

be unwise and dangerous to make classifications, which might re-open the way to prejudices of race, caste, colour and nationality' (at 279).

Despite the perpetuation of colonial structures under the League, *inter alia*, through the mandate system,<sup>4</sup> discriminatory arguments referring to culture, religion and race had lost their traction at least in official meetings of the institution. In *Mestizo International Law*, these changes are the result of continuous struggles of the semi-peripherals to replace the old substantive criteria of European international law by formal attributes of statehood. To follow the author through the sites of these struggles in the League's Assembly, its Permanent Mandate Commission, the Hague Codification Conference (1930) and the Pan-American Conference in Montevideo (1933) is a highly instructive journey. Meetings with Alejandro Alvarez, Gustavo Guerrero, Constantin Sipsom, and Chao-Chu Wu in these venues help him to demonstrate that these semi-peripheral international lawyers still had a common project consisting mainly of fully recognized independent statehood and the prohibition of intervention. Among their opponents were famous modern European international lawyers from the core, such as Nicolas Politis.

Becker Lorca observes a new methodological approach of the modern semi-peripherals, now 'mediating between solidarity and individualism' even though the political project in essence remained the same (at 337). At times, however, Becker Lorca's insistence on a methodological shift in the arguments of his protagonists does not seem to be fully convincing. After all, formalism with its claim to treat like cases alike appears to have remained the main argumentative device to undermine substantive imperialist arguments, regardless of scattered cosmetic references to solidarity and internationalism. It should be added in this context that such strategic formalist 'appropriations' of the law by weaker entities inevitably also come with an affirmative and normalizing dimension as to the legal order as a whole.

This wonderful book ends with the 1933 Montevideo Conference and the strategic use of regional codification by Latin American jurists to advance their universal project of full independence of semi-peripheral nations from imperialist domination. Through the ultimately successful inclusion of the USA into the Montevideo Convention process, the achieved standard of legal equality based on formal statehood and the principle of non-intervention turned out to have a long-lasting influence on international law. Arguably, these struggles also shaped the battle for international law in the post-World War II decolonization period.<sup>5</sup> But that is another story.

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Louise Chappell. ***The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy***. New York: Oxford University Press, 2016. Pp. 276. £64. ISBN: 9780199927913.

The book under review provides a unique analysis of gender justice in international criminal law. The author, Louise Chappell, professor in social sciences and international studies at the University of New South Wales, provides a meticulous and theoretically well-informed historical investigation of the implementation of gender justice (and its shortcomings) by the International Criminal Court (ICC) and what impact this might have for the future of the Court.

<sup>4</sup> Anghie, *supra* note 2.

<sup>5</sup> J. von Bernstorff and P. Dann (eds), *The Battle for International Law in the Decolonization Period* (forthcoming, 2017).

Chappell's book seeks to answer the following questions: 'Why has it been so difficult to implement some substantive gender justice rules and not others?' and 'What are the consequences of these outcomes for the Court and the international gender justice actors?' (at 2). In answering these questions, the author takes a complex approach. In response to the first question, she draws on gender legacies of international law: traditional conceptions of gender roles and norms, which have, in Chappell's view, decisively shaped the path of gender justice. As Chappell argues through her book, the implementation of gender justice rules by the ICC has only been partially successful. In her view, and this constitutes the answer to her second main question, this partial success substantially affects the Court's legitimacy.

In order to explain these two answers, the author brings together theoretical discussions about gender justice, feminist historical institutionalism, and a sociological (rather than normative) conception of the legitimacy of international organizations. After laying out her guiding principles in her first rather abstract chapter, Chappell skilfully guides the reader through the following six chapters, offering profound reasons for her conclusion that the 'outcome of the ICC's first dozen years suggests that there are still many gaps and pockets of resistance and a long way to go to achieve complete gender equality under international law' (at 205). In doing so, Chappell does not 'centrally engage with normative arguments about what the focus of international law *should be*' (at 2, emphasis in original), its core objective is rather to 'trace *what is* – the gap between the promise of the Rome Statute gender justice provisions and the reality – and to explain *why* certain outcomes have been (re)produced' (at 3, emphasis in original). The book has 'its foundations in gender politics' (at 3) and offers 'a new framework for conceptualizing the influence of transnational feminist activism on gender justice outcomes' (at 10). In all that, the book seeks to 'better explain the interaction between actors and institutions in an international context and to better understand the potential and limits of gender justice advocates' strategies to promote change' (at 3).

