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Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?

Nienke Grossman

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Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?

Nienke Grossman*

Abstract

International courts are playing an increasingly important role in deciding international disputes and in defining the content of international law. Yet women make up only a meager percentage of international court judges. This Article explores the relationship between the paucity of women judges and the legitimacy of international courts. After providing statistics on women's participation on eleven of the world's most important courts and tribunals, the Article argues that under-representation of one sex affects the normative legitimacy of international courts because it endangers impartiality and introduces bias when men and women approach judging differently. Even if men and women do not "think differently," a sex un-representative bench harms sociological legitimacy for constituencies who believe they do nonetheless. For groups traditionally excluded from international lawmaking or historically discriminated against, inclusion likely strengthens sociological legitimacy, while continued exclusion perpetuates conclusions about unfairness. Finally, sex representation is important to the normative legitimacy of international courts because representation is an important democratic value. Sex representation may endanger sociological legitimacy, however, for constituencies who associate authority with male judges or if women judges are unqualified or perceived as less qualified.

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I. INTRODUCTION

On September 13, 2010, Xue Hanqin and Joan E. Donoghue were sworn in as judges on the International Court of Justice (ICJ). For the first time in its sixty-five year history, two women judges are serving simultaneously on the fifteen-member bench.¹ Only one woman—Rosalyn Higgins—precedes them.² The appointment of the second and third woman ever to serve on the Court is an important milestone, but women still make up only 13 percent of the ICJ’s bench.³

The paucity of women judges is not unique to the ICJ. Although women account for almost half of the world’s population,⁴ they rarely make up even close to 50 percent of judges on the world’s most important international

¹ International Court of Justice (ICJ), Press Release, *Swearing-in of Two New Members of the Court at a Public Sitting*, No. 2010/29 (Sept. 10, 2010), online at <http://www.icj-cij.org/presscom/files/3/16093.pdf> (visited Oct. 11, 2011).

² Dapo Akande, *Two Women Nominated to Replace Retiring US and Chinese Judges on the International Court of Justice (Updated)* (EJIL Analysis June 22, 2010), online at <http://www.ejiltalk.org/two-women-nominated-to-replace-retiring-us-and-chinese-judges-on-the-international-court-of-justice/> (visited Nov. 19, 2011).

³ As this article went to press, the United Nations General Assembly and the Security Council elected Julia Sebutinde, a Ugandan female judge, to the ICJ bench. She is expected to become the Court’s fourth permanent female judge in February 2012. ICJ, Press Release, *United Nations General Assembly and Security Council elect Ms. Julia Sebutinde as a Member of the Court*, No. 2011/39 (Dec. 15, 2011), online at www.icj-cij.org/presscom/files/5/16855.pdf (visited Dec. 23, 2011).

⁴ The ratio of men to women in 2008 was 1.02:1. United Nations Statistics Division, *World Population Prospects: The 2008 Revision*, online at http://www.geohive.com/earth/pop_gender.aspx (visited Oct. 11, 2011).

adjudicative bodies.⁵ Until Elsa Kelly's appointment on October 1, 2011, no female judge ever served on the twenty-one member bench of the International Tribunal for the Law of the Sea (ITLOS).⁶ Only four women serve on the twenty-seven member bench of the European Court of Justice (ECJ).⁷ In 2009, only 9 percent of arbitrators in International Centre for Settlement of Investment Disputes (ICSID) arbitrations were women.⁸ Strikingly, of eleven courts surveyed,⁹ women outnumbered men only on one: the International Criminal Court (ICC).¹⁰

Reflecting the general population's sex ratio—or "sex representation"—on international court benches may matter for any number of reasons. This Article explores the relationship between sex representation and legitimacy of international adjudication. Understanding what drives legitimacy is essential to those interested in protecting both judicial institutions and the law they interpret and apply. Not only is international adjudication an exercise of public authority

⁵ See Section II.

⁶ International Tribunal for the Law of the Sea (ITLOS), *Members of the Tribunal Since 1996*, online at <http://www.itlos.org/index.php?id=97&L=0> (visited Oct 11, 2011).

⁷ Court of Justice of the European Union, *Members*, online at http://curia.europa.eu/jcms/jcms/Jo2_7026/ (visited May 21, 2010).

⁸ This statistic was obtained by dividing the number of times women were appointed to sit on panels by the total number of arbitrators appointed for cases registered in 2009 for which panels had been appointed by May 23, 2010. Individuals who served on more than one panel were counted each time they served on a panel. International Centre for Settlement of Investment Disputes (ICSID), *List of Concluded Cases*, online at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (visited May 26, 2010); ICSID, *List of Pending Cases*, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (visited May 26, 2010). A 2007 study found only 3.5 percent of investment treaty arbitrators were women. See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 NC L Rev 1, 81 (2007). See also Jun Bautista, *International Arbitration: Past, Present and Future*, Asia Pac Arbitration Rev *8 (2009), online at <http://www.globalarbitrationreview.com/reviews/12/sections/46/chapters/485/international-arbitration-past-present-future/> (visited May 21, 2010) (stating that only 14 of 279 ICSID arbitrators were women).

