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Is International Criminal Law Feminist?

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IS INTERNATIONAL CRIMINAL LAW FEMINIST?

By Margaret M. deGuzman* & Rachel López**

I. INTRODUCTION

In many ways, the story of international criminal law (ICL) has been one of triumph for women. Perhaps more than for any other area of international law, women have been central to constructing ICL. Although women were excluded from important positions at the Nuremberg and Tokyo trials,¹ they have since played prominent roles in creating and staffing international criminal courts, including the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC). Women have filled top leadership roles at these institutions, such as chief prosecutor and president. More than half of the ICC's past and present judges have been women.² This is particularly notable compared to the abysmal records of most other international courts and commissions: at the International Court of Justice, only five of the 111 judges, past and present, have been women, and only ten of the International Law Commission's 247 members have been women.³ Moreover, feminist scholars and activists have been at the forefront of a sustained and successful campaign to criminalize acts of sexual and gender-based violence at the international level. Their efforts led to rape being recognized as a war crime, crime against humanity, and instrument of genocide by the ICTY and ICTR; and to the inclusion of expansive provisions regarding sexual and gender-based violence in the Rome Statute of the ICC.⁴

Despite these remarkable achievements, much work to advance equality for women in ICL remains to be done. However, as this chapter demonstrates, there are sharp divisions among feminist scholars about which direction to go. The future of ICL as a feminist project, at its essence, turns on one central question: Does ICL advance feminist goals? In answering this question, this chapter seeks to chart the landscape of feminist critiques of international criminal law. We identify two camps of feminist thought regarding ICL: (1) those who believe in the enterprise of international criminal law as a method for advancing women's rights; and (2) those who reject the enterprise believing that it undermines those rights. Adopting a framework first articulated by Robert Cover and then further developed by Katharine Young, we label these 'redemptive' and 'rejectionist' frames.⁵ Although we do not claim that all feminist engagement with ICL fits neatly into these categories or that the categories themselves are 'neat', we argue that this distinction provides a useful lens through which to understand the history of feminist engagement with ICL and to think constructively about its future.

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¹ Dianne Marie Amann documents the exclusion of women at the Nuremberg trials in her chapter in this volume, 'Absented at the Creation: Nuremberg Women and International Criminal Justice'.

² Milena Sterio, 'Women as Judges at International Criminal Tribunals' (2020) 29 *Transnational Law & Contemporary Problems* 219, 229.

³ One of the women at the International Law Commission, Nilufer Oral, contributed a chapter to this volume examining the role of women as highly qualified publicists in international law.

⁴ Louise Chappell, 'Women, Gender, and International Institutions: Exploring New Opportunities at the International Criminal Court' (2017) 22 *Policy & Society* 3, 9 (2017).

⁵ Katharine G. Young, 'Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States' (2013) 4 *Northeastern University Law Journal* 323, 324.

Feminists who adopt a redemptive frame recognize the limitations of ICL but ultimately see the enterprise as redeemable—that is, they believe that with the right reforms, it can be a tool for advancing women’s rights. On the other hand, those who adopt a rejectionist frame believe the premises that undergird ICL are so fundamentally patriarchal that the best course is to find another way of advancing women’s rights. In short, the redemptive frame drives feminists toward finding ‘a way forward within [the] current legal institutions’ of ICL. In contrast, the rejectionist frame pushes them to look elsewhere to advance feminist agendas.⁶ This chapter aims to put these two feminist camps in conversation and modestly suggest ways that these feminists might work collectively to support the core shared feminist goal: the advancement of gender equality.

We begin this chapter by discussing redemptive feminist engagement with ICL, tracing the ways feminists have worked within the institutions of ICL to advance women’s rights. This section highlights the numerous advances of women in this domain, from criminalizing violence that disproportionately affects women to working toward greater inclusion of women in decision making. These efforts have been notable both for the unprecedented consensus among feminists working to advance these goals and for the tremendous successes of the movement. Following this discussion, we outline the arguments of those who reject ICL as a tool for women’s advancement, cataloguing them according to the central critiques they levy against ICL. Namely, these feminists are concerned that ICL portrays women in ways that perpetuate gendered stereotypes, fails to recognize the range of gendered harms that affect women in wartime, and reinforces women’s roles within existing patriarchal structures instead of challenging them. We conclude by charting the common ground between these groups of feminists and suggesting areas of agreement where the collective advancement of women might be possible.

II. REDEMPTIVE FEMINIST ENGAGEMENT WITH ICL

Most feminist scholarship and advocacy in ICL have focused on redeeming the enterprise as a mechanism for promoting women’s rights. These efforts start from the premise that ICL, like all international law, discriminates against women. International criminal law draws its substantive norms from international humanitarian law, international human rights law, and national criminal law principles. Its procedures are adapted from those of national criminal law systems. These bodies of law and procedure reflect the discriminatory biases present in virtually all the world’s legal systems, as well as some biases particular to the laws of armed conflict. Decisionmakers implementing ICL likewise exhibit the pro-male prejudices endemic in most of the world.

Feminists have sought to address the various kinds of biases that undergird the systems at the foundations of international criminal law, including by seeking to expand substantive norms, crafting woman-friendly procedural norms, promoting the prosecution of crimes that particularly or disproportionately affect women, and working for greater inclusion of women in decision-making roles.

The primary feminist actors in this redemptive effort have been academics and activists, and they have worked in a remarkably coordinated fashion. Two organizations have been responsible for most of this coordination: The Women’s Caucus for Gender Justice (Women’s Caucus) was created in 1997 and included hundreds of organizational and individual members dedicated to ensuring the effective prosecution of crimes of sexual violence at the ICC.⁷ Two years after the Rome Statute entered into force, this group was reconstituted as the Women’s Initiative

⁶ Ibid, 323.