First, the author employs Nancy Fraser's trivalent model of justice in the broader feminist scholarship on gender in law and international relations to arrive at a comprehensive conception of gender justice.<sup>1</sup> She follows Nancy Fraser holding that gender (in)justice has three dimensions: economic, socio-cultural, and political. The economic dimension of gender injustice is manifested by the fact that women are, at least on average, still economically worse off than men. This calls for a reconsideration of the existing discriminative economic mal-distribution and a suitable redistribution. On a socio-cultural level, we should overcome androcentrism and/or cultural values that are associated with masculinity, particularly when it comes to problems of (mis)recognition and status inequality. Last but not least, the political dimension of gender injustice calls for a better representation of women and their interests – and a reconsideration of the question about who is included and excluded 'from the circle of those entitled to a just distribution and reciprocal recognition' specifies the reach of the other two levels (at 6, 33, Box 2.1).

In Chapters 1 and 7, the author outlines her conception of legitimacy. She conceives of legitimacy in a non-normative sociological or descriptive sense, according to which the question about the legitimacy of institution should not be understood as a question about whether the institution is in fact legitimate or justified but, rather, about whether its sustaining constituencies perceive it as legitimate or justified. Referring to Benjamin Schiff, she suggests that '[t]he organization's legitimacy hinges upon relevant constituencies' acceptance of its behaviour and its least public embrace (if not private conviction of the virtues) of its value and values' (at 20, 21).<sup>2</sup> The author's further analysis applies Schiff's identification of various constituencies

<sup>1</sup> N. Fraser, *Scales of Justice: Remaking Political Space in a Globalizing World* (2009); Fraser, 'Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice', 1 *Studies in Social Justice* (2007) 1, at 23–35.

<sup>2</sup> B. Schiff, 'Evolution of ICC Legitimacy', Conference Paper for the International Studies Association Annual Meeting (2010).

engaged with the ICC and different dimensions of legitimacy. First, she takes into account Schiff's constituencies, like states, international organizations (such as the United Nations), non-governmental organizations (NGOs), victims, expert observers and perpetrators. However, in a second step, the author seeks for further subcategories for states and NGOs – in particular, the gender justice constituency. In addition, she analyses the Court's legitimacy with respect to different phases of its operation: the design phase of the ICC, the operational phase (decisions) and, finally, the consequences or the effects of the Court's work. Thus, the book combines a three-tiered view of gender justice (asking for representation, recognition and redistribution) with an analysis of the ICC's legitimacy with respect to its different phases of design, operations and consequences), as perceived by its gender justice constituency: the gender justice actors.

In Chapter 2, Chappell is devoted to showing how the 'ICC is situated in the temporal and spatial political/legal context in which it is nested, including a consideration of the gender legacies of international law that helped set the temporal context of the ICC' (at 26). Chappell carefully portrays the efforts of the Women's Caucus of Gender Justice (Women's Caucus) during the design phase of the Rome Statute and provides a definition of gender justice constituencies and discusses their relations to other (counter) actors, like conservative civil society groups in the international criminal law community.<sup>3</sup>

Chapters 3–5 analyse the Rome Statute and identify the Court's performance in relation to (i) the (under)representation of women and gender experts at the Court; (ii) the recognition of gender justice through the enumeration and prosecution of crimes and (iii) the attributions of the ICC, which has also a redistributive function. Chapter 3 analyses how the Rome Statute contains provisions in order to achieve gender justice by the representation of female justice, personnel at the ICC with gender expertise and victims. Chapter 4 analyses how the Rome Statute not only recognizes gender justice through its numeration of specific crimes but also contextualizes this numeration with the (poor) historical record of prosecution of sexual and gender-based violence. Chappell here refers to Rosemary Grey's detailed analysis of prosecutorial discretion.<sup>4</sup> And Chapter 5 also acknowledges that some important redistributive demands of gender justice actors have been incorporated in the Rome Statute, like the relatively ambiguous reparation rules and the implementation of the Trust Fund for Victims.

Chappell further emphasizes the importance and growing interest in institutionalism and aims to demonstrate the value of a feminist historical approach to institutionalism (at 11). In her opinion, 'there are three interlinked institutional factors that have influenced the recognition, representation, and redistributive gender justice outcomes at the ICC: the formal institution design features of the Rome Statute, informal rules, and the nested environment in which the Court operates' (at 11). Of these three factors, 'identifying the operation of informal rules at the court' poses a major methodological challenge for Chappell: 'It is in these silences where we are likely to find the gender "status quo bias", the "taken-for-grantedness" and operation of gender legacies of international law' (at 25). But, for all that, tracing these informal rules is crucial for Chappell. As she sees it, it is by these rules that gender legacies – existing social norms, practices and expectations – determine the contestation of the (transformative) objectives by gender justice actors and influence reform possibilities (at 3).

