

## Envisioning the Future ‘Art and Craft’ of Judicial Decision-Making at the ICC

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This collection of feminist judgments shines a spotlight on the work of the International Criminal Court (ICC) over the course of its first twenty-five years since the adoption of the Rome Statute. Through a curated selection of cases, its reimagined judgments and reflections expose the limitations of ICC judicial adjudication and, in several instances, the limits of international criminal law (ICL) more generally. Importantly, too, these rewritten decisions point out clear directions for the ICC Chambers to advance gender-sensitive jurisprudence for atrocity crimes, while staying safely within the guard rails of the Rome Statute.<sup>1</sup> In doing so, this volume showcases the possibilities for harnessing the existing gender justice provisions embedded within the Rome Statute,<sup>2</sup> and the scope of the ‘art and craft’ of judicial decision-making.

The need to maintain legal plausibility by staying within these guard rails has been one of the most revealing aspects of this feminist judgment project (see Marshall, Chapter 16.3). Given the Rome Statute’s reputation for providing the

<sup>1</sup> Our contributors were instructed to imagine themselves in the robes and wigs of the judiciary in rendering a judgment that was legally plausible and relied upon evidence available to the judiciary at the time of the original decision. For a select few authors, these restraints proved too great, compromising their vision of gender justice. In particular, Sophie Rigney’s piece (Chapter 9.2) invites considerations of issues of morality, responsibility, power, and violence which are not provided for by the Rome Statute, in rejecting the concept of ICL as it exists today.

<sup>2</sup> Examples include Article 21(3), which requires that all sources of applicable law are interpreted without adverse distinction on gender grounds, Article 68(1), which requires the Court to take measures to protect survivors of sexual and gender-based violence, and Articles 7 and 8, which identify a wider range of sexual and gender-based crimes as crimes against humanity and war crimes than any previous instrument of international criminal law. For a full discussion see 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, at 250.

most advanced ever set of gender justice rules under international criminal law,<sup>3</sup> these reimagined judgments are instructive in demonstrating the potential of the Rome Statute to advance gender justice but also just how most ICC judges have been in using the existing rules to achieve this outcome. Whether through gendered norms of ‘impartiality’,<sup>4</sup> blindness, timidity, or lack of training in gender analysis, the ICC judiciary has been highly constrained in its approach to reading the law through a gender lens, unlike the judgments and reflections in this collection. At the ICC, it remains rare for judges to employ the modes of contextualised and gender-informed reasoning that are at the heart of the feminist judgment method.<sup>5</sup> *And yet, ‘it is possible to be both a judge and a feminist’, as Judge Pillay writes in her foreword to this book.*

The feminist judgments included in this collection provide insights for current and future ICC judges as to how the Rome Statute can be used to achieve more gender-just outcomes, as well as to scholars and activists about where limitations and obstacles remain. However, it should be noted that for some of our contributors, these efforts towards change are likely to be futile. For some authors, to paraphrase Audre Lorde,<sup>6</sup> regardless of the tools for reform, the Master will always remain in charge of the ICL house given its gendered, imperialist, patriarchal, racial, and cultural foundations. In particular, the contributions by Sophie Rigney (Chapter 9.2), Souheir Edelmi (Chapter 16.5), Jill Marshall (Chapter 16.3), and Immi Tallgren (Chapter 12.1) posit, to varying extents, that the system of international criminal law itself is incompatible with a feminist approach to justice, and challenge readers to rethink the entire premise of the ICC, to focus on building local ethnically, culturally, and gender-sensitive (non-carceral) processes to achieve conflict-related accountability and justice. These important critiques push us to think harder about the meaning of ‘feminism’ in the feminist judgments projects, and to consider more expansive ways of engaging with legal institutions.

In making the case for ‘yet another’ feminist judgment project, Kasey McLoughlin (Chapter 3) revisits the fairy-tale motif which has been so prominent in accounts of judging (both ‘traditional’ and ‘critical’), and, in so doing, explores the implications of imagination and reimagination. According to Erika Rackley, like

<sup>3</sup> L. Chappell, *The Politics of Gender Justice at the International Criminal Court* (Cambridge: Cambridge University Press, 2016), at 36; P. Spees, ‘Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power’ 28(4) *Journal of Women in Culture and Society* (2003) 1233–1254; C. Steains, ‘Gender Issues’ in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), at 357.

<sup>4</sup> A. Phillips, *The Politics of Presence* (Oxford: Oxford University Press, 1995), at 186. Phillips suggests that, whilst impartiality is often interpreted as a ‘view from nowhere’ it should actually reflect ‘views from everywhere’, which makes securing judicial diversity so important.

<sup>5</sup> Grey, McLoughlin, and Chappell, *supra* note 2, at 248.

<sup>6</sup> A. Lorde, ‘The Master’s Tools Will Never Dismantle the Master’s House’ in *Sister Outsider: Essays and Speeches* (New York: Crossing Press, 2007) 110–114.

