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Do Feminists Believe in Fairy Tales?

The Case for Bringing the Feminist Judgment Methodology to the International Criminal Court[*]

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INTRODUCTION

A few years ago, following a presentation we (the editorial team) were delivering about applying the feminist judgment methodology to the International Criminal Court (ICC), an evidently exasperated audience member interjected and said something to the effect of 'But why do another feminist judgment project?' Although initially a little taken aback by the question, it nonetheless raises an important point – *why* indeed?

This is a question we have taken seriously in curating this project – it is perhaps a bigger question than it might appear at first glance. I do not know the thinking underpinning the questioner's tone and query at our presentation, although I might speculate. With time and popularity, perhaps some of the novelty or shine of this methodology has worn off. The framing of the question at the time felt as though it was suggesting, at best, a certain kind of naiveté on our part (a misplaced faith in law and its institutions) or, at worst, a complicity with law's violence, its subjugation of marginalised people. It thus might also be speculated that the question is at once an old *and* a new question about feminist method: to what extent should feminists engage with law? On what (or whose) terms, and to what ends? Is our faith in law misplaced? Are our attempts to mimic the judicial role just the stuff of wishful fairy tales?

In this chapter, I therefore want to address two, albeit interconnected, questions: *why* another feminist judgment project? and *why* the International Criminal Court? In so doing I aim to situate this book within the tradition of existing feminist projects

[*] This chapter draws on some of the arguments presented in an earlier article jointly authored by members of the editorial team for this book: 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. Any errors or omissions remain my own.

and to reflect on judgment writing as feminist method. Asking 'Do Feminists Believe in Fairy Tales?' unites these questions.

The fairy tale (or mythological) motif is, perhaps surprisingly, prominent in accounts of judging, from masculinist explanations of the nature of adjudication through Dworkin's superhuman Hercules[1] to the image of the (fairy-tale) woman judge cast so evocatively by Erika Rackley's analogy of the mermaid whose voice is dulled or diminished to fit in.[2] There is also the somewhat incongruous image of Lady Justice, as described by Clare McGlynn:[3] 'the mythical symbol of justice, the blind-folded figure holding the scales of justice, which appears above our courts, is female, yet women as judges, the dispensers of justice, are few and far between'.[4] Finally, the notion of fairy tales has also been invoked to rebut traditional, declaratory theories of judging, by suggesting that to believe that judges don't make law is akin to believing in fairy tales.[5] As Judge Lord Reid of the United Kingdom noted almost fifty years ago:

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore.[6]

It might be countered that feminist legal theorists *never* believed in that particular cave and were always critical of law's supposed objectivity. The 'fairy tales' or fictions embedded in traditional theories came under heavy scrutiny in the second half of the twentieth century, when feminist theorists uncovered the deeply masculinist assumptions embedded in the law and called into question assumptions about law's

[1] See R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

[2] I note that, in a recent piece, Rackley has somewhat disavowed the little mermaid framing (i.e. the idea that, like the little mermaid, the woman judge was an outsider and, to fit in, she too had to give up what made her distinctive). Indeed, at least part of Rackley's revision is the benefit of observing more real-life women judges (in her case, especially the feminist leadership of Brenda Hale in the United Kingdom). Although Rackley has moved on from this particular framing of the little mermaid, we think it is nonetheless useful to consider what it tells us about the evolving imagery of the woman judge – the apparent novelty of women's access means that evolving understandings should not surprise us. See E. Rackley, 'A Short History of Judicial Diversity' 76(1) *Current Legal Problems* (2023) 1–32.

[3] Together with Rosemary Hunter, Clare McGlynn and Erika Rackley edited what we now describe as the 'English feminist judgment project'. Both have written extensively about gender and judging, and feminist approaches to legal adjudication in more domestic contexts. R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (London: Hart, 2010).

[4] C. McGlynn, *The Woman Lawyer: Making the Difference* (London: Butterworths, 1998) 171.

[5] See Lord Reid, 'The Judge as Law Maker' 12 *Journal of the Society of Public Teachers of Law* (1972) 22–29.

[6] *Ibid*.

(assumed) impartiality. In fact, a major contribution of feminist thought (extending the earlier work of the realists)[7] has been in exposing the true nature of traditional jurisprudential theories as 'male theories about law',[8] in challenging the stories lawmakers have traditionally told about themselves. One of the most problematic of these stories is the way in which most prominent legal scholars, who have historically been men, have imagined the law (and their role in it) as an objective and apolitical enterprise.[9] Implicit in this story is the idea of 'the distinction between on the one hand regarding law as created by human beings, and on the other, as existing separately from deliberate human intervention'.[10] Feminist accounts of law have presented a rejoinder to 'the way in which a distinctly male view of the world has been masquerading as detached objectivity'.[11]

Of course, feminists have adopted a range of methods for demonstrating the law's partiality – the feminist judgment method is but one (relatively) recent innovation. Feminist judgment projects have emerged, at least in part, due to an exasperation with the legal system's failure to account for gender – they are one of many tools for demonstrating how a distinctly male view of the world has been masquerading as detached objectivity. Importantly, such projects have also taken place against the backdrop of significant shifts[12] in conceptualising the relationship between gender and judging. This conceptualisation has in many instances moved beyond earlier understandings of difference,[13] arguing that rather than expecting *women* judges to

[7] I note that feminist legal theory was not the first to challenge the demarcation between the judge and the law – the key point of departure between feminist legal theory and other critical theories is that it aims to 'show that the supposed gender-blind approach to legal scholarship is problematic, since the claim of neutrality is often a cover-story for male orientated and discriminatory legal knowledge and policy'. See M. Davies (ed.), *Asking the Law Question* (3rd ed., Sydney: Lawbook Company, 2008) 213.

[8] H. Barnett, *Sourcebook on Feminist Jurisprudence* (London: Cavendish, 1996) 301.

[9] A. Scales, 'The Emergence of Feminist Jurisprudence: An Essay' 95(7) *Yale Law Journal* (1986) 1373–1403.

[10] Davies, *supra* note 7, at 41.

