

Feminist Judgments in International Law

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1

Feminist Judgments in International Law: An Introduction

LOVEDAY HODSON AND TROY LAVERS

I. Beginnings

As feminists who have been engaged in international law scholarship for a number of years, we are constantly driven to think creatively and optimistically of ways that we might do international law differently. We are among a growing number of academic feminists who are challenged by our students and by our own ethical and political commitments to push the discipline in new directions; simply put, many of our discussions focus on the question of how the theory and practice of international law might be done better. International law scholarship is prone to utopian thinking that can often contrast cruelly with the reality of its daily application.¹ Yet feminists have insisted that imagination, hope and activism have a crucial role to play in the study, understanding and application of international law.² We have also witnessed first-hand the remarkable creative energy generated, and the insights that emerge, when a group of feminists with an interest in international law are brought together and given space to strategise, critique, encourage and reflect. This book is borne from a paradoxical position that encompasses both optimism about international law's transformative potential and frustration at its frequent failure to bring about meaningful change.

The process of writing *Feminist Judgments in International Law* began a number of years ago. The project from which this book evolved – a project we referred to as the feminist international judgments project (FIJP) – brought together almost

¹M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2005).

²For further discussion, see, for instance: H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester, Manchester University Press, 2000); S Kuovo and Z Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Oxford, Hart Publishing, 2011); C O'Rourke, 'Feminist Strategy in International Law: Understanding its Legal, Normative, and Political Dimensions' (2017) 28(4) *European Journal of International Law* 1019.

50 international legal scholars and some activists, and asked them to collaborate in the task of (re-)writing key international judgments from a feminist perspective. Participants were asked to imagine what those international judgments might look like viewed through a feminist lens. Applying theory in such a practical way required us to consider the concrete ways in which feminist perspectives can change international law. This book, then, is the result of a collaborative exercise that involved demonstrating the practical application of alternative (feminist) values to international law practice. During the incredible journey that culminated in this collection, our positions have been challenged and our understanding of the value of feminist thinking in international law has deepened.

In undertaking this project, we have followed in the footsteps of some remarkable feminist legal scholars. The idea of a project in which key legal judgments are re-written from a feminist perspective can be traced to the Women's Court of Canada, in which six academics individually re-wrote a Supreme Court judgment.³ That Canadian project was followed by a larger-scale English/Welsh project that generated considerable interest among legal scholars and beyond, resulting in a high-profile collection of published judgments.⁴ Interest in the methodology has now generated a significant number of domestic projects. An Australian collection of feminist judgments was published in 2014;⁵ a Northern/Irish feminist judgments project in 2017;⁶ and a New Zealand one followed also in 2017.⁷ In the US, a series of collections is being written, each focussed on a particular area of law.⁸ Scottish,⁹ Indian¹⁰ and African¹¹ projects are currently underway. These projects have enriched thinking about how feminist theory might serve to influence legal outcomes and, to some extent, have also raised questions about the significance that can be attached to women judges.¹² Importantly, they are also generating

³ These judgments are available at: www.thecourt.ca/decisions-of-the-womens-court-of-canada. There is currently a second Canadian project underway. See also DG Reaume, 'Turning Feminist Judgments into Jurisprudence: The Women's Court of Canada on Substantive Equality' (forthcoming, 2019) *Oñati Socio-Legal Series*.

⁴ R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010).

⁵ H Douglas, F Bartlett, T Luker and R Hunter (eds), *Australian Feminist Judgments: Righting and Re-writing Law* (Oxford, Hart Publishing, 2014).

⁶ M Enright and J McCandless (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford, Hart Publishing, 2017).

⁷ E McDonald, R Powell, M Stephens and R Hunter (eds), *Feminist Judgments of Aotearoa New Zealand: A Two-Stranded Rope* (Oxford, Hart Publishing, 2017).

⁸ For details about this series of projects, see the US Feminist Judgments Project website at: <https://sites.temple.edu/usfeministjudgments>.

⁹ Further information on the Scottish Feminist Judgments Project is available at: www.sfjp.law.ed.ac.uk.

¹⁰ Further information on the Feminist Judgments Project India is available at: <https://fjpi.wixsite.com/fjpi>.

¹¹ Further information on the African Feminist Judgments Project is available at: www.lawandglobaljustice.com/the-african-feminist-judgments-project.

¹² See, for example: E Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Abingdon, Routledge, 2013); S Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Abingdon, Routledge, 2013).

a network of feminist legal scholars across jurisdictions: in 2017, for instance, organisers of various projects met at the International Institute for the Sociology of Law in Oñati, Spain, to share our experiences and to consider ways in which the methodology might develop.¹³ Unexpectedly, then, embarking on a feminist judgments project brought with it from the outset a comforting sense of being supported by a loose network of feminists sharing a creative academic endeavour.

II. Towards an International Law Project

Motivated by the English/Welsh project, we recognised that the methodology of re-writing judgments could have particular importance in an international law context. While feminist scholarship and activism is rich in its complexity and diversity and does not represent a single unified approach, feminists are increasingly at the forefront of critical international legal scholarship. Inspired by the ground-breaking work of MacKinnon in *Towards a Feminist Theory of the State*¹⁴ and Chinkin, Wright and Charlesworth's 1991 article 'Feminist Approaches to International Law'¹⁵ and subsequent monograph,¹⁶ the challenge of laying bare the patriarchal structures upon which the discipline is founded and its consequent blind-spots has been taken up enthusiastically by a growing number of international scholars.¹⁷ However, feminists have discovered that the obstacles

¹³The publications from this meeting are forthcoming in the *Oñati Socio-Legal Series*. See also S Cowan et al, 'Feminist Judging: From Margin to Centre' (*Social and Legal Studies Blog*, 21 November 2018) <https://socialandlegalstudies.wordpress.com/2018/11/21/feminist-judging-margin-centre>.

¹⁴C MacKinnon, *Towards a Feminist Theory of the State* (Cambridge MA, Harvard University Press, 1989).