Hans Christian Andersen's little mermaid, the woman judge must 'shed her difference and fit the fairy tale'<sup>7</sup> – the fairy tale being the liberal legal world. We argue that feminist judgment writing as feminist method is not (merely) the stuff of fairy tales, but rather a practical demonstration of what *is possible* within the bounds (sometimes pushing them) of law. Although we acknowledge the challenges and tensions which arise through feminist engagement with law and its institutions (especially when those very institutions have shown how impervious they are to feminist interventions), we nonetheless think that there are important practical, educative, and political reasons justifying such engagement.

In this concluding chapter, we start by considering some general points for the feminist judgment method which have emerged from the collection, including the importance of context and intersectionality, before drawing out internal and external opportunities and barriers for transforming the ICC into a tool for advancing gender justice.

#### LESSONS FOR THE FEMINIST JUDGMENT METHOD

As explained in the introductory Chapter 2, the story of feminist engagement with law is the story of pressing and redrawing boundaries. Feminist accounts have demonstrated the consequences which stem from women's exclusion from the development of international law: 'a narrow and inadequate jurisprudence that has legitimated the unequal position of women worldwide'.<sup>8</sup> In ICL, women's exclusion has shaped the development of law and its institutions (notwithstanding the work of feminist scholars in seeking to shape the Rome Statute).<sup>9</sup> In this book, we have continued to press the boundaries of imagination and judgment within the bounds of the Statute, interrogating how *gender* has been framed in international criminal law. Gender is not a synonym for woman/women; nor is it possible to view the world through a gender-free lens – this is the fiction of neutrality which has held sway in traditional accounts of law:

Many people do not recognize how obvious gender is because they think it means women: if women are not there it is not gendered. In this view, we need to add a gender perspective to explain where women are, notice their hidden activities, and denounce the injustice of their exclusion. On the contrary, I propose that it is

<sup>7</sup> E. Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor' 22(4) *Legal Studies* (2002) 602–624, at 602.

<sup>8</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), at 13.

<sup>9</sup> See for example, B. Bedont and K. Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' 6 *Brown Journal of World Affairs* (1999) 65–85; R. Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' 46(1) *McGill Law Journal* (2000) 217–240; V. Oosterveld, 'The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' 18 *Harvard Human Rights Journal* (2005) 55–84.

ontologically impossible not to have a gender perspective: it is implicit in all domains of academic inquiry. The more interesting question then becomes: what research agendas and hypotheses will lead us towards a better understanding of gender?<sup>10</sup>

Rather, adopting a gender lens entails making visible all people who are targeted in conflicts for contravening assigned gender narratives that regulate what is 'acceptable' behaviour, in terms of societal norms and values, and understanding their distinct experiences.<sup>11</sup> It further involves asking the 'why question', understanding what motivates the commission of gender-based crimes, in order to move towards sustainable peace.<sup>12</sup> By setting out what might be possible if feminist and gender-sensitive voices echoed from the judiciary, this book imagines a new jurisprudence, one where marginalised voices are included.

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 closest to the commission of international crimes, whether as victims/survivors, as perpetrators, or, in some cases, as both. *The photo essay by Omal Khair, Dil Kayas and Azimul Hassan (Chapter 15), which disrupts the text to offer a visual window into lived experiences of Rohingya people, underscores this point.* By placing context at the forefront, our authors have demonstrated the value of the feminist judgment method in advancing justice. In a nutshell, situating people in their historical and political context rather than imagining them as genderless, raceless beings has resulted in greater clarity in understanding how gender relations, and their intersection with other structural power relations, influence the meaning, experience, processes, and outcomes of justice.

### Contextualisation and Gender

Feminist judgments in this collection demonstrate that by adopting a contextual view it is possible to disrupt gender stereotypes. Contextualisation leads to an emphasis on the fluid and dynamic nature of the meaning of the term 'gender' in relation to the statute, and the need to understand gender as a social construction (for example, Davis and Kumskova, Chapter 10.5; SáCouto, Chapter 16.6). As Loyce Mrewa (Chapter 11.3) states, a contextual approach enables judges to 'better reflect the full culpability of the accused and the extent of the harm suffered by victims'. Judgments in this book highlight how seemingly gender-neutral crimes are experienced differently based on gender, including genocide (Radhakrishnan and Shubin, Chapter 10.2), pillage (Keith, Chapter 11.4), deportation (Palmer and Oo, Chapter 14.2), the enlistment,

<sup>10</sup> M. Htun, 'What It Means to Study Gender and the State' 1 *Politics and Gender* (2005) 157–166, at 162.

<sup>11</sup> L. Davis, 'Dusting off the Law Books: Recognising Gender Persecution in Conflicts and Atrocities' 20(1) *Northwestern Journal of Human Rights* (2021) 63–126.

