from prosecution, on crimes with no obvious sexual content (such as deportation and pillage), and on what the Rome Statute calls 'grounds for excluding criminal responsibility' (that is, defences), for example.

[19] Y. Dutton and M Sterio, 'The War in Ukraine and the Legitimacy of the International Criminal Court', *Just Security*, 20 August 2022, available at www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/; A. Mitrovica, 'An ICC Warrant against Putin Is Good – and Hypocritical', *Al Jazeera*, 20 March 2023, available at www.aljazeera.com/opinions/2023/3/20/an-icc-warrant-against-putin-is-good-its-also; N. Hedayat, 'The Response to Ukraine Is Laudable. But as a British Afghan, I'm a Little Jealous', *The Guardian*, 19 March 2022, available at www.theguardian.com/commentisfree/2022/mar/19/response-ukraine-laudable-british-afghan-jealous-kabul-crisis; N. Farrelly and A. Simpson, 'Why Has the West Given Billions in Military Aid to Ukraine, but Virtually Ignored Myanmar?', *The Conversation*, 30 January 2023, available at https://theconversation.com/why-has-the-west-given-billions-in-military-aid-to-ukraine-but-virtually-ignored-myanmar-198297; Z. Abuza, 'On Ukraine, the World Acts; on Myanmar, It Waits', Radio Free Asia, 3 March 2022, available at www.rfa.org/english/commentaries/myanmar-ukraine-03032022134344.html; M. O'Brien, 'Symposium on Myanmar and International Indifference: The Sloe Turning Wheels of Justice – Even for Genocide', *Opinio Juris*, 20 August 2022, available at https://opiniojuris.org/2022/08/30/symposium-on-myanmar-and-international-indifference-the-slow-turning-wheels-of-justice-even-for-genocide/.

[20] E.g. P. V. Sellers, 'Gender Strategy Is Not Luxury for International Courts' 17(2) *American University Journal of Gender, Social Policy & the Law* (2009) 327–335; I. Rosenthal, V. Oosterveld, and S. SáCouto, 'What Is "Gender" in International Criminal Law?' in *Gender and International Criminal Law* (Oxford: Oxford University Press, 2022) 11; J. Gardam, 'A New Frontline for Feminism and International Humanitarian Law' in M. Davies and V. Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory* (Farnham: Ashgate, 2013) 217; M. Jarvis, 'Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes' in S. Brammertz and M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) 1, 10–14.

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A factor that we chose to prioritise was seeking input from a diversity of authors – scholars, practitioners, or other experts, including those with lived experience of the conflicts that have come before the ICC. To this end, we circulated an open call for contributions on widely read international law blogs, asked colleagues to share the call with their networks, and offered support such as training in feminist judgment methods and access to research assistants and library resources, in order to diversify and enrich our pool of contributors. This process informed our selection of situations because where we had the option of including contributors from countries where the ICC has been active, we were especially motivated to include those countries so as to make full use of the contributors' expertise and experience.

The nine situations that we eventually settled upon reflect these various considerations and constraints. This enables our authors to consider crimes alleged to have been perpetrated in a range of African and Asian countries, including crimes allegedly committed by nationals of a Western country, and enables the book to explore a wide range of legal issues including (but not limited to) sexual violence against males, females, and third-sex people, and to engage with the three categories of crimes that have been adjudicated in the ICC so far, namely war crimes, crimes against humanity, and genocide.

Although our selection of situations and countries strikes a balance between all of the important considerations outlined above, we are the first to admit that it is imperfect and incomplete. To their credit, some of our contributors have, in principled and respectful ways, queried our selection decisions. We recognise the integrity and the value of these interventions, and have responded as best we could, given our constraints. Indeed, in selecting which situations and cases would be represented in this collection, we also found ourselves chafing against some of the drawbacks of the feminist judgment method. For example, we struggled with the fact that this method replicates existing gaps in the ICC's jurisprudence, because the task is to rewrite judgments that have actually been made by the Court (a point underscored in Patricia Sellers' contribution on the impact of 'absent jurisprudence' in Chapter 4). Thus, the method does not address the multitude of cases that could theoretically come before the ICC but are yet to do so, despite repeated calls for accountability by survivors and their supporters. We were also conscious that the craft of feminist judgment writing requires a high level of legal literacy, which limits the pool of contributors to those with legal training.

