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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS: INTERNATIONAL CRIMINAL COURT

Gender and judging at the International Criminal Court: Lessons from 'feminist judgment projects'

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Abstract

To date, analyses of gender justice at the International Criminal Court (ICC) have focused primarily on critiques of, and shifts within, the Office of the Prosecutor. This article takes a different approach by focusing on the ICC's judiciary. We being by arguing that state parties can and should do more than electing a balance of male and female judges – they can also ensure gender-sensitivity on the Bench by supporting candidates with expertise in gender analysis, and by backing judges who bring a feminist approach to their work once elected. Next, we explain the concept of the 'feminist judgment-writing' and suggest that this method offers a useful framework for embedding gender-sensitive judging at the ICC. To illustrate this argument, we highlight opportunities for ICC judges to engage in gender-sensitive judging in relation to interpreting the law, making findings of fact, and deciding procedural questions. The final section of the article discusses how best to institutionalize the practice of gender-sensitive judging at the ICC.

Keywords: feminism; gender; International Criminal Court; international criminal law; judges

1. Introduction

At the December 2020 session of the Assembly of States Parties (ASP) to the ICC, six new judges will be elected to the Court. Already, there has been some discussion of 'gender' in relation to this upcoming judicial election,[1] mostly in relation to the provision of the Rome Statute that requires a 'fair representation of female and male judges' at the Court.[2] There is no doubt that this provision addresses a critical issue, the (ongoing) over-representation of male judges in international courts, including at the ICC.[3] States must take active steps to correct this imbalance, so that the ICC does not reinforce

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[1]E.g., ICC Assembly of States Parties, 'Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court', ICC-ASP/16/INF.2, 2 May 2020; Coalition for the International Criminal Court, 'ICC Judicial Elections 2020', available at www.coalitionfortheicc.org/icc-judicial-elections-2020.

[2]1998 Rome Statute of the International Criminal Court, 2187 UNTS 90 (Rome Statute), Art. 36(8)(a)(iii).

[3]As of June 2020, the ICC has seven female judges and 20 male judges (two of whom have continued in office after the completion of their term in order to complete proceedings in the *Ongwen* trial). The International Court of Justice (ICJ) currently has 13 male judges and three female judges, the UN-backed Extraordinary Chambers in the Courts of Cambodia has 21 male judges and three female judges, and in the residual mechanism for the international criminal tribunals for Rwanda and former Yugoslavia, just six of the 25 judges are women.

entrenched assumptions that wielding public power and engaging in complex decision-making are the sole prerogatives of men.[4] Yet that question of sex representation is by no means the *only* gender issue that bears on the election of ICC judges. Equally important is the need to support judges who have a *gender-sensitive* approach to adjudication: those who are willing to interpret and apply the law in a gender-sensitive way, bearing mind patterns of privilege and discrimination along gender lines. But does the Rome Statute support this notion of gender-sensitive judging? If so, where is there scope for ICC judges to exercise gender sensitivity on the Bench? And what role can states and civil society play to institutionalize this approach?

This article delves into these largely under-examined questions about the opportunities for gender-sensitive judging at the ICC. Throughout the article, we draw on insights from national and international 'feminist judgment projects', in which scholars and other authors re-write existing judicial decisions from what they consider to be a 'feminist' point of view. We do not argue that the techniques associated with feminist judgment projects *exhaust* the possibilities for gender-sensitive judging at the ICC. Indeed, as we explain, there is scope for ICC judges to go *further* than these projects by asking the 'gender question' rather than the 'woman question' only. Nonetheless, we suggest that when thinking through the options for gender-sensitive judging at the ICC, feminist judgment projects provide a sensible starting point because they offer a suite of techniques that could be applied in the ICC.

Laying the groundwork for our analysis, Section 2 of the article argues that a commitment to gender-sensitive judging is built into the foundations of the ICC, and that increased support for gender-sensitive judges within the ICC could potentially enhance perceptions of the Court's legitimacy. Section 3 introduces the concept of 'feminist judgment-writing' as a methodology for cultivating gender-sensitive judging at the Court. We explain the key principles of this methodology, and situate the methodology within the broader context of feminist engagement with law. In Section 4, we seek to demystify the idea of 'feminist judgment writing' by identifying specific opportunities for feminist judging in the ICC in three key arenas of judicial decision-making: interpreting the law, making findings of fact, and deciding procedural questions. As this part shows, there are already pathways for gender-sensitive judging within the ICC's legal framework, and scattered examples of gender-sensitive judging in the practice of the Court. Looking to the future, Section 5 makes some suggestions for embedding a culture of gender-sensitive judging in the ICC.

We hope that this article may draw attention to questions of gender competency in the upcoming ICC judicial election, and that it will be a useful contribution to the literature on international judicial decision-making. The article also extends the feminist scholarship on international criminal law. While this scholarship is already extensive, much of it focuses on the role of prosecutors in combatting sexual and gender-based crimes,[5] or on the Rome

[4]For a deeper analysis of the importance of women's representation in the judiciary of the ICC and other international courts see L. Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (2016), 51–86.

[5]E.g., C. Niarchos, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', (1995) 17 *Human Rights Quarterly* 649; R. Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law', (2000) 46 *McGill Law Journal* 217; K. D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (1997); K. D. Askin, 'Prosecuting Wartime Rape and Other Gender Related Crimes: Extraordinary Advances, Enduring Obstacles', (2003) 21 *Berkeley Journal of International Law* 288; D. Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law', (2007) 25 *Windsor Yearbook of Access to Justice* 3; N. Jain, 'Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution', (2008) 6 *Journal of International Criminal Justice* 1013; 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: Critical Perspectives* (2013), 7; C. S. Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (2013); V. Oosterveld, 'Evaluating the Special Court for Sierra Leone's Gender Jurisprudence', in C. Jalloh (ed.), *The Sierra Leone Special Court and its Legacy* (2014), 234; N. Hayes, 'La Lutte Continue: Investigating and Prosecuting Sexual Violence at the ICC', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 801; S. Williams and E. Palmer, 'The Extraordinary Chambers in the Courts of Cambodia: Developing the Law on Sexual Violence?', (2015) 15 *International Criminal Law Review* 452; V. Oosterveld and P. V. Sellers, 'Issues of Sexual and Gender-Based Violence at the ECCC', in S. M. Meisenberg

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Statute's definition of 'gender'.[6] The last decade has also seen a rise in scholarship about the importance of *female judges* in international courts, with several scholars arguing that increasing the proportion of female judges will make international courts more legitimate, and potentially more effective at adjudicating sexual violence crimes.[7] Judges of international courts have also shown an interest in this issue of female representation, with some asserting that female judges respond to sexual violence crimes differently than their male peers.[8] Yet with few exceptions,[9] there has been little discussion among international law scholars or judges about the need for *gender-sensitive* judges, as distinct from *female* judges. By focusing on that under-explored issue, we hope to make a useful contribution to broader scholarship on gender and international criminal law.

The ICC serves as an intriguing case study for this analysis of gender-sensitive judging in international law. 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.[10] The decisions of its 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 courts. The terms 'gender-sensitive judging' or 'feminist judging' are not used in the Rome Statute. Nonetheless, the Statute provides a firmer foothold for such an approach than the statute of any other international court, as we argue below.

The technique of gender-sensitive judging has implications for all aspects of the ICC's work. However, in this article, we have tended to focus on one aspect of the Court's work – the adjudication of sexual and gender-based crimes. We have done so because, as feminist scholars have long argued, sexual violence crimes reflect deeply entrenched ideas about gender.[11] For example, the rape of women is often linked to beliefs about men's entitlement to women's bodies.[12] Sexual

and I. Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (2016), 321; R. Grey, *Prosecuting Sexual and Gender-Based Crimes in the International Criminal Court* (2019).

[6]E.g., V. Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?', (2005) 18 *Harvard Human Rights Journal* 55; R. Grey et al., 'Gender-based Persecution as a Crime Against Humanity: The Road Ahead', (2019) 17 *Journal of International Criminal Justice* 957.