[11] C. A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' 8(4) *Signs* (1983) 635–658, at 636

[12] See K. McLoughlin, *Law, Women Judges and the Gender Order: Lessons from the High Court of Australia* (Abingdon: Routledge, 2022), for a summary of some of the key shifts in conceptualising 'difference', particularly in canvassing how certain constructions of difference essentialised women, and how in many instances the search for women's purported different judicial voice was elusive.

[13] The literature is vast, but I note some feminist theorists, responding at least in part to Carol Gilligan's 'ethic of care', hypothesised that women judges would be the panacea to the law's gender blindness. See e.g. C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); C. Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' 1 *Berkeley Women's Law Journal* (1985) 39–63; S. Sherry, 'The Gender of Judges' 4 *Law and Inequality* (1986) 159–169. This is not to suggest that all feminists have subscribed to such a viewpoint, even contemporaneously. For example, for a critique of the essentialism embedded in feminist legal theory more broadly, see A. P. Harris, 'Race and Essentialism in Feminist Legal Theory' 42(3) *Stanford Law Review* (1990) 581–616.

make a difference, it is more plausible to expect that *feminists*[14] might make a difference insofar as their approach to legal reasoning is concerned. Although different feminist judgment projects have dealt differently with questions of temporality, place, history, and culture, they are united by the alluringly simple notion that legal judgments *could* have been decided differently. As a body of work, these projects powerfully make the case that it matters *who* judges are. More specifically, they demonstrate that there *were* always possibilities to bring a more gender-sensitive or feminist perspective to bear in the art and craft of judgment writing while staying within the guardrails of the law.

Although the notion of fairy tales serves as the central provocation for this chapter, I want to make clear that fairy tales operate on more than one level. First, I am interested in rebutting the notion that the feminist judgment methodology might simply be dismissed as mere 'fairy tale' or wishful thinking. Such an argument is premised on the notion that there is unmet promise and potential in adopting feminist or gender-sensitive approaches at the ICC. Second, while the notion of the judge as described by Lord Reid might have been roundly dismissed, it seems there is still a comfort, or at least resilience, in the fairy tale of 'the objective judge'. We see this in the extent to which real-life judges seek to eschew feminist identities. Of course, what Reid was saying was not especially controversial or radical for his time. Feminist jurisprudence extended the critique even further than the realists. As Scales observed, 'the realists did not press their critique deeply enough. They did not bring home its implications in the face of their failure. The system has clung even more desperately to objectivity and neutrality'.[15] On such a view, feminist judgments are not merely the stuff of fairy tales – in fact, they are part of the business of disrupting the orthodoxy. However, this is not to discount the *value* of fairy tales insofar as they might serve to imagine different ways of doing things. Indeed, historically the first fairy tales involved women critiquing the patriarchy.[16]

Thus, in posing the question 'Do Feminists Believe in Fairy Tales?', this chapter interrogates how the feminist judgment method contributes to this tradition of feminist legal theory in dispelling myths about the neutrality of law and challenging conceptions of the objective masculinised judge. I do so in considering the challenges and tensions which arise through feminist engagement with law and its institutions, especially when those very institutions have shown how resistant they are to feminist interventions. I further consider the tangible impact feminist

[14] See e.g. S. J. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (New York: Routledge, 2013); R. Hunter, 'Can Feminist Judges Make a Difference?' 15(1–2) *International Journal of the Legal Profession* (2008) 7–36.

[15] Scales, *supra* note 9.

[16] M. Ashley, 'The first fairytales were feminist critiques of patriarchy. We need to revive their legacy', *The Guardian*, 11 November 2019, available at www.theguardian.com/books/2019/nov/11/the-first-fairytales-were-feminist-critiques-of-patriarchy-we-need-to-revive-their-legacy; A. Neikirk, '. . .Happily Ever After (Or What Fairytales Teach Girls about Being Women)' 8 *Hohonu: A Journal of Academic Writing* (2009) 38–42.

judging[17] might have in the real world, dismissing the notion that such interventions are merely a fairy-tale exercise in reimagining. I make the case for another feminist judgment project, canvassing the ICC's record to date and the unmet promise of the Rome Statute, and arguing that judges have an important role to play in enhancing gender justice.[18] Throughout the discussion, I demonstrate that this notion of justice is about far more than questions of the sex composition of the bench.

WHY (ANOTHER) FEMINIST JUDGMENT PROJECT? OR DO WE STILL BELIEVE IN (FEMINIST) FAIRY TALES?

Who is the judge of our collective imagination? Thinking deeply about that question, Rackley pondered the extent to which we are still captivated by the particularly alluring fairy tale of neutrality as described by Lord Reid. Rather than taking it as a given, Rackley questioned whether we have indeed abandoned our commitment to the fairy-tale image of the judge as 'a person stripped of self and re-clothed with the magical attributes of "fairness", "impartiality", "disengagement" and "independence"'.[19] Cataloguing accounts of judging (albeit reflecting scholarship on the common law method in English-speaking countries), she argued:

> The judge who inhabits our legal imagination has no personality, no history and no voice. His identity is often hidden beneath a wig and gown, his humanity erased, his voice silenced, his actions directed and constrained. This suits us just fine. We expect the judge to have no identity. We like the idea of a judge who performs superhuman feats in human form, just like a superhero.[20]

By interrogating this fairy tale, Rackley presents a decidedly different kind of story – one which analyses the implications of women's exclusion and the way in which it continues to shape and constrain understandings of judges. Her argument is that, despite protestations to the contrary, for better or worse we remain trapped in a kind of fairy-tale conceptualisation of judging, even if it has been exposed as a myth. This framing is not only about how those external to the judicial role understand it but

[17] In this volume, we have taken an expansive view of what 'counts' as feminist judging. The editors were very much guided by Hunter's seven-point checklist; although accepting that feminism is not monolithic, we were also guided by our contributors in how they sought to frame their reimagined judgments as feminist (see R. Hunter, 'An Account of Feminist Judging' in R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010), 35; for a further discussion of the feminist judgment methodology see Chapter 2 in this book).