Acknowledging these limitations, we included several artistic contributions, in the form of two commissioned poetic reflections on the ICC (Chapters 1 and 18), as well as three photographic essays (Chapter 15). As already noted, in the first poem, Maxine Beneba Clarke weaves the potential embodied by the reimagined judgments through often untold stories about law and how its institutions touch our lives. The second poem, Sara Saleh's 'The Checkpoint', provides a personal perspective on a long-running conflict which continues to take a heavy toll on Palestinian and Israeli civilians. The inclusion of these poems is intended to transcend, symbolically

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at least, some of the constraints of the feminist judgment method. That is, we wanted to include voices not draped in the (imagined) trappings of judicial authority, in a further acknowledgement of the limits of the law. Responding to reflections by some of our contributors, the poems also extend the book's reach beyond the nine situations from which the judgments are sourced, in order to consider other sites of oppression, colonial domination, and violence.

In addition to the poetic interventions, the book contains three photographic essays featuring the works of Rohingya refugees Azimul Hassan, Omal Khair, and Dil Kayas, who fled persecution in Myanmar in 2017 for the relative security of life in the world's largest refugee camp in Cox's Bazar, Bangladesh. In 2018, Fortify Rights, an international human rights non-governmental organisation (NGO) that has been working in Myanmar for over a decade, along with Doha Debates, provided Hassan, Khair, and Kayas with smart phones and on-the-ground photography and media skills training in order to visually document and communicate their experiences of life in the camp. They have since established sizeable followings on Instagram, published a book of their photographs,[21] and won an award for their work.[22] The inclusion of Hassan, Khair, and Kayas' photographs at the conclusion of the Bangladesh/Myanmar section in Part II of the book contributes a powerful visual expression of the ongoing impacts of atrocities committed in Myanmar, by illustrating in full colour the people and lives at the centre of the foregoing rewritten decisions. The editors' decision to include photographs in the book in this way represents an attempt not only to go beyond the feminist judgment method and the limits of legal reasoning, but to break free of the constraints of the written word itself, transcending language and literacy barriers in the way that only an image can. These photographs are intended to complement the rewritten decisions on the Bangladesh/Myanmar situation, but also as a reminder that the individuals and lives that are rendered in black and white, through words on a page, in all of the rewritten ICC judgments in this book, exist beyond and outside of the confines of a judicial decision.

Our hope is that this book is the beginning of road for feminist judgment writing in international criminal law, but may pave the way for further projects which reach places, stories, and ideas beyond those covered in this book.

The agonising fact that after our selection was made the world continued to see the outbreak of new conflicts and escalation of others is one that also warrants

[21] O. Khair, D. Kayas, and A. Hassan, *A Chance to Breathe: A Photography Book by Rohingya Refugees* (Fortify Rights, 2022), available at www.fortifyrights.org/a-chance-to-breathe/.

[22] Shorty Social Goods Award, 2020 in the 'Best Work for Immigration and Refugees' category. Fortify Rights Annual Report 2021/22 (2022), available at www.fortifyrights.org/downloads/Fortify%20Rights%20Annual%20Report%202021.pdf.

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discussion. For example, the book does not include a gender analysis of the crime of aggression because Russia's 2022 invasion of Ukraine occurred once our project was well underway. Nor could we have predicted the intensification of violence in Gaza and Israel following Hamas' actions in October 2023 and Israel's response, which is occurring in real time at a sickening pace as we go to print, claiming the lives of thousands of civilians, many of them children. That these and so many other conflicts erupted and morphed throughout our writing process meant that decisions we made when setting the scope of the book feel different several years later. This is a challenge for any scholarly enterprise that responds to events unfolding in real time, and invites reflection on how future feminist judgment collections might be designed so as to be more responsive to developments in the real world.