⁷ Chappell (n 4) 14.

for Gender Justice (Women's Initiative) 'to monitor the Court and advocate for gender-inclusive justice'.⁸

These feminist individual and organizational actors were able to achieve a high degree of consensus regarding aims and methods.⁹ This is especially remarkable considering the often-fierce battles among feminists addressing criminal law issues at the national level. For instance, feminists working in ICL resolved the conceptual debate concerning the nature of rape in favor of the sexual violence frame rather than that of sexual autonomy.¹⁰ According to Janet Halley, the feminist organizational style that evolved in the 1990s 'was overwhelmingly coalitional, resulting in a literary "trace" of feminist work that is almost devoid of manifest internal conflict'.¹¹

Importantly for our thesis, since the 1990s, most feminists engaged with ICL have accepted, almost without question, the appropriateness of criminal law responses to harm against women, which is hotly contested among feminists more broadly.¹² Indeed, the redemption of ICL to advance women's rights has become a centerpiece of the women's human rights agenda. As Patricia Sellers, an important feminist international criminal lawyer and scholar, and contributor to this volume, has argued, sexual violence against women in armed conflict undermines women's ability to exercise their human rights, from civil and political rights to economic, social, and cultural rights, and even such 'third generation rights' as the right to peace.¹³ Rhonda Copelon, one of the most influential ICL feminists, describes the formation of the ICC as a victory for women's human rights.¹⁴ Ruth Philips, who attended the Rome Conference as a member of the Women's Caucus, views the Rome Statute as 'perhaps the most comprehensive example of the 'mainstreaming' of women's human rights discourse'.¹⁵ Feminist groups continue to push for the centering of accountability in the UN Security Council's Women, Peace and Security (WPS) agenda.¹⁶

From its inception, the redemptive feminist ICL agenda centered on ensuring the prosecution of historically under-prosecuted crimes that disproportionately affect women,

⁸ See 'History' (Women's Initiative for Gender Justice) <<https://4genderjustice.org/history/>> accessed 28 July 2022).

⁹ Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30 *Michigan Journal of International Law* 1, 2.

¹⁰ *Ibid.*, 58–59 ('When the time came to pick a feminist message about rape to send through IHL . . . feminists reached the consensus view that rape is a crime of sexual violence').

¹¹ *Ibid.*, 2.

¹² See eg Anna Terwiel, 'What Is Carceral Feminism?' (2020) 48 *Political Theory* 421, 422 ('[A] growing number of feminists are advocating community-based justice mechanisms that do not involve the state'); Chloë Taylor, 'Anti-Carceral Feminism and Sexual Assault—A Defense' (2018) 34 *Social Philosophy Today* 29, 31–32 ('There is a longstanding feminist literature that argues that law-and-order responses to crimes of sexual and gendered violence revictimize and fail complainants, whatever they do to offenders').

¹³ UN OHCHR, 'Patricia Viseur Sellers, The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation' (2008) 4, <https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf>.

¹⁴ Rhonda Copelon, 'International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking' (2002) 11 *American University Journal of Gender Social Policy and Law* 865, 868–69 ('The ICC exists not only as an institution of justice but as an incentive to states to adopt and prosecute these crimes domestically. . . . The fact that intimate violence is now clearly a human rights issue is itself significant and heightens the demand for vigorous and multifaceted preventive and remedial action by the state').

¹⁵ Ruth B. Philips, 'Too Close to Home? International Criminal Law, War Crimes and Family Violence' (2002) 24 *Thomas Jefferson Law Review* 229, 232.

¹⁶ Mattia Pinto, 'Of Sex and War: Carceral Feminism and Its Anti-Carceral Critique' (2020) 8 *London Review of International Law* 351, 354.

especially crimes of sexual and gender-based violence. The ultimate objective was to ensure more—and more effective—investigation and prosecution of such crimes. This objective was not entirely uncontroversial. For instance, Philips explains that feminists in former Yugoslavia had different views of the appropriate feminist agenda.¹⁷ Nonetheless, what has been called the feminist ‘anti-impunity’ agenda won out at the level of international organizations and advocacy efforts.¹⁸ Such efforts can be divided into three broad categories, each elaborated below: redeeming ICL’s substantive, decision making, and procedural norms.

A. Redeeming ICL’s Substantive Norms

Many substantive norms in statutes of international courts and tribunals have roots in international humanitarian law. Like all international law, this body of law was crafted by and primarily addresses the needs and perspectives of men; it does little to protect women. The Hague Conventions and Regulations address gender crimes only obliquely as violations of ‘family honour’,¹⁹ reflecting the central concern of male well-being. The Nuremberg and Tokyo Tribunal statutes and judgments make minimal reference to gender crimes, despite their ubiquity in those conflicts.²⁰ The 1949 Geneva Conventions, drafted after World War II, contain just one direct reference to rape and a few additional provisions that have been interpreted to prohibit sexual violence.²¹ Rape is not listed among the ‘grave breaches’ that require criminal prosecution under those Conventions. This failure to address crimes of sexual violence reflects the historical view of women as male property, rendering sexual assault in armed conflict a ‘spoils of war’.