⁹ The eleven bodies surveyed are (1) International Court of Justice, (2) International Tribunal for the Law of the Sea, (3) European Court of Justice, (4) European Court of Human Rights, (5) Inter-American Court of Human Rights, (6) African Court on Human and People's Rights, (7) International Centre for the Settlement of Investment Disputes, (8) World Trade Organization's Dispute Settlement Body, (9) International Criminal Court, (10) International Criminal Tribunal for the former Yugoslavia, and (11) International Criminal Tribunal for Rwanda.

¹⁰ International Criminal Court (ICC), *Biographical Notes on the Judges*, online at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/> (visited May 21, 2010). Yet as of October 11, 2011, only two women judges out of nineteen nominees are up for election to fill six spots opening on the ICC's bench. See ICC, *Alphabetical List*, online at <http://www.icc-cpi.int/Menus/ASP/Elections/Judges/2011/Alphabetical+listing-2011.htm> (visited Oct 11, 2011).

that requires theoretical justification,¹¹ but also, without legitimacy, international courts simply could not function as a practical matter. They lack enforcement powers and a guaranteed flow of funds. They rely on the political will of the international community to avoid irrelevance. Sociological research shows that people are more likely to defer to decisions and rules when they view deciding authorities as legitimate.¹² Similarly, states may withdraw from the jurisdiction of international courts or impede their functioning when they no longer perceive them as legitimate.¹³ In the absence of strong enforcement mechanisms and guaranteed funding, perceptions that courts possess legitimacy increase the odds that states and others will cooperate with them and respect their rulings.¹⁴ International courts are playing a greater role in international dispute resolution and the development of international law than ever before.¹⁵ If sex representation affects legitimacy, it must become a higher priority for international court supporters. Although various studies note the paucity of women judges on international courts,¹⁶ few question its impact on the

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- ¹¹ See generally Armin von Bogdandy and Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 Eur J Int'l L (2012) (forthcoming), online at <http://ssrn.com/abstract=1593543> (visited Sept 18, 2011). See also M. Koskeniemi, *The Ideology of International Adjudication and the 1907 Hague Conference*, in Yves Daudet, ed., *Topicality of the 1907 Hague Conference, the Second Peace Conference* 127, 152 (Martinus Nijhoff 2008) ("[I]t is high time that 'international adjudication' were made the object of critical analysis instead of religious faith.").
- ¹² Tom R. Tyler, et al, *Legitimacy and Criminal Justice: International Perspectives*, in Tom R. Tyler, ed., *Legitimacy and International Criminal Justice: International Perspectives* 9, 10 (Russell Sage 2007).
- ¹³ For example, the United States famously withdrew from the compulsory jurisdiction of the ICJ following its decision in the Nicaragua case. See United States Department of State, Department Statement, *Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice* (Jan 18, 1985), 24 ILM 246 (1985); United States Department of State, *Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction* (Oct 7, 1985), 24 ILM 1742 (1985) (terminating the United States' acceptance of compulsory jurisdiction of the ICJ).
- ¹⁴ Thomas Franck, *Fairness in International Law and Institutions* 26 (Oxford 1995) ("International law, even more than any individual state's legal system, needs this element of promotion of voluntary compliance because of the relative paucity of modes of compulsion.").
- ¹⁵ See, for example, Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 NYU J Int'l L & Pol 791, 797–98 & n 18 (2007). See generally Andrea K. Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized*, 2006 J Disp Resol 119 (2006) (discussing the increasing judicialization of international public disputes).
- ¹⁶ See, for example, Jan Linehan, *Women and Public International Litigation* (Project on International Courts and Tribunals 2002), online at http://www.pict-pcti.org/publications/PICT_articles/Women1.pdf (visited Oct 11, 2011) (surveying a number of international courts); Ruth Mackenzie and Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv Int'l L J 271, 278 (2003) ("Another nomination and selection issue worthy of attention is the relatively low number of female judges on international courts and tribunals.").

legitimacy of international adjudication.¹⁷ The time has come to determine whether women judges actually matter to the legitimacy of international courts.

A court is legitimate when it possesses justified authority.¹⁸ It has qualities that lead “people (or states) to accept [its] authority . . . because of a general sense that the authority is justified.”¹⁹ In previous work, I proposed that international courts are perceived as legitimate when they (1) are fair and unbiased, (2) interpret and apply norms consistent with what states believe the law is or should be, and (3) are transparent and infused with democratic norms.²⁰ While a normatively legitimate institution “*has* the right to rule,” based on presumably objective criteria, a sociologically legitimate institution is “*believed* to have the right to rule,” a subjective determination.²¹ Those concerned with normative legitimacy ask whether an institution is actually legitimate and what ought to matter to perceptions of justified authority, drawing from philosophy or political theory.²² Students of sociological legitimacy ask what drives relevant constituencies—individuals, non-governmental organizations, international organizations, states, and the international community—to view international courts as possessing justified authority.²³ The underpinnings of sociological legitimacy are presumably provable through empirical research.²⁴

¹⁷ See, for example, Noemi Gal-Or, *The Under-Representation of Women and Women's Perspectives in International Dispute Resolution Processes*, 4 Transnatl Disp Mgmt *7 (2008) (beginning to formulate hypotheses on why the absence of women matters to international dispute resolution); Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 Feminist Legal Studies 257, 265–66 (2002) (considering whether the paucity of women on the European Court of Justice's (ECJ) bench affects its legitimacy and why).