¹⁵H Charlesworth, C Chinkin and S Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613.

¹⁶Charlesworth and Chinkin, above n 2.

¹⁷K Engle, 'International Human Rights and Feminism: When Discourses Meet' (1991–92) 13 *Michigan Journal of International Law* 517; D Dallmeyer, *Reconceiving Reality: Women and International Law* (Washington DC, American Society of International Law, 1993); H Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' (1993) 25 *Studies in Transnational Legal Policy* 1; K Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law and Contemporary Problems* 293; G Binion, 'Human Rights: A Feminist Perspective' (1995) 17(3) *Human Rights Quarterly* 509; H Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *American Journal of International Law* 379; A Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275; B Meyersfeld, 'Reconceptualizing Domestic Violence in International Law' (2003–04) 67 *Albany Law Review* 371; D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Portland OH and Oxford, Hart Publishing, 2005); D Otto, 'Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law' in A Orford (ed), *International Law and its Others* (Cambridge, Cambridge University Press, 2006); C MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge MA and London, Harvard University Press, 2006); A Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge, Cambridge University Press, 2007); D Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 *Melbourne Journal of International Law* 11; M Fineman and E Zinsstag, *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* (Cambridge, Intersentia, 2013); Kuovo and Pearson, above n 2; G Heathcote, *The Law on the Use of Force: A Feminist Analysis* (London, Routledge, 2012).

they face are considerable. Their work brings into question the very structure of international law, its methods and values. Decision-making in international law traditionally prioritises abstract logic and hard (formal) law, thereby reducing the potential importance of conciliation, negotiation, soft law and equity.¹⁸ Traditional scholarship in international law also has the State as its key focal point, raising questions about the power of the State, the sovereignty of States and the use of force by States. Consequently, issues of importance to women all too often fall into the blind spots of international law's gaze. Hilary Charlesworth, for example, has wondered why there is 'a whole series of treaties obsessed with straddling stocks, when the use of breast milk substitutes, which is a major health issue for women in Africa, remains subject to voluntary W.H.O. codes?'¹⁹

A feminist international judgments project was therefore both timely and relevant. Indeed, frustrated by the confines of traditional international law, feminists have frequently sought to create alternative spaces in which to express their perspectives. There is a long tradition of feminists responding creatively to the discipline's narrow confines by reaching beyond them, perhaps most famously in the form of women's tribunals that aim to address the devastating failure of more formal fora to address crimes and gross human rights violations against women.²⁰ Other examples that have particularly inspired us include Buchanan and Johnson's use of popular film to expose the binaries created in traditional approaches to the sources of international law,²¹ and the work of Yoriko Otomo, whose poetry includes *Her proper name: a revisionist account of international law*, which relates an imagined (absent) account of the signing of the Treaty of Westphalia from the perspective of Maria von Helfenstein (Lady Landgravine):

Lady Landgravine, they call me. Madame the Landgravine. They gift me so they can guarantee Manne's humanity, Law's masculinity. Their passage to Life and Immunity seduces with promises of Security. But for me? What Virtue is left with no body to keep?²²

Adopting inventive methods has been a crucial part of feminist attempts to disrupt and challenge the discipline's normative foundations. While the creativity and vision that feminists demonstrate in their engagements with international

¹⁸ Charlesworth and Chinkin, above n 2, 62–71. For example, see R Buchanan and R Johnson, 'The "Unforgiven" Sources of International Law: Nation Building, Violence and Gender in the West(ern)' in Buss and Manji, *ibid*, 131.

¹⁹ H Charlesworth, 'The Hidden Gender of International Law' (2002) 16(1) *Temple International and Comparative Law Journal* 93, 97.

²⁰ See, for instance, CM Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 95(2) *American Journal of International Law* 335; T Dolgopoul, 'The Judgment of the Tokyo Women's Tribunal' (2003) 28(5) *Alternative Law Journal* 242; R Sakamoto, 'The Women's International War Crimes Tribunal On Japan's Military Sexual Slavery: A Legal and Feminist Approach to the "Comfort Women" Issue' (2001) 3(1) *New Zealand Journal of Asian Studies* 49.

²¹ Buchanan and Johnson, above n 18.

²² Y Otomo, 'Her Proper Name: A Revisionist Account of International Law' (March 2014) 2(1) *London Review of International Law* 149.

law continue to inspire and encourage us, in practice, feminists' work has arguably struggled to make an impact on mainstream international law and in judicial thinking. International law as a discipline is deeply rooted in patriarchal thought, and it is notoriously dominated by male perspectives. This collection adopts an innovative approach – one that at once engages with and side-lines law's authority – in order to join those efforts that aim to produce a counter-narrative. The weight of international law's norms is such that the simple yet powerful fact that the law might be otherwise can frequently be overlooked. In re-writing key international judgments, we aimed to demonstrate in accessible and meaningful ways possible alternatives to the structural inequalities of traditional international law.

Simply creating a space in international law that is dominated by women is remarkable. Aside from the scholarly dominance of male voices, it is very apparent that women are excluded from international decision-making and, in particular, are frequently being overlooked for appointment to international courts and tribunals. According to recent research by Nienke Grossman:

[O]n nine of twelve international courts of varied size, subject-matter jurisdiction, and global and regional membership, women made up 20 percent or less of the bench in mid 2015. On many of these courts, the percentage of women on the bench has stayed constant, vacillated, or even declined over time. Women made up a lower percentage of the bench in mid 2015 than in previous years on two-thirds of the courts surveyed.²³

As Grossman rightly concludes, such disparity brings the legitimacy of international tribunals' decision-making into question.²⁴ To some extent, this judgment re-writing project touches on the question of what other tangible differences would follow if gender parity on international benches were achieved, and we acknowledge that women's participation is a vital subject for international lawyers to address. Nonetheless, this project is premised on the idea that it is not enough to call for gender parity: in seeking decisions that make a tangible difference and that address injustice, we pinned our hopes on self-consciously adopting feminist approaches to international law and judging as a driving force for meaningful change.²⁵

A further motivation for commencing this project was the opportunity it offered to explore the question of how far (international) law is amenable to feminist ends.²⁶ From Carol Smart's caution that 'law is so deaf to core concerns of

²³ N Grossman, 'Achieving Sex-Representative International Court Benches' (January 2016) 110(1) *The American Journal of International Law* 82–95, 82. See also the work of GQUAL Campaign for Gender Parity in International Representation: www.gqualcampaign.org.