[7]E.g., D. Terris, C. P. R. Romano and L. Swigart, *The International Judge: An Introduction To The Men and Women Who Decide the World's Cases* (2007), at 18–19; N. Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', (2012) 12 *Chicago Journal of International Law* 647; N. Grossman, 'Achieving Sex-Representative International Court Benches', (2016) 110 *American Journal of International Law* 82; P. Pillay, 'Women in International Law: A Vanishing Act?', *Opinio Juris*, 3 December 2018, available at opiniojuris.org/2018/12/03/women-in-international-law-a-vanishing-act/; J. Powderly, *Judges and the Making of International Criminal Law* (2020), 56–74.

[8]For example, former ICTY judge Gabriel Kirk McDonald has opined: '[a]s a woman, I can feel the act of rape. I can empathize with it. Men look at it differently ... It is almost as though they see themselves in the shoes of the perpetrator'. Judge Navanethem Pillay, now at the ICJ and previously President of the ICTR and a judge at the ICC, has stated that although she does not generally think that male and female judges think differently, 'women come with a particular sensitivity and understanding about what happens to people who are raped'. Taking a contrasting position, Christine Van den Wyngaert, now a judge at the Kosovo Specialist Chambers and before that, at the ICC and ICTY, has remarked: 'In relation to being a woman and a judge, I personally don't believe that there is really any gendered dimension to the profession.' See S. Sharratt and G. Kirk McDonald, 'Interview with Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia', (1999) 22 *Women & Therapy* 23, at 33; Terris, Romano and Swigart, *supra* note 7, at 47–8; R. Racasan, 'ATLAS Profile: Christine van den Wyngaert', *ATLAS*, 23 October 2019, available at www.atlaswomen.org/profiles/2019/10/23/christine-van-den-wyngaert.

[9]Chappell, *supra* note 4, at 51–86; K. Hessler, 'Women Judges or Feminist Judges?: Gender Representation and Feminist Values in International Courts' (Conference Paper, Gender on the International Bench conference, Pluricourts, 23–24 March 2017); R. Grey and L. Chappell, '"Gender just judging" in international criminal courts: New directions for research', in S. Harris Rimmer and K. Ogg (eds.), *Research Handbook on Feminist Engagement with International Law* (2019), 213.

[10]Rome Statute, Art. 5.

[11]See Grey, *supra* note 5, at 49–66.

[12]S. Brownmiller, *Against Our Will: Men, Women and Rape* (1975); R. Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law', (1994) 5 *Hastings Women's Law Journal* 243.

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violence against men and boys has also been linked to gendered ideas: in addition to causing serious physical damage, it is used to undermine men's status by making them appear 'effeminate' or 'homosexual' in societies where those labels are considered degrading for men.[13] A sensitivity to gender issues is therefore particularly relevant in cases involving sexual and gender-based crimes, although this is by no means the only situation in which gender-sensitivity on the Bench is an asset.

2. The foundations for gender-sensitive judging

The importance of gender-sensitivity is 'baked into' the ICC's design, so to speak. During the Court's creation, the international feminist legal community successfully advocated for strong gender justice provisions in the Rome Statute.[14] These provisions were supported by numerous states, as well as the Women's Caucus for Gender Justice, the key feminist organization engaged in the negotiations. Some of the proposed gender justice provisions had to be watered down in order to appease conservative states, particularly the provisions defining the terms 'gender' and 'forced pregnancy'.[15] However, the Women's Caucus and like-minded states were successful in locking in many gender justice rules.[16] In particular, the Rome Statute:

- recognizes a wider range of sexual and gender-based crimes than any previous instrument of international law,[17]
- refers to special measures to protect the dignity and wellbeing of victims of sexual and gender-based violence,[18]
- requires that all sources of law applicable within the ICC are interpreted and applied without adverse distinction (discrimination) on gender grounds,[19]
- urges states to elect a 'fair representation of female and male judges',[20] and
- includes provisions aimed at securing gender expertise in the Chambers (i.e., the judiciary),[21] Office of the Prosecutor,[22] and Registry.[23]

Not all feminist scholars were equally thrilled with the Rome Statute. For instance, Janet Halley has queried whether women's rights actors were right to put their faith in a criminal mechanism, and has criticized women's rights activists involved in the Rome Statute negotiations for what she regards as their 'chilling indifference to the suffering and death of men' in war.[24] Hilary Charlesworth and Christine Chinkin have acknowledged that the Statute was a step towards accountability for conflict-related sexual violence crimes, but pointed out that international

[13]S. Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', (2007) 18 *European Journal of International Law* 253; C. Dolan, 'Victims Who Are Men', in F. Ní Aoláin et al. (eds.), *The Oxford Handbook of Gender and Conflict* (2018), 86.

[14]Chappell, *supra* note 4; B. Bedont and K. Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court', (1999) 6 *Brown Journal of World Affairs* 65; Oosterveld, *supra* note 6.

[15]M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (2006), 77–93; L. Chappell, 'Women's Rights and Religious Opposition: The Politics of Gender at the International Criminal Court', in Y. Abu-Laban (ed.), *Gendering the Nation-State: Canadian and Comparative Perspectives* (2008), 139.

[16]C. Steains, 'Gender Issues', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 357.

[17]Rome Statute, Arts 7(1)(g), 7(1)(h), 8(2)(b)(xxii), 8(2)(e)(vi).

[18]Ibid., Arts 54(1)(b), 68(1), 68(2).

[19]Ibid., Art. 21(3).

[20]Ibid., Art. 36(8)(a)(iii).

[21]Ibid., Art. 36(8)(b).

[22]Ibid., Art. 42(9).

[23]Ibid., Art. 43(6).

[24]J. Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', (2008) 30 *Michigan Journal of International Law* 1, at 123.

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criminal law remains unable to overcome the continued structural subordination of women in many parts of the world.[25] As these critiques and others show, there is no singular 'feminist' assessment of the Rome Statute, or the ICC. Yet there is no doubt that compared to previous instruments of international law, the Rome Statute was remarkably gender-sensitive.

The provision about gender expertise in the judiciary moved through several iterations during the negotiations. In the ICC Preparatory Committee's meetings between 1996 and 1998, Samoa argued that this provision should use the term 'gender expertise', New Zealand moved that it should refer to 'competency in gender analysis', and a joint proposal by Australia, Belgium, Canada, Costa Rica, New Zealand, Lichtenstein, and the USA argued that it should refer to 'the need, within the membership of the Court, for expertise on gender and sexual violence and protection of children'.[26] Most of these states also argued that the ICC should have a balance of male and female judges, but they rightly understood this as a separate issue from gender competency on the Bench.[27] The Women's Caucus likewise insisted that the Statute should require judges with gender expertise, *in addition* to female judges. As the late Rhonda Copelon, a leader of the Women's Caucus, explained: 'We insisted upon a dual standard [for ICC judges], one based on gender expertise *and* one on biology', noting that 'men can and should become gender experts'.[28]

At the 1998 Rome Conference, proposals for gender expertise in the judiciary were supported by many states including two permanent members of the Security Council (the USA and Russia).[29] However, because a smaller but insistent bloc was wary of the term 'gender', the negotiating parties reached a compromise – in judicial elections, state parties would take into account the need to elect judges with 'legal expertise on specific issues, including, but not limited to, violence against women or children'.[30] Admittedly, that language is not ideal: a requirement for expertise in 'gender violence' would have been more inclusive in terms of also addressing gendered crimes against men and non-binary people, and would have been consistent with other articles in the Rome Statute in which the term 'gender violence' is used.[31] Yet even with this compromise wording, the Rome Statute offers a stronger foundation for gender-sensitive judging than the statutes of previous international courts, all of which were silent on this issue. It does so by differentiating between the judges' sex and their legal expertise in violence against women, and by affirming that *both* issues are relevant in the context of judicial elections.