[18] For a definition of 'gender justice', see Nancy Fraser's 'trivalent model' in N. Fraser, *Scales of Justice: Reimaging Political Space in a Globalizing World* (New York: Colombia University Press, 2009), as discussed in L. Chappell, *The Politics of Gender Justice at the International Criminal Court* (Cambridge: Cambridge University Press, 2016).

[19] 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 613.

[20] *Ibid*.

also about the judges themselves. As Rackley argued, it is the insulation 'by his judicial or superhero identity from his own tainted sense of self' that enables the judge to 'execute the law's violence that might otherwise be too painful for him to perform'. Or, to put it another way, 'It is a belief in the possibility of his own superheroism that enables the judge to judge'.[21]

Such thinking suggests that the myth of Dworkin's Herculean judge, who has 'superhuman skill, learning, patience and acumen',[22] brings a level of comfort, trust, and reliance to those for whom the sphere of law has been determined to be a place of restricted entry. Perhaps this gives us some insight about why this image prevails, even if it has been exposed as a myth. What Rackley demonstrates so powerfully is the complex tension which has been born out of the feminist preoccupation with difference, including the important shift from expecting *women* judges to make a difference to the expectation that *feminist* judges will make a difference.[23]

> What does this have to do with the feminist judgment methodology? Certainly, it speaks to ways in which judicial voice might remain constrained by long held notions of exclusion and inclusion. It also brings into sharp relief questions of legitimacy. There is also a further, bigger question: extending the fairy tale motif, what kind of fairy tales underlie the feminist judgment methodology? Feminist judgments are themselves acts of (re)imagination – but are they fairy tales? Though they are fiction, feminist judgments are designed to exist in the realm of the possible. That is the precept at the very heart of the project: they aim to demonstrate what might be possible within the existing bounds of legal formalism.

In justifying another feminist judgment project, I necessarily seek to emphasise the success of the methodology. But what does success mean? Of course, in part this involves a re-examination of the goals of feminist judgment writing projects. These projects have variously been described as law reform projects, social projects, and educative projects. Certainly, such projects are a critique of the status quo – a practical demonstration of the contingency of legal judgment and a comment on law and the feminist method, and the judicial enterprise more broadly. These projects are also political – by demonstrating the contingency of legal reasoning, they are a clarion call to appoint judges with gender expertise. In both these ways, feminist judgment projects serve an educative purpose.

Does success therefore mean real-life judges taking up the feminist mantle? Is it something less ambitious? Is it as simple as the project leading some to question who has been (or still may be) the gatekeeper of knowledge in an area of society that governs and regulates their behaviour? Certainly, one might argue that the adoption of the methodology in various jurisdictions speaks to a certain measure

[21] *Ibid*, at 614.
[22] Dworkin, *supra* note 1, at 105.
[23] See e.g. Kenney, *supra* note 14; Hunter, *supra* note 14.

of success.[24] As the editors of the US Supreme Court project, Crawford, Berger, and Stanchi, have argued:

> The signature achievement of the feminist judgments projects has been to combat the myth of a purely logical judicial decision-making process and to demonstrate that judicial decision-making is rarely detached from personal background and experience. By re-imagining the reasoning of judicial opinions through the added insight of feminist theories and methods, while bound by the precedent and facts of the time, the feminist judgment authors are able to write and decide like actual judges, while still accounting for intersecting inequalities resulting from gender, race, class, disability, sexual orientation, gender identity, ethnicity, immigration status and national identity.[25]

Many of the arguments *for* feminist judgment writing as feminist method have been rehearsed elsewhere but they merit briefly revisiting here. For Rackley, one of the co-editors of the England and Wales Feminist Judgment Project, the academic value of judgment writing lies in the discipline of putting one's theoretical insights into judgment form, of 'really testing abstract theories and political commitments against the realities of actual cases'.[26] Indeed, feminist judgment projects are explicit about their own methodological limitations in terms of what can be done within the bounds of legal formalism and also in the tacit acknowledgement that feminists dressing up in judicial robes are not subject to the same institutional pressures as real judges. As Hunter and colleagues acknowledge, 'judgments are themselves a constrained and bound genre, and writing a judgment imposes certain expectations and constraints on the writer that inevitably affect – even infect – her theoretical purpose'.[27] Importantly, the value (which is in many instances framed as legal plausibility) of reimagined judgment also underscores potential limitations. Unlike ordinary academic critique, the genre of judgment writing makes demands of its

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

[25] L. Berger, K. Stanchi, and B. Crawford, 'Learning from Feminist Judgments: Lessons in Language and Advocacy' 98 *Texas Law Review Online* (2019) 40–70, at 44.

[26] E. Rackley, 'Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales' 24(2) *Canadian Journal of Women and Law* (2012) 389–413, at 397.

[27] Hunter, *supra* note 17, at 5.

authors to suspend disbelief: a judicial voice must be adopted, a decision must be reached and academic judgment writers 'cannot reinvent or radically reshape the law (although they may push at its boundaries)'.[28]

It is therefore probably unsurprising that there has also been considerable reflection from feminist scholars about their engagement with this methodology. Certainly, some contributors to this project noted their own discomfort in engaging with the method – reflecting on the awkwardness of inhabiting the role of judge and the constraints inherent in upholding such a system. The performative aspect of judging (understood as a role inhabited by mere humans) is exposed in powerful ways by feminist judgment writing as a form of feminist critique. Responding to the method, Davies argues that 'drag is the judicial norm' rather than the exception, because all 'judges are performing a role'.[29] Because it is a performance contingent on plausibility, '[f]eminist judges are not at liberty to ignore legal conventions in favour of simply applying a feminist approach but rather must, like all drag artists, be faithful to pre-existing normative ideas'.[30]

But the fairy tale also provokes other questions: Methodologically, what does it mean to engage with law? Are we, as feminists, engaging in wishful (fairy-tale) thinking to engage with law? Should we, as feminist academics, work complicitly within a system that has excluded us. Returning to that provocative question: In pursuing another feminist judgment project (and reflecting on critiques of centring law), is the feminist judgment methodology itself a naïve belief in fairy tales? Is dressing up in judicial robes an example of the tale of the emperor's new clothes? Is it simply the stuff of fairy tales to imagine that law really can be done differently, and that real-life judges might be influenced by these feminist judgments.