²⁴ *ibid.*, at 84.

²⁵ N Torbisco-Casals, 'Why Fighting Structural Inequalities Requires Institutionalizing Difference: A Response to N Grossman' (2016) 110 *American Journal of International Law Unbound* 92. For an interrogation of what difference feminist judges can make, see R Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15 *International Journal of the Legal Profession* 7.

²⁶ On governance feminism, see: J Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton NJ, Princeton University Press, 2006); J Halley et al, *Governance Feminism: An Introduction* (Minneapolis MN, University of Minnesota Press, 2018).

feminism that feminists should be extremely cautious of how and whether they resort to law,²⁷ feminists have not been uncritical of law's potential to bring about radical change. Smart's specific concern is that 'in accepting law's terms in order to challenge law, feminism always concedes too much.'²⁸ As coordinators of a project that places formal legal process at its centre, we were alive to these concerns yet persisted in the hope that feminist theory and methodology could offer alternative perspectives that illuminate pathways to doing law differently.

III. Designing the Project

As stated above, the aim of the project in straightforward terms was to take the feminist re-writing methodology and apply it to the decisions of international tribunals. Feminist judgment projects, as Hunter has written, provide an important platform for scholars and others to come together and challenge legal doctrine through the process of 'telling the story differently' and highlighting law's silences through the use of contextual materials.²⁹ In the words of the coordinators of the English/Welsh law project: 'The [project] challenges the notion that judgment-writing is or ought to be an expertise confined to judges, and seeks to develop the practice of writing judgments as a form of critical scholarship.'³⁰

In many respects, the value and innovation of this current collection lies in its replication of the feminist judging re-writing methodology and applying it in a novel (international law) context. However, it goes without saying that each jurisdiction presents its own questions and challenges for feminists; consequently, the FIJP took a unique form.

Beyond the innovation of its jurisdictional context, the current project contributes to the development of the feminist judgment re-writing methodology in two specific respects. The first contribution of our project to the judgment-writing methodology is the way in which participants have been encouraged to adopt a reflective stance. The format of other (domestic law) projects has been to include a commentary written by someone other than the author of the judgment. In this collection, participants were asked to reflect and write on their experience of the judgment-writing process and the project itself. The aim of specifically encouraging reflective practice in this project was to disrupt the apparent finality of the judgment-writing process: reflective practice suggests a continual process of learning, un-learning and change.³¹ In the words of Brooke Ackerly and Jacqui True: 'Feminist theory has made empirical work particularly challenging because

²⁷ C Smart, *Feminism and the Power of Law* (London, Routledge, 1989) 2.

²⁸ *ibid* at 5.

²⁹ R Hunter, 'An Account of Feminist Judging' in Hunter, McGlynn and Rackley, above n 4, 35–40.

³⁰ R Hunter, C McGlynn and E Rackley, 'Feminist Judgments: An Introduction' in Hunter, McGlynn and Rackley, above n 4, 5.

³¹ M Ortlipp, 'Keeping and Using Reflective Journals in the Qualitative Research Process' (2008) 13(4) *The Qualitative Report* 695.

feminist theories reveal the politics in every aspect of the research process. Feminist theories commit feminist researchers to exploring absences, silence, difference, oppression and the power of epistemology.³²

Consequently, they argue, the '*feminist research ethic* is a commitment to inquiry about how we inquire'.³³ Reflection and reflexivity can also reveal the ways in which power – including our own situatedness – shapes the research process and knowledge formation (and, in this case, judgment-writing), which opens up the possibility of mitigating its abuse. In this context, it can therefore help to underline the value-laden nature of legal judgment-writing. In this collection, participants' reflections form the final section of their chapters and provide insight into the judgment-writing process.

Secondly, this project adds to the judgment-writing methodology by foregrounding a collaborative approach. Whereas earlier projects have generally adopted an individual approach to judgment-writing in which the feminist judgment acts as a separate and additional voice that is 'added' to the original judgment, the international project foregrounded a collaborative methodology. As all of the feminist judgments to date have emerged from common law jurisdictions, the blueprint they provided us with required some re-thinking when applied outside of that legal context. Tribunals such as the European Court of Human Rights typically issue one joint judgment, while leaving open the possibility of individual judges delivering separate or dissenting judgments in their own name.³⁴ Others, such as the Court of Justice of the European Union, leave no scope at all in their procedures for delivering individual judgments. When embarking on this project, our perspective was therefore somewhat different from those that preceded us: collectively writing a single judgment, which effectively stands in place of the original judgment, seemed to be an obvious approach to take.

With the exception of two separate decisions written by individual judges (*Burden v the United Kingdom* and *Prosecutor v Radovan Karadžić*), the judgments in this collection were written by chambers composed of two to four judges. We anticipated that working in this way would enable participants to experience more closely the 'real-world' nature of international judgment writing, where judgments are generally written in a collective voice and the views of individual judges are not identified. In their contributions, several participants reflect on the nature of delivering judgment and some examine its (in)compatibility with feminist methodology. The very nature of judgment-writing appeared to set us on a quest for a 'single truthful narrative' that sat uncomfortably with many participants. In all cases where a judgment was written jointly, our participants, bringing to the chamber their own feminist views, were faced with the compromises inherent in

³² B Ackerly and J True, 'Reflexivity in Practice: Power and Ethics in Feminist Research' (Dec 2008) 10(4) *International Studies Review* 693, 694.