With states' agreement over this provision and the other gender justice provisions in the Rome Statute, expectations were set among the international feminist legal community, many feminist scholars, and victims' groups that the ICC would work to support gender justice and be especially sensitive to crimes against women. In this sense, the ICC's legitimacy in part came to rest on the Court achieving its gender justice mandate.[32] In the intervening years, civil society has taken steps to support gender-sensitivity in the ICC's judiciary, including in the context of judicial elections. For example, the Coalition for the International Criminal Court – a network of 2,500 NGOs that interact with the ICC – asked candidates about their gender expertise in the lead-up to the 2017 judicial election, so that states and others would have further information on that issue.[33] More recently, in the lead-up to the 2020 judicial election, Open Society Justice Initiative recommended that states conduct a more rigorous assessment of the candidates' qualifications including asking

[25]H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 335.
[26]Steains, *supra* note 16, at 379–80.
[27]Ibid., at 376–9.
[28]Copelon, *supra* note 5, at 238 (emphasis added).
[29]Ibid., at 381 (fn 80).
[30]Ibid., at 380, 382.
[31]Rome Statute, Art. 42(9).
[32]Chappell, *supra* note 4.
[33]E.g., Coalition for the ICC, *Judicial Elections 2017 Questionnaire - Kimberly Prost, Canada*, 16 August 2017, available at www.coalitionfortheicc.org/document/judicial-elections-2017-questionnaire-kimberly-prost-canada.

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each candidate to explain their 'specific experience in gender and children matters'.[34] A similar view is reflected in the 2020 questionnaire for judicial candidates developed by the Coalition for the International Criminal Court. The questionnaire solicits information on each candidate's gender competency, including by asking them to describe any experience in addressing misconceptions relating to sexual and gender-based crimes, to share examples of applying a gender perspective in their professional career, and to reflect on the expectation that judges of the ICC will not condone or manifest any bias based on gender, *inter alia*.[35]

Yet this interest in gender-sensitive judging has not been matched within the Court as a whole. Rather, the most consistent leadership on gender justice within the ICC has come from the Office of the Prosecutor. During Fatou Bensouda's term, the Office has published a sophisticated policy for investigating and prosecuting sexual and gender-based crimes,[36] and has made significant progress in charging these crimes. By the Rome Statute's twentieth anniversary in July 2018, sexual and gender-based crimes (against both male and female victims) accounted for almost half of all crimes charged at the ICC.[37] But even if subsequent ICC Prosecutors share Bensouda's commitment to gender justice, these efforts from the Office of the Prosecutor will be of limited use unless the ICC's judges are willing to use the foundational aspects of the Rome Statute to 'see' gender bias in the legal system and, where possible, to ameliorate that gender bias by interpreting and applying the law in more gender-sensitive ways.

In contrast to the leadership shown by the Office of the Prosecutor, there has been no systematic attempt to integrate gender competence in the Chambers. For example, there have been no public reports of judges undergoing training in gender analysis, and of the three 'practice manuals' published by the ICC Chambers following judicial retreats, none has referred to the importance of interpreting the law in a gender-sensitive way, or given guidance on how judges should question alleged victims of sexual and gender-based crimes at trial.[38]

The lack of focus on gender-sensitivity within the Chambers is made even more concerning when one considers the ICC's troubled track record in prosecuting sexual and gender-based crimes[39] – at the time of writing, the Court's first conviction for sexual and gender-based crimes had been overturned,[40] and an appeal against its only other conviction for sexual and gender-based crimes was pending.[41] There are multiple reasons for this low number of convictions for sexual and gender-based crimes, including omissions by the prosecution, insufficient evidence to establish the charges, and a lack of co-operation by states. But the Chambers have at times added to these problems, such as by interpreting the term 'sexual violence' so as to exclude instances of forced nudity[42] and forced circumcision,[43]

[34]Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, 2019, at 7, available at www.justiceinitiative.org/uploads/a43771ed-8c93-424f-ac83-b0317feb23b7/raising-the-bar-20191112.pdf.

[35]Coalition for the ICC, 'Questionnaire for candidates to the 2020 ICC Judicial Election', available at www.coalitionfortheicc.org/sites/default/files/cicc_documents/ICC%20Judicial%20elections%20questionnaire%202020.pdf.

[36]ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014).

[37]Grey, *supra* note 5, at 253.

[38]In the practice manuals, the only reference to 'gender' is a direction that, if witnesses who claim to have experienced sexual or gender-based crimes have not disclosed that experience to their family, then participants in the ICC proceedings should take particular caution in investigating these alleged crimes. See *Chambers Practice Manual*, February 2016, 30; *Chambers Practice Manual*, May 2017, 34; *Chambers Practice Manual*, 2019, 4.

[39]A detailed examination of the ICC's practice in prosecuting sexual and gender-based crimes can be found in Grey (2019), *supra* note 5.

[40]*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red, A.Ch. 8 June 2018.

[41]*Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T.Ch. VI, 8 June 2019.

[42]*Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, P.T.Ch. III, 10 June 2008, paras. 39–40.

[43]*Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, P.T.Ch. II, 23 January 2012, paras. 260–266.

seeming to require more evidence to establish foresight of sexual violence crimes than of other offences,[44] and refusing to allow male victims of sexual violence to testify when this evidence was potentially relevant to the charges.[45]

The ASP – the ICC's governing body – has also put little emphasis on the gender-sensitivity of judges, notwithstanding the ASP's key role in the judicial election process. In the ICC, judges are elected by the ASP for a nine-year term, after being nominated by state parties and vetted by an Advisory Committee created by the ASP.[46] To be eligible for election, judicial candidates must be of 'high moral character', must be nationals of state parties to the Rome Statute, must have competence in either criminal law or international law, and must be fluent in at least one of the Court's two working languages (English and French).[47] Alongside those 'must-haves', the Rome Statute also sets out several non-binding criteria for states to bear in mind. Specifically, states must 'take into account' the need to include judges of different sexes, and from different countries and legal systems, as well as judges with legal expertise on certain issues including 'violence against women or children'.[48]

In 2004, the ASP gave *partial* effect to the latter considerations by creating 'minimum voting requirements' for judicial elections. According to these requirements, the ICC must always include: at least nine judges with criminal law experience; at least five with international law experience; at least six female and six male judges; and at least two judges from each regional group.[49] Yet the ASP has never put in place requirements with regard to legal expertise in 'violence against women or children', indicating that this criterion – despite its inclusion in the Rome Statute – is treated as relatively unimportant by state parties.

This lack of state support is concerning, given that judges who engage explicitly in gender analysis often face backlash and would therefore benefit from states' political support. This 'backlash' phenomena is well-documented in domestic jurisdictions,[50] and has been seen in international courts also. An example is the ICTY's *Furundžija* case, in which the defence claimed that Judge Florence Mumba's former role on the UN Commission of the Status of Women created a risk or appearance of bias. The implication was that because the Commission on the Status of Women had condemned wartime rape, Judge Mumba would not be seen as an impartial judge in a rape case. To its credit, the ICTY Appeals Chamber found that the defence's complaint had 'no basis'.[51] Despite that, it seems that some commentators still regard an emphatic commitment to gender justice as too 'political' for a judge. This became apparent following Judge Elizabeth Odio Benito's gender-sensitive dissent in the *Lubanga* case, which we discuss in more detail below. For example, Ambos wrote that this dissent appeared 'rather as a policy speech for certain constituencies in the NGO community than a strict judicial analysis', and Jacobs remarked

[44]*Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, T.Ch. II, 7 March 2014, paras. 1663–1664. See also B. Inder, 'A Critique of the Katanga Judgment', *ICC Women*, 11 June 2014, available at www.iccwomen.org/documents/Global-Summit-Speech.pdf; K. D. Askin, 'Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence', *IJMonitor*, 11 March 2014, available at www.ijmonitor.org/2014/03/katanga-judgment-underlines-need-for-stronger-icc-focus-on-sexual-violence/; Grey, *supra* note 5, at 270–2; Chappell, *supra* note 4, 119–21.