The highly publicized use of rape as a tool for ethnic cleansing in the Balkan conflict of the 1990s stimulated redemptive feminist efforts that led to a rapid expansion in the legal norms governing international criminal accountability for crimes of sexual violence. Without canvassing all such developments, some noteworthy examples include the explicit recognition of rape as a crime against humanity in the Statute of the ICTY²² and as a war crime in the Statute of the ICTR.²³ Most notably, the Rome Statute reflects sustained and coordinated redemptive feminist efforts. The Women’s Caucus was among the most active and engaged NGO groups during the Rome Conference, vigorously pursuing its agenda of ensuring the statute contained expansive provisions regarding sexual and gender-based violence. Philips writes of the statute’s ‘watershed provisions

¹⁷ Philips (n 15) 235–36 (describing the denunciation by a radical feminist organization of a group of women who ‘suggested that military sexual violence is endemic to all societies’).

¹⁸ Karen Engle, ‘Anti-impunity and the Turn to Criminal Law in Human Rights’ (2015) 100 *Cornell Law Review* 1069.

¹⁹ Hague Convention IV - Laws and Customs of War on Land, 18 October 1907, 36 Stat 2277, 1 Bevans 631 (entered into force 26 January 1910) Art 46.

²⁰ Kelly D Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’ (2003) 21 *Berkeley Journal of International Law* 288, 295.

²¹ *Ibid.*

²² UN Security Council, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 (1993) Art 5, and S/25704/Add.1, adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993).

²³ UN Security Council, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, SC Res 955 (8 November 1994) Art 4.

that define multiple forms of sexual violence'.²⁴ The forms of violence that can be prosecuted as crimes against humanity under the Rome Statute include not only rape but also 'sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'.²⁵

Additionally, crimes against humanity include persecution based on 'gender'. The Women's Caucus' insistence on including this term occasioned one of the Conference's most contentious debates. Some delegations, including the Holy See and some Arab states, were concerned that the term implicitly recognized rights based on sexual orientation.²⁶ The compromise reached was to define the term as encompassing 'the two sexes, male and female, within the context of society'.²⁷ The ICC Office of the Prosecutor interprets this phrase broadly to include 'sex characteristics and social constructs and criteria used to define maleness and femaleness . . .'.²⁸

In addition to successfully seeking recognition of crimes of sexual and gender-based violence as international crimes, feminists have worked for expansive interpretations of such crimes. As noted above, feminists engaging with ICL coalesced around the notion of rape as a crime of violence, leading them to advocate for a focus on the element of force rather than non-consent. In the groundbreaking *Akeyasu* case, the ICTR defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.²⁹ Chappell lauds this definition, asserting that the 'emphasis on coercion rather than the more problematic notion of consent used in most common law definitions of rape further shifts the definition towards a victim perspective of the crime'.³⁰

Feminist efforts to redeem ICL's substantive norms have not been limited to expanding the definitions of crimes to account for the gendered and sexualized harms women experience in armed conflicts.³¹ As Doris Buss has explained, they have also sought to ensure that sexual violence against women in armed conflict is viewed as a continuation of the violence and inequality women experience in peacetime.³² Indeed, some feminists argue that ICL should be expansive enough to reach peacetime rape.³³ This has led some to resist efforts to recognize rape as a means of committing genocide, fearing that a focus on rape as genocide undermines efforts to eradicate 'everyday rape'.³⁴

²⁴ Philips (n 15) 232.

²⁵ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (entered into force on 1 July 2002) Art 7.

²⁶ Valerie Oosterveld, 'The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 Harvard Human Rights Journal 55, 63–64.

²⁷ Rome Statute (n 25) Art 7(3).

²⁸ ICC Office of the Prosecutor, 'Policy on the Crime of Gender Persecution' (7 December 2022) <<https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>>.

²⁹ Prosecutor v Akeyasu, Case No ICTR 96-4-T, Judgment (2 September 1998) para 598.

³⁰ Chappell (n 4) 11.

³¹ Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 International Criminal Law Review 409, 412–13.

³² Ibid, 413.

³³ Halley (n 9) 74–75.

³⁴ Ibid, 100. ('Neither Charlesworth nor the WCGJ advocated an emphasis on rape as genocide. Here, Charlesworth and the WCGJ were heirs to the Copelon line. Copelon had opposed the genocidal rape framing pursued by Catharine A. MacKinnon and others; Copelon led what Engle calls the 'everyday rape camp' in the early 1990s. But Engle is right that the feminist disagreement over genocide was followed by consensus on almost everything'); see also Karen Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 American Journal of International Law 778, 779 ('Those who argued that the rapes should primarily be

Overall, however, expanding substantive norms was central to redemptive feminist efforts in ICL. These efforts not only enlarged the scope of norms related to sexual and gender-based violence prosecutable at international courts but also impacted many national legal systems. Upon joining the Rome Statute, states must ensure their national systems can prosecute Rome Statute crimes, which has led many to adopt legislation mirroring the Statute.³⁵

B. Redeeming ICL's Decision-Making Norms

An important aspect of the redemptive feminist agenda in ICL is to ensure crimes of sexual and gender-based violence are investigated and prosecuted broadly and that the investigations and prosecutions are conducted in a way that accounts for victims' needs. Patricia Sellers has played a central role in these efforts. When she took on the role of Legal Advisor for Gender to the Prosecutor of the ICTY, she was the first to hold such a position. Although it was not easy to penetrate the decision-making process in the Prosecutor's office, which was dominated by men,³⁶ over time, Sellers made important inroads. In particular, she helped to ensure that crimes of sexual and gender-based violence are considered extremely serious by decisionmakers at all levels of the process, an important goal of redemptive feminists.³⁷ The role of gender advisor is now enshrined in the Rome Statute of the ICC.³⁸

Moreover, the Rome Statute requires the Prosecutor in exercising investigative powers to consider 'the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children . . .'.³⁹ Hiring decisions at the court must take into account the need to include personnel with expertise in sexual and gender violence.⁴⁰ The ICC Prosecutor's Office has adopted numerous policy documents that ensure a particular focus on crimes of sexual and gender-

understood as an instrument of genocide distinguished these crimes from 'everyday rape', or even every day wartime rape, arguing that they were a tool for the systematic extermination of Bosnian Muslims. Other feminists vehemently disagreed, insisting that, unfortunately, the rape of women in times of war- even in such large numbers- was nothing new, and that genocide should not be the focus of attention').