Contributors

Contributors to the book include academics, practitioners, poets, and photographers. In terms of the contributing judgment and reflections authors, the editors sought to ensure this cohort was reflective of an international and intersectional feminism,[23] and the book includes nearly fifty authors, of all genders, from almost twenty different countries. Bringing their diverse theoretical approaches, professional experience, and cultural backgrounds to the book, these contributors explore the connections between gender, race, nationality, ethnicity, faith, and sexual orientation in relation to the law and practice of the ICC. It was important to the editorial team that the book included perspectives from leading feminist scholars in international law as well as emerging voices in the field. This diversity among contributors was particularly important to us, in light of the relative homogeneity of our editorial team.

The selected authors include leading professors as well as emerging scholarly voices, international criminal law practitioners, and many current or former ICC/UN tribunal lawyers. This group includes people of all genders, several of whom hail from ICC situation countries, including Afghanistan, Kenya, Uganda, Myanmar, Palestine, and Bangladesh. All contributors share a commitment to feminist judgment writing, but bring diverse theoretical perspectives including Third World Approaches to International Law (TWAIL) and queer theory. Others bring experience from legal practice, including as prosecutors, defence counsel,

[23] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 1 *University of Chicago Law Forum* (1989) 139–167.

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victims' counsel, and judicial officers. This diversity ensures a broad range of perspectives and, we hope, enables the book to speak to broad readerships and networks.

METHODOLOGY: FEMINIST JUDGMENT WRITING AND REFLECTION

Context

As feminist scholars it is important to reflect upon the personal and political circumstances in which this project was completed. Against the backdrop of a global pandemic, the lines of demarcation between the public and private blurred as many of us worked from home. The gendered dimensions of this blurring have not been fully appreciated, but early research[24] and the reflections of contributors to this project well demonstrate the gendered nature of care. In this important respect, this is a very much a book produced in the time of COVID. Just as many real-life courts moved online, so did our project. Most meetings moved online, and although this had some drawbacks in terms of facilitating the in-person connections which have been the hallmark of previous feminist judging projects, it also made the process far more accessible to those with funding limitations, work commitments, environmental concerns, and caring responsibilities that make travelling to in-person meetings difficult.

Aside from the global phenomenon of COVID, while in no way diminishing its impact, contributors to this project concurrently experienced the full gambit of life circumstances that often occur behind the scenes of large projects. Within the wider team we marked the birth of a number of children, as well as encountering grief and loss, health challenges, and other struggles including childcare and financial hardships. Others had to contend with climate disasters and emergencies. Global conflict was never far from the minds of those within the project, and we recognise that a number of contributors were living, if not with active conflict, then with the challenges of post-conflict settings. Contributors were also promoted, changed careers, and embarked on new adventures and achieved outstanding goals. The influences, and unique adventures and trials, have no doubt shaped the final thoughts and considerations of all involved in ways that would not have been contemplated at the beginning of this project.

[24] See e.g. B. R. Parry and E. Gordon, 'The Shadow Pandemic: Inequitable Gendered Impacts of COVID-19 in South Africa' 28(2) *Gender, Work & Organization* (2021) 795–806; S. Germain and A. Yong (eds.), *Beyond the Virus: Multidisciplinary and International Perspectives on Inequities Raised by COVID-19* (Bristol: Bristol University Press, 2023); M. Graham, V. Weale, K. Lambert, N. Kinsman, R. Stuckey, and J. Oakman, 'Working at Home' 63(11) *Journal of Occupational and Environmental Medicine* (2021) 938–943.