[45]R. Grey, J. O'Donohue and L. Krasny, 'Evidence of sexual violence against men and boys rejected in the Ongwen case', *Amnesty International*, 10 April 2018, available at hrij.amnesty.nl/evidence-sexual-violence-men-boys-rejected-ongwen.

[46]Open Society Justice Initiative, *supra* note 34, at 16–23.

[47]Ibid., Art. 36(3).

[48]Ibid., Art. 36(8).

[49]Resolution ICC-ASP/3/Res.6, 10 September 2004, para. 20. See also Open Society Justice Initiative, *supra* note 34, at 19.

[50]See C. Backhouse, 'The chilly climate for women judges: reflections on the backlash from the Ewanchuk case', (2003) 15 *Canadian Journal of Women and the Law* 167; K. McLoughlin, '"Collegiality is not Compromise": Farewell Justice Crennan, The Consensus Woman', (2016) 42 *Australian Feminist Law Journal* 241.

[51]K. D. Askin, 'Prosecuting Wartime Rape and Other Gender Related Crimes: Extraordinary Advances, Enduring Obstacles', (2003) 21 *Berkeley Journal of International Law* 288, at 331–2.

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'[a]pparently, the latest test trend of international decisions is to have a strong dissent from a Latin American Judge trying to push a human rights agenda'.[52]

Fortunately, the lingering distrust of feminist or gender-sensitive judges that seems to underpin such comments has not ruled out the election of some ICC judges with gender expertise. There have been several ICC judges who are known for their commitment to gender justice, including Judge Odio Benito and Judge Navanethem Pillay who, before coming to the ICC, both made significant contributions to the ICTY and ICTR's jurisprudence on sexual and gender-based crimes. Moreover, of the 12 candidates who ran in the ICCs most recent judicial election (2017), ten provided evidence of legal expertise in violence against women, including five of the six candidates who were elected.[53] Yet, without direct guidance from the ASP or a commitment within the ICC Chambers, there is no guarantee that expertise in 'violence against women' (or indeed, in gender-based violence generally) will be seen as important in subsequent judicial elections or in the practice of the Court.

These considerations are important because a commitment to gender-sensitive judging, if implemented within the agreed boundaries of the Rome Statute, could potentially increase public confidence in the ICC. That is, it could enhance the ICC's 'normative legitimacy', meaning how fair and just the institution is, taking into account factors such as whether it persists in committing serious injustices, and whether its practices align with its professed goals.[54] That is because a court that reinforces gender hierarchies is not simply 'neutral'. Rather, it is an institution that legitimizes existing gender inequalities, and therefore contributes to an ongoing injustice. In addition, routinely *modeling* and *communicating* a commitment to gender-sensitive judging, could enhance the Court's 'sociological legitimacy', meaning its *perceived* right to rule, at least in the eyes of the many states and women's rights activists who lobbied for gender justice provisions in the Rome Statute, as well as other constituencies who have championed this value in the intervening years.[55]

Having made the case that gender-sensitive judging is important to the ICC, the next question is *how* could this approach be implemented? That is, what could judges do to integrate a concern for gender justice into their work at the Court? Below, we outline one method that could assist in this regard, namely 'feminist judgment-writing'.

3. The concept of 'feminist judgment-writing'

Decades of feminist scholarship show that most laws have been written from a male perspective, and that judges have tended to interpret law and evidence from a male viewpoint.[56] Feminist scholars have argued that these biases will not necessarily be fixed by adding *female* law-makers and legal practitioners to the mix, because 'woman' is not a proxy for 'feminist'.[57] Rather, there is a

[52]Chappell, *supra* note 4, at 116.

[53]Their evidence included experience adjudicating, prosecuting or defending in sexual violence cases, publishing or giving presentations about women's rights, preparing submissions to the Committee on Elimination of Discrimination Against Women, and lobbying for law reform around women's access to justice. See, e.g., Aitala (see 2–5), Akane (15–16), Alapini Gansou (22–3, 24), Bossa (32, 35), Đurđević (37, 39), Ibañez Carranza (47, 60) Khosbayar (64–5) Majara (69–70, 73–5), Mensa-Bonsu (78–9), Peralta Distéfano (89, 92–3): ICC ASP, *Sixth election of judges of the International Criminal Court: Annex I Alphabetical list of candidates (with statements of qualifications)*, ICC-ASP/16/3/Add.1, 11 September 2017, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-3-Add1-ENG.pdf.

[54]Chappell, *supra* note 4, at 19–20.

[55]For a leading article on the concepts of 'normative legitimacy' and 'sociological legitimacy' see A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics & International Affairs* 405.

[56]R. Graycar and J. Morgan, *The Hidden Gender of Law* (1990).

[57]E.g., S. J. Kenney, *Gender & Justice: Why Women in the Judiciary Really Matter* (2013), 181.

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need for more legislators and lawyers – female or otherwise – who understand that the intersection of gender, age, ability, race, class, and so forth can limit access to justice, and who are committed to empowering women and other marginalized groups through the interpretation and application of law.[58]

In recent decades, feminist critiques of gender bias within legal systems have led to a methodology known as 'feminist judgment-writing'. In this methodology, historically and legally significant judgments are re-written by feminist authors as an imaginative exercise, using the facts and law that were available when the original judgment was issued.[59] By writing these alternative or 'shadow' judgments, feminist judgment projects are able to expose the hidden masculine bias of purportedly neutral judicial decisions, and to bridge the gap between theory and practice. In the context of criminal law, this approach is neither 'pro-prosecution' nor 'pro-defence', but offers a more gender-sensitive perspective on the legal process as a whole. As Hilary Charlesworth argues, feminist judgment-writing is a form of 'prefiguring', that is, a mode of activism summed up in the maxim 'be the change you want to see'.[60] This is because feminist judgment-writing does not rely on persuading other actors (e.g., legislators) to enact new laws; it is a practice that can be implemented immediately, in order to demonstrate the untapped gender justice potential within the law as it stands.

While not legally authoritative, the shadow judgments produced by feminist authors are valuable pedagogical tools – they show the roads not taken in seminal cases, and inspire further thinking about the possibilities for applying existing law in ways that are sensitive to gender. As such, feminist judgment-writing provides a powerful vehicle for demonstrating what is plausible within the bounds of legal formalism. This need not *exclude* more radical feminist projects, such as seeking law reform, or creating people's tribunals that apply law of their own creation. But it is an additional form of feminist engagement with law which helps to challenge orthodox ways of thinking, and could potentially change legal practice if judges are willing to apply principles of feminist judgment-writing in real cases. In practice, feminist scholars, activists, lawyers, and jurists often move between more radical modes of engagement (such as law reform) and more incremental modes of engagement (such as 'feminist-judgment writing'), depending on the nature and immediacy of the issues at stake. Reflecting on this need for multiple modes of engagement back in 1992, feminist legal scholar Mari Matsuda argued:

> There are times to stand *outside* the courtroom door and say "this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times to stand *inside* the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood".[61]

[58]R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (2010); K. McLoughlin, '"A Particular Disappointment"?: Judging Women and the High Court of Australia', (2015) 23 *Feminist Legal Studies* 273; K. McLoughlin, 'Judicial fictions and the fictive feminists: Re-imagination as feminist critique in PGA v The Queen', (2015) 24 *Griffith Law Review* 592; K. McLoughlin, 'Situating Women Judges on the High Court of Australia: Not Just Men in Skirts?' (PhD Thesis, University of Newcastle, 2016).

[59]R. Hunter, C. McGlynn and E. Rackley, 'Feminist Judgments: An Introduction', in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (2010), 3.

[60]H. Charlesworth, 'Prefiguring Feminist Judgment in International Law', in L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (2019), 479, at 492.

[61]M. Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method', (1989) 11(1) *Women's Rights Law Reporter* 7, at 8.