¹⁸ Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 Geo Wash Intl L Rev 107, 115 (2009); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 Am J Intl L 596, 600–01 (1999); Klaus Dingwerth, *The New Transnationalism: Transnational Governance and Democratic Legitimacy* 14–15 (Palgrave MacMillan 2007).

¹⁹ Bodansky, 93 Am J Intl L at 600 (cited in note 18).

²⁰ See generally Grossman, 41 Geo Wash Intl L Rev 107 (cited in note 18); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, Working Paper No 1154117, *13 (Georgetown University Law Center, 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154177 (visited Oct 11, 2011); Tom R. Tyler, *Legitimacy and Criminal Justice* at 4 (cited in note 12).

²¹ Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, in Rüdiger Wolfrum and Volker Röben, eds, *Legitimacy in International Law* 25, 25–26, 31 (Springer 2008), as discussed in Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 Intl Crim L Rev 643, 645 (2011). See also Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv L Rev 1787, 1795 (2005).

²² Daniel Bodansky, *The Concept of Legitimacy in International Law*, in Rüdiger Wolfrum and Volker Röben, eds, *Legitimacy in International Law* 308, 309–310, 313 (Springer 2008).

²³ Id.

²⁴ See id.

After providing the statistics on women's participation on eleven different international courts in Section II, this Article argues that sex representation influences both normative and sociological legitimacy of international courts. Section III asserts that when men and women decide issues differently because of gender²⁵—or qualities unique to each sex derived from nature or nurture—both sexes are necessary for unbiased adjudication, an important legitimacy-influencing factor. Courts where one sex is severely under- or over-represented lack normative legitimacy because they are inherently biased. Section IV explains that even if men and women do not “think differently,” sex representation matters for sociological legitimacy because relevant constituencies believe they do nonetheless. Constituencies who believe sex affects outcomes will view unrepresentative courts as lacking justified authority. Section IV relies on the history of the creation of the post-World War II international criminal tribunals and discusses the attitudes of traditionally excluded and discriminated groups toward unrepresentative courts. Section V proposes that sex representation strengthens the normative legitimacy of international courts because representativeness is an important democratic value. It discusses new representativeness requirements on a variety of international courts and tribunals. Section VI concludes the Article and raises questions for further study and debate.

II. WOMEN ON INTERNATIONAL COURTS: THE NUMBERS²⁶

The paucity of women sitting on the benches of many of the world's most important international adjudicative bodies is striking. Table I provides the basic statistics, including the total number and percentages of women judges on eleven different international courts and tribunals in late May and early June 2010. The statistics for the ICJ are more recent, however.²⁷ Figure A shows the percentage of permanent women judges since these bodies were established, while Figure B shows the percentage of women judges, both ad hoc or ad litem and permanent, serving on these courts in late May and early June 2010.

These bodies are “international” because they were established by multilateral treaties or by the international community through the United Nations Security Council; the adjudicators and staff include citizens of many

²⁵ Charlesworth and Chinkin define “gender” as capturing “the ascribed, social nature of distinctions between women and men—the excess cultural baggage associated with biological sex.” Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* 3 (Manchester 2000).

²⁶ Unless otherwise cited, see Table I and accompanying endnotes for the sources of statistics in this Section. The endnotes also explain how these statistics were compiled.

²⁷ The ICJ statistics are from February 2011.

states; and they interpret and apply international law. They are adjudicative bodies because they interpret and may apply law to specific factual scenarios. This Article focuses on courts of recognized international importance, dealing primarily, but not exclusively, with issues of public international law.

The international courts and tribunals surveyed include courts of both general and specific jurisdiction. They address issues as wide-ranging as trade, human rights, maritime delimitation, foreign investment, and genocide. While some of these courts are permanent, like the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the African Court on Human and Peoples' Rights (ACHPR), the Inter-American Court of Human Rights (IACHR), the International Criminal Court (ICC), the European Court of Human Rights (ECHR), and the European Court of Justice (ECJ), others are expected to be of temporary duration, such as the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). Further, they include arbitral tribunals, such as those convened under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) and the World Trade Organization's Dispute Settlement Body (WTO DSB).

No women judges sat on the ITLOS bench in May 2010, and women judges were virtually absent until only recently from the ICJ.²⁸ After the ICJ and ITLOS, the ECJ contained the next lowest number of women judges, with 15 percent permanent female judges in May 2010. Four of the six women judges ever to have served on the ECJ sat on the bench in June 2010.²⁹

Women made up 43 percent of the WTO Appellate Body at the time of the study. Since its establishment, however, only 19 percent of Appellate Body members were women. Three of the four women who served on the Appellate Body since it was created sat on the bench in mid-2010. Women were appointed only 17 percent of the time to WTO arbitral panels in 2009. Women were appointed only 9 percent of the time to ICSID panels in 2009. Historically, women made up a mere 6 percent of individuals appointed to arbitrate disputes in ICSID.

²⁸ On June 29, 2010, the United Nations General Assembly and Security Council elected Xue Hanqin, the second woman ever to serve as a permanent judge on the ICJ. *Chinese Diplomat Elected to International Court of Justice* (Xinhua General News Service June 29, 2010) online at http://news.xinhuanet.com/english2010/china/2010-06/29/c_13376020.htm (visited Oct 12, 2011). On September 9, 2010, the United Nations General Assembly and Security Council elected Joan E. Donoghue to become the third woman judge on the ICJ. ICJ, *Two New Members* (cited in note 1). As this article went to press, on December 15, 2011, the United Nations General Assembly and Security Council elected Ms. Julia Sebutinde to serve as a member of the ICJ effective February 2012. ICJ, *United Nations General Assembly and Security Council elect Ms Julia Sebutinde as a Member of the Court* (cited in note 3).