Some insights are provided by real-life feminist judges who have engaged with the methodology in earlier projects – writing forewords, offering guidance about the art and craft of judgment writing, and the judicial role more broadly. For example, Sally Brown,[31] in the foreword to the Australian project, suggested: 'If more people who become judges are aware of the gendered nature of law and the overriding importance of equality, and more reflective about the fluidity of the judicial role and the effect of power on the operation of law, there will be judgments which grapple with the concerns of these authors.'[32] Similarly, Brenda Hale,[33] in the foreword to the UK project, pondered:

[28] *Ibid*, at 398 (footnotes omitted).
[29] M. Davies, 'The Law Becomes Us: Rediscovering Judgment, Review of Feminist Judgments: From Theory to Practice' 20(2) *Feminist Legal Studies* (2012) 167–181, at 173.
[30] *Ibid*.
[31] Sally Brown is an Australian judge. She was appointed Chief Magistrate of Victoria in 1990, and then a judge of the Family Court of Australia in 1993.
[32] S. Brown, 'Foreword' in H. Douglas et al. (eds.), *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford: Hart, 2014).
[33] Brenda Hale served as president of the Supreme Court of the United Kingdom from 2017 until her retirement in 2020.

> So what difference would it make if there were more feminist judges? We take it as given that all judges have to work within their judicial oaths: to 'do right to all manner of people after the laws and usages of this realm without fear or favour affection or ill-will.' They cannot have an 'agenda' to shape the law to their own design. But they can certainly bring their own experience and understanding of life to the interpretation or development of the law or its application in individual cases.[34]

Hale went on to describe reading the UK feminist project as a 'chastening experience for any judge who believes himself or herself to be both true to their judicial oath and a neutral observer of the world'.[35] Or, put another way, what might judges make of the disruption of the 'myth of a purely logical judicial decision-making process and to demonstrate that judicial decision-making is rarely detached from personal background and experience'?[36] On one view, such an argument should not arouse *too* much controversy. And yet the notion that that feminism might be inimical to the judicial role has been hard to dislodge.

This is because this idea of the judge, as the 'objective' superhero continues to have enormous gravitational pull. Real-life judges have, in many instances, eschewed feminist identities. In those rare instances in which international criminal law (ICL) judges and actors have demonstrated a commitment to women's rights, it has come at a high personal cost, with accusations of 'bias and lack of impartiality' and 'judicial activism',[37] arguably making other judges reluctant to push at the gendered boundaries of ICL.[38] For instance, in the International Criminal Tribunal for the former Yugoslavia's (ICTY) *Furundžija* case, Judge Florence Mumba was accused by the defence of apprehended bias due to her former role on the UN Commission on the Status of Women (a claim that was ultimately dismissed by the Appeals Chamber).[39] This environment of suspicion or even outright hostility to gender sensitivity at the ICTY was captured by Patricia Viseur Sellers, former Legal Advisor for Gender in the ICTY Prosecutor's Office, who reflected that 'thoroughly normalizing the investigation and prosecution of sexual

[34] B. Hale, 'Foreword' in R. Hunter, C. McGlynn, and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) v, vi.

[35] *Ibid*.

[36] *Ibid*.

[37] L. Chappell, '"Newness", "Oldness", "Nestedness" and Gender Justice Outcomes' 10(4) *Politics & Gender* (2014) 572–594; L. Chappell and R. Grey, 'Gender Just Judging in International Criminal Courts: New Directions for Research' in S. Rimmer and K. Ogg (eds.), *Research Handbook on Feminist Engagement with International Law* (Cheltenham: Edward Elgar, 2019) 213–239.

[38] H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000); Chappell, *supra* note 18.

[39] K. D. Askin, 'Prosecuting Wartime Rape and Other Gender Related Crimes: Extraordinary Advances, Enduring Obstacles' 21 *Berkeley Journal of International Law* (2003) 288–349, at 331–332.

violence created a perceptible backlash [at the ICTY]'.[40] Judge Elizabeth Odio Benito has also faced accusations of bias and politicisation following her gender-sensitive dissent in the *Lubanga* case.[41]

As such, we think that the bridging of theory and practice is important in opening dialogues between the academy and the profession. This is evident in former ICC Judge Navi Pillay's Foreword to this book in which she admits to having disavowed the label 'feminist' whilst at the same time acknowledging that 'it is possible to be both a judge and a feminist, once one understands that feminism underscores equality of women and men'. In a similar vein, at the launch of the Australian feminist judgment book, Justice Margaret McMurdo[42] stressed that being a feminist was entirely in keeping with the judicial role: 'How could the contextually appropriate advocating of women's rights on the ground of equality of the sexes result in a reasonable apprehension of bias? There is complete synergy between feminism and the judicial oath.'[43]

In this volume (as with other feminist judgment projects), we have the participation of real-life judges, such as the Honourable Naigaga Winifred Kyobiika from Uganda, in legitimising feminist approaches to judging. Through such projects, we demonstrate that 'judges can challenge the lingering suspicion that feminist judging comes at the cost of impartiality'.[44]

Since the central premise of the feminist judgment methodology is that the rewritten judgment must be possible within the time and space of the original decision, these reimaginations serve to reveal the masculine (and other) biases of law, as well as the potential to disrupt them. The insistence on operating within the bounds of the law in making decisions which would have been possible at the time (which is especially significant in some of the more historic rewrites) has enhanced the credibility of these projects. Evidently, credibility and being 'taken seriously' by legal practitioners is a trade-off for causing greater disruption to the legal processes which are often 'sites of oppression in themselves'.[45] Many authors in other volumes, as well as this one, have expressed difficulty in 'treading the line' wherein they may engage in the judgment-writing process, highlighting new opportunities for feminist interpretations, in a way that still permits a critique of the process itself.[46] Of course,

[40] P. Viseur Sellers, 'Gender Strategy Is Not Luxury for International Courts' 17(2) *American University Journal of Gender, Social Policy & the Law* (2009) 301–326, at 312.