<sup>12</sup> *Ibid.*, at 66.

conscription, and use of child soldiers (Wilmet, Chapter 8.2), and the destruction of cultural property (Ismail, Chapter 13.2; Graham and Jones, Chapter 13.4). The specific disadvantage of those who are persecuted because they are something other than male or female, such as the Hijra people in Myanmar, is also apparent (Palmer and Oo, Chapter 14.2; O'Hara, Chapter 14.3).

A contextualised gender analysis surfaces the multitude of harms experienced by women and their children who are born because of conflict-related rape (Kirabira, Ringin, and Grey, Chapter 9.3; Naigaga Kyobika, Chapter 9.4), and by male victims of sexual violence (Eichert, Chapter 11.2). Suzanne Varrall and Sarah Williams' reimagined *Bemba* judgment in the Central African Republic (CAR) situation (Chapter 11.5) draws attention to the persistence of sexual and gender-based violence in conflict, and calls for it to be better recognised in the Court's interpretation and application of the doctrine of command responsibility, which they argue is informed by the concept of protection under international humanitarian law (IHL).<sup>13</sup> Moreover, they remind us that while the majority of sexual and gender-based violence in conflict affects women and girls, a gender-sensitive approach to IHL needs to challenge traditional views of gender roles that cast men as combatants and, as a result, potentially under-protect civilian men and boys.

Contextualisation through a gender lens also enables a deeper reflection on victim/survivor agency. Such a view is often missing in legal judgments where those experiencing crime tend to be objectified and seen only through the prism of disempowerment. In this collection, victim/survivor agency is recognised – for example, in Souheir Edelbi's interpretation of the 'interests of justice' test (Chapter 16.5), in Anushka Sehmi's emphasis on the right of victims to choose their own legal representation (Chapter 10.4), and in the reflection by Salima Ahmadi and Sari Kouvo (Chapter 16.1), which reaffirms the need to challenge narratives that Afghani women are all oppressed victims to be saved by the West. Judgments also focus on the complementarity and jurisdictional aspects of the Rome Statute, supporting the view that victims of gender-based crimes should be able to access the ICC when the domestic-level courts are demonstrably not fit for purpose, thus expanding the interpretation of 'unable or unwilling' (Easy, Chapter 12.3; Gooding, Chapter 16.4).

Other judgments and reflections challenge existing legal tropes related to perpetrators, bringing into view the role of women as war criminals, in the case of Simone Gbagbo in Côte d'Ivoire (Hodgson, Chapter 12.2). In the Uganda section, Sophie Rigney's rewritten judgment in the *Ongwen* case explicitly confronts the defendants' position as both the victim and the perpetrator of crimes under international law (Chapter 9.2). In the Afghanistan situation, Mashal Aamir and Adrienne Ringin (Chapter 16.2) identify the need for the ICC to rigorously prosecute crimes

<sup>13</sup> Additional Protocol I to the Geneva Convention, Art. 4; Additional Protocol II to the Geneva Convention, Arts. 24–25.

committed by all forces, not just the Taliban, but also the United States, the former Islamic Republic, and other international forces. In demonstrating this point, Aamir and Ringin rely upon evidence of torture, rape, and outrages upon personal dignity committed by US forces in Central Intelligence Agency (CIA) facilities in Afghanistan, Poland, Romania, and Lithuania.

Viewing ICC *processes* contextually allows judges to see intrinsic connections between: gender and head-of-state immunity in ending impunity for crimes of sexual and gender-based violence (Uma and Kudekallu, Chapter 10.3); the rules of procedure relating to the amendment of charges (Oosterveld, Chapter 11.6), and video evidence (Zarmsky and Irving, Chapter 13.5). Melissa McKay (Chapter 13.3) also reminds readers of one of the oft-forgotten purposes of sentencing, which is the process of rehabilitation. Echoing other chapters that advance a non-carceral approach, she raises the prospect of community service through the ICC's Trust Fund for Victims as a potentially more fruitful avenue of punishment than incarceration.

### *Gender and Intersectionality*

Our authors also point to the importance of bringing an *intersectional* lens to their gender analysis. As the introductory chapters by Priya Gopalan (Chapter 7) and Angela Mudukuti and Louise Chappell (Chapter 5) show, the ICC is a long way from recognising the impact of intersectional power structures which can co-constitute and exacerbate the perpetration and impact of atrocity crimes. The rewritten judgments highlight the importance of intersectionality, demonstrating how the effects of crimes are shaped not only by gender structures alone, but are also intertwined and interact with structural religious, racial, disability, and economic dis/advantages in communities where atrocity crimes are committed.