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Instigated by the Women's Court of Canada,[62] complementary feminist judgment projects have since emerged in Australia,[63] Ireland,[64] Scotland,[65] the United States,[66] New Zealand,[67] and India,[68] with a further African project now underway.[69] These collections have covered most if not all areas of domestic law, including contract, property, tort, criminal law, constitutional law, and family law. They demonstrate that there is no single way to be a 'feminist judge', not least because feminism itself is not monolithic. For example, women of colour, women in the Global South, and queer women often have different concerns to more privileged women, and therefore have different priorities for legal reform.[70] In America, for example, women of colour have been at the forefront of demands for reproductive autonomy, often anchoring their writing and activism in an analysis of the sexual and reproductive exploitation of slaves.[71]

Notwithstanding this plurality within feminism, most feminist judgment projects follow certain common principles. As explained by Rosemary Hunter, one of the pioneers of the 'feminist judgment-writing' movement, this methodology typically involves: 'asking the woman question' (meaning that judges should consider how ostensibly gender-neutral rules can disadvantage women when put into practice); ensuring that women are included in the decision-making process; challenging gender bias in judicial reasoning; paying attention to the context and the reality of women's lived experience; seeking to overcome injustices along gender lines; and being informed by feminist scholarship.[72] Hunter emphasizes that this approach to judging does not require judges to act unlawfully; the point is to apply gender-sensitive thinking *within* the constraints of the law.

Compared to their domestic counterparts, scholars of international law have been relatively late to the concept of 'feminist judgment-writing'. The 2019 *Feminist Judgments in International Law* collection, in which feminist authors re-write existing judgments of international courts with alternative reasoning, is an important first step in this regard.[73] It demonstrates that, had judges interpreted and applied their legal frameworks in more gender-sensitive ways, things would have

[62]D. Majury, 'Introducing the Women's Court of Canada', (2006) 18 *Canadian Journal of Women and the Law* 1.

[63]H. Douglas et al. (eds.), *Australian Feminist Judgments: Righting and Rewriting Law* (2014).

[64]M. Enright, J. McCandless and A. O'Donoghue (eds.), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (2017); K. McLoughlin, 'Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity Mairead Enright, Julie McCandless and Aoife O'Donoghue (eds); Hart Publishing, 2017; 643 pages; $90 (paperback), Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds); Hart Publishing, 2017; 549 pages; $160 (hardback)', (2018) 43 *Alternative Law Journal* 146, at 147

[65]S. Cowan, C. Kennedy and V. Munro (eds.), *Scottish Feminist Judgments: (Re)Creating Law from the Outside In* (2019).

[66]K. Stanchi, L. Berger and B. Crawford (eds.), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016).

[67]E. McDonald et al. (eds.), *Feminist Judgments of Aotearoa New Zealand – Te Rino: A Two-Stranded Rope* (2017).

[68]M. Mukherjee, 'Judging in the Presence of Women as Legal Persons – Feminist alternative to the Indian Supreme Court Judgment in Sakshi v. Union of India', (2011) 1(2) *Feminists at Law*, doi.org/10.22024/UniKent/03/fal.25. See also *The Feminist Judgment Project India*, available at fjpindia.wixsite.com/fjpi/cases.

[69]'African Feminist Judgments Project Launched by Cardiff Law and Global Justice', *Cardiff Law and Global Justice*, 11 October 2018, available at www.lawandglobaljustice.com/news/2018/10/11/african-feminist-judgments-project-launched-by-cardiff-law-and-global-justice.

[70]E.g., C. Moraga and G. Anzaldúa (eds.), *This Bridge Called My Back: Writings by Radical Women of Color* (2015); R. Kapur and B. Cossman, 'Subversive Sites 20 Years Later: Rethinking Feminist Engagements with Law', (2018) 44 *Australian Feminist Law Journal* 265.

[71]E.g., D. E. Roberts, 'The Future of Reproductive Choice for Poor Women and Women of Color', (1992) 14 *Women's Rights Law Reporter* 305; L. J. Ross, 'Reproductive Justice as Intersectional Feminist Activism', (2017) 19 *Souls: A Critical Journal of Black Politics, Culture, and Society* 286; K. Mutcherson, 'Things That Money Can Buy: Reproductive Justice and the International Market for Gestational Surrogacy', (2018) 43(4) *North Carolina Journal of International Law* 150; K. Mutcherson (ed.) *Feminist Judgments: Reproductive Justice Rewritten* (2020).

[72]R. Hunter, 'An Account of Feminist Judging', in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (2010), 30, at 35.

[73]L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (2019).

turned out differently in well-known cases such as the Permanent Court of International Justice's *Lotus* case,[74] the International Court of Justice's *Advisory Opinion on Reservations to the Genocide Convention*,[75] the ICTY's *Karadžić* case,[76] the Special Court for Sierra Leone's *AFRC* case,[77] and the ICC's *Lubanga* case,[78] which we consider in more detail below.

The concept of feminist judging, as developed in these national and international projects, has important implications for the ICC. It raises the bar for 'gender on the Bench' by showing that state parties can do more than electing a balance of male and female judges – they can also ensure gender-sensitivity on the Bench by supporting candidates with expertise in gender analysis, and by backing judges who bring a feminist approach to their work once elected. Of course, when engaging in gender analysis, the ICC judges need not *stop* with feminist judgment-writing. Rather, they can take this method and build on it by asking the 'gender question' rather than just the 'woman question' – by which, we mean they could think about the law's differential impact on men, women, boys, girls, non-binary people, and people whose sexual orientation or gender identity differs from the norm. Moreover, judges may apply gender analysis at all stages of the proceedings, including in the cut and thrust of a trial, rather than waiting until the judgment-writing phase.

4. Opportunities for feminist judging at the ICC

To demonstrate that pathways for feminist judging (broadly conceived) exist within the ICC, this section of the article looks more closely at three main spheres of judicial activity: interpreting the law, making findings of fact, and making procedural decisions. This section of the article is the most technical, and intentionally so. The aim is to show that feminist judging is possible within the constraints of the Rome Statute; indeed, we see some examples of feminist judging in the Court's case law already.

4.1 Judges as interpreters of law

In proceedings at the ICC, judges are often called on to interpret terms and concepts in the ICC's legal texts. When engaging in this task, there is scope for judges to think about the gendered consequences of a particular interpretation: will it have a discriminatory effect in practice, and if so, can this be avoided?[79] Such questions give effect to Article 21(3) of the Rome Statute, which requires the Court to interpret and apply the law without adverse distinction on certain grounds, including gender. By thinking through how different interpretations of law might result in gender discrimination, judges can in substance engage in feminist-judging, even if they choose not to describe their method in such terms.

This point is illustrated in the feminist judgment in the *Lubanga* case, written by Yassin Brunger, Emma Irving, and Diana Sankey.[80] The *Lubanga* case presented the ICC's first opportunity to interpret the war crime of 'using children [aged 15 or under] to participate actively in hostilities' pursuant to Article 8(2)(e)(vii) of the Rome Statute. The accused, Thomas Lubanga Dyilo, was the

[74] *S.S. Lotus case (France v. Turkey)*, PCIJ Rep Series A No 10.

[75] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15.

[76] *Prosecutor v. Radovan Karadžić*, Trial Judgement, T. Ch., Case No. IT-95-5/18-T, 24 March 2016.

[77] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Trial Judgment, Case No. SCSL-04-16-T, T. Ch. II, 20 June 2007.

[78] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012.

[79] See R. Grey, 'Interpreting international crimes from a "female perspective": opportunities and challenges for the International Criminal Court', (2017) 17 *International Criminal Law Review* 325.

[80] Y. Brunger, E. Irving and D. Sankey, 'The Prosecutor v Thomas Lubanga Dyilo', in L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (2019), 409.