²⁹ Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts* *7, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723407 (visited Nov 18, 2011).

The human rights courts—the Inter-American, African, and European Courts—ranged from 18 to 37 percent permanent female judges on the bench. All three human rights courts showed increases in the percentage of permanent women judges since establishment. Two of the four women ever to have served on the IACHR were judges in June 2010. Only one woman has ever served as an ad hoc judge on the IACHR, in 2009.

The ICC was the only court to exceed 50 percent participation by women. Fifty-eight percent of judges on the ICC in May 2010 were women. Nevertheless, as of July 22, 2011, no female candidates were nominated to fill six spots opening on the bench.³⁰ Although only one permanent woman judge sat on the sixteen-member bench of the ICTY in May 2010, 42 percent of ad litem judges were women, and 21 percent of all judges in May 2010 were women. Historically, women made up 15 percent and 29 percent of permanent and ad litem judges on the ICTY. Twenty percent of ICTR permanent judges were women, while 27 percent of ad litem judges were women in mid-2010. Since the ICTR's establishment, women constituted 36 percent of ad litem judges and 18 percent of all permanent judges.

In sum, men were over-represented when compared to their proportion of the population on the eleven adjudicatory bodies surveyed in May and June 2010. Women made up only about 21 percent of the judiciary of these international courts. The percentages ranged from 0 percent on ITLOS to an exceptional 58 percent on the ICC bench. Courts whose subject matter jurisdiction is limited to human rights and international criminal law possessed the highest percentage of women judges, when both permanent judges and ad hoc or ad litem judges are included. The only exception is the WTO, when both the Appellate Body and panels are counted.³¹ The courts with the lowest percentage of women ad hoc or ad litem plus permanent judges were ITLOS (0 percent), the ICJ (5 percent), and ICSID (9 percent).

III. SEX REPRESENTATION MATTERS TO NORMATIVE LEGITIMACY WHEN MEN AND WOMEN “THINK DIFFERENTLY”

The perception that adjudicators are impartial or unbiased is essential to any court's legitimacy, including international ones. Bias, or partiality, is “an inclination of temperament or outlook; *especially*: a personal and sometimes

³⁰ ICC, *Alphabetical List* (cited in note 10). By October 2011, two women candidates had also been nominated. *Id.*

³¹ The statutes of human rights and international criminal courts are also more likely to contain requirements for sex representation on the bench. See Section IV.A.

unreasoned judgment: prejudice.”³² Bias undermines fairness, which is closely tied to justified authority.³³ There can be no fair trial before a biased bench. Like domestic courts, international court decisions must be fair, consistent, and driven by law to retain legitimacy.³⁴ The international community’s belief in the importance of impartial judges is apparent in ubiquitous provisions requiring the selection of impartial judges in the statutes of international courts.³⁵ Judges are expected to constrain their reasoning within the bounds of law to avoid accusations of partiality and bias. States or other constituencies may withdraw

³² *Merriam-Webster Dictionary*, 118 (Merriam-Webster 11 ed 2003) (defining bias). The Oxford Dictionary defines bias as “prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair . . .” Elizabeth J. Jewell and Frank Abate, eds, *New Oxford American Dictionary* 160 (Oxford 2001).

³³ See Brian Barry, *Justice as Impartiality* 17–18 (Oxford 1995). See also Luban, *Fairness to Rightness* at *13 (cited in note 20); Tyler, *Legitimacy and Criminal Justice* at 4 (cited in note 12); Grossman, 41 *Geo Wash Intl L Rev* at 129 (cited in note 18).

³⁴ See Luban, *Fairness to Rightness* at **13–14 (cited in note 20); Steven Glickman, Note, *Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court*, 43 *Colum J Transnatl L* 229, 266 (2004). See generally Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* 102–04, 147–49 (Brandeis 2007). See also Thomas M. Franck, *The Power of Legitimacy Among Nations* 147–48 (Oxford 1990) (referring to the idea of consistent application of rules as “coherence,” a quality that will affect the “compliance pull” of rules). “[I]t legitimates a rule, principle, or implementing institution because it provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems.” *Id.*

³⁵ See, for example, The Rome Statute of the International Criminal Court, Art 36(3)(a), 37 ILM 999, 1020 (1998) (Rome Statute) (“The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.”); Statute of the International Criminal Tribunal for the Former Yugoslavia, Art 13, 32 ILM 1159, 1195 (1993) (ICTY Statute) (“The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”); Statute of the International Criminal Tribunal for Rwanda, Art 12, 33 ILM 1598, 1606 (1994) (ICTR Statute) (“The judges shall be persons of high moral character, impartiality, and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.”); Statute of the International Court of Justice, Art 2, 59 Stat 1055, 1055 (1945) (ICJ Statute) (“The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”). See also Grossman, 41 *Geo Wash Intl L Rev* at 132–33, 136–37 (cited in note 18) (quoting provisions from the ECJ, Inter-American Court of Human Rights (IACHR), ICJ, ITLOS, Permanent Court of Arbitration (PCA), and the World Trade Organization (WTO)).