³⁵ See Parliamentarians for Global Action, 'Campaign for the Universality and Effectiveness of the System of the Rome Statute of the International Criminal Court (ICC), Implementation' <<https://www.pgaction.org/ilhr/rome-statute/implementation.html>> accessed 3 August 2022) (listing states that have passed such legislation).

³⁶ One of the authors, Margaret deGuzman, worked with Sellers at the ICTY in 1997 and recalls conversations with her on this point.

³⁷ See Richard J Goldstone, 'Prosecuting Rape as a War Crime (2002) 34 Case Western Reserve Journal of International Law 277, 282 (explaining that Patricia Sellers' diligence contributed to the progress made in recognizing and prosecuting gender crimes at the ICTY).

³⁸ Rome Statute (n 25) Art 42(9).

³⁹ Ibid, Art 54.1(b)

⁴⁰ Ibid, Art 36.8(b) (providing that in selecting judges, 'States Parties shall also take into account the need to include judges with legal expertise on . . . violence against women...'); see also *ibid*, Art 42.9 (requiring prosecutors to 'appoint advisors with legal expertise on . . . sexual and gender violence...'); see also *ibid*, Art 43.6 (mandating that the Registrar's Victims and Witness Unit 'include staff with expertise in . . . trauma related to crimes of sexual violence').

based violence.⁴¹ The prioritization of such crimes is not limited to the ICC.⁴² For instance, in August 2010, a number of current and former international prosecutors issued a declaration urging states to ensure the appropriate investigation and prosecution of gender crimes.⁴³

Many of these developments would not have occurred without the efforts of feminist activists. For instance, the *Akayesu* case at the ICTR originally included no sexual violence charges. Only after feminists filed an *amicus* brief were such charges added, eventually producing the historic judgment convicting the accused of rape as a crime against humanity and an instrument of genocide.⁴⁴ Richard Goldstone, the first prosecutor of the ICTY, has acknowledged the critical role that Sellers played in ensuring the prosecution of crimes of sexual and gender-based violence at that institution.⁴⁵

Feminist scholar Rosemary Grey emphasizes that feminists are not merely concerned with ensuring accountability for gender-based crimes; the inclusion of such crimes in high-profile trials is also important.⁴⁶ She explains that: ‘there is value in bringing charges that reflect a broad spectrum of gender-based crimes against male and female victims, and in producing trial records that recognize the relevance of gender norms to the commission of these crimes . . .’.⁴⁷ Grey’s research suggests that ICC policies and staff are aligned with this feminist vision.⁴⁸ Interviews she conducted among staff in the ICC Office of the Prosecutor reveal that they hold ‘a broad conception of their role in prosecuting gender-based crimes’.⁴⁹

C. Redeeming ICL’s Procedural Norms

Redemptive feminism has also strongly influenced the development of ICL’s procedural norms. Perhaps most importantly, they helped to shape the victim participation regime at the ICC. At the Rome Conference, feminists advocated for victims to be accorded a central place in ICC proceedings, believing that such participation provides benefits to victims, such as a sense of

⁴¹ See eg The Office of the Prosecutor of the International Criminal Court, ‘Policy Paper on Case Selection and Prioritisation’ (15 September 2016) 15 (‘The Office will pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes’.); The Office of the Prosecutor of the International Criminal Court, ‘Policy Paper on Sexual and Gender-Based Crimes’ (June 2014); The Office of the Prosecutor of the International Criminal Court, ‘Prosecutorial Strategy 2009–2012’ (1 February 2010) 8 (projecting a focus on gender crimes and crimes against children); Press Release: The Office of the Prosecutor Launches Public Consultation on a New Policy Initiative to Advance Accountability for Gender Persecution Under the Rome Statute (20 December 2021) <<https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability>>.

⁴² Margaret M deGuzman, ‘Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda’ (2011) 11 *International Criminal Law Review* 515.

⁴³ Robert H. Jackson Center, ‘The Fourth Chautauqua Declaration’ (2010) <jurist.org/paperchase/IHL%20Dialogs%20The%20Fourth%20Chautauqua%20Declaration%20August%2031%202010%5B1%5D.pdf>; see also Robert H. Jackson Center, ‘The Ninth Chautauqua Declaration’ (2015) <<https://7gxsl10eqdj9anba1k3swtoo-wpengine.netdna-ssl.com/wp-content/uploads/2018/10/NinthChatauquaDeclarationSigned.pdf>>.

⁴⁴ See Goldstone (n 37) 282.

⁴⁵ *Ibid.*, 280.

⁴⁶ Rosemary Grey, *Prosecuting sexual and gender-based crimes at the International Criminal Court: Practice, Progress and Potential* (Cambridge University Press 2019) 31.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 31–32.

⁴⁹ *Ibid.*, 32.

restoration.⁵⁰ The Women's Caucus was among the strongest voices in this regard.⁵¹ The Rome Statute's expansive victim participation regime is, in large part, a result of their efforts.