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president of an armed group in the Democratic Republic of Congo. Reports that female child soldiers within Lubanga's group had been raped by their commanders had been relayed to the (then) ICC Prosecutor, Luis Moreno-Ocampo, prior to the confirmation of charges proceedings.[81] Despite that, the Prosecutor did not refer to this issue in the Document Containing the Charges. As a result, no allegations of rape were included in Lubanga's charges.[82]

Nonetheless, when the trial began, the prosecution proceeded to introduce evidence of sexual violence. It alleged that female child soldiers in Lubanga's group were routinely raped and used as domestic servants by their commanders, and argued that this sexual abuse fell within one of the charges that Lubanga was facing, namely, 'using children to participate in hostilities'.[83] The majority of the Trial Chamber, comprising Judge Adrian Fulford and Judge René Blattman, did not accept that argument. They held that a child has participated actively in hostilities if the support that he or she provided to the combatants 'exposed him or her to real danger *as a potential target*',[84] but refused to determine whether the rape of child soldiers by their commanders would satisfy that test, given that this question fell outside the factual scope of the charges in the case.[85]

The feminist judgment authored by Brunger et al. offers an alternative approach to interpreting the phrase 'using children to participate activity in hostilities'. It holds that when interpreting this phrase, judges must examine 'the overall experience of children, including the various roles undertaken within the armed group and the risks of violence and harm they are exposed to both from enemy forces *and their "own" armed group*'.[86] It further cautions that 'when examining the experiences of child soldiers it is critical to recognize that those experiences are not gender-neutral'.[87] Applying this interpretation, the feminist judgment concludes that sexual violence *can* be included within the legal definition of the phrase 'to participate actively in hostilities', as can using children for forced domestic labour, because there are manifestations of the internal risks posed to children within armed groups.[88]

This (fictional) feminist judgment largely accords with the real dissenting opinion written by Judge Odio Benito in the *Lubanga* case. In that opinion, her Honour reasoned that an interpretation which excluded sexual violence from the phrase 'using children to participate actively in hostilities' was impermissible because it would discriminate against female child soldiers, who tend to be at greater risk of sexual abuse than their male peers.[89] Importantly, her Honour did not sacrifice the concept of fair trial rights in her dissenting opinion. She did not argue that *in this case*, the accused was responsible for the alleged rape of child soldiers by other members of his armed group. Rather, her point was that, as a question of law, it was important to interpret the Rome Statute in a non-discriminatory manner *before* applying that interpretation to the facts at hand.[90]

In *Lubanga*, the Appeals Chamber ultimately decided that, when assessing whether a child has been used to 'participate actively in hostilities', one must simply 'analyse the link between the activity for which the child is used and the combat in which the armed force or group of the

[81]E.g., Public Redacted Version of Confidential Letter to ICC Prosecutor, *Women's Initiatives for Gender Justice*, 16 August 2006, available at www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf.

[82]*Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, P.T.Ch. I, 29 January 2007.

[83]E.g., *Prosecutor v Thomas Lubanga Dyilo*, Prosecution's Closing Brief, ICC-01/04-01/06-2748-Red, T.Ch. I, 1 June 2011, paras. 143, 227–34.

[84]*Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012, para. 628.

[85]Chappell *supra* note 4, at 111–14; Grey, *supra* note 5, at 130–3; Hayes (2013), *supra* note 5, at 10–25.

[86]Brunger et al., *supra* note 80, para. 49.

[87]Ibid., para. 50.

[88]Ibid., paras. 73–4.

[89]*Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute (Separate and Dissenting Opinion of Judge Odio Benito), ICC-01/04-01/06-2842, T.Ch. I, 14 March 2012, paras. 16 and 21 (emphasis added).

[90]Ibid., paras. 6–7.

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perpetrator is engaged'.[91] The flexibility of this interpretation leaves some scope to capture the differing ways that male and female child soldiers are used.[92] For example, in the 2019 *Ntaganda* judgment, Lubanga's former co-accused Bosco Ntaganda was convicted of multiple crimes including the war crime of using children to participate actively in hostilities. The judgment recognized a range of activities as falling within the scope of this crime including participating in reconnaissance missions to gather information about the opposing forces and UN personnel.[93] Consistent with the prosecution's submissions, the judgment recognized the gendered dimensions of those reconnaissance missions, which included forcing female child soldiers to enter enemy camps in disguise as prostitutes, which required them to have sex with enemy soldiers.[94]

These examples from the *Lubanga* and *Ntaganda* cases demonstrate the scope to engage in feminist judging when interpreting a seemingly gender-neutral crime, namely, the war crime of 'using children to participate actively in hostilities'. The judge must uphold the principle of legality, but within that constraint, he or she can also minimize gender discrimination by thinking carefully about whose experiences will be excluded when the crime is applied in the real world. This same approach could be used to interpret other seemingly gender-neutral crimes which are yet to receive detailed judicial analysis in the ICC, such as the war crimes of intentionally attacking buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, or hospitals,[95] destroying the natural environment,[96] and subjecting civilians to starvation,[97] or the crime of aggression,[98] to name a few. The interpretation of such crimes must be governed by the principle of legality, which precludes judges from inventing new crimes after the fact.[99] Yet there is scope to avoid gender discrimination while upholding that principle, as the above cases illustrate.

Moreover, it is not only *crimes* which could be interpreted in a gender-sensitive way. Judges might also ask the 'woman question' and the 'gender question' when construing defences, modes of liability, sentencing criteria, provisions on state co-operation, and indeed, any aspect of the Court's legal framework. In particular, the ICC's rules on complementarity lend themselves to gender analysis.[100] For example, as part of its complementarity assessment, the ICC must determine whether a state with jurisdiction is able and willing to investigate and prosecute the case 'genuinely'.[101] When interpreting this test of 'genuineness', the Court may consider whether the national justice system is so biased against women that it could not be considered impartial. The court might also consider whether investigation processes in the national system are so lacking in gender-sensitivity that the necessary evidence and testimony would not be obtained. The

[91] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A.Ch., 1 December 2014, para. 335.

[92] See Grey, *supra* note 5, at 315–17.

[93] *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T. Ch. VI, 8 July 2019, paras. 1125–1132.

[94] Ibid., paras. 404, 1130. See also *Prosecutor v. Bosco Ntaganda*, Public Redacted Version of Prosecution's Closing Brief, ICC-01/04-02/06-2277-Anx1-Corr-Red, T.Ch. VI, 7 November 2018, para. 657.

[95] Rome Statute, Art. 8(2)(b)(ix); 8(2)(e)(iv).

[96] Ibid., Art. 8(2)(b)(iv). At the 2019 ASP, states agreed to amend the Rome Statute to include an equivalent war crime in the context of non-international armed conflicts.

[97] Ibid., Art. 8(2)(b)(xxv).

[98] Ibid., Art. 8*bis*.

[99] Ibid., Art. 22.

[100] L. Chappell, R. Grey and E. Waller, 'The gender justice shadow of complementarity: Lessons from the International Criminal Court's preliminary examinations in Guinea and Colombia', (2013) 7 *International Journal of Transitional Justice* 455; D. De Vos, *Complementarity's Gender Justice Prospects and Limitations: Examining Normative Interactions between the Rome Statute and National Accountability Processes for Sexual Violence Crimes in Colombia and the Democratic Republic of Congo* (PhD Thesis, European University Institute, 2017); A. Kapur, 'Complementarity as a Catalyst for Gender Justice in National Prosecutions', in F. Ní Aoláin et al. (eds.), *The Oxford Handbook of Gender and Conflict* (2018), 225.

[101] Rome Statute, Art. 17.

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Office of the Prosecutor has considered these types of issues when interpreting the ICC's complementary rules in its 2014 *Policy Paper on Sexual and Gender-Based Crimes*,[102] but the judges are yet to apply a gender lens to these rules.