Judgments grapple with crimes whose commission is enabled by gender and intersecting power structures including political affiliation, ethnicity, and religion (Davis and Kumskova, Chapter 10.5; Radhakrishnan and Shubin, Chapter 10.2; O'Hara, Chapter 14.3), and age (Maravall-Buckwater, Chapter 8.4; Gopalan and Jurasz, Chapter 8.3). Susana SáCouto's reimagined decision in the Afghanistan situation characterises the persecution of Afghan female politicians, public servants, and students through the intersection of gender and political grounds (Chapter 16.6). And in the contribution by Patricia Sellers and Rosemary Grey (Chapter 4), the intersecting gender, racialised, and economic dimensions of slavery crimes are front and centre.

These judgments and the chapters reflecting on them helpfully demonstrate that an intersectional approach is not only both feasible and plausible but can result in the ICC providing a more expansive form of justice.

### *Temporality*

As editors, we've also noted in judgments and other chapters the emergence of temporality as a feature influencing judicial deliberations and outcomes at the ICC. This point is raised most starkly in the 'in conversation' chapter between Sellars and Grey (Chapter 4). Reflecting on 'absent jurisprudence', Sellers challenges us to think of how an alternative past – a past in which the gendered dimensions of criminal conduct were more fully captured in the jurisprudence of the various international courts and tribunals – would arguably have gifted us a different legal present. As Grey notes in Chapter 3, using a 'time travelling imaginative approach', Sellers 'conjures up an alternative legal present and paves the way for an alternative legal future'.

Time also emerges as a relevant factor in other judgments and reflections. Valerie Oosterveld (Chapter 11.6) strikes an appropriate balance between the duty to establish the truth in allowing the Prosecutor to add additional charges of sexual violence and the need to balance the interests of the defence in the *Yekatom* case. She notes that, as there has been a delay in setting a trial date, the interests of the defence are not materially affected by allowing the charges, which more fully reflect the alleged culpability. In the Myanmar reflection (Chapter 14.1), Catherine Renshaw and Afroza Anwary also highlight how using a linear time frame 'preclude[s] more multi-layered, complex, interactive, and cyclical notions of time that encompass longer-term and inter-generational pain'. The Afghanistan reflection by Salima Ahmadi and Sari Kouvo (Chapter 16.1) raises temporality in another sense by positing that drawing time boundaries around cases limits the scope of crimes, perpetrators, and victims. In relation to Afghanistan, the singular focus on the crimes committed by the Taliban has meant that the victims of crimes perpetrated by the Islamic Republic of Afghanistan government and international forces have no current avenue to justice.

Together, the feminist judgment method as used in this volume can unearth the gendered context, intersectional power relations, and time as factors. The judgments show that once recognised, these factors can reshape judges' understanding of the perpetration, experience, and impact of international crimes. As discussed in the next section, the results of this methodology are a prompt to the ICC to rethink court processes and the use and relevance of different types of evidence, as well as verdicts and sentencing decisions.

### *Inspiring the Future: What Can Be Done to Advance Feminist Judging at the ICC?*

The judgments that are reimagined in this book may form part of the legal history of the ICC, yet the value of speculating about 'what could have been' can be framed not only in the critical sense of 'what went wrong' but in the imaginative sense of

providing inspiration for the future. Inspired by Immi Tallgren's contribution (Chapter 12.1), all our reflection writers were specifically asked to take on the task of 'thinking outside the box' to determine their vision of gender justice. That is, we asked reflection writers to consider what justice would entail, in their particular situation, if it was not limited by the parameters of the Rome Statute. These insights compel us to view the present day as tomorrow's past, as Patricia Sellers has done (Chapter 4), and give us an opportunity to think creatively about how to shape the future of the ICC in relation to gender justice.

Just as critiques of the Court take many forms in this volume, so too do proposals for reform, which are articulated most clearly in the reflection chapters. These writers take very different positions in terms of envisioning what could be done to enhance opportunities for strengthening gender justice in international criminal law, ranging from abandonment of the ICC, through to reform of the Statute, and more minimalist (yet no doubt radical in the eyes of existing judges) efforts to bring a feminist sensibility to adjudicating atrocity crimes.

For some reflection writers, the guard rails of the Rome Statute will always prove too restrictive for achieving gender justice. For instance, reflecting on Côte d'Ivoire, Immi Tallgren writes: 'A feminist rethinking might even ask to what extent does the ICC and the overwhelming, passionate commitment, activism, and academic investment in international criminal punishment form part of a global political economy that adds to the already manifold challenges faced by post-colonial states?' (Chapter 11.1). Reflecting on Darfur, Sareta Ashraph is encouraged by the reimagined judgments in this volume (Chapter 10.1). However, she calls into question whether the Rome Statute and ICC Rules of Evidence and Procedure are suitable instruments for achieving gender equality, at least until international justice actors engage in a more radical questioning of political and philosophical underpinnings of international criminal law. Salina Ahmadi and Sari Kouvo (Chapter 16.1), who focus on Afghanistan, are equivocal about how far the law can be relied upon to advance gender justice. Their approach might be described as 'ICC+', recognising that the Court will only ever provide a partial solution to accountability, and justice seekers will also need to look for justice through other social, economic, and political institutions.