Other procedural norms that reflect feminist influence include the ICTY's rule excluding consent as a defense to sexual assault if there is evidence the victim had reason to fear 'violence . . . or psychological oppression'.⁵² The rule further mandates an *in camera* relevance hearing before consent evidence is admitted and specifies that no corroboration of a victim's testimony is required.⁵³ These rules align with the redemptive feminist view of rape as a crime of violence, a condition endemic to most situations involving international crimes.

A final focus of redemptive feminists has been to expand the number of women decisionmakers in ICL institutions. Here again, their advocacy at the Rome Conference bore fruit. The Rome Statute requires that women be fairly represented among ICC judges.⁵⁴ Currently, nine of 18 judges at the ICC are women.⁵⁵ In contrast, at the *ad hoc* tribunals, women represented a significantly smaller fraction.⁵⁶ The ratio has improved somewhat at the International Residual Mechanism for Criminal Tribunals (IRMCT), where eight of the 25 judges are women.⁵⁷ The experiences of the *ad hoc* tribunals demonstrated the important impact of women decisionmakers at such institutions. In the *Akayesu* case, it was the sole woman judge at the ICTR, Navi Pillay, whose questioning of witnesses illuminated the uncharged crimes of sexual violence for which the defendant was ultimately convicted.⁵⁸ Likewise, Judge Elizabeth Odio-Benito intervened in cases at the ICTY to ensure the prosecution of crimes of sexual and gender-based violence.⁵⁹

Redemptive feminist efforts in ICL, although ongoing, are widely viewed as already quite successful. In her 2005 book, *Sexual Offenses in Armed Conflict and International Law*, Noëlle Quénivet concluded: '[I]t is fair to declare that feminist legal writers have won many of the battles they had been waging for years'.⁶⁰ Likewise, Susana SáCouto, a contributor to this volume, has lauded the 'incredible advances' feminists have made in their efforts to 'end impunity for sexual and gender-based violence'.⁶¹ Similar statements abound in feminist literature about ICL.⁶²

⁵⁰ See Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project' (2012) 18 *Michigan Journal of Gender and Law* 297, 315 (explaining that '[w]omen's rights activists supported the concept for...[they] believed...that [victim] participation in criminal proceedings has a number of potential restorative benefits').

⁵¹ Pam Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' (2003) 28 *Journal of Women, Culture & Society* 1233, 1238.

⁵² International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence UN Doc IT/32/Rev.50 (8 July 2015) Rule 96.

⁵³ *Ibid.*

⁵⁴ Rome Statute (n 25) Art 36(8)(a)(iii) (mandating that States Parties take into account in selecting judges '[a] fair representation of female and male judges').

⁵⁵ The International Criminal Court, 'Current Judges' <<https://www.icc-cpi.int/judges/judges-who-s-who>> accessed 11 August 2022.

⁵⁶ Sterio (n 2) 223–27.

⁵⁷ As Nienke Grossman points out in her chapter, 'The "Invisible Court": Gender and Nationality in Registries and Secretariats', we also need to consider the number of women on staff and their distribution across the professional hierarchy at these courts.

⁵⁸ Goldstone (n 37) 282.

⁵⁹ Sterio (n 2) 241.

⁶⁰ Noëlle N.R. Quénivet, *Sexual Offenses in Armed Conflict and International Law* (Transnational Publishers, Inc 2005) 171.

⁶¹ SáCouto (n 50) 297–98.

⁶² See eg Kelly D. Askin, 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003' (2004) 11 *Human Rights Brief* 16, 16–19 ('The past ten years have witnessed explosive

III. REJECTIONIST FEMINIST ENGAGEMENT WITH ICL

Not all commentators are enthusiastic about the redemptive feminist efforts described above. Rather, the redemptive feminist agenda is increasingly criticized by another group of feminists who question ICL's fundamental assumptions about the benefits of punishment. These feminists reject the international community's hard turn toward carcerality to address human rights violations, arguing instead that ICL is undermining the feminist agenda in various ways. This section canvases the arguments of feminists who adopt a rejectionist frame *vis-à-vis* ICL, either rejecting the use of criminal law wholesale or at least favoring greater investment in other justice mechanisms they believe are more in line with feminist goals.

A. Rejecting ICL's Portrayal of Women

First, some feminists are skeptical about international criminal law because they believe it expresses gender in performative ways that undercut women's agency and perpetuate gendered stereotypes.⁶³ As a starting point, these feminists are united in their belief that the international criminal legal process promotes a problematic construction of women as vulnerable victims in need of protection.⁶⁴ For instance, Vasuki Nesiah, also a contributor to this volume, worries that ICL's 'focus on gender has been conflated with a focus on women as victims'.⁶⁵ She points out that women are not only victims in wartime and that the depictions of women as victims stifle more complex gender analyses.⁶⁶ Likewise, Christine Schwöbel-Patel describes how the victims of international crimes are often portrayed as 'women and children, non-white, perhaps with some form of mutilation, often sparsely clothed'.⁶⁷ In this imagery, which mimics fundraising efforts for humanitarian organizations, victims are 'racialized, feminized and infantilized'.⁶⁸ Sara Bertotti, Gina Heathcote, Emily Jones, and Sheri Labenski believe that these portrayals perpetuate 'essentialist narratives of victimhood and peacefulness of women' and emphasize 'female vulnerability' instead of women's 'survival, agency, and participation'.⁶⁹

developments in recognizing and prosecuting gender crimes in international law'.); Goldstone (n 37) 278 ('In the past decade of tumultuous progress in international criminal law, the advances made in the recognition and prosecution of gender crimes committed during armed conflict are particularly noteworthy'.).