[41] 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 253.

[42] Margaret McMurdo is an Australian Judge who served as the President of Queensland Court of Appeal from 1998 until her retirement in 2017.

[43] M. McMurdo, 'Address at the Launch of the Book *Australian Feminist Judgments: Writing and Re-writing Law*, Speech, 2 December 2014 (Banco Court, Brisbane: University of Queensland), available at https://law.uq.edu.au/files/19693/AFJP-booklaunch-address-mcmurdo021214.pdf.

[44] See Grey et al., *supra* note 41, at 264.

[45] Munro, *supra* note 24, at 255.

[46] *Ibid*.

many of these tensions are even more apparent and complex against the backdrop of coloniality. As Dawuni notes in Chapter 6 in this volume, although colonisation may have ended, its effects are ongoing 'as an idea of subjugation continues to be a principal means of control over the political, economic, linguistic, and legal systems of former colonies'.

Some authors in our project have offered contributions which are more 'disruptive'; less willing to be bound by the genre of judgment writing.[47] While I agree that one of the most compelling features of feminist judgment writing has been its insistence on plausibility, it is also true that there are innumerable ways to engage with the law and legal system while maintaining scepticism about the law, its language and authority. One compelling example was the approach taken by the Indigenous authors in the Australian project whose contributions were not written as judgments because white man's law would not be adequate.[48] Taking these critiques further, the Indigenous Judgment Project was even more radical in its departure from the method – utilising poetry, narrative, and essay to challenge the hegemony of judgment.[49] These contributions provide an important counter to the notion that adopting feminist/critical judging techniques alone would be sufficient to effect widespread transformation in judicial reasoning and method.

Even through our project's engagement with the feminist judgment method I nonetheless acknowledge the dangers of engaging with law. As Otto argued in her review of the International Law Project, 'feminist encounters with law are therefore always fraught with danger for feminist ideas which are vulnerable to co-option into the service of imperial and masculinist agendas'.[50] She offers the following examples, all of which are salutary given our book's focus: 'when the US-led invasion of Afghanistan was defended as a measure to support women's rights, and the World Bank's promotion of women's equality and LGBTIQ inclusion because of their instrumental value in boosting free market economic productivity'.[51]

These examples underscore doubts some feminists have expressed about the capacity for women to transform legal practices and processes by working within

[47] In this collection, for example, see Rigney's abolitionist approach, McKay's imposition of a non-carceral sentence, and Zarsky and Irving's inclusion of an 'additional comment'. These approaches all pushed the boundaries in terms of what is legally plausible under the Rome Statute.

[48] See I. Watson, 'Response to *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR H' in H. Douglas et al. (eds.), *Australian Feminist Judgments: Righting and Rewriting Law* (1st ed., London: Bloomsbury, 2014).

[49] N. Watson and H. Douglas, *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (1st ed., London: Routledge, 2022).

[50] D. Otto, 'Feminist Judging in Action: Reflecting on the Feminist Judgments in International Law Project' 28(2) *Feminist Legal Studies* (2020) 445–446 (citations omitted).

[51] *Ibid.*

the limits of the law.[52] Indeed, the disinclination of some feminist legal theorists to engage with the law stems from the view that legal processes are so inherently masculine that they are beyond transformation. While much is made of the arguments about decentring law, this was 'never meant to mean that feminists should ignore law nor indeed that they should never engage with its various guises'.[53] As Smart herself reflected, responding to the early formulation of feminist judgment projects:

> Indeed law (especially at the levels of both formulating legislation and case law) provides a vital site for the contestation of ideas and values. It provides an opportunity to voice feminist values and concerns, and even possible alternatives. … The project, which is about revisiting actual reported cases and rewriting them from the basis of feminist values, seems to be entirely in keeping with the project of encouraging discursive struggle. What, I wonder, could be worse than remaining mute?[54]

Far from 'remaining mute' we have co-opted the fairy-tale motif, utilising its power of imagination, possibilities, and retelling to generate a new reality, one which is possible within the bounds that already exist. Using such techniques, it becomes more difficult for critics to dismiss the feminist project as creating something which is created as 'fake', 'forged', or 'false'. Rather, it is a demonstration of that which the judge *could* have decided but did not – either by explicit choice or by unconscious blindness. Feminist judgment projects are not (merely) wishful thinking, 'rather in showing how cases could have been decided differently within the constraints imposed on judicial decision making … feminist judgments are a manifestation of political truth'.[55] The judgments provide a tangible and vivid demonstration 'not only of the importance of having a judiciary that reflects the communities it serves, but also the extent to which a diverse judiciary can bring different perspectives to bear'.[56]

In curating another feminist judgment project, we defend the feminist judgment methodology, acknowledging its limitations, and the limitations of law more broadly. To borrow Matsuda's powerful imagery, in this volume we have one foot in the courtroom and one foot outside – cognisant of law's power and possibilities, and its limitations.[57] Of course, *who* gets to stand inside the courtroom (imbued with any authority and voice) is itself contested, the product of all kinds of political machinations and hierarchies. This is the matter to which I now wish to turn:

[52] C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1990); M. J. Mossman, 'Feminism and Legal Method: The Difference It Makes' 3 *Wisconsin Women's Law Journal* (1987) 147–168.

[53] C. Smart, 'Reflection' 20 *Feminist Legal Studies* (2012) 161–165, at 162.

[54] *Ibid*, at 162–163.

[55] Rackley, *supra* note 26, at 408.

[56] *Ibid*.

[57] M. Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' 11(1) *Women's Rights Law Reporter* (1998) 7–10, at 8.

explaining why the ICC makes a compelling case study for extending the feminist judgment method to a new site.

WHY EXTEND FEMINIST JUDGMENT METHODOLOGY TO THE INTERNATIONAL CRIMINAL COURT?

What features of the ICC make it the suitable subject of another feminist judgment project? Here there are two matters which bear emphasis. The ICC's record means that it is rightly a site of feminist concern, one that has not lived up to its promise of gender justice – a promise that is significant (notwithstanding the many and valid critiques of the Rome Statute).[58] Although the ICC does not make any reference to feminist judging, the importance of gender sensitivity is 'baked into' the ICC's design, so to speak.[59] The feminist judgment methodology thus provides an important outlet to illustrate this promise, which can be more fully realised by thinking about the transformative role of judges.