from a court's jurisdiction or cease to comply with its judgments if they perceive bias on the bench.³⁶

Sex representation matters to legitimacy when the sexes approach differently law, facts, or any part of the task of judicial decisionmaking, or when they influence each other's decisions because of differences derived from biology or distinct life experiences, also called "gender."³⁷ If women and men bring varying viewpoints to bear on judging, and neither sex's approach is inherently "correct," both are necessary for unbiased process and results.³⁸

Low numbers of women judges on international courts make empirical studies of the impact of women judges on international adjudication quite rare.³⁹ One recent study shows that women judges are much more likely to rule in favor of jurisdiction in ICSID cases than men.⁴⁰ In fact, women never voted against jurisdiction.⁴¹ Although limited, empirical and anecdotal evidence suggests a gender effect in international criminal cases. For example, one study showed that ICTY panels with female judges imposed more severe sanctions on defendants who assaulted women, while male judges imposed more severe sanctions on defendants who assaulted men.⁴² Further, Judge Navanethem Pillay, the only female judge on the ICTR panel trying Jean Paul Akayesu, is credited with taking the initiative to question witnesses about evidence of sexual violence.⁴³ Her

³⁶ See, for example, Edith B. Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in Lori F. Damrosch, ed., *The International Court of Justice at a Crossroads* 123, 123–24 (Transnational 1987); Tyler, *Legitimacy and Criminal Justice* at 10 (cited in note 12).

³⁷ Charlesworth and Chinkin, *Boundaries of International Law* at 3 (cited in note 25).

³⁸ See Kate Malleon, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 *Feminist Legal Studies*, 1, 10–11 (2003) (making a similar argument for justifying gender equality on the bench).

³⁹ For example, a study examining the relationship between sentence length and sex of judge and victim did not include the ICTR because "there are too few [women judges] to conduct empirical analysis and virtually all the guilty defendants received life sentences." Kimi L. King and Megan Greening, *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 *Soc Sci Q* 1049, 1050 n 2 (2007).

⁴⁰ Michael Waibel and Yanhui Wu, *Are Arbitrators Political?*, ASIL Research Forum *35 (UCLA Nov 5, 2011), online at http://www.asil.org/midyearmeeting/pdfs/papers/November_5_2pm/Are%20Arbitrators%20Political.pdf (visited Nov 18, 2011).

⁴¹ *Id.*

⁴² King and Greening, 88 *Soc Sci Q* at 1049–50 (cited in note 39). See also *id.* at 1065–66 ("Having a female judge on cases with female victims increases the sentences by about 46 months Female judges seem to be protecting female victims in sexual assault cases All male panels give lengthier sentences by 106 months if there is a male victim than those including female jurists . . .").

⁴³ Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 *Case W Res J Intl L* 277, 282 (2002). See also Navanethem Pillay, *Equal Justice for Women: A Personal Journey*, 50 *Ariz L Rev* 657, 665–66 (2008); Terris, Romano, and Swigart, *The International Judge* at 44–45 (cited in note 34); Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the ICTR*, in Deena R. Hurwitz and Margaret

insistence, combined with the efforts of non-governmental organizations, resulted in amendment of Akayesu's indictment to include charges of sexual violence.⁴⁴ The Tribunal then convicted him of the crimes against humanity of rape and of genocide founded on rape. Mr. Akayesu was the first person ever convicted of such crimes.⁴⁵ In the words of the former prosecutor of both the Rwandan and Yugoslav Tribunals, Richard Goldstone:

This judicial diligence in facilitating testimony on gender crimes and in urging the inclusion of such crimes in indictments, together with the diligence of Patricia Sellers and others in the Office of the Prosecutor, contributed to the significant progress that the Tribunals have made in their recognition and prosecution of gender crimes.⁴⁶

Similarly, even when ICTY lawyers thought insufficient evidence was available to charge Dragan Nikolić with gender crimes, ICTY Judge Elizabeth Odio Benito "publicly exhorted" prosecutors to include gender crimes in his indictment.⁴⁷ Nikolić ultimately pled guilty to a number of charges, including aiding and abetting the crime against humanity of rape.⁴⁸

Unlike international courts, a plethora of scholars have studied judicial gender effects in United States courts. These studies, however, show a limited and sometimes non-existent gender effect on judging, with the possible exception of cases involving gender issues like family law and discrimination.⁴⁹ Yet a recent survey of United States federal appellate opinions showed a sex discrimination plaintiff was 10 percentage points less likely to prevail if the judge was male.⁵⁰ When a woman was present on a judicial panel deciding a sex discrimination case, men were more likely to rule in favor of the plaintiff.⁵¹ The

L. Satterthwaite, eds, *Human Rights Advocacy Stories* 193, 200–01 (Foundation 2009) (showing that male judges were also solicitous of testimony on crimes of sexual violence in the *Akayesu* case).

⁴⁴ Goldstone, 34 Case W Res J Intl L at 282 (cited in note 43).

⁴⁵ See *Prosecutor v Akayesu*, Judgment, Case No ICTR-96-4, ¶¶ 696, 731 (ICTR Sept 2, 1998); José E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J Intl & Comp L 359, 362–63 (1999).