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Process

In June 2021 we hosted two online workshops (offered at different times to accommodate different time zones) to introduce the methodology, set out a timeline, and build connections between collaborators. We facilitated participant roundtable discussions, inviting contributors to discuss what excited them about the project. Some contributors presented 'elevator pitches' about their ideas for writing their chosen judgment. In terms of introducing the feminist judgment methodology, we engaged our contributors in a discussion of a rewritten judgment from the Australian project to promote discussion about *what* made the piece feminist.

As part of these initial workshops, we also shared pre-recordings of interviews conducted by the editorial team with participants in previous feminist judgment projects: Heather Douglas (one of the editors of the Australian Feminist Judgment Project) and Catherine O'Rourke (one of the contributors to the Irish/Northern Irish Project).[25] These interviews provided a helpful grounding in the genre of judgment writing, with both providing insightful reflections and advice about the challenges which stem from donning the imagined judicial robes to produce a plausible legal judgment (in ways that they may not previously have attempted as academics) *and* ensure that the judgment is feminist. O'Rourke reflected on the framework of the original judgment as a 'useful guardrail' which she used as a vehicle to 'grow into' her judgment. Douglas encouraged contributors to 'throw out' the original judgment, starting with a blank page rather than tinkering with the original judgment, while also 'dropping the idea that you had to actually decide differently', meaning that the rewritten judgment might reach the same conclusion as the original judgment, but through different reasoning. These meditations on avenues to pursue provided options and scope for our own participants to work in a way that suited their own approach.

In response to submitted proposals, we were fortunate to be able to provide participants with an interview with Rosemary Hunter, one of the editors of the UK Feminist Judgment Project (and editor and valued advisor to many subsequent projects). Hunter's guidance built on her 2010 'checklist' for feminist judging, reminding participants that 'authority is not incompatible with feminism' and that the power of language will assist in allowing them to don the judicial robes, depart from the academic genre, and engage with the judicial voice. Memorably, this was condensed to the phrase 'just do it'. The generosity extended by these colleagues created a valuable bridge between this project and those within the global feminist judgment methodology community, and provided useful practical guidance for our contributors. We are grateful for their time and expertise in helping our participants craft their contributions.

[25] These materials are available at our project website: www.humanrights.unsw.edu.au/research/current-research/reimagining-judging-international-criminal-courts-gendered-approach.

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Rounding off our series of video resources to support contributors in finalising their judgments was an interview between the editors, Rosemary Grey and Kcasey McLoughlin. This interview focused on specific mechanisms, rules, and procedures which operate within the ICC, assisting the participants in bolstering the plausibility of their rewritten judgment. Grey encouraged participants to dive deeply into the source material, to find evidence or legal arguments which may have been overlooked or disregarded in the real judgment, especially in ensuring that victims' perspectives are heard, and to consider the Court's power to change the legal characterisation of facts where appropriate.[26]

Although practical reasons restricted face-to-face engagement, we were still determined to work in a collaborative way, utilising the skills and expertise of all involved to create a supportive, peer-driven experience for both judgment and reflection writers. To achieve this, we organised online 'discussion circles' to enable contributors to participate in a facilitated peer-review process and benefit from each other's creativity and expertise. This also permitted reflection writers to attend and gain an understanding of the individual approach of the judgment writers, strengthening the reflective chapters.

Beyond organising these meetings, we also encouraged contributors to reach out to each other for support and feedback in an attempt to further community building within the project itself. The editorial team additionally provided individual and general feedback on each judgment outline, and then later on the draft judgments. This was supplemented by material put together by the editorial team which sought to provide guidance on issues of evidence, facts and law at the ICC more specifically. As editors, it was important to us, following previous projects, not to be overly prescriptive about what counts as 'feminist'. For the most part, our feedback was not concerned with tone or style, but rather the plausibility of the judgment. That is, did the judgment read as legally tenable, even if the authors chose to depart from the style and conventions typically used in ICC judgments. While asked to stay within the bounds of the Rome Statute, our judges were encouraged to find their own authentic judicial voice, and we kept an open mind when contributors defended their decision to take their rewritten judgment in a direction that we had not anticipated.