The ICC's Poor Record in Attaining Gender Justice

Sexual and gender-based crimes (SGB) are endemic in periods of conflict,[60] and yet the ICC has secured just two convictions for such crimes, both towards the end of the second decade of its operation: *Ongwen* 2021[61] and *Ntaganda* 2019.[62] This low level of accountability creates a series of injustices: it leaves intact perpetrator impunity; it leaves victims without recognition or reparation; and it undermines the legitimacy of the ICC, given the commitment of its architects to advancing gender justice across all systems, jurisdictions, and societies.[63] But the ICC's weak contribution to gender justice runs much deeper than just failed convictions for SGB crimes; the ICC's failure to integrate a gender perspective has touched every stage of the trial. For example, the Court has not considered gendered barriers to justice when assessing whether its cases should be turned over to national courts,[64] and has excluded

[58] See for example A. Facio, 'All Roads Lead to Rome, but Some Are Bumpier than Others' in S. Pickering and C. Lambert (eds.), *Global Issues, Women and Justice* (Sydney: Federation Press, 2004) 308–334; B. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008).

[59] The editors of this volume developed this argument in Grey et al., *supra* note 41, at 250.

[60] PRIO, 'Continued Failure to Address Wartime Sexual Violence', PRIO Policy Paper 07, 2018, available at https://cdn.cloud.prio.org/files/6602e342-5de5-4c2a-b4d8-a07c2d304ab1/Nordås%20Nagel%20Cohen%20-%20Continued%20Failure%20to%20End%20Wartime%20Sexual%20Violence%20PRIO%20Policy%20Brief%207-2018.pdf?inline=true.

[61] Trial Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021.

[62] Trial Judgment, *Ntaganda* (ICC-01/04-02/06), Trial Chamber VI, 8 July 2019.

[63] L. Chappell, 'The Gender Injustice Cascade: "Transformative" Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court' 21 (9) *International Journal of Human Rights* (2017) 1223–1242.

[64] L. Chappell, R. Grey, and E. Walker, 'The Gender Justice Shadow of Complementarity' 7(3) *International Journal of Transitional Justice* 455–475.

women's perspectives in cases relating to the destruction of cultural heritage.[65] Grey's work on prosecuting SGB crimes has shown how the proportion of SGB charges decreases significantly at each stage of trial in comparison to other crimes, illustrating an overarching issue with both prosecutorial and judging approaches.[66] To improve accountability for SGB crimes in the ICC, and to ensure that the Court develops a more gender-sensitive practice which places survivors at the centre, there is an urgent need to understand the reasons for this failure. This includes filling a research gap to interrogate the role of the judiciary in perpetuating the problem.

One such strategy for understanding the part the judiciary has played in the Court's poor gender justice record is adopting the feminist judgment methodology. The focus that the methodology brings to judging is currently lacking from the sophisticated critique of ICL which feminist scholars have been developing since the 1990s.[67] The focus of this work has primarily revolved around issues of how legal concepts and practices have historically been gendered in ways which lead to women's discrimination in the courtroom,[68] and how women survivors of SGB violence in conflict have been ignored, or their experiences rendered less grievous than other crimes.[69] However, missing from feminist ICL scholarship is the concept of 'feminist judging', a critical method which, as discussed above, has been used in domestic/national settings, and an understanding of how such an approach can be utilised in efforts to overcome gender biases embedded in ICL. To the extent that international legal studies have addressed gender and judging at all, the focus has (mostly) either been on increasing the number of women judges on relevant courts,[70] or on feminist judging in non-criminal international law venues.[71]

[65] R. Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (Cambridge: Cambridge University Press, 2019).

[66] 'At each of these stages of proceedings, a decreasing proportion of gender-based crimes has been confirmed: just under 93 per cent at the arrest warrant/summons to appear stage; 74 per cent at the confirmation stage; and zero per cent at the end of the trial … At every stage of proceedings, the OTP has been less successful in establishing charges of gender-based crimes than other crimes.' Grey, *supra* note 63, at 265.

[67] See e.g. H. Charlesworth, C. Chinkin, and S. Wright, 'Feminist Approaches to International Law' 85 *American Journal of International Law* (1991) 613–645; Charlesworth and Chinkin, *supra* note 38; R. Copelon, 'Surfacing Gender: Re-engraving Crimes against Women in Humanitarian Law' 5 *Hastings Women's Law Journal* (1994) 243–265; Chappell, *supra* note 18; R. Grey and L. Chappell, 'Prosecuting Sexual and Gender-Based Crimes in the International Criminal Court: Inching towards Gender Justice' in S. Mouthaan and O. Jurasz (eds.), *Gender and War: International and Transitional Justice Perspectives* (Cambridge: Intersentia, 2019) 209–234.

[68] F. Ní Aoláin, D. F. Haynes, and N. Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (New York: Oxford University Press, 2011).

[69] Charlesworth and Chinkin, *supra* note 38; Chappell, *supra* note 18.

[70] N. Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' 12(2) *ChicagoUnbound* (2012) 647–684.

[71] See L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (Oxford: Hart, 2019). Note that this important contribution includes just one ICC case. See also K. Gooding, 'How Can the Methodology of Feminist Judgment Writing Improve Gender Sensitivity in

Furthermore, as noted in Chapter 2, existing gender-oriented analyses of the ICC have tended to focus on how poor *investigation and prosecution* strategies have contributed to the ICC's initial failure to secure convictions for SGB crimes.[72] The ICC Prosecutor's Office recognises this fact and has consequently appointed gender advisors and published a comprehensive gender policy aimed at improving its track record across the board.[73] This focus has meant that there is comparatively little recognition or research (or at least the recognition has been slower) into the role that *judges* have played in adjudicating SGB crimes, and no collective action[74] by the ICC's judiciary to draw lessons from the extensive research on gender-sensitive judging in domestic courts.[75] As such, a feminist rewriting of ICC decisions examines the Court's poor conviction record from a new angle.