Some of our other reflection writers think that future progress may be possible by working within the boundaries of the law, but only with reform of the Statute. For instance, Catherine Renshaw and Afroza Anway, discussing Myanmar/Bangladesh, suggest that to adequately address gender persecution it is necessary to reform the rules, to replace the current definition of 'gender' with one that is without the current constraints contained in the reference to the 'two sexes' (Chapter 14.1).<sup>14</sup>

<sup>14</sup> Art. 7(3) of the ICC Statute defines 'gender' as: 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'



Such a change would inevitably require an amendment to the Rome Statute. However, the process for altering the Court's foundational document requires meeting a high threshold in terms of the agreement of states parties,<sup>15</sup> and, perhaps unsurprisingly, there have to date been few successful attempts to amend it.<sup>16</sup>

For other authors, reform of the Rome Statute is unnecessary to ensure gender justice is better embedded in the practice of the ICC, as the Court arguably already possesses the tools needed to properly acknowledge and account for the gendered and intersectional nature of atrocity crimes.<sup>17</sup> The true challenge, therefore, lies in the implementation of this aspirational treaty to achieve its gender mandate.<sup>18</sup> Some of the reflection writers suggest avenues for surfacing the still (under-)utilised aspects of the Statute. Melanie O'Brien, writing on Uganda, suggests one important intervention would be to better honour the wishes of victims in making reparation orders, as well as expanding the vision of who counts as a victim, such as children born of conflict-related rape (Chapter 9.1). For Kerstin Braun, reflecting on Mali, attitudinal change among the judiciary is necessary to advance gender justice, alongside broadening conventional understandings of specific contexts, such as expanding the definition of cultural property to encompass women's relationship to cultural objects and practices (Chapter 13.1). From the DRC situation, Aparajitha Narayanan and Sandrine de Herdt suggest judges need to be more attuned to the socio-economic effects of sexual violence crimes (Chapter 8.1). Alice Dieci and Cassandra Mudgway use the CAR situation to make this contextual point more broadly, suggesting that judicial reasoning based on context rather than abstract situations is the best way to capture the lived experiences of victims, including the operation of gender norms as they relate to gender-diverse people (Chapter 11.1).

<sup>15</sup> Art. 121 of the ICC Statute provides the mechanics for amendments, which require a two-thirds majority vote in favour by states parties to be adopted as per sub-section (3). Under Art. 121(5), amendments to provisions concerning the substantive crimes within the jurisdiction of the Court shall only enter into force for those states parties which accept the amendment; those which do not accept an amendment to these provisions will not be bound by any changes. Such an 'opt-in' approach presents significant problems for the Court's universality and jurisdiction. Amendments to other provisions shall enter into force for all states parties one year after acceptance or ratification by seven-eighths of all states parties as per Art 121(4) – an extremely high threshold to meet.

<sup>16</sup> As a result of the Review Conference in Kampala in 2010, which was held in accordance with Art. 123 of the ICC Statute, amendments were made which provided the Court jurisdiction over the crime of aggression. An amendment to Art. 8 of the ICC Statute was also adopted to harmonise provisions on war crimes in non-international armed conflict and international armed conflict. At the fourteenth session of the Assembly of States Parties in 2015, the deletion of Art. 124 (concerning declarations of transitional acceptance of jurisdiction) was agreed unanimously.

<sup>17</sup> Chappell, *supra* note 3, at 51–86.

<sup>18</sup> *Ibid.*

## OPPORTUNITIES FOR AND BARRIERS TO REFORM

Having identified some key areas for reform, in this final section we want to reflect on what might be some of the main practical opportunities for and barriers to realising gender justice at the ICC. We look first at some of the internal issues before widening the lens to think about the Court in the broader international context.

### *Internal Opportunities*

A key point made by Mudukuti in her conversation with Chappell (Chapter 5), by Dawuni (Chapter 6), and in our introductory chapters (Chapters 2–4), was the critical importance of having a diversity of judges on the bench capable of ‘seeing’ context to bring about more gender-just judgments. The need for a systematic effort to integrate gender sensitivity and competence into how the ICC Chamber performs its role provides one of the most significant opportunities for positive change within the ICC, in terms of realising gender justice. This starts with processes and policies within the Assembly of States Parties (ASP) to ensure the bench is composed of judges who are both gender diverse and gender competent, but also requires the provision of institutional support to maintain gender expertise among the judges and translate that expertise into judicial decision-making.