⁶³ Buss (n 31).

⁶⁴ See eg Daniela Nadj, *International Criminal Law and Sexual Violence against Women: The Interpretation of Gender in the Contemporary International Trial* (Routledge 2018) 195–221; Fionnuala Ní Aoláin, 'The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda' in Philip Alson and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press 2016); Anne Orford, 'Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275, 281–82.

⁶⁵ Vasuki Nesiah, 'Gender and Forms of Conflict: The Moral Hazards of Dating the Security Council' in Fionnuala Ní Aoláin, Naomi Cahn, Dina Francesca Haynes, and Nahla Valji (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018) 294–95.

⁶⁶ *Ibid.*

⁶⁷ Christine Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood' (2016) 4 *London Review of International Law* 247, 250.

⁶⁸ *Ibid.*

⁶⁹ Sara Bertotti, Gina Heathcote, Emily Jones, and Sheri Labenski, *The Law of War and Peace, A Gender Analysis: Volume One* (2021) 185, 217; see also Kiran Kaur Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23 *Feminist Legal Studies* 149, 159 (2015) (arguing that such portrayals contribute to 'fetishisation of non-white female bodies' and stereotypes about the

At the same time as women's fragility is magnified, so is men's brutality.⁷⁰ Engle argues that this 'double gendering of agency' produces a narrative of the state where the political and military leaders are male, and women are victims in need of outside military or police protection.⁷¹ Yet, this binary of female victims and male perpetrators masks a much more complex reality, which in turn impedes a more nuanced gender analysis.⁷² First, painting women as only victims obscures the multitude of roles that women can play in conflict. Indeed, as Engle points out, '[m]any women actively participate in, are bystanders to, or benefit from nationalist, racist, and ethnic- and class-based politics and violence'.⁷³ Likewise, Third World feminists have analyzed how women in the Global North are sometimes complicit in, and benefit from, conflict in the Global South.⁷⁴ Second, the double gendering of agency may render those victims who do not neatly fit the gendered victim/perpetrator dyad invisible. For example, drawing from interviews of Bosnian Serb women who were raped during the Bosnian war, Olivera Simić contends that ICL creates hierarchies of victims with victims of sexual violence from so-called 'perpetrator states' often silenced because they are not the 'right victim'.⁷⁵ Furthermore, Chloé Lewis has argued that the dyad contributes to the systemic silencing of male victims of sexual violence.⁷⁶ Queer feminists have also criticized the Rome Statute for limiting gender identity to two sexes, either male or female, which further silences victims who do not neatly fit this binary.⁷⁷

B. *Rejecting ICL's Narrow Focus on Sexual Violence*

Some feminists also take issue with ICL's 'hyperfocus on sexual violence',⁷⁸ which, in their view, does not fully represent the range of gendered harms and 'risks erasing the nuance in gendered experiences of conflict'.⁷⁹ According to some of the harshest critics who take this view, ICL centers sexual violence not because it is the most serious harm to women in wartime, but

'oppressiveness of "traditional" (non-Western) cultures' thereby re-enforcing the idea that feminism needs to be imported from the West to save these women).

⁷⁰ Karen Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (2020) 10–12.

⁷¹ Ibid, 214, 217; see also Dianne Otto, 'Feminist Judging in Action: Reflecting on the Feminist Judgments in International Law Project' (2020) 28 *Feminist Legal Studies* 205, 213 (describing the 'dualistic gender stereotypes' that appear in ICC decisions 'associating boys with combat and girls with non-combat roles').

⁷² In their chapter, Tamsin Phillipa Paige, Stacey Henderson, and Joanne Stagg expand on these points, demonstrating how a regressive bioessentialist framework of gendered behavior often undergirds international law.

⁷³ Engle (n 70) 11; Bertotti et al (n 69) 203 ('Having so few women brought before international courts and tribunals may give the impression that equally few women have participated as aggressors during these conflicts'); see also Sheri Labenski, *Female Defendants in International Criminal Law: Feminist Dialogues* (2021).

⁷⁴ Engle (n 70) 11.

⁷⁵ Olivera Simić, *Silenced Victims of Wartime Sexual Violence* (2018) 1–9.

⁷⁶ Chloé Lewis, 'Systemic Silencing: Addressing Sexual Violence against Men and Boys in Armed Conflict and its Aftermath' in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Springer 2014) 203–17.

⁷⁷ Karen Engle, Vasuki Nesiah, and Dianne Otto, 'Feminist Approaches to International Law' in Jeffrey Dunoff (ed), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2022) 188.

⁷⁸ This concern resembles the redemptive critique that the hyperfocus on sexual violence within ICL portrays sexual violence as unique to wartime and minimizes sexual violence during peacetime.

⁷⁹ Bertotti et al (n 69) 185; see also Lise Gotell, 'Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism' in Anastasia Powell, Nicola Henry, and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Springer 2015). This point is also underscored by Susana SáCouto in her chapter, explaining how the Guatemalan *abuelas* in the *Sepur Zarco* case viewed the domestic labor they were forced to perform to be as harmful as the sexual violence they endured.

rather because it is the worst imaginable crime to men who are unable to protect their loved ones.⁸⁰ Collectively, this group of feminists is concerned that criminal punishment is ill-equipped to address the root causes of gender-based violence and diverts attention away from other solutions that might have greater success in doing so.⁸¹ They believe criminal law's focus on the individual is fundamentally at odds with the systemic efforts needed to realize gender equality.⁸² In their view, other redistributive measures and educational initiatives would be more effective at obtaining gender justice and sustained peace than the very costly employment of ICL.⁸³