⁴⁶ Goldstone, 34 Case W Res J Intl L at 282 (cited in note 43).

⁴⁷ Id at 281. See also Terris, Romano, and Swigart, *The International Judge* at 44 (cited in note 34).

⁴⁸ *Prosecutor v Nikolić*, Sentencing Judgment, Case No IT-94-2-S, ¶¶ 15, 21–22 (ICTY Dec 18, 2003).

⁴⁹ Sally J. Kenney, *Thinking about Gender and Judging*, 15 Intl J Legal Prof 87, 96–101 (2008); Malleson, 11 Feminist Legal Studies at 5–8 (cited in note 38). Sally Kenney and Kate Malleson provide a summary of many of these studies and their varied results. See Kenney, 15 Intl J Legal Prof at 96–101; Malleson 11 Feminist Legal Studies at 7 (cited in note 38). Especially since United States President Jimmy Carter made concerted efforts to diversify the United States federal bench, many scholars have studied the impact of gender (and race) on judging in the United States. See, for example, Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 Mich J Gender & L 113, 117–20 (1999).

⁵⁰ Christina L. Boyd, Lee Epstein, and Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am J Pol Sci 389, 390 (2010).

⁵¹ Id at 390, 406.

study found “the presence of a female on the panel actually *causes* male judges to vote in a way they otherwise would not—in favor of plaintiffs.”⁵² Another study showed asylum applicants randomly assigned to female judges were 44 percent more likely to prevail than those assigned to male judges.⁵³

Given the paucity of data on a gender effect in international court judging, statements of women judges are instructive. Both international and domestic female judges assert that their gender affects judging, at least in some areas of the law. For example, former United States Appellate Court and ICTY Judge Patricia Wald wrote:

Do women on the bench really make any difference in the development of the law? The maxim that a wise man and a wise woman will come to the same conclusions is endlessly repeated, but I think it is somewhat simplistic. And certainly different wise women will come to different conclusions. Nearer the truth, I think, is that being a woman and being treated by society as a woman can be a vital element of a judge’s experience. That experience in turn can subtly affect the lens through which she views issues and solutions A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.⁵⁴

Judge Wald has pointed to five major gender-crime precedents crafted when at least one female judge sat on the bench.⁵⁵ While ICC Judge Navanethem Pillay posited women do not “decide in a different way,” she also proposed that “women come with a particular sensitivity and understanding about what happens to people who are raped.”⁵⁶ Similarly, a former judge of the IACHR, Cecilia Medina Quiroga, described a situation where her womanly perspective affected reparations in a case involving a massacre where rape occurred in Guatemala.⁵⁷

National judges echo these sentiments. Although she expressed doubts about the accuracy of studies purporting to show that gender affects judging, United States Supreme Court Justice Ruth Bader Ginsburg suggested gender may play a role in shaping the law nonetheless: “[T]he presence of women on the bench made it possible for the courts to appreciate earlier than they might

⁵² Id at 406.

⁵³ Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan L Rev 295, 342 (2007).

⁵⁴ Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge’s Journey to the Bench and Beyond*, 36 U Toledo L Rev 979, 989 (2005).

⁵⁵ Patricia M. Wald, *What Do Women Want From International Criminal Justice? To Help Shape the Law* (IntLawGrrls Oct 5, 2009), online at <http://intlawgrrls.blogspot.com/2009/10/what-do-women-want-from-international.html> (visited Oct 12, 2011).

⁵⁶ Terris, Romano, and Swigart, *The International Judge* at 48 (cited in note 34).

⁵⁷ Id at 186–87.

otherwise that sexual harassment belongs under Title VII.”⁵⁸ In *Safford Unified School District v Redding*, a case involving the constitutionality of the strip search of a 13-year old girl, Justice Ginsburg asserted of her all-male colleagues: “‘They have never been a 13-year-old girl.’ . . . ‘It’s a very sensitive age for a girl.’ . . . ‘I didn’t think that my colleagues, some of them, quite understood.’”⁵⁹

Similarly, Madam Justice Bertha Wilson, the first woman on Canada’s highest court, wrote that “there are probably whole areas of the law on which there is no uniquely feminine perspective,” but:

In some other areas of the law, [] a distinctly male perspective is clearly discernible. . . . Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature of women and women’s sexuality that, in this day and age, are little short of ludicrous.”⁶⁰

Likewise, Lady Baroness Hale, the sole female justice on the Supreme Court of the United Kingdom, asserted that her “leading a woman’s life” made a difference in her judging in “some areas . . . the most obvious being child-bearing and sexuality.”⁶¹ In her view, women bring “different perceptions to the task of fact-finding—which is what most judges do much of the time.”⁶²

A European Commission survey of both male and female judges, advocates, and public prosecutors in fifteen European Union states found that in cases involving violence against women or children, family issues, and to a lesser extent, sexual discrimination, “it is recognised (mainly by the women interviewed) that gender does have an influence.”⁶³ Several women judges from Northern Ireland made similar statements.⁶⁴ One proposed that differences in experience by gender would increase sentencing in cases involving child abuse and sex crimes.⁶⁵ Another remarked, “[i]t would bring in a different dimension I think. You don’t apply the law any differently. But I do think you see things from a different angle.”⁶⁶ In the same vein, Israeli District Court Judge Hana

⁵⁸ Emily Bazelon, *The Place of Women on the Court*, NY Times MM22 (July 12, 2009) (interviewing Justice Ruth Bader Ginsburg).