The resulting judgments are as diverse as the contributors who wrote them. Some opted to adhere strictly to the traditional feminist judgment methodology, whereby their judgment reflects the formulations, rules, and structure of the original judgments while also focusing on concepts and evidence that were not afforded attention. Other contributors were perhaps more disruptive of the method – pushing the bounds of plausibility (at least insofar as the Court is currently constituted) and imagination. For example, Rigney's abolitionist approach, McKay's imposition of a

[26] An approach which, when utilised by then Judge Navanethem Pillay, saw the first convictions for rape in the case of the *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, 2 September 1998.

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non-carceral sentence, and Zarsky and Irving's creation of an 'additional comment' have not been canvassed within the current judgments of the ICC, but they challenged us to consider what might be possible if the role of the judge was reimagined in more radical ways. The wealth of possibilities expose the rigidity of the current ICC system and missed opportunities to deliver gender justice, as well as highlighting potential ways forward for the Court.

The final submitted judgments were then passed to the reflection writers. Engaging in their own discussion circles, reflection writers were invited to read the reimagined judgments and compare them with the original, finding thematic lines for all the judgments within their situation. While the reflections are also as varied as those who authored them, all follow a similar structure. First, a brief contextual overview is offered, whereby key actors, events, judgments, and outcomes are identified to help situate the reader. Attention then moves to how the judgments differ from or align with the original judgment, interrogating what makes the reimagined judgment 'feminist'. Finally, the reflection offers a critical appraisal of the possibilities that ensue when gender is seriously considered within judicial deliberations. Where the reflection writer has considered it appropriate, they have also offered commentary on the approach undertaken by the judgment writer. Following the suggestion from reflection writer Immi Tallgren, this approach allowed the judgment and reflection writers the opportunity to 'think outside of the box',[27] not only to explore their own interpretation of the feminist judgment method but also to offer their own thoughts about what a more gender-sensitive international criminal law system might look like. Some respectfully disagree with the approach undertaken by the judgment writer while others prefer to draw attention to the context-specific realities that underpin the judgment in the first instance. Although judgment writers were not asked to respond to the reflection chapters in this book, contributors are free to continue to express and exchange ideas in other forums.

Focus

This project aligns with previous feminist and critical judgment projects whereby the intention is to suspend disbelief, thereby allowing the judgments to be read as legally plausible. The desire was to clearly demonstrate that each Chamber of the ICC had the ability to come to the judgment, within the parameters of the ICC's legal system, and based on the information that was available at the time, but that the current systems and processes of thinking utilised by the Court interfered with

[27] We acknowledge the important contribution of Immi Tallgren, who offered an 'outside-the-box' section in her first reflection draft, and the editorial team found it so engaging that we asked all reflection writers to follow Tallgren's lead in offering their own outside-the-box reflections.

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that outcome. We therefore encouraged contributors to adhere to the information that was available to the Court at the time. We suggested scouring the testimony, documentary evidence, and expert evidence that had been submitted in the relevant case, even if it had not been cited in the real decision, to locate the reimagined decision within the ambit of the Court, reflecting the strict/classical feminist judgment method adhering to admissibility rules.

As we acknowledge, however, that part of the feminist judgment method is also disrupting the traditional paradigms of judicial processes; where contributors sourced material outside of these parameters, we decided not to be too restrictive. For example, Radhakrishnan and Shubin's judgment (about genocide in Darfur) cites some sources which post-date 4 March 2009, but have been retained for pedagogical purposes with an asterisk (*) notation because they are relevant and valuable sources that might assist with subsequent genocide decisions by the ICC and other courts. We also encouraged contributors to make full use of the ICC's legal framework, such as the provisions permitting the Court to request evidence[28] or to invite submissions from *amici curiae*.[29] Therefore, contributors were able to note the lack of evidence they wished to consider, such as social harms or gendered roles, and demonstrate the need for such evidence for a full determination to be made.