³³ *ibid.*, 695.

³⁴ For a discussion of the significance of separate judgments, see R White and I Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9(1) *Human Rights Law Review* 37–60.

the process of their individual voices becoming subsumed into a group output. Each met this challenge in different ways. Chambers' reflections on the judgment-writing process show that for several of our groups the answer was to reveal more overtly the contingent nature of their decisions and to face head-on the politics informing them. For some, a degree of 'incoherence' was viewed as a feminist tool that disrupted the 'rationality' and 'neutrality' of typical judgment-writing that conceals the choices made and the politics at work in reaching those decisions. In the words of Hilary Charlesworth, 'Feminist methods emphasize conversation and dialogue rather than the production of a single, triumphant truth'.³⁵ Working collaboratively was also intended as a strategic act of political unity that we hoped might offer an alternative to placing emphasis on, and rewarding of, isolated individual work that characterises our experiences of academia. We further hoped that working together closely in this way might lay foundations for future collaborations among feminists working in international law, whose geographical spread and disciplinary specialisms, in our experience, makes forging professional partnerships and networks particularly challenging.

Participants in the project have interests in a number of different areas of international law, and include established scholars, PhD students, and some activists. The nature of this project meant that, while 41 people contributed fully to the judgment-writing, participation was much wider than our list of authors suggests: more academics, lawyers and judges than we can mention individually contributed in various ways to the project. We would make two observations about this. Firstly, it was immediately apparent to us that these projects are unique in so far as their capacity to capture people's imaginations and inspire their passion. Secondly, this project brought to the fore questions about the feasibility of treating academic authorship as a form of ownership over knowledge that has been gained in isolation. As Lisa Ede and Andrea Lunsford have commented (and a point that emerged in many of the conversations that took place in the duration of this project), 'success in the academy depends largely on having one's work recognized as an individual accomplishment'.³⁶ We certainly did not set out with the view that collaboration is an *essential* methodological tool: intersectional feminism has shown the importance of being attuned to individual voices and sensitive to difference, particularly where those voices are marginalised and silenced.³⁷ What we hoped for in this project was a reflective process in which those dynamics were exposed and reflected on as the group worked towards a decision that was

³⁵ H Charlesworth, 'Feminist Methods in International Law' (2004) 36 *Studies in Transnational Legal Policy* 159, 159.

³⁶ L Ede and A Lunsford, 'Collaboration and Concepts of Authorship' (2001) 116(2) *PMLA* 354–69, 357.

³⁷ For a discussion, see, for instance: R Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1; J Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71.

composed in a single voice. This of course opened up questions about how this hope could be reconciled with the imperatives and norms of establishing academic authorship.

The practical challenges of working collaboratively were considerable: we now reflect wryly on Ede and Lunsford's remark that, 'the seemingly simple paperwork requirements for a large collaborative project can daunt the most enthusiastic group member.'³⁸ While we started this project with our eyes open to the obstacles we faced, we were certainly not completely successful in overcoming the practical challenges of collaboration. The project undoubtedly took longer than we anticipated and, unfortunately, some participants (particularly NGO workers) were unable to see the judgment-writing process through to completion. In terms of the steps we took to mitigate these issues, we were keenly aware of how important it was to ensure that participants were clear about what was expected of them; as such, all chambers were assigned a President who was the main point of contact for us and was tasked with ensuring that the collaboration was as successful and productive as possible. In the event that not all participants agreed on (all) points of law raised in the judgment, a separate or dissenting judgment (where allowed by the rules of the relevant court) was permitted. In the end, only one chamber actually took advantage of this option (Judge Merris Amos in *Ruusunen v Finland*). Interestingly, another chamber (*Leyla Şahin v Turkey*) took it upon themselves to invent an additional member of their chamber (Judge Dost Düşman Ayırt Etmek) who acted as foil and devil's advocate in his dissenting judgment.

Effectively co-ordinating the number and geographical spread of participants was a considerable challenge. Chambers were encouraged to make good use of available technology for sharing files and group discussions. Participants were predominantly based in European countries (and mainly the UK), although the project also included participants based in North America. Following an open planning meeting in Leicester, the project began with a one-day introductory workshop that was attended by all participants, a judge of the International Criminal Court and coordinators of the English/Welsh feminist judgments project. Two further two-day workshops followed, during which time was allocated to presenting and providing feedback on each judgment individually. All meetings and workshops were held in London for reasons of (relative) accessibility for the group of (mostly European) participants involved. Experts were invited to attend workshops as discussants on individual judgments, which gave participants the opportunity to further interrogate and reflect upon their judgments. For a project that aimed to open up international law to alternative perspectives and silenced voices, recognising that it is Euro-centric is an important point of reflection. Some of this can be explained by our involvement in European scholarly networks and by our need to ensure that participants could meet face-to-face. But nonetheless, it was incumbent upon us to make greater efforts to offer a different account of

³⁸ Above n 36, 363.

international law from that which emerges from a heavy dominance of Europe and the West over the discipline's normative values and institutions.

IV. The Structure of this Book

Ultimately, 15 international judgments were (re-)written during the project and form this collection (by which short-hand, we also refer to the decisions of international tribunals in the form of Views, Advisory Opinions and Orders). Following this introductory chapter by the editors, Part II focuses on general international law, and includes one re-written judgment of the Permanent Court of International Justice (commonly referred to as the *Lotus Case*, but retitled the *Bozkurt Case* here), one judgment (*Germany v Italy*) and one order of the International Court of Justice (*The Lockerbie Case*) as well as an Advisory Opinion (Reservation to the Genocide Convention). That section concludes with a judgment from the Court of Justice of the European Union (*Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social*). Part III of this book, in which we turn to human rights, includes five rewritten judgments of the European Court of Human Rights (*Goodwin v the United Kingdom*; *Leyla Şahin v Turkey*; *Opuz v Turkey*; *A, B and C v Ireland*; *Ruusunen v Finland*) and a further individual separate judgment from that Court (*Burden v the United Kingdom*). Part III ends with the Views of the Committee on the Elimination of Discrimination against Women adopted in *Kell v Canada* re-written. The subsequent Part of this book contains a judgment from the Special Court for Sierra Leone (*AFRC Trial Judgment*); another from the International Criminal Court (*The Prosecutor v Lubanga Dyilo*); and ends with a separate opinion in a case from the International Criminal Tribunal for the former Yugoslavia (*Prosecutor v Radovan Karadžić*). The concluding chapter of this collection is written by Hilary Charlesworth, who reflects on the role of judgment re-writing as a form of prefigurative politics.