While the ASP has established minimum requirements for judicial appointments in relation to criminal law and international law competence and fair representation of sexes and regional groups,<sup>19</sup> it has not mandated any requirements with regard to judicial candidates who possess legal expertise in violence against women or children. As we have argued elsewhere, we believe that such a measure would be a first step in building the gender expertise of the ICC Chambers.<sup>20</sup>

Beyond the selection of diverse and gender-competent judges, it is critical that these judicial officers are provided institutional support if they are to deliver gender-sensitive outcomes, in the form of relevant and ongoing training and materials. For example, in relation to the crime of gender persecution and the recent policy of the Office of the Prosecutor (OTP) in this area,<sup>21</sup> a corresponding training module and practice manual for the judiciary would ensure a systematic institutional approach to this issue. Of course, as our chapters have indicated, gender persecution is only one area of substantive law in which further training and materials could assist the Bench in building and maintaining gender expertise. Judges need stronger skills for

<sup>19</sup> Resolution ICC-ASP/3/Res.6, 10 September 2004, § 20. See also Open Society Justice Initiative, *Electing the Next Judges of the International Criminal Court: Expertise and Skills*, available at [www.justiceinitiative.org/publications/electing-the-next-judges-of-the-international-criminal-court-principles-and-essential-skills](http://www.justiceinitiative.org/publications/electing-the-next-judges-of-the-international-criminal-court-principles-and-essential-skills), at 19.

<sup>20</sup> Grey, McLoughlin, and Chappell, *supra* note 2, at 253.

<sup>21</sup> Office of the Prosecutor, *Policy on the Crime of Gender Persecution*, December 2022.

understanding how gender relates to socio-economic, cultural, and religious structures in any given setting. Meanwhile, adjudication in areas not usually considered gender related – including the types of evidence available, court processes for witness and victim protection, the impact of delayed trials on specific victims – can all be enriched by a gender analysis.

In sum, the nomination, selection, and training of ICC judges to ensure gender diversity *and* expertise must be an area of increased attention.<sup>22</sup> This cannot occur in isolation, but must take place alongside approaches to prosecution and investigation which work together to better embed gender sensitivity in the organisational culture and the staff of the ICC.

### *External Pressures and Opportunities*

Numerous external factors are currently affecting the ICC's effectiveness and will continue to make it difficult for it fulfil its mandate. Of these, none perhaps is more significant than the febrile geopolitical context in which the Court operates. As one of many international institutions, the ICC operates within the broader international relations context in which states interact, which has consequences for its ability to realise global gender justice outcomes. At a macro level, for example, the prospects for universalisation of the Rome Statute are limited by continuing strategic competition between major powers which makes membership of China, Russia, and/or the United States highly unlikely.<sup>23</sup> It also limits the likelihood of referrals by the UN Security Council of any situations that may touch upon the interests of one of the permanent five Council members, given their veto power.<sup>24</sup> This situation serves to reinforce the selectivity problems which have plagued the Court,<sup>25</sup> as reflected so powerfully in Sara Saleh's poem on Palestine (Chapter 18). The absence of major global powers from the ICC regime thus affects the Court's legitimacy and credibility, a problem that is further undermined by comparatively weak Asian representation,<sup>26</sup> and the continuing risk of withdrawal of African states, including South Africa.<sup>27</sup> As Mudukuti notes in her conversation with Chappell (Chapter 5), if the

<sup>22</sup> Grey, McLoughlin, and Chappell, *supra* note 2.

<sup>23</sup> A. Bower, *Norms without the Great Powers: International Law and Changing Social Standards in World Politics* (Oxford: Oxford University Press, 2016).

<sup>24</sup> K. Clarke and S. Koulen, 'The Legal Politics of the Article 16 Decision: the International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise' 7 (3) *African Journal of Legal Studies* (2014) 297–319.

<sup>25</sup> B. Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' 18(1) *Journal of International Criminal Justice* (2020) 107–139.

<sup>26</sup> On the reluctance among Asian states, see A. Kapur, 'Asian Values v. The Paper Tiger' 11 *Journal of International Criminal Justice* (2013) 1059–1090.

<sup>27</sup> On 26 April 2023, South Africa's President Cyril Ramaphosa rescinded a statement that the country planned to withdraw from the International Criminal Court ahead of hosting the BRICS (Brazil, Russia, India, China, and South Africa) summit, which Russia's President Vladimir Putin, wanted by the Court for war crimes, would otherwise be expected to attend.

focus of the ICC is not impartial, and seen not to be impartial, it risks failing to effectively engage with and address the gendered dimensions and intersectional nature of atrocity around the globe.

Within the broader geopolitical context, the range and nature of current and emerging conflicts also gives rise to issues which impact the pursuit of gender justice at the ICC. These include the impacts of protracted conflict, inter-state conflicts, the role and use of technology in war, as well as the persistence of sexualised violence and the intersectional nature of atrocity crimes.