4.2 Judges as fact-finders

As the ICC has no jury, making findings of fact is the sole responsibility of the judges. Based on the evidence presented by the parties, as well as any evidence that the judges have called on their own motion,[103] the judges determine the factual questions that arise in each case. For example, they determine which states and armed groups were parties to a given conflict, and how long that conflict lasted, as well as the intricacies of who said what during a particular meeting, and whether particular acts of rape, murder, and so forth took place. As with the task of legal interpretation, the task of fact-finding lends itself to feminist approaches. Feminist judgment projects show that feminist judging does not only affect legal reasoning; it can also influence the *factual* narrative that arises from the case. As Erika Rackley observed in the English feminist judgments project, 'the judge—like all authors—makes strategic choices about how to tell their story, including where to begin, the inclusion, exclusion, relevance or otherwise of certain facts'.[104]

One technique of feminist fact-finding is to pay attention to the gendered context in which the crimes occurred. This point is illustrated by the feminist re-write of the High Court of Australia's 1996 judgment in the *Taikato* case. The defendant in this case, Ms Taikato, had been convicted of possessing a weapon (a can of formaldehyde spray) in her purse. Under the applicable law, carrying this spray was a criminal offence unless the defendant had a lawful purpose or a reasonable excuse. Ms Taikato argued that she *did* have a lawful purpose, namely, carrying it to protect herself in case of attack. The High Court rejected this argument, finding that there was no perceived threat that would justify her possession of the weapon. In reaching that conclusion, the Court effectively ignored the context for the defendant's actions, namely, the reality of violence against women, as well as her own experience of being attacked by a stranger in the past. By contrast, the feminist judgment, written by feminist scholars Penny Crofts and Isabella Alexandra, placed considerable weight on these contextual factors. As a result, it found that Ms Taikato's possession of the spray was a proportionate response to a well-founded fear, such that she was entitled to the defence of 'self-defence'.[105]

In some cases, the ICC judges have shown a similar sensitivity to the gendered context in which the facts occurred. An example can be seen in the *Ongwen* case, which concerns attacks perpetrated by the Lords' Resistance Army (LRA) in Uganda.[106] According to the Prosecutor, the LRA often abducted civilians for use as soldiers, sexual slaves, and 'wives'. The prosecution witnesses included 'P-227', a woman who was allegedly abducted and then forced to become a 'wife' to Ongwen.[107] The defence challenged her testimony, noting that P-227 denied having been raped when she spoke with NGO workers directly after her escape, but then claimed she *had* been raped when interviewed by ICC investigators some years later.[108] However, P-227 stood by her rape testimony, explaining that she initially concealed this ordeal from the NGOs workers because (unlike the ICC investigators) they were male, and because at the time they questioned her,

[102]ICC Office of the Prosecutor, *supra* note 36, para. 41.

[103]Rome Statute, Art. 69(3).

[104]E. Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgments Project', in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (2010), 44.

[105]P. Crofts and I. Alexander, '*Taikato v R*', in H. Douglas et al. (eds.), *Australian Feminist Judgments: Righting and Rewriting Law* (2014), 250.

[106]See Grey and Chappell, *supra* note 9, at 235–6; Grey *supra* note 5, at 269–70.

[107]*Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, P. T. Ch. II, 23 March 2016, para. 118.

[108]*Prosecutor v. Dominic Ongwen*, Transcript, ICC-02/04-01/15-T-11-Red-ENG, P.T.Ch. II, 19 September 2015, at 22–4.

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she was exhausted from her escape.[109] The Pre-Trial Chamber deemed P-227's testimony reliable notwithstanding its internal inconsistencies, taking into account her account of trauma and her stated preference for speaking with female investigators.[110] In reaching that conclusion, the judges demonstrated an awareness of the gendered social context that makes it difficult for some women to disclose their experiences of sexual violence, especially when speaking to men.[111]

A feminist approach to fact-finding also includes considering the experience of people who are often overlooked – those at the margins of the case. We see this in the feminist re-writing of the Permanent Court of International Justice's (PICJ) 1927 *Lotus* case. The case concerned the death of eight Turkish seaman who died when French and Turkish ships collided upon the high seas (seas beyond the territorial jurisdiction of any state). Officers from both ships were prosecuted for manslaughter in Turkey. The issue for the PICJ was whether France possessed *exclusive* criminal jurisdiction over its own officer, with the result that Turkey had violated international law by prosecuting him in a Turkish court. In the real judgment, the Court determined this question with no regard to the harm suffered by the women and children made destitute when the Turkish sailors – their husbands and fathers – drowned at sea. By contrast, these bereaved families are the focus of attention in the feminist judgment. In fact, the feminist judgment concludes that Turkey was right to prosecute the crimes, because it was the country of the widows and children whose relatives died in the collision.[112]

In several ICC cases, the judges have shown a similar concern for the rights and wellbeing of people on the fringes of the case. For example, in the *Lubanga* case, the trial and appeal judges recognized that 'indirect victims', such as the relatives of child soldiers recruited by Lubanga's group, had been injured and were therefore entitled to reparation.[113] Similarly, in *Katanga*, the trial and appeal judges concluded that the relatives of people who were murdered were entitled to reparation for their suffering.[114] Building on those precedents, the victims' counsel in the *Ntaganda* case have argued that children who have been born as a result of rape should be presumed to have suffered harm, and therefore be entitled to reparation.[115] Certainly, a feminist approach to fact-finding warrants a consideration of any stigmatization or trauma experienced by this class of indirect victims – this point is noted in the feminist *Lubanga* judgment described above.[116]

We emphasize that opportunities for feminist judging in relation to fact-finding exist outside of rape cases. The broader point is that judges should make a point of considering the experiences of actors who are usually on the margins, and paying attention to the gendered power relationships

[109]Ibid., at 43–5.

[110]*Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, P. T. Ch. II, 23 March 2016, para. 118.

[111]See D. Luping, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court', (2009) 17 *American University Journal of Gender, Social Policy & the Law* 431, at 493; M. Jarvis and N. Nabti, 'Policies and Institutional Strategies for Successful Sexual Violence Prosecutions', in S. Brammertz and M. Jarvis (eds.), *Prosecuting Sexual and Gender-Based Crimes at the ICTY* (2016), 73, at 83; Human Rights Watch and Fédération Internationale des Ligues des Droits de l'Homme, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, September 1996, 55.

[112]C. Chinkin et al., 'Bozkurt case, aka the Lotus case (France v Turkey)', in L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (2019), 27, at 35, 46.

[113]*Prosecutor v. Thomas Lubanga Dyilo*, Annex A to Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 order for reparations (amended), ICC-01/04-01/06-3129-AnxA, A.Ch., 3 March 2015, para. 6.

[114]*Prosecutor v. Germaine Katanga*, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3778-Red, A.Ch., 8 March 2018, paras. 93–127.

[115]*Prosecutor v. Bosco Ntaganda*, Public Redacted Version of the "Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations", ICC-01/04-02/06-2477-Red, T.Ch. VI, 28 February 2020, para. 38.

[116]Brunger et al., *supra* note 80, para. 77.

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which either expand or reduce an individual's ability to exercise agency. These principles can potentially be applied to any kind of proceeding that comes before the ICC.

4.3 Evidence and procedure

In addition to interpreting legal principles and making findings of fact, ICC judges regularly make decisions of a procedural nature. For example, they decide whether certain evidence is admitted, whether leave to appeal is granted, whether *amicus curiae* briefs will be accepted, and whether to alter the legal characterization of facts in order to prove a different offence or mode of liability than that initially charged. While many procedural decisions take a written form, there are also scores of oral decisions made by trial judges on a daily basis, such as whether to allow particular questions in cross-examination, and whether to interject with additional questions from the Bench. Procedural decisions tend not to make headlines, unless they are particularly controversial. The Trial Chamber's decision to change the mode of liability at the end of the *Katanga* case is perhaps the best-known example.[117] Yet, although they tend not to receive as much attention, procedural decisions are important sites for feminist judging. This is because procedural decisions affect how vulnerable people, including survivors of sexual and gender-based crimes, experience the justice process.