⁵⁹ Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, NY Times A16 (June 4, 2009).

⁶⁰ Bertha Wilson, *Will Women Judges Really Make a Difference?* 28 Osgoode Hall L J 507, 515 (1990).

⁶¹ Brenda Hale and Rosemary Hunter, *A Conversation with Baroness Hale*, 16 Feminist Legal Studies 237, 245 (2008).

⁶² Id.

⁶³ See Miriam Anasagasti and Nathalie Wuiame, *Women and Decision-Making in the Judiciary in the European Union* 8 (European Commission 1999). See also id at 23–24.

⁶⁴ Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 25 J L & Socy 490, 510–12 (2008).

⁶⁵ Id at 512.

⁶⁶ Id at 510.

Evenor perceived little difference between male and female judges most of the time.⁶⁷ Yet she pointed out several instances where gender likely makes a difference, including commercial cases “where women may be a bit more suspicious regarding certain transactions,” a case involving the requirement for corroborating testimony in sexual assault cases, and a case involving a heinous sexual assault where she had to convince her male colleagues that a woman did not consent to rape.⁶⁸

While many women judges on international and domestic courts reject the idea that gender makes a difference in every case, they consistently point to situations where it has. Being women affected the way they viewed certain facts, and sometimes, entire substantive areas of the law. In the domestic realm, judges and scholars reference discrimination, family, domestic violence, asylum, criminal, and commercial law cases as, at least occasionally, influenced by judicial gender. Because of the paucity of female judges on international courts, especially until fairly recently, few empirical studies of gender effects are available. Nonetheless, women did vote differently than men on jurisdiction in ICSID cases. Also, where female judges are more common—on human rights and international criminal courts—one empirical study and anecdotal evidence suggest a gender effect. Although feminists offer critiques of several fields and doctrines of international law, such as environmental and economic law and state sovereignty and responsibility,⁶⁹ whether sex representation actually affects adjudication largely remains to be seen. If, or perhaps when, gender affects judging, impartiality requires both male and female judges. Because impartiality is a fundamental driver of legitimacy, severe over- or under-representation of one sex detracts from a court’s normative legitimacy.

IV. SEX REPRESENTATION MATTERS TO SOCIOLOGICAL LEGITIMACY BECAUSE PEOPLE BELIEVE MEN AND WOMEN “THINK DIFFERENTLY”

What if these judges and limited empirical studies are wrong? Maybe women of diverse religions, cultures, nationalities, classes, and sexualities lack some fundamental “essence” that transcends their differences.⁷⁰ In other words,

⁶⁷ Hana Evenor, *Women on the Bench*, in Shimon Shetreet, ed, *Women in Law* 93, 95 (Kluwer 1998).

⁶⁸ Id at 95–96.

⁶⁹ See generally Doris Buss and Ambreena Manji, eds, *International Law: Modern Feminist Approaches* (Hart 2005) (discussing feminist critiques of various areas and doctrines of international law). See also generally Karen Knop, *Re/statements: Feminism and State Sovereignty in International Law*, 3 *Transnatl L & Contemp Probs* 293 (1993).

⁷⁰ D. Kelly Weisberg, *Introduction*, in D. Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* 335 (Temple 1993) (defining essentialism).

perhaps no uniquely “female” perspective exists at all, or at least not in all areas of international law. And can’t judges educate themselves about their partiality when it does exist, as Dean Martha Minow has suggested?⁷¹

Sex representation matters nonetheless. So long as constituencies of these courts believe gender shapes or informs how judges view law or facts, sex representation matters to perceptions of impartiality and fairness, and thereby, sociological legitimacy. The history of the creation of the post-World War II international criminal tribunals suggests non-governmental organizations and states argued for the inclusion of women judges because they thought women would make a difference to outcomes and decisionmaking—regardless of whether they actually do. Further, representation appears to be of particular importance in shaping perceptions of impartiality and fairness where one group has experienced a history of discrimination or unfair treatment, regardless of the subject matter jurisdiction of any specific adjudicatory body. In such cases, constituencies are likely to question the authority of a court that lacks representation of the discriminated group.

A. The International Criminal Tribunals

Groups influential in the shaping of post-World War II international criminal tribunals appeared to believe sex representation affected both the direction of the law and complete fact-finding. During the creation of the ICTY, several non-governmental organizations mobilized for the inclusion of women judges among numerous other initiatives aimed at ensuring perpetrators of rape would be punished.⁷² Women’s groups feared the rape of tens of thousands of mostly Bosnian Muslim women would be ignored.⁷³ Despite horrendous tales of rape and other sex-based violence against women in World War II, Nuremberg prosecutors chose not to prosecute or introduce evidence about these crimes.⁷⁴ Although the International Military Tribunal for the Far East heard some testimony about rape, especially committed by the Japanese troops in Nanking and the Philippines, gender-specific crimes were not widely prosecuted.⁷⁵ Women’s groups thought that the presence of women judges might make a

⁷¹ Martha Minow, *Justice Engendered*, 101 Harv L Rev 10, 74 (1987).

⁷² Jennifer Green, et al, *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 Hastings Women’s L J 171, 176 (1994).