Around 110 instances of armed conflict are underway around the world at the time of writing, the majority of which are in Africa and the Middle East.<sup>28</sup> Of the eight countries covered in this volume, most continue to experience armed conflicts on their territory,<sup>29</sup> which is indicative of the prolonged and intractable nature of many of today's (and potentially tomorrow's) wars. It is well established that conflict exacerbates previously existing gender inequalities, while often entrenching gender roles. For example, research demonstrates that during armed conflict women have less access to health services than men, and especially in protracted conflicts.<sup>30</sup> The lack of access is particularly notable in the context of maternal mortality, as more than 50 per cent of maternal deaths worldwide occur in settings affected by armed conflict or natural disasters.<sup>31</sup> The persistence of conflicts over long periods therefore has significant and broad gendered implications, which need to be recognised in the ICC's approach to investigating, characterising, adjudicating, and punishing perpetrators of atrocity crimes in these contexts, as well as awarding reparations to victims who have experienced years of loss.

Although the majority of conflicts are still largely conducted with conventional small arms and light weapons, such as the infamous AK47,<sup>32</sup> the way that technology is used in war is changing, as demonstrated by the growing application of artificial intelligence and machine learning in weapons and weapons systems.<sup>33</sup> What is often lacking from the discourse around technology, weapons, and war, however, is the differential and gendered impacts of technology use in situations of conflict and repression. The International Committee of the Red Cross has recognised that 'sex-specific harms arise from the use of certain weapons', and gender analysis of civilian casualty data indicates that 'women, men, boys and girls are killed at different rates

<sup>28</sup> This number includes international and non-international armed conflicts as well as military occupations. Source: RULAC, 'Conflicts', available at [www.rulac.org/browse/conflicts](http://www.rulac.org/browse/conflicts).

<sup>29</sup> The exceptions at the time of writing were Cote d'Ivoire and Uganda. See *ibid*.

<sup>30</sup> K. Meagher, B. Attal, and P. Patel, 'Exploring the Role of Gender and Women in the Political Economy of Health in Armed Conflict: A Narrative Review' 17 *Global Health* (2021) 1–9.

<sup>31</sup> V. Pillai, Y. C. Wang, and A. Maleku, 'Women, War, and Reproductive Health in Developing Countries' 56(1) *Social Work in Health Care* (2017) 28–44.

<sup>32</sup> ICRC, 'Arms Availability', available at [www.icrc.org/en/war-and-law/weapons/arms-availability](http://www.icrc.org/en/war-and-law/weapons/arms-availability).

<sup>33</sup> S. Longpre, M. Storm, and R. Shah, 'Lethal Autonomous Weapons Systems & Artificial Intelligence: Trends, Challenges, and Policies' 3(1) *MIT Science Policy Review* (2022) 47–56.

depending on the context and weapon used'.<sup>34</sup> These are factors that need to be understood by those involved in investigating and prosecuting international crimes, not only to comprehend the impacts on victims, but also to assess basic legality of the use of weapons and weapons systems under international humanitarian law.<sup>35</sup> This is particularly relevant to those war crimes under Article 8 of the Rome Statute, but has a broader significance as well.

External pressures are also affecting the ICC in terms of jurisdiction, particularly the principles of complementarity and universal jurisdiction. The principle of complementarity was central to the Rome Statute's negotiation and remains central to its interpretation. The principle recognises a hierarchy in which national jurisdictions have the primary authority to prosecute suspected perpetrators, with the jurisdiction of the ICC being of a subsidiary nature.<sup>36</sup> This means that, where affected states are unable or unwilling to genuinely investigate and/or prosecute international crimes, the ICC's mandate (as well as the exercise of universal jurisdiction) can be critical to promoting gender justice. Yet, as noted by Chappell, Grey, and Waller,<sup>37</sup> complementarity has also served to limit the reach of the ICC's gender mandate, and to restrict the expressive power of the Court to influence reforms and address gender-discriminatory practices in national jurisdictions. Questions of complementarity and the interaction of this principle with gender issues are highlighted in the reimagined decisions of Kathryn Gooding in the Afghanistan situation (Chapter 16.3) and Sarah Easy in the Côte d'Ivoire situation (Chapter 12.3). These contributions give pause for reflection upon the barriers faced by women and gender-diverse people in accessing justice globally, and how the ICC's interpretation and application of the principle of complementarity can also limit the reach of the Court's gender mandate.

In other contexts, the hierarchy implicit in the complementarity regime has been less strictly adhered to, creating a different set of challenges for the ICC and international criminal justice goals. For example, despite ongoing investigations and prosecutions of atrocities by Ukrainian officials,<sup>38</sup> the 2022 Russian invasion of Ukraine has been referred to the ICC by forty-three states parties, and several third

<sup>34</sup> H. Durham et al., 'Gendered Impacts of Armed Conflict and Implications for the Application of IHL', ICRC (2022), available at <https://blogs.icrc.org/law-and-policy/2022/06/30/gendered-impacts-of-armed-conflict-and-implications-for-the-application-of-ihl/>.