For me, the heart of the book is Chappell's analysis of the complementarity system of the ICC in Chapter 6. In my view, this chapter reflects the real resistance against gender justice not only at the ICC but also at the national level. Relying on Nancy Fraser's 'post-Westphalian model' (at 162), Chappell discusses the unsuccessful efforts by the Women's Caucus to implement the

<sup>3</sup> Rome Statute on the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90.

<sup>4</sup> Rosemary Grey, 'Prosecuting Sexual and Gender Violence in the International Criminal Court: Something Old, Something New' (2015) (PhD dissertation, University of New South Wales, Sydney).

gender justice principles on the Rome Statute's rules on complementarity. She further points out how the Court's design and operational legitimacy is influenced by the relation of gender justice and complementarity provisions. In particular, the small gender justice record at the Court and on a national level has to be seen in the context of a lack of gender-specific formal complementarity rules.

To bolster her criticism, Chappell provides a profound explanation of the complementarity provisions and their aims. Following Beth Simmons and Allison Danner, Chappell argues that complementarity rules ensure that the ICC is a complementing system, 'which supplement[s] – rather than supplant[s] – domestic law prosecutions'.<sup>5</sup> However, the ICC is seen as a system, 'where new forms of accountability are meant to disseminate downward, with the ICC encouraging (and, where necessary, threatening) states to undertake their own investigations and prosecutions and to get their own legal regimes in order' (at 164).

The author highlights two important points. First, she underscores Valerie Oosterveld's opinion that 'because complementarity was framed as a [gender-neutral] jurisdictional issue, it was considered to be a matter outside the remit of the [Women's] Caucus [of Gender Justice] and an area over which it was not considered an expertise' (at 167).<sup>6</sup> Second, she emphasizes that states are concerned about the boundary of jurisdiction and the limitation of the control over their (gender and sexual-related) domestic law (at 167). Chappell returns to this argument later in the book when she presents her and Rosemary Grey's research from 2013 on how the gender mandate of the Rome Statute has been implemented in 50 of the 121 state parties. They found that implementation suffered from severe shortcomings, particularly with respect to the gender and sexual violence provisions (at 183). Chappell also shows how little attention has been paid to gender justice issues in the preliminary examinations of the situation in Guinea and Colombia. However, she acknowledges the efforts of the Office of the Prosecutor (OTP) of the ICC in its 2014 Policy Paper on Sexual and Gender-Based Crimes, which provides a helpful tool for applying international criminal law norms without reproducing gender inequalities.<sup>7</sup> With this policy paper, the OTP announced its integration of a 'gender perspective' and 'gender analysis' into all stages of its work.

Chappell construes the policy paper as a response to calls from gender justice actors for revisions and reforms. The OTP's response to the gender justice constituencies' critique over the Court's mixed gender justice records is important for its legitimacy, as it emphasizes the possibility to change something at the ICC. And revisability is central to the legitimacy of institutions (at 204). The author concludes that 'the absence of formal gender justice complementarity rules in the Rome Statute is evidence of the strength of sovereignty claims' (at 189).

In Chapter 7, the final chapter, Chappell brings together the key findings from the first six chapters in order to evaluate them on the basis of Nancy Fraser's trivalent transformative model of gender justice. She concludes that this model is helpful not only for analysing the developments at the ICC but also for using it as a template for future court practice and the question of legitimacy (at 194), as shown before. Finally, she warns the gender justice constituency not to overburden the ICC with its expectations but, rather, to catalyse the ICC's mandate and to support investigation, evidence-gathering processes of sexual and gender-based violence. She further requests the full implementation of the gender justice mandate laid down in the Rome Statute into domestic law.

<sup>5</sup> B.A. Simmons and A. Danner, 'Credible Commitments and the International Criminal Court', 64 *International Organization* (2010) 2, at 230.

<sup>6</sup> V. Oosterveld, personal communication with author (2014).

<sup>7</sup> International Criminal Court Office of the Prosecutor, 'Policy Paper of Sexual and Gender-based Crimes', *Office of the Prosecutor*, International Criminal Court (2014).

Every lawyer, activist and everyone else who cares about gender justice knows about the challenges and backlashes in the context of investigations and prosecutions of sexual and gender-based crimes against women and men. For them and for the rest of civil society, and certainly for lawyers within the system of international criminal law, this book provides an important study of the gender legacies of international law, the various facets of gender justice, the influence of interrelated institutional factors and its impact on the ICC's (perceived) legitimacy. Everyone who wonders about the legitimacy of the Court should read this book.