⁷³ See, for example, id (discussing pressure by women’s groups to make sure that gender-based crime be punished).

⁷⁴ Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* 13–14 (Martinus Nijhoff 1997).

⁷⁵ Id at 180, 194, 202–03 n 648.

difference in the prosecution of international crimes against women.⁷⁶ For these reasons, women's groups lobbied hard for the election of Gabrielle Kirk McDonald and Elizabeth Odio Benito to the ICTY bench.⁷⁷

The National Alliance of Women's Organisations, a British umbrella group concerned with women's human rights and equality, saw the establishment of the ICTY as an opportunity not only to "assure full justice to women in the former Yugoslavia who have been and continue to be brutalized in sex-specific ways, but also to correct the historic trivialization of the abuse of women in war."⁷⁸ Among its proposals for achieving these goals were "[t]hat at least 50% of the personnel involved at every level and in every aspect of the Tribunal's functions be women."⁷⁹ The Organization of the Islamic Conference's proposal on the composition of the new Tribunal, too, called for the judges to "represent, on an equitable geographic basis, the world's major legal systems, with particular representation from the Islamic countries and with due regard to gender representation."⁸⁰

Similarly, the Lawyer's Committee for Human Rights proposed that criteria for the selection of judges be "designed to ensure diversity in terms of geographic origin, gender and religion."⁸¹ The United Nations Secretary General's Report on the creation of a Yugoslav tribunal promoted the hiring of women staff, and the United States representative to the Security Council emphasized the importance of women jurists and prosecutors at the ICTY.⁸²

⁷⁶ See Green, et al, 5 Hastings Women's L J at 176 (cited in note 72).

⁷⁷ Id at 176-77.

⁷⁸ Letter of the National Alliance of Women's Organizations to the Secretary General of the United Nations, The United Nations Commission of Experts, the Members of the Security Council and The United Nations Office of Legal Counsel (Mar 31, 1993), in Virginia Morris and Michael P. Scharf, 2 *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* 399 (Transnational 1995).

⁷⁹ Id at 401.

⁸⁰ Letter from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey to the Secretary General of the United Nations (Mar 31, 1993), in Morris and Scharf, 2 *Insider's Guide* 405, 407 (cited in note 78) (emphasis added).

⁸¹ Letter from the Lawyer's Committee for Human Rights to United Nations Secretary General (Apr 19, 1993), in Morris and Scharf, 2 *Insider's Guide* 463, 465 (cited in note 78).

⁸² UN Security Council, *Report of the Secretary General Pursuant to ¶ 2 of Security Council Resolution 808* (1993), UN Doc S/25704, ¶ 88 (May 3, 1993), reprinted in 32 ILM 1159 (1993) ("Given the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women."). Madeleine Albright asserted that "[m]y Government is also determined to see that women jurists sit on the Tribunal and that women prosecutors bring war criminals to justice. Our view is shared by all of the women Permanent Representatives of this Organization." Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting (May 25, 1993), in Morris and Scharf, 2 *Insider's Guide* 179, 186 (cited in note 78).

Nonetheless, when the United Nations Security Council created the Yugoslav, and later, Rwandan tribunals, it included no requirements for sex representation in their statutes.⁸³ Only after the creation of the ICC did the Security Council add a sex-representation provision to the statutes, and then only for ad litem judges.⁸⁴

When the time came to negotiate the constitutive instrument of the ICC, non-governmental organizations and many countries insisted on the inclusion of a provision requiring “a fair representation of female and male judges,” as well as expertise in violence against women and children.⁸⁵ Both non-governmental organizations and states justified the inclusion of this language in part based on perceptions of women judges’ impact on the law and facts developed by the ICTY and the ICTR.⁸⁶ For example, the United States supported the appointment of “qualified women as well as men” because “[o]n the basis of its experience [with the ICTY and the ICTR] . . . [it] believed that that issue needed to be covered explicitly in the Statute if the Court was to be responsive to the concerns of women caught up in international and internal conflicts.”⁸⁷ The representative from Senegal, too, called for gender balance: “The [ICTR and ICTY] . . . had been hampered by the lack of judges with experience in regard to violence against women, rape or discrimination against women. A woman who [had] been raped would naturally find it easier to talk about her experience to another woman.”⁸⁸

Similarly, the Women’s Caucus for Gender Justice, an international women’s human rights organization based in New York at the time of the Rome Statute negotiations, argued that “[f]or the International Criminal Court to effectively dispense and promote universal justice . . . it must necessarily incorporate gender perspectives in all aspects of its jurisdiction, structure and operations.”⁸⁹ Among its imperatives for achieving this goal was gender balance

⁸³ ICTY Statute, Art 12; ICTR Statute, Art 12.

⁸⁴ See Section V.

⁸⁵ Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 McGill L J 217, 238 (2000), citing Rome Statute, Arts 36(8)(a)(iii), 36(8)(b).

⁸⁶ Cate Steains, *Gender Issues*, in Roy S. Lee, ed, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 357, 359 (Hague 1999).

⁸⁷ *Consideration of the Question Concerning the Finalization and Adoption of a Convention on the Establishment of an International Criminal Court in Accordance with General Assembly Resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997*, 14th Meeting (June 24, 1998), in M. Cherif Bassiouni, ed, 3 *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* 208 (Transnational 2005).

⁸⁸