Engle, Nesiah, and Otto build on this point, arguing that the international criminal law project distracts from, and at times actively undermines, other feminist projects.⁸⁴ For instance, as Frédéric Mégret also documents in his chapter, ICL arguably undercuts the anti-war messaging of the women's peace movement by making war safer for women instead of eradicating it.⁸⁵ Likewise, as noted above, Third World feminists object to ILC's depiction of women from the Global South in essentialized ways and as in need of protection from the Global North.⁸⁶ Finally, sex-positive feminists argue that in limiting the possibility of consent being raised as a defense to rape, ICL risks criminalizing consensual sexual conduct by women during armed conflict.⁸⁷

Building from this last point, Janet Halley argues that the incorporation of sexual violence into ICL has given rise to a form of 'governance feminism' that may ultimately harm women's rights in unanticipated ways.⁸⁸ Generally, Halley and her co-authors argue that as the feminist movement gained ground, the feminist agenda was incorporated into statist structures and law, making feminism a bureaucratic endeavor and feminists less capable of recognizing when laws that appear 'feminist' undercut women's rights on the ground.⁸⁹ As an example, Halley points to the aforementioned unintended consequences of criminalizing sexual violence articulated by sex-positive feminists, which ultimately undermine women's agency.⁹⁰

⁸⁰ Catherine O'Rourke, 'International Law and Domestic Gender Justice, or Why Case Studies Matter' in Martha Albertson Fineman and Estelle Zinsstag (eds), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* 17 (Cambridge University Press 2013).

⁸¹ Engle (n 70) 11; Nesiah(n 65) 294; see also Bertotti et al (n 69) 184 (describing the one of the consequences of the prosecution of sexual violence in ICL as being 'the limited analysis of indirect and other forms of violence and their gendered effects'); Buss (n 31) 419 ('Removing powerful, dangerous men from volatile situations can be an important outcome, but as a performance of justice being done, individual convictions can also dangerously distract international attention from the large-scale, systemic failures that underpin conflict'.); Fionnuala Ní Aoláin & Catherine Turner, 'Gender, Truth, and Transition' (2007) 16 *UCLA Women's Law Journal* 229, 256–57.

⁸² Buss (n 31) 416 (citing to Aya Gruber, 'Rape, Feminism and the War on Crime' (2009) 84 *Washington Law Review* 581, 614).

⁸³ Bertotti et al (n 69) 221; Engle (n 70) 14–15 ('This presumption of deterrence, which is rarely backed up with any evidence or rationale, is perilous for at least two reasons. First, it promises something it cannot possibly achieve—to eliminate sexual violence in conflict. Second, through that promise, it facilitates a transfer of energy and resources toward criminal punishment mechanisms and away from other social, political, and economic interventions—including through law—that might better address the structural causes of violence'.)

⁸⁴ Engle (n 70) 2; see also Engle, Nesiah, and Otto (n 77) 174.

⁸⁵ Engle, Nesiah, and Otto (n 77) 189–91.

⁸⁶ *Ibid.*, 191–94.

⁸⁷ *Ibid.*, 185–87; see also, Engle (n 70) 94–96, 119, 160.

⁸⁸ Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender* 335.

⁸⁹ *Ibid.*, 341.

⁹⁰ *Ibid.*, 380–82.

C. Rejecting ICL as Patriarchal

For others, the feminist turn to carceral justice is problematic because it is inherently anti-woman and builds patriarchal power. To them, it makes little sense for feminists to advocate for sex offenders to be incarcerated in correctional institutions, which often re-enforce toxic masculinity.⁹¹ Another set of related critiques, already alluded to above, concerns ICL's situation of rape as a predicate crime to genocide and crimes against humanity. Because these international crimes are often framed as harm to humanity or a particular ethnic or racial group, and not women specifically, the harm of sexual violence to women is often framed in terms of their inability to marry or reproduce after rape.⁹² Rosalind Dixon argues that this framing reinforces a misogynist world order that relies on women's place within the patriarchal family and society.⁹³ Likewise, Engle argues that the criminal legal process risks compounding harm to women by casting rape as something that shames women in the eyes of their communities and also 'universalizes the experience of rape across all women and all cultures'.⁹⁴ Like rape, forced marriage may also be doctrinally problematic, as its criminalization is sometimes justified because the act perverts the sanctity of marriage as an institution.⁹⁵

Furthermore, for some women, the process of providing testimony about these crimes may feel disempowering because they are only witnesses to crimes, not complainants with the ability to frame what other harm they might have experienced, such as 'rejection, depression, destitution and continuing prostitution', and arguably lack the agency within and ownership of the process needed for their stories to be fully heard.⁹⁶ Analyzing the testimony of a woman who testified during the *Kunarac* trial before the ICTY, Julie Mertus describes how the prosecutor privileged her victimization while silencing her telling of female resistance to sexual violence.⁹⁷ Viewed in this light, the process of engaging with ICL may actually harm women.

IV. CONCLUSION: LOOKING FORWARD

As feminists decide where to focus their collective efforts to advance women's rights, one way forward may be to adopt a more pluralistic understanding of post-conflict justice, also advocated by one of this chapter's authors elsewhere.⁹⁸ Post-conflict pluralism recognizes that victims have a range of needs and desires in the wake of atrocity, which no singular justice mechanism can meet alone.⁹⁹ Moreover, their very conception of what constitutes justice can differ

⁹¹ Buss (n 31) 417.

⁹² Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' (2002) 13 *European Journal of International Law* 697.

⁹³ *Ibid.*, 703–05.