The judgments in this collection were primarily chosen from those proposed by people responding to our call for participants and were selected to reflect the diversity and range of international law, although of course we could not hope to capture its full breadth. Our hope is that the possibilities that the re-writing methodology offers for critical engagement with international law are sufficiently indicated by this collection to inspire future projects that focus in greater depth on specific tribunals and specific areas of international law.

Each of the judgment chapters comprises three main parts. These chapters begin with an Authors' Note that introduces the key aims and distinguishing features of the re-written judgment. As there is not a separate commentary on the judgments written by someone other than the judgment writer(s) – which, as mentioned above, has been the usual practice with other projects – the Authors' Notes aim to make the re-written judgments accessible. To this end, they place the judgment in its legal context, outline the relevant facts/background to the

judgment, and address the legal and social responses to, and consequences of, the original judgment. Finally, these Notes explain the aims of the re-written judgment and the contribution it makes to the feminist reimagining of international law.

The Authors' Note is followed by the judgment itself. In several instances, chambers were not able to re-write the entire original judgment, and were certainly not expected to do so. Many chambers therefore agreed upon the relevant part of the judgment to be re-written and have focused their attention accordingly. Re-written feminist judgments are not bound by strict rules. However, because in this project we wanted to demonstrate feminist alternatives in a concrete and meaningful way, a basic rule for our chambers was that the judgment they wrote must be one that *could* have been one written by the relevant tribunal at the time. The primary consequence of this was that chambers' judgments could only refer to material available at the time the original judgment in question was written: for many, this was a considerable frustration and limitation. The process was not intended to act as an appeal of the original decisions, and chambers were therefore not bound by the points of law decided in the original decisions. Inevitably, however, chambers faced frustrating evidential gaps when trying to make novel points but drawing primarily on the facts and arguments from the original judgments. As long as the re-written judgment *could* have been produced by the specific tribunal, chambers were free to respond to such gaps in a creative way. They were also free to play creatively with the judgment-writing style and conventions of their tribunals, as long as they paid deference to the relevant rules of procedure. Writing a judgment is, of course, a very different discipline to writing an academic paper, where an author's theoretical commitments will be laid bare and opened up for examination. Nonetheless, the feminist judgments are at times highly political in tone. As editors, we celebrated this and did not ask participants to strive for 'objectivity' or 'neutrality'. In the words of Hunter, 'Fairness, independence and impartiality do not – indeed cannot – require the judge to become a blank slate upon which the evidence and arguments in each case are written afresh.'³⁹

Finally, in terms of chapter structure, a Reflection follows each judgment that pools the thoughts of chamber members on the judgment-writing process and creates a record of their experiences of the project and its methodology. As we mentioned previously, the reflective writing is one element that sets *Feminist Judgments in International Law* apart from other judgment re-writing projects, and one we ultimately found to be a revealing and useful part of the methodology. The Reflections also provide a space for participants to discuss their experiences of what it was like to re-write a judgment from a feminist perspective. As Hilary Charlesworth notes in her concluding chapter, these Reflections – rife as they are with emotional language, contradictions, conflict and uncertainties – act to destabilise the authoritative voice in which the judgments have typically been re-written.

³⁹Hunter, above n 29, 31.

They make an important contribution to revealing the contingent nature of international decision-making and the challenges of trying to use international law as a feminist tool to bring about meaningful change.

V. The Judgments

This collection includes judgments that span a period of time from 1927 to 2012. While some of the later judgments raise issues that are particular to women, several contributions address general questions of international law, the gendered dimension of which are not always immediately apparent. The judgments in this collection therefore serve to demonstrate the relevance of feminism to a wide range of international law subjects and questions. The judgments in Part II in particular bring a fresh approach to normative questions. They demonstrate how a feminist chamber may: place greater emphasis on the context of a dispute; highlight the impact of power and politics on international law decision-making; foreground the experiences of individuals; offer a different interpretation of rules and rights; show less deference to the formal sources of international law; and, crucially, challenge the centrality of the State in international law. The collection also turns to the decisions of human rights tribunals. The distinctiveness of much feminist scholarship of international human rights law lies in, among other things, its challenge to the apparent neutrality and universality of human rights law's normative principles. Feminist method can also reveal 'a distorted picture of pattern of human rights abuses'⁴⁰ in which the experience of women is overlooked. While drawing on such insights, the contributors to this collection were not entirely untroubled in their commitment to rights. In practice, most feminists juggle an insider-outsider position, and our contributors in Part III juggle these contradictions and dilemmas in fascinating ways. Part IV, on international criminal law, offers particular insights on the ways in which grave harms done to women and girls, particularly in the context of conflict, are marginalised.

A. General International Law

The judgment chapters begin with a rewriting of the *Bozkurt Case (France v Turkey, aka the Lotus Case)*. Dating from 1927, this judgment of the Permanent Court of International Justice is the oldest in the collection and is often one of the first cases read by students when learning about State sovereignty as a fundamental principle of the international legal system. The chamber in this collection re-imagines the

⁴⁰ A Byrnes, 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation: Some Current Issues' (1988–89) *Australian Yearbook of International Law* 205, 211.

now infamous *Lotus* principle: that the rules of international law emanate from the free will of States. In challenging this principle, the chamber exposes the gendered nature of (Western) sovereignty and the gendered personification of States. Strikingly, for their judgment, the feminist chamber decided to adopt the name of the Turkish vessel, 'the Bozkurt', that had collided with the French vessel, 'the SS Lotus', thereby directing us to think about the way in which power structures operate in international decision-making. The re-written judgment also places the case in historical context and opens up questions about the rights of women that were not posed by the original tribunal. In finding that Turkey's exercise of jurisdiction did not violate international law, the 'Bozkurt Principle' de-centres State sovereignty and establishes international co-operation as a hallmark of international society.