An example can be seen in the feminist re-write of the 2001 House of Lords judgment in *R v. A*, in which the accused was charged with raping his former girlfriend.[118] In his defence, the accused argued that the complainant had consented to the sexual intercourse (which would defeat the *actus reus* element) or alternatively, that he had *believed* that she was consenting (which could defeat the *mens rea* element). To establish these claims, he sought leave to admit evidence of prior consensual sex with the complainant. The trial judge rejected his request due to a statutory 'rape shield', i.e., a provision that bars an accused from leading evidence about the complainant's prior sexual behaviour. The Court of Appeal then reversed that decision, finding that he *could* lead the evidence to support his claim about *believing* that the sex was consensual, but could *not* lead it to show that the complainant did, in fact, consent. The accused appealed to the House of Lords, arguing that limiting his use of evidence in that manner was a breach of fair trial rights under the UK Human Rights Act 1998. The House of Lords agreed. It found that if evidence of prior consensual sex with the complainant is so relevant that its exclusion would violate the right to a fair trial, then that evidence *can* be admitted, notwithstanding the statutory 'rape shield'.

The feminist judgment, written by feminist legal scholar Clare McGlynn, places far more emphasis on the privacy and dignity of the complainant. McGlynn recalls the advocacy that led to the statutory 'rape shield', reasoning that it exists to protect the complainant's privacy, and because the complainant's sexual history is usually irrelevant to the question of whether he or she consented to the sexual act which forms the basis of the charge. She argued:

> One does not consent to sex in general or even to one person in general ... Autonomy entails the freedom and capacity to make a choice whether or not to consent on *each and every occasion*.[119]

[117]E.g., S. Rigney, '"The Words Don't Fit You": Recharacterisation of the Charges, Trial Fairness, and *Katanga*', (2014) 15 *Melbourne Journal of International Law* 515; K. Heller, '"A Stick to Hit the Accused With": The Legal Recharacterization of Facts under Regulation 55', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), 981, at 1000–2.

[118]*Regina v. A* (No 2) [2001] UKHL 25.

[119]C. McGlynn, 'R v A (No 2) Judgment', in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (2010), 211, at 221 (emphasis added).

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For that reason, and to prevent juries making inaccurate assumptions based on the complainant's prior sexual behaviour,[120] McGlynn held that the statutory 'rape shield' justifiably barred the accused from leading any evidence of his prior sexual relationship with the complainant. As McGlynn persuasively argued, ensuring that the complainant's prior sexual behaviour stays 'out of bounds' will make the court process significantly more accessible for rape survivors. In her words:

> The treatment of witnesses in court adversely impacts upon decisions to report to the police. Who would want to put themselves before a voyeuristic court to have their sexual history trawled through and criticized, and often with little direct relevance to the issues at trial?[121]

This is an important point, given data from the UK Home Office showing that 'the expectation of being questioned, in public, regarding their previous sexual history is the biggest single factor in prompting women to withdraw their complaints'.[122]

A similar concern for the rights and dignity of sexual violence survivors is found in the ICC's rules of procedure and evidence,[123] as well as in the practice of the Court. For example, during the *Bemba* trial, some witnesses found it harrowing to describe the details of their experience rape. In particular, they struggled to articulate the act of penetration. In such situations, the judges sought to relieve the pressure on the witness by proposing that the defence accept that the act of penetration occurred, a proposal often accepted by the defence.[124] In this way, the judges were able to limit the distress to the witness. Another example of judges taking steps to reduce pressure on survives of sexual violence can be seen in the aforementioned *Lubanga* case. During trial, Judge Odio Benito routinely asked witnesses about possible acts of sexual violence in Lubanga's group. The defence argued that these questions were irrelevant to the charges and should therefore desist.[125] However, the Trial Chamber ruled that the questions about sexual violence were appropriate because the responses might be relevant to sentencing or reparations, and it was better for the witnesses if they were asked at trial, in order to reduce the chance that they would have to be recalled later on.[126] A third example can be found in the *Ongwen* case, in which the Trial Chamber agreed to accept testimony of sexual violence that had been recorded at the pre-trial stage. In making that decision, the Chamber recognized that calling the witnesses to give their evidence a second time would put them under unnecessary strain.[127]

Our preliminary review of ICC practice shows that feminist judging is possible – and is to some extent already happening – in three spheres of judicial activity: interpreting law, making findings of fact, and making procedural decisions. The final section of the article considers how a gender-sensitive approach might be institutionalized at the ICC, so that instances of gender-sensitive judging become the norm.

5. The future of 'feminist judging' at the ICC

There are several actions that Court insiders and outsiders can take to encourage and enable gender-sensitive judging at the ICC. First, within the ICC Chambers, judges can look to domestic

[120]Ibid., at 214–15.

[121]Ibid., at 212.

[122]Ibid., at 213–14.

[123]E.g., ICC, Rules of Procedure and Evidence, Rules 70, 71.

[124]E.g., *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript, ICC-01/05-01/08-T-61-Red2-ENG, T. Ch. III, 8 February 2011, 6–7.

[125]*Prosecutor v. Thomas Lubanga Dyilo*, Decision on judicial questioning, ICC-01/04-01/06-2360, T. Ch. I, 18 March 2020, paras. 3–5.

[126]Ibid., paras. 33–9.

[127]P. Bradfield, 'Preserving Vulnerable Evidence at the International Criminal Court – the Article 56 Milestone in Ongwen', (2019) 19 *International Criminal Law Review* 373.

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courts and domestic feminist legal analysis to better understand how a feminist judging approach has been and could be deployed. This could include learning from the many feminist judgments projects discussed at the start of this article, as well as the recent collection of feminist judgments in international law. All parts of the Chambers, including legal officers who often play a significant role in judgment-writing, can be part of this learning process.

Second, judges can make greater use of the Rome Statute's invitation to take gender seriously, including by ensuring that they always interpret and apply the law without adverse distinction on gender grounds as required by Article 21(3). When applying this gender lens, judges can think carefully about the intersections of gender, age, race, culture, and so forth, in order to better understand how sex and gender interact with other identities to exacerbate violence in conflict and post-conflict settings. Feminist scholars and activists whose views are under-represented in existing 'feminist judgment projects' (which are mainly from Western, common-law countries), have a particularly important wisdom to offer in this respect. By listening attentively to these scholars and activists, ICC judges can better respond to the diverse interpretations of feminism and gender justice that have originated in different parts of the globe.

Third, both in public and behind closed doors, judges can challenge the lingering suspicion that feminist judging comes at the cost of impartiality. This will require that judges advocate for a feminist approach as a necessary *corrective* to the historically male orientation of judging in international and national courts.

If gender-sensitive judging is to become normalized at the ICC, it will also require support *outside* the Court. In particular, states parties must show leadership in this regard. Adding more women to the ICC's judiciary is a step forward, and a priority in its own right, but it is imperative that states also ensure that qualified judges with expertise in gender analysis are nominated, lobbied for, and elected. While the Statute only refers to legal expertise in 'violence against women',[128] states can build on that prompt by also appointing judges with legal expertise in violence against girls, and against men and boys, as well as violence which discriminates on the basis of sexual orientation and gender identity. The wording of Article 36(8)(b), which requires state parties to consider the need to elect judges with 'legal expertise on specific issues, *including, but not limited to*, violence against women or children' (emphasis added), is sufficiently flexible to support this interpretation.[129]

Finally, those constituencies surrounding the ICC and interested in its ongoing success need to demonstrate support for those judges who are willing to work within the bounds of the Rome Statute to arrive at gender-sensitive decisions. Such support will contribute to countering backlash, encouraging more judges to engage in feminist judging and, ultimately, reinforcing the legitimacy of the ICC.

These measures will enhance the Court's capacity to make full use of its progressive and explicitly gender-sensitive legal framework, and will deliver on the expectations that are written into the Court's design. The Rome Statute provides a foundation for this approach but without provisions *mandating* that judges demonstrate a sensitivity to gender norms and hierarchies, it falls to actors within and outside the ICC to make room for gender-sensitive judges in the Court. Should ICC judges be open to drawing best practice lessons across international and domestic legal systems, then gender justice can only be strengthened, and the legitimacy of the ICC enhanced. By thinking through these issues, judges at the ICC can engage in feminist judgment-writing, taking what has been mostly an academic thought-experiment into the arena of real life.

[128]Rome Statute, Art. 36(8)(b).

[129]The principle of *ejusdem generis* supports this interpretation.

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