Gender Parity and Gender Expertise on the Bench

It is relevant to consider the ICC's own record in terms of gender parity and gender expertise on the bench and whether this makes the Court a suitable focus for another feminist judgment project. The importance of not conflating sex with gender expertise was at least to some extent addressed by the Rome Statute through its provisions for the election of judges. Notably, Article 36(8)(a) provides that states parties shall in the selection of judges 'take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges'. Importantly, it further specifies in Article 36(8)(b) that 'States Parties shall also take into account the need to include judges with legal

International Criminal Law' 5 *LSE Law Review* 115–152 for a thoughtful feminist rewriting of *Ongwen* prior to our ICC Feminist Judgment Project.

[72] L. Chappell, 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court' 67(1) *Political Research Quarterly* (2014) 183–196; N. Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' in W. Schabas, Y. McDermott, and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law* (Farnham: Ashgate, 2013) 7; Grey and Chappell, *supra* note 67.

[73] Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes', June 2014, available at https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes–June-2014.pdf; Office of the Prosecutor, 'Policy on Gender-Based Crimes', December 2023, https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf.

[74] Although the judiciary itself may not have issued a practice manual or taken further collective action, I note the effective training programmes carried out by organisations such as African Legal Aid and Women's Initiatives for Gender Justice which have worked to incorporate gender expertise within the chambers. See e.g. African Legal Aid, 'Gender Mentoring Training Programme for Judges of International Criminal Courts', November 2022, available at www.africalegalaid.com/gender-mentoring-training-programme-for-judges-of-international-criminal-courts; WIGJ, 'Gender Training', 2004–2007, available at https://4genderjustice.org/home/gender-training.

[75] Hunter, *supra* note 17; K. McLoughlin, 'A Particular Disappointment? Judging Women and the High Court of Australia' 23(3) *Feminist Legal Studies* (2015) 273–294.

expertise on specific issues, including, but not limited to, violence against women or children'.[76] Although these provisions do not conflate sex and expertise, they fall short of requiring equal gender representation and they do not put any particular weight on the matters to be taken account (for example, gender expertise).

The Rome Statute's provisions for judicial election provide some context to the Court's gender statistics, which have shown mixed success in embedding gender representation and expertise. From 2010 to 2014, women constituted the majority of justices on the ICC bench, reaching a peak of 61 per cent in 2011. However, underscoring the precarious nature of such gains, in 2015 female representation on the bench slipped to an all-time low of 33 per cent.[77] After the 2020 ASP Session, women held nine of eighteen judicial appointments.[78] At the 2023 ASP, two more women were elected to the bench, resulting in women again holding 61 per cent of all judicial positions.

As of March 2023, there were fourteen nominations to the positions, with six female to eight male nominations.[79] Notably, all three candidates from the Asia-Pacific states were male.[80] Accordingly, even specific provisions which account for a 'fair representation' have not necessarily been a safeguard for securing something akin (or close) to parity.

Perhaps more significantly for our purposes is the number of judges with specific gender expertise. In 2023, five out of the eighteen sitting justices self-identify as possessing gender expertise:[81]

(1) Judge Luz del Carmen Ibáñez Carranza, gender and children legal expertise.
(2) Judge Chang-ho Chung, gender legal expertise (ECCC).
(3) Judge Bertram Schmitt, gender legal expertise.
(4) Judge Althea Violet Alexis-Windsor, legal expertise in sexual violence.
(5) Judge Miatta Maria Samba, legal expertise in sexual violence.

Our point here is not to over-emphasise the significance of these numbers in any empirical sense. Understood in a wider historical context (which has denied women access to judicial roles) – parity or near parity on the bench must be set against that reality. But, as Kenney explains, numbers matter because they affect power in institutions, and we 'need to know if the institution is uniform, skewed, tilted, or

[76] The Rome Statute UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN 92-9227-227-6, Art. 36(8)(b).
[77] The Coalition for the ICC Elections Team, 'Gender Representation on the ICC Bench' (2020), available at https://coalitionfortheicc.org/sites/default/files/cicc_documents/CICC%20Elections%20Team%20statement%20gender%20representation.pdf.
[78] ICC, 'Judges' (2022), available at www.icc-cpi.int/sites/default/files/Publications/JudgesENG.pdf.
[79] Assembly of States Parties, 'Nominations for Judges of the International Criminal Court', 23 March 2023, available at https://asp.icc-cpi.int/elections/judges/2023/Nominations.
[80] *Ibid*.
[81] ICC, 'Judges' (2023), available at www.icc-cpi.int/sites/default/files/Publications/JudgesENG.pdf.

balanced'[82] to understand how institutions are gendered.[83] Gender expertise is not the sole purview of women, and sex does not connote knowledge or authority. Two of the above five judges self-identifying as having expertise are male.[84] Moreover, I am not suggesting that this expertise is synonymous with a feminist approach to judging – although of course it stands to reason that this expertise might manifest itself this way (or at least increase the likelihood that a judge possessing such expertise might be more likely to show feminist or gender-sensitive approaches to judging). Rather, my point is about the relative importance that might be placed on ensuring that the ICC judiciary reflects the principles of fair representation, and the election of judges with gender expertise.[85] That is, despite these provisions, the Court has a mixed record, both in terms of gender parity and in the appointment of judges with specific gender expertise.

This record makes the ICC fertile ground for another feminist judgment project. The fact that the Court's provisions on gender representation and expertise have not been fully realised opens the door for asking: What if they had been? How might judgment differ if written by someone openly espousing feminist principles? Importantly, the fact that such expertise is explicitly recognised (to an extent) by the Statute itself renders its application more pertinent.