⁹⁴ Karen Engle, 'Judging Sex in War' (2008) 106 *Michigan Law Review* 941, 941–42; see also Engle (n 70) 7–10.

⁹⁵ Kiran Kaur Grewal, 'International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies' (2015) 23 *Feminist Legal Studies* 149, 152.

⁹⁶ Dixon (n 92) 703–05.

⁹⁷ Julie Mertus, 'Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women's Agency' (2004) 6 *International Feminist Journal of Politics* 110.

⁹⁸ See Rachel López, 'Post-Conflict Pluralism' (2018) 39 *University of Pennsylvania Journal of International Law* 749.

⁹⁹ *Ibid.*, 763–64.

widely.¹⁰⁰ These preferences and understandings often depend on the political, economic, cultural, and historical context in which they live.¹⁰¹ So, rather than rejecting ICL wholesale, feminists could turn their sights to developing other methodologies, venues, and institutions to advance the feminist agenda, informed by the victims themselves. Whereas the pages of law journals are often lined with the words of feminist scholars living and writing in the Global North, post-conflict pluralism mandates prioritizing the localized wants and needs of the victims of gender-based violence wherever they are found.¹⁰²

Some feminists have already adopted this stance and have focused their efforts on proposing or expanding other justice methodologies and mechanisms, either as alternatives or complements to criminal punishment. For instance, some scholars promote restorative justice, which focuses on healing and reconciliation, as more in line with women's desires.¹⁰³ Indeed, studies have found that women are more likely than men to forgive transgressions.¹⁰⁴ For that reason, restorative justice, the primary goal of which is to repair the harm caused to victims and communities, might be more aligned with most women's priorities.¹⁰⁵ Katherine van Wormer also links restorative justice to standpoint feminism, which is based on 'the premise that the standpoint or position in society of women provides a vantage point from which to view women's social reality' and holds that 'less powerful members of society experience a different reality as a consequence of their oppression'.¹⁰⁶ To truly understand the plight of women, standpoint feminists believe it is critical to create space for holistic understandings of women's political and personal realities to emerge.

Consequently, standpoint feminists center giving voice to the powerless by amplifying personal narratives in a non-adversarial process.¹⁰⁷ As one example, van Wormer cites the Peruvian Truth and Reconciliation Commission, which investigated the widespread sexual violence against women during the Peruvian civil war, as a process centered on truth-telling by victims in a setting that created space for holistic narratives.¹⁰⁸ Others like Dixon argue that civil processes are preferable to criminal ones because they create less rigid spaces for women to share their stories and provide the full context that contributed to the harm they have suffered.¹⁰⁹ Dixon proposes an international victims' compensation tribunal, modeled after civil proceedings in national courts, but in which the tribunal would make the reparation, not a defendant, obviating the need for defendants even to be present.¹¹⁰

Ideally, broader narratives about the wide range of harms women experience in wartime will emerge at these alternative justice sites. These contextualized narratives could inform a more

¹⁰⁰ Ibid; see also Sarah Nouwen and Wouter Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' (2015) 13 *Journal of International Criminal Justice* 157 (documenting how their field research in Sudan and Uganda revealed four alternative conceptions of justice, including restoration of relationships, ending on-going violence, redistribution, and non-criminal forms of punishment and equality).

¹⁰¹ López (n 98) 760–64.

¹⁰² Ibid, 762, 764.

¹⁰³ Katherine van Wormer, 'Restorative Justice as Social Justice for Victims of Gendered Violence: A Standpoint Feminist Perspective' (2009) 54 *Social Work* 107, 109 (2009).

¹⁰⁴ Andrea J. Miller et al, 'Gender and Forgiveness: A Meta-Analytic Review and Research Agenda' (2008) 27 *Journal of Social Clinical Psychology* 843 (2008).

¹⁰⁵ Van Wormer (n 103) 109.

¹⁰⁶ Ibid, 108–09.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, 110–11.

¹⁰⁹ Dixon (n 92) 708, 712.

¹¹⁰ Ibid, 711.

nuanced understanding of how gender affects one's experience of conflict and thereby minimize the 'double gendering of agency' described by Engle. These alternative justice sites could also have a more expansive reach than the tribunals that apply ICL, which have limited resources and jurisdictional coverage and thus may not touch the lives of most women. Moreover, this pluralistic approach might help us to reframe feminist approaches to ICL away from protecting 'women' and toward promoting less bioessentialist notions of 'gender', prescribed by Tamsin Phillipa Paige, Stacey Henderson, and Joanne Stagg in their chapter.

The expansion of feminist agendas we propose would not entail a complete rejection of criminal law modalities for addressing harm to women in situations of conflict and atrocity. Instead, it would require more careful consideration of when criminal law should be deployed and more attention to simultaneous or alternative uses of other justice modalities. Future research should be devoted to developing a deeper understanding of when various approaches to justice best advance women's interests. Any consideration of criminal prosecutions should, at a minimum, uphold the 'do no harm' principle, ensuring that the interests of women, particularly those most affected by relevant events, are not undermined.

Our suggested path forward should find resonance with at least some redemptive and rejectionist feminists engaging with ICL. Many ICL proponents, including redemptive feminists, recognize that the international community's hard turn toward criminal law to address human rights violations occurred without the benefit of sustained attention to crafting regime goals and priorities. Our proposal thus fits within broader efforts to achieve greater alignment between goals and actions in ICL. Likewise, many feminists who view ICL through a rejectionist lens recognize that criminal law can make important contributions to promoting women's rights in some limited circumstances. We hope that by stimulating engagement at the intersection of feminist efforts, a path forward can be identified that better promotes our common goals.

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