The second core focus was developing rewritten judgments that are 'feminist', focusing on and highlighting the lived experiences and evidence that is often dismissed or relegated at the ICC. Although we as editors wanted to leave space for our contributors to bring their own conceptions of feminism to the project, we were guided by Hunter's 'checklist'[30] for what constitutes feminist judging, such as asking the 'woman' question, including women and other marginalised actors, challenging gender bias on both legal doctrine and judicial reasoning, reasoning from context and with awareness of power relations, foregrounding the reality of women's lived experience, trying to redress 'injustices and improve the conditions of women's lives', promoting substantive equality, and drawing on ideas from feminist literature).

But going beyond that checklist, we also encouraged contributors to consider intersectional feminist analysis, and to amplify the voices of victims/survivors where possible. Contributors interpreted these cues in different ways. For example, Anushka Sehmi's reimagined judgment emphasises the importance of giving victims agency in the ICC, and Souheir Edelbi's judgment places victims at the centre of the 'interests of justice test'. Combining these 'feminist' techniques with other critical approaches, such as queer approaches and TWAIL approaches, were also

[28] Rome Statute, Art. 69(3).
[29] ICC Rules of Procedure and Evidence, Rule 103.
[30] E.g. R. Hunter, 'An Account of Feminist Judging' in R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010).

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welcome. The result of this process and focus is twenty-seven rewritten decisions that critically engage with international criminal law, demonstrating that within the current system, there is scope to render decisions that are feminist, victim-focused, and plausible.

IMAGINING NEW BOUNDARIES

The book unites two distinct fields of research. First, we hope that it will be relevant to a global audience of international criminal law scholars, students, and practitioners. Today, international criminal law is practised in multiple institutions, including: the Hague-based ICC, the UN stand-alone investigations into Syria, Central African Republic, Iraq, and Myanmar; the Extraordinary Chambers in the Courts of Cambodia; and the UN mechanism which is completing the work of the Rwanda and Yugoslavia tribunals. It will also be a valuable teaching tool for international law students in universities throughout the world, because it provides examples of clear, applied feminist critique of well-known (and some less well-known) ICC cases.

Second, we hope that the book will be a valued text for feminist scholars in international and national law. Both bodies of scholarship are extensive, but they are not in always in dialogue. In particular, there has been little engagement by international law scholars with the method of feminist judgment writing, while previous projects within this genre have focused on the domestic sphere. By extending this method to an international court, and by showcasing intersectional approaches to feminist judgment writing, we are offering something new to this target audience.

The book is also practical in its orientation, so will appeal to legal practitioners at all levels – lawyers, barristers, prosecutorial and judicial staff, and judges of international criminal courts – because it offers relevant and specific examples of how to apply their legal framework in a more gender-sensitive way. The book shows what feminist judging entails in real cases; it does not just describe the method in abstract terms. As editors, we have endeavoured to ensure that all authors use accessible language and explain theoretical concepts in straightforward terms.

The story of feminist engagement with law is the story of pushing and redrawing boundaries. A key aim is to demonstrate the consequences which stemmed from women's exclusion from the development of international law: to expose what Charlesworth and Chinkin describe as 'a narrow and inadequate jurisprudence that has legitimated the unequal position of women worldwide'.[31] In international criminal law, women's exclusion has likewise shaped the development of law and its institutions (notwithstanding the work of feminist scholars in seeking to shape the Rome Statute). In this book, we continue to push the boundaries of imagination and

[31] H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

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judgment, within the bounds of that statute. Importantly, the book demonstrates how *gender* has been framed in international criminal law – serving as an important reminder that gender is not a synonym for woman, and that a gender lens is crucial for accurately understanding the world. Indeed this neutrality is the fiction (or fairytale) which has for too long held sway in accounts of law, and adjudication. By setting out what might be possible if feminist and gender-sensitive voices echoed from the judiciary, this book imagines a new jurisprudence from the ICC.

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