Like many feminist scholars, the author is aware of critiques of the law's capacity to promote gender justice since law is, as Carlo Smart puts it, 'deaf to the core concerns of feminism' (at 8).<sup>8</sup> Yet Chappell is convinced that 'engagement in institutions of power, including the law, is indeed fraught, but can produce incremental, transformative change over time' (at 9, referring to Mary Katzenstein).<sup>9</sup> As far as international law is concerned, the author is ambivalent and knows that engagement with the law can not only reinforce gender biases 'but can also produce transformative responses even though, the result of gender engagement with the law can be nothing more than a "least worst outcome"' (at 9).

The amount of scholarship and theories referenced makes the book sometimes hard to read. The reader needs to take her time and might even have to read some chapters more than once in order to understand how the implementation of a gender perspective is intertwined with gender legacies, the gender constituencies' strategies and the ICC's perceived legitimacy. Chappell's conclusion – that 'Nancy Fraser's trivalent transformative model also serves as a template for future court practice, [as it] suggests the need for Court personnel to pay attention, ... and provide ongoing support gender justice epistemic community who help keep the Court accountable for its commitment to ending impunity' is still valid (at 194). In particular, in the case of Colombia, the OTP had the opportunity to start implementing its policy paper.<sup>10</sup> In 2015, a communication was submitted by the organizations Sisma Mujer, Colectivo de Abogados 'José Alvear Restrepo' and the European Centre for Constitutional and Human Rights. This communication highlights the Colombian government's lack of implementation of its legal obligations. Measures were not implemented despite adequate legislation to fight impunity for crimes of sexual and gender-based violence committed in the context of armed conflict, and no criminal investigative strategies were adopted to overcome the distinct difficulties of sexual violence cases committed before 2014.<sup>11</sup> The OTP has not opened investigations yet. It was not even clear if and how it applied its new gender policy paper.<sup>12</sup>

<sup>8</sup> C. Smart, *Feminism and the Power of Law* (1989).

<sup>9</sup> M.F. Katzenstein, *Faithful and Fearless: Moving Feminist Protest inside the Church and Military* (1998).

<sup>10</sup> The situation in Colombia has been under preliminary examination by the Office of the Prosecutor (OTP) since June 2004. In November 2012, the OTP published an Interim Report on the Situation in Colombia and identified five areas of continuing focus into, *inter alia*, the proceedings relating to sexual crimes. At the end of 2015, the OTP office 'remains concerned about the lack of substantial progress in investigations and prosecutions before the ordinary justice system' in the case of sexual crimes. However, it still did not open any investigations in the case of Colombia. See OTP, Report on Preliminary Examination Activities (2015), paras 136–166.

<sup>11</sup> European Centre for Constitutional and Human Rights, Sisma Mujer and Colectivo de Abogados 'José Alvear Restrepo', When Women Become Targets: Sexual and Gender-Based Violence in Colombia's Conflict – A Matter for the International Criminal Court (2015), available at [www.ecchr.eu/en/international-crimes-and-accountability/sexual-violence/colombia.html](http://www.ecchr.eu/en/international-crimes-and-accountability/sexual-violence/colombia.html) (last visited 31 October 2016).

<sup>12</sup> OTP, *supra* note 6, at 166: 'Regarding national proceedings for sexual crimes and forced displacement, although some relative progress has been made in the last year, in particular under the JPL framework, the Office remains concerned about the lack of substantial progress in investigations and prosecutions before the ordinary justice system.'

Nonetheless, the positive complementarity might have influenced the outcome of the recent peace agreement. This agreement is unique in its implementation of a gender perspective and the consideration of lesbian, gay, transsexual and bisexual rights. Thanks to the demand and pressure of women's groups, a gender subcommission was created and charged with proofreading the final document to ensure that their perspective was represented. It has to be noted that the final text of the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes under the Rome Statute. Instead, sexual violence is to be investigated and prosecuted by the so-called Special Jurisdiction for Peace.<sup>13</sup> Although the first draft agreement did not pass the country's referendum, the gender justice constituency hopes that the substance of this agreement, including the prosecution of sexual and gender-based violence by the Special Jurisdiction of Peace will be implemented in the final agreement.

Research like Chappell's is necessary to show that there is indeed reason to be pessimistic that gender injustice at the ICC can be overcome and that we need more allies in and outside the court system to implement gender justice – not only at the ICC but also, in particular, at the national level. This book is for those activists who are interested in an academic answer for why some of their approaches have been successful and others have not. She does not tell us what to do, but she gives us some guidelines to better understand institutional resistance. Understanding the sources of institutional resistance are an indispensable prerequisite for overcoming it – not least, for implementing gender justice. I hope that Chappell's voice will be heard.

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<sup>13</sup> OTP, Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Peace Negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army, 1 September 2016, available at [www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia](http://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia) (last visited 31 October 2016); OTP, *supra* note 6, paras 136–166.