<sup>35</sup> Art. 36 of Additional Protocol I to the Geneva Conventions obliges states to review new weapons, means, or methods of warfare, which includes physical and digital systems.

<sup>36</sup> The preamble to the Rome Statute states: 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions', while Art. 17(1)(a) requires deference to state prosecutions where the state is able and willing.

<sup>37</sup> Grey, McLoughlin, and Chappell, *supra* note 2; R. Grey and E. Waller, 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia' 7(3) *International Journal of Transitional Justice* (2013) 455–475.

<sup>38</sup> As at May 2023, more than 88,500 atrocities have been reported in Ukraine since Russia invaded, according to the Prosecutor General's office in Kyiv.

states are conducting their own investigations with a view to prosecution based on universal jurisdiction.<sup>39</sup> There are also plans to create a new tribunal to prosecute the Russian invasion as a crime of aggression.<sup>40</sup> Evidence of alleged sexual crimes such as rape and other abuses has been gathered across the country, including by a Ukrainian special war crimes unit for sexual violence. The broad-based international commitment to accountability in this situation should be welcomed, albeit notwithstanding obvious questions of selectivity.<sup>41</sup> Yet this situation also results in potential inefficiencies and a dilution of responsibility as multiple efforts overlap and even interfere with one another, which does not benefit the realisation of gender-justice goals in this situation. The ICC's ability to exercise jurisdiction in any Russia/Ukraine cases will depend on the scope and 'genuineness' of those various national proceedings.

The growing exercise of universal jurisdiction by third states in relation to international crimes also has potential to contribute to the realisation of gender justice globally, but adjacent to, rather than inside of, the ICC framework. The situation in Myanmar provides an illustrative example. Internal conflict in this country since at least 2016 has been characterised by significant instances of sexual and gender-based violence, potentially amounting to international crimes. Yet despite authorisation in 2019 of an ICC investigation into the Myanmar/Bangladesh situation, to date no charges have been laid, leading to criticism of the apparent lack of progress by the OTP in this situation.<sup>42</sup> The reimaged judgments from the Myanmar/Bangladesh situation contained in this volume (Chapters 14.1–14.3) demonstrate that there are significant gender justice dimensions to this situation which will remain unresolved pending further developments in the ICC's investigation, including the issuance of arrest warrants for alleged perpetrators. In such circumstances, third states acting on the basis of universal jurisdiction may be able to progress gender-justice goals. In Argentina, a judicial investigation into crimes against Rohingya people committed by the Myanmar military is

<sup>39</sup> For instance, on 3 July 2023 the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) started its operations in the Hague, hosted by the European Union Agency for Criminal Justice Cooperation.

<sup>40</sup> In September 2022, the Council of Europe proposed to create a tribunal that would have a mandate to 'investigate and prosecute the crime of aggression' committed by 'the political and military leadership of the Russian Federation'. Additionally, on 19 January 2023, the European Parliament called for the creation of an international tribunal to carry out investigations and prosecutions for Russian and Belarusian responsibility for the crime of aggression, complementary to the ICC. The text was adopted with 472 votes in favour, 19 against, and 33 abstentions.

<sup>41</sup> P. Labuda, 'Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion' *Leiden Journal of International Law* (2023) 1–22.

<sup>42</sup> R. Ahmed, 'International Criminal Court and Its Tryst with Justice: The Case of Myanmar' 4 (10) *International Journal of Arts Humanities and Social Sciences Studies* (2019) 23–33.

occurring on the basis of universal jurisdiction,<sup>43</sup> and through this process the testimony of sexual violence victims in that conflict can be heard – an initial step towards achieving justice for the survivors of these crimes.

Creating a court sensitive to these pressures, their influence on the gendered dynamics of conflict, and the resultant specific targeted crimes against men and women and gender-diverse people is critical to ending impunity and to advancing gender justice. Following Patricia Sellers (Chapter 4), by adopting a contextual and intersectional approach to atrocity crimes we can create a new future for international criminal law in general, and the ICC specifically.

In her poem at the start of this book, Maxine Beneba Clarke wisely writes: ‘Some say the law ought not to bend. That it should be a neutral, certain thing. But there are reasons judgement and interpretation are bequeathed to human – humane – hearts, and heads.’ There is clearly much work to be done to deliver gender-inclusive international justice as far as the ICC is concerned, and a significant role for the judiciary to play in realising this goal. It is the transformative power of judges that makes international criminal law, and the ICC in particular, fertile ground for the Feminist Judgment Project and its methodology to have effect and inspire change.

<sup>43</sup> TRIAL, ‘Universal Jurisdiction Database’, available at <https://trialinternational.org/latest-post/universal-jurisdiction-case-in-argentina-an-important-decision-for-the-rohingyas>.