The de-centring of State sovereignty continues in chapter three, which offers a feminist rewriting of the *Reservations to the Genocide Convention* advisory opinion of the International Court of Justice (ICJ). The original opinion dates from 1951, and was the first international decision to address the legal effect of reservations to multilateral treaties. The ICJ in its opinion established the 'object and purpose' test for determining the validity of reservations, a test that came to be included in the Vienna Convention on the Law of Treaties 1969. The original advisory opinion places State consent at the heart of treaty law. The feminist chamber puts forward an alternative normative vision, identifying a different, concrete means for determining the validity of reservations that does not rest on State approval. The de-centring of States is a priority of much feminist engagement with international law, challenging the assumption that States are unbiased and will, for instance, protect human rights and promote humanitarian values. The re-written advisory opinion recommends specific mechanisms for determining the validity of reservations, recognising that those mechanisms will be imperfect, but arguing that they will nonetheless offer better oversight of States' reservations. The chamber was clear that the existing system, that largely relies on State-monitoring of reservations, is insufficiently rigorous, particularly in human rights and humanitarian contexts, and that their proposed alternative would lead to greater State accountability.

At the heart of chapter four is a forensic examination of the allocation of power within the international system. *Libyan Arab Jamahiriya v Unites States of America* (aka the *Lockerbie* case), concerns an ICJ order for provisional measures sought by Libya in order to prevent the United States from applying economic sanctions in retaliation for the so-called harbouring of terrorists responsible for the bombing of Pan Am flight 103 that had exploded over Lockerbie, Scotland in 1992. In seeking to add pressure on Libya to extradite the suspects, the United States, with the support of the United Kingdom and France, had succeeded in getting economic sanctions against Libya authorised by the Security Council. Libya's challenge to the lawfulness of those sanctions raised a crucial question about whether the Court has jurisdiction to review a binding decision of the Security Council. In its original decision, the ICJ denied Libya's request. In its re-written order, the feminist chamber grants Libya's request and stakes a claim for the international rule of law by calling for a more activist ICJ with jurisdiction to review Security Council

Resolutions, stipulating that the Security Council's powers cannot be unrestricted. In reaching its decision, the chamber adopts an ethical position that foregrounds the victims of atrocities and challenges the exercise of state power without accountability. Further, the feminist chamber calls attention to the fact that the situation arose from the United States seeking to use its position as a permanent member of the Security Council in order to effectively circumvent their legal obligations.

Chapter five addresses the customary law governing State immunities. In *Germany v Italy*, the question to be answered was how far State immunities extend in civil suits for human rights violations before national courts. Italian courts had granted compensation to Italians who had been forcibly deported from their homes during World War II and suffered from crimes such as forced labour. The compensation awarded included the seizure of German State property; in response, Germany instigated a case against Italy before the ICJ, alleging that the German State's immunity should have shielded it from these claims before national courts. The ICJ in its original decision agreed that the Italian courts should have recognised German immunity and should not have allowed civil claims to be brought. The re-written judgment puts the case in historical context and places at its centre the rights of the victims who had claimed compensation, highlighting their suffering as opposed to simply reaffirming a State-centred approach to international law. As a result of their feminist analysis, in which close attention is paid to power dynamics and hierarchies, the chamber did not recognise Germany's immunity from these human rights claims.

The section ends with a decision of a regional court, the Court of Justice of the European Union (CJEU). *Gómez-Limón Sánchez-Camacho v Instituto Nacional De La Seguridad Social (INSS)* is a case brought by a Spanish national who had reduced her working hours in order to care for her child, and who, while taking advantage of parental leave provisions, developed a permanent disability that prevented her from undertaking paid work. The calculation of her invalidity pension was based on the reduced hours she worked while taking parental leave instead of being calculated on the full-time hours that she ordinarily worked. This case, then, has a clear gender dimension at its core, raising the specific question of whether the calculation of Ms Gómez-Limón's pension constituted direct or indirect gender/sex discrimination contrary to EU law. In its original judgment, the CJEU adopted an analytically selective view of discrimination and found that the reduced calculation of the invalidity pension was not unlawful; conversely, however, the re-written judgment adopts an approach, informed by an intersectional understanding of discrimination, that departs from the equal treatment model. The feminist chamber achieves this different outcome by confronting the reality that more women take parental leave in the form of reduced working hours in order to care for children than men and are consequently more likely to have reduced pension contributions in the circumstances of this case. The feminist chamber acknowledges the social imbalances and stereotypes that underpin the facts in this judgment and, in adopting its approach to discrimination, argues that the laws in question are specifically aimed to tackle these.

B. Human Rights

Chapter seven, *Christine Goodwin v the United Kingdom*, touches on intimate questions concerning the construction of gender in international law. Christine Goodwin, a trans woman, sought legal recognition of her lived gender before the European Court of Human Rights (ECtHR). The original judgment, which recognised that Ms Goodwin's Article 8 (right to private life) and 12 (right to marry) rights under the European Convention on Human Rights (ECHR) had been violated, was considered a progressive victory for trans rights; however, the feminist chamber's rewriting of the judgment shows that the original judgment served to reinforce a binary understanding of gender and was silent on a number of important issues. Echoing earlier chapters, a key method adopted by the feminist chamber was to pay greater attention to the lived experiences of Christine Goodwin and the marginalisation, challenges and humiliations she endured because of the incongruence between her lived and legal gender. Significantly, the rewritten judgment frames the obligation on the State as a negative one; that is, the State must refrain from imposing a gender on an individual that she does not identify with. Placing her suffering at the heart of its reasoning, the feminist judgment also takes Convention jurisprudence into new territory by finding that the State violated Ms Goodwin's right to be free from inhuman and degrading treatment.

Chapter eight, *Leyla Şahin v Turkey*, foregrounds autonomy in its reasoning. Leyla Şahin, a student, challenged the ban on wearing the Islamic headscarf in Turkish universities on the basis that it interfered with her right to freedom of religion and right to education under the ECHR. In its original judgment, the ECtHR found no violation, arguing that the prohibition was valid as a means of preserving the secular, democratic State. The re-written judgment defines the right to a private life as a right to autonomy, identity and integrity. The feminist chamber argues that the restriction penalises women and fails to take women's interests seriously; its judgment asserts women's freedom to make decisions on religious clothing as a matter of personal autonomy. A fictitious dissenting judge joins this chamber and operates to voice concerns that the wearing of headscarves symbolises the subordination of women. The Majority in the feminist chamber rejected the view that women need protection and a State rule to set them free, instead relying on arguments about women's individual freedom of choice.

Chapter nine imagines a further separate but concurring opinion in *Burden v the United Kingdom*, another case from the ECtHR that raises questions about how law privileges certain relationships. The Burden sisters, who had lived together all their lives without partners or children, wanted the inheritance tax exemptions enjoyed by married spouses or civil partners to be extended to them as co-habiting siblings. The sisters claimed they were being discriminated against with respect to the enjoyment of their property rights under the ECHR, in so far as they were denied a benefit available to heterosexual and homosexual spouses and partners. The Chamber and Grand Chamber rejected their application. The ECtHR found that the inheritance tax exemptions aimed to promote stable

family life and that the UK had consequently not exceeded its margin of appreciation. The original Grand Chamber judgment found that sibling relationships were qualitatively different from that of spouses and civil partners. The re-written separate opinion in this collection departs from the original judgment in the way it views the special legal status of spouses and civil partners; the feminist judgment finds that the privileging of romantic intimate relationships over other relationships of care amounts to unlawful discrimination. Nonetheless, the re-written judgment, taking into account the relative wealth of the Burden sisters, argues that the State was within its margin of appreciation to not grant them exemption from inheritance tax in this case.

The collection next turns to a case in which the ECtHR was faced with facts arising from a situation of domestic violence, *Opuz v Turkey*. Nahide Opuz suffered abuse throughout her marriage and, after repeated attempts to gain help and assistance for the police and other authorities, she was stabbed and run over by her ex-husband and her mother was fatally shot by him. After being convicted of the murder, he was released pending appeal. The abuse had taken place over the course of some time, and the authorities largely treated it as a private matter. The original judgment, as the feminist chamber acknowledges, was ground-breaking in so far as it brought domestic violence within the ambit of the ECHR. However, in an effort to transcend the individualism of the human rights judgments, the re-written judgment in chapter ten highlights the structural causes of domestic violence, which the feminist chamber argues are rooted in patriarchal social structures that are not exclusive to 'other' cultures. As such, domestic violence is treated by the feminist court as a prevalent, global phenomenon.

The *A, B and C v Ireland* case from the ECtHR, the subject of chapter eleven, was brought by three women who had been unable to obtain the abortions they sought, respectively, for personal, financial or medical reasons and had been required to travel to the UK for the procedure. The applicants claimed that (the then) Irish law governing abortions, which was extremely restrictive in European terms in light of the constitutional protection of the right to life of the unborn, violated a number of their Convention rights. The original court dismissed the women's claims with the exception of the Article 8 (right to private life) claim of applicant 'C', who had sought an abortion on medical grounds. The first striking aspect of the re-written judgment in this collection lies in its approach to interpretation; the suffering and the discrimination the women experienced is placed at the centre of the chamber's decision-making. The feminist chamber found the harm caused to the women by the restrictive laws on abortion in Ireland could not be ignored, and that the gendered nature of the discrimination they suffered needed to be exposed. The margin of appreciation, a tool of interpretation that can operate to restrict the court's review of national legislation, is set aside in the rewritten judgment: gender discrimination is deemed a major goal of the Convention and Irish law deemed to exceed the State's margin of appreciation.

The final case in this collection from the ECtHR is *Ruusunen v Finland*. Susan Ruusunen wrote a book about her romantic relationship with the then

Prime Minister of Finland, Matti Vanhanen. He was aware that the book was being written and, indeed, consented to be photographed for its cover. Susan Ruusunen was nonetheless convicted of the dissemination of information violating personal privacy and fined. She made an application to the ECtHR claiming that Finland had violated her right to freedom of expression. The original court in its judgment found that Finland had a certain margin of appreciation with respect to placing limitations on the right to free speech, and concluded that the interference with Ms Ruusunen's freedom of speech in this case pursued a legitimate aim and was proportionate. The re-written judgment grants Finland a narrower margin of appreciation. It further criticises the gender bias that operated against Ms Ruusunen in the media and government circles, arguing strongly for her right to tell her story of a romantic relationship and not to be silenced and stereotyped as a gold-digger. A separate opinion to the feminist judgment emphasises the particular difficulties faced by single parents on limited incomes when facing criminal charges.

The human rights section of this collection ends with a decision from the Committee on the Elimination of Discrimination against Women, *Kell v Canada*. Cecilia Kell, an indigenous woman living in northern Canada, had secured housing under a scheme for indigenous people. Kell suffered serious abuse from her common law partner and had to leave her home for her safety; her partner, in response, had the locks changed and managed to place the lease of Kell's home in his name alone, abusing his position on the housing board. Kell attempted to regain access to her home through numerous and lengthy domestic legal challenges, but was unsuccessful in her efforts. In many respects, the target of the rewritten decision is the law itself. Cecilia Kell endured years of fruitless legal battles in her efforts to retain her property. In their Views, the feminist chamber argues that her 'intersectional marginality' served to make her invisible to the Canadian legal system; she was a single parent, an indigenous woman and a domestic abuse survivor. Although the original Committee found that Canada had violated certain articles of the Convention, the re-written Views foreground the blind spots of legal process in its analysis and adopts an intersectional approach that highlight in particular the role that Ms Kell's indigeneity played in her experience of discrimination and marginalisation.

C. International Criminal Law

The *AFRC* Trial Judgment, formally known as the *Prosecutor v Brima, Kamara and Kanu*, rewritten in chapter fourteen, emanates from the Special Court for Sierra Leone. The defendants were high-ranking members in the Armed Forces Revolutionary Council, charged with 14 counts of various war crimes and crime against humanity, including acts of sexual violence and the use/recruitment of child soldiers. All three men were found guilty of a number of crimes and sentenced to between 45 and 50 years. While the judgment arguably raised awareness of sexual crimes, sexual slavery and forced marriage, it failed to convict the defendants on

those counts. The re-written judgment in this collection consequently addresses crucial gaps in the original judgment concerning gender-based crimes. The first important step the feminist chamber takes is to expand the definition of rape in international criminal law. By explicitly recognising that women can be perpetrators of crimes committed during conflict and that men can be victims of sexual crimes, their account disrupts the usual gendered narratives of conflict. The feminist judgment next turns to refining the contours of forced marriage, framing it as a form of sexual slavery. In sum, the chamber presents a more complex account of women's and girls' experiences during conflict that are not confined to victimhood. The re-written judgment engages with the silences in the original judgment and paints a more complex vision of child soldiering that is built on the actual experience of those involved.

Thomas Lubanga Dyilo, whose trial is the subject of chapter fifteen, has the distinction of being the first person to be convicted by the International Criminal Court. His crimes were part of the conflict in the Democratic Republic of the Congo, in which context Lubanga led a large group of rebels during the Ituri conflict. His charges largely related to the conscription and enlisting of child soldiers under the age of 15 as part of the rebel group. He was convicted of those war crimes charges in 2009. The re-written judgment clarifies the relationship between the crimes of conscription and enlistment, drawing on feminist insights on the notion of consent. It also highlights the silences of the original judgment in terms of the experiences of the girl child, revisiting what it means to 'actively participate in hostilities'. Finally, it foregrounds the particular, gendered experiences of sexual violence that were marginalised in the original judgment. The re-written judgment contextualises the experiences of girl and boy child soldiers and emerges with a more gender-sensitive approach to the questions raised.

The final judgment in this collection is *Prosecutor v Radovan Karadžić*, a judgment of the International Criminal Tribunal for the former Yugoslavia. Karadžić was a political leader and President of Republika Srpska during the conflict in former Yugoslavia in the 1990s. He was convicted by the Trial Chamber of war crimes, crimes against humanity and genocide, namely the genocide committed in Srebrenica during the Bosnian war. However, he was acquitted of genocide in the Municipalities of Bosnia Herzegovina because the court found that the genocidal intent had not been proven. In this partly dissenting opinion, the judge carefully examines the evidence relating to the sexual violence perpetrated in the Municipalities. At the time of writing, both parties had filed notices of appeal. The feminist opinion considers the pattern of evidence of sexual violence, recognising its communicative value as part of its reasoning with regard to establishing genocidal intent. In asking 'the woman question', the dissenting opinion challenges the silences in the Majority judgment on sexual crimes in the Municipalities and recognises the profound nature of the resulting harm. The opinion argues that the legal reasoning on intent to commit genocide was wrongly interpreted by the Majority, and the nature of the harm done to victims of sexual violence was largely overlooked.

VI. Concluding Thoughts

We hope that this rich and diverse collection of judgments plays a part in continuing the conversation about how feminists can harness the transformative potential of international law, in spite of the challenges that this work presents. We have certainly been inspired and awed by the outcome of the chambers' efforts: the judgments in this collection have, in turn, moved us, made us laugh out loud at times, and they have galvanised us to continue to strive to challenge injustice and entrenched power relations in our various interactions with international law. Ultimately, they demonstrate without ambiguity that international law can be done differently. At times our chambers found international law to be a limited tool when seeking significant reform. The understandable conclusion that might be drawn from this is that law and legal method alone is unlikely to be sufficient to meet feminist ends; whilst this is undoubtedly an important observation, we have also observed in this collection the possibilities offered by creatively harnessing law. In short, international law – whilst clearly not a panacea for injustice, especially in its traditional guise – perhaps inhabits space of greater potential than feminist and critical thinkers, worn down by its apparent intransigence, might usually concede. The collaborative method we adopted in *Feminist Judgments in International Law* has contributed to the forging of a network of supportive friendships that are, we have come to believe, an essential part of feminist survival and success. The question of what wider impact this collection will have is part of the next chapter in this project's unfolding story.

We further hope that this project will inspire on-going conversations about the ways in which feminist judgment projects can continue to develop and to adapt to different jurisdictions and contexts. Feminists' relationship with law has often been an ambivalent one, and feminist judgments have proven a useful way to both engage with law and to reject law's values and practices that are damaging to feminist ends. We have found the methodology to be a remarkable tool for creating dynamic, creative and passionate exchanges between feminists working in, and with, law; we have little doubt that they will continue to be an important part of feminists' tool kits. Participants in these projects are forced to think about their feminism in practical ways, and to demonstrate the utility of that which is usually thought about in abstract terms. This is a powerful method and incentive, and we experienced it as having something of an energising effect on participants. On a personal level, we have been moved by the commitment and camaraderie of the women and men who came together to share their vision of how international law might do better. The challenges are undoubtedly significant, but the commitment we have witnessed from so many people during this project, on the road to the completion of *Feminist Judgments in International Law*, makes overcoming those challenges seem more possible.