Highlighting the primary importance of gender expertise on the bench is even more important in light of the Court's continued preoccupation with numerical rather than substantive representation. Certainly, it feels as if this concern with parity remains significant – to the point that it might obscure other concerns – in accounts about judges and the role that they might play on the Court. For example, on International Women's Day (IWD) in 2023, the President of the Court, Judge Piotr Hofmański, made a point of emphasising the numerical picture:

> The ICC is proud to be at the forefront of the movement toward gender equality in the field of international justice. With nine female and nine male judges currently on our bench, we project to the world the critical importance of the equal participation of men and women in the field of law. Yet, much more remains to be done to achieve effective equality of opportunities in our workforce. As an International Gender Champion, I am strongly committed to treating this as a continuous priority that requires tangible efforts on a daily basis.[86]

[82] S. Kenney, 'New Research on Gendered Political Institutions' 49(2) *Political Research Quarterly* (1996) 445–466, at 456

[83] See McLoughlin, *supra* note 12, for an examination of the way in which the institutional features of a given court might be conceptualised as reflecting a particular 'gender regime' which in turn shapes the *institutional* and *individual* contributions of judges.

[84] ICC, *supra* note 83.

[85] Importantly, I note that regional representation is also significant in achieving gender justice due to the insights gained from regional diversity into intersectional power structures which exacerbate and underlie atrocity crimes.

[86] ICC, 'International Criminal Court Marks International Women's Day' (8 March 2023), available at www.icc-cpi.int/news/international-criminal-court-marks-international-womens-day-1.

In contrast, in his remarks on IWD, ICC Prosecutor Karim A. A. Khan KC also emphasised the ICC's working environment, but appeared to evidence a wider and more nuanced understanding of gender justice than focusing solely on equal representation. He said:

> On this International Women's Day, I reaffirm my commitment to the ICC's Gender Strategy and my conviction that gender equality, gender diversity, and empowerment of women within my Office are key prerequisites for high performance … Our Office also protects women's rights in the crimes we investigate and prosecute. That includes the crime of gender persecution – the ultimate crime of discrimination towards women, including lesbian, bisexual, transgender, queer, and intersex women.

Now, of course these are isolated comments made in recognition of International Women's Day – they should not be taken as representing a complete picture regarding the institutional understanding of gender justice. But they nonetheless serve as another reminder that more work is needed in emphasising the role *judges* might play in improving gender justice.

Fulfilling the Promise of the Rome Statute

Finally, it is not merely the ICC's poor gender justice record or varying levels of gender expertise that make it a suitable forum for extending the feminist judgment methodology. Rather, the fact that the Rome Statute itself already contains substantial (and under-utilised) gender-sensitive provisions transforms the rewriting from an academic exercise into a real-world possibility. The editors of this volume have elsewhere canvassed the possibilities for ICC judges to engage in gender-sensitive or feminist judging, stressing the significant *promise* in the Rome Statute when it comes to delivering gender justice. As we argued, there are three main spheres of judicial activity which could be utilised by the bench to bring into effect the potential of the Statute: interpreting the law, making findings of fact, and making procedural decisions.[87]

During the Court's creation, the international feminist legal community successfully advocated for strong gender justice provisions in the Rome Statute.[88] These

[87] As we argued: When interpreting decisions, 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? 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. See Grey et al., *supra* note 41, at 268.

[88] *Ibid*, at 250; 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; S. Mouthaan, 'The Prosecution of Gender-Based Crimes at the ICC: Challenges and Opportunities' 11(4) *International Criminal Law Review* (2011) 775–802.

provisions were supported by numerous states, as well as the Women's Caucus for Gender Justice, the key feminist organisation engaged in the negotiations.[89] Indeed, some of the proposed gender justice provisions had to be watered down in order to appease conservative states, particularly the provisions defining terms such as 'gender' and 'forced pregnancy'.[90] However, the Women's Caucus and like-minded states were successful in locking in many gender justice rules. For example, the Rome Statute recognises a wider range of sexual and gender-based crimes than any previous instrument of international law;[91] it refers to special measures to protect the dignity and well-being of victims of SGB violence;[92] and it requires that all sources of law applicable within the ICC are interpreted and applied without adverse distinction (discrimination) on gender grounds.[93] Of course, the Rome Statute's provisions aimed at securing gender expertise in the Chambers (that is, the judiciary),[94] Office of the Prosecutor,[95] and Registry[96] are all also important in embedding this expertise in the institution.

As such, embedded within the Rome Statute is an unrealised promise for gender justice. The Rome Statute provides a firm foothold for such an approach – and acknowledging, of course, that the method has been successfully deployed in reimagining historic and more contemporary decisions where arguably no such firm foothold exists. The feminist judgment methodology provides an important forum to explore the potential of this promise by changing *who* decides the law, testing the limits between legal plausibility and feminist principles.

It therefore presents something of a blueprint for what might be possible within existing institutions. Is it akin to belief in a fairy tale to imagine the appointment of real-life feminist judges? Here I think that at least part of the work of the feminist judgment methodology is to destigmatise the notion that bringing such a perspective to bear is antithetical to the judicial role. Indeed, even if ICC member states *want* to elect feminist judges, and even if serving judges *want* to become more gender sensitive, there is little guidance on the features of feminist judging in relation to this particular court, or in relation to ICL more generally. This is due to a lack of knowledge transfer from the extensive literature on and practice of feminist judging in domestic courts to the international arena.

[89] Grey et al., *supra* note 41, at 252.
[90] *Ibid*, at 250; M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (London: Routledge, 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* (Vancouver: UBC Press, 2009) 139.
[91] The Rome Statute UN General Assembly, *supra* note 76, Arts. 7(1)(g), 7(1)(h), 8(2)(b)(xxii), 8(2)(e)(vi).
[92] *Ibid*, Arts. 54(1)(b), 68(1), 68(2).
[93] *Ibid*, Art. 21(3)
[94] *Ibid*, Art. 36(8)(b).
[95] *Ibid*, Art. 42(9).
[96] *Ibid*, Art. 43(6).

This book serves to bridge that gap. It demonstrates what might be possible on the international stage. It invites the legal community, and those beyond, to engage with the work already underway in many domestic spheres; to reimagine *who* the imagined international criminal law judge might be, and how they might approach their task. It reopens the possibilities that were in full force during the 1998 Rome Conference and earlier preparatory meetings. So, why another feminist judgment project? Because the promise and potential of the ICC for gender justice is not a fairy tale – and that is something we as feminists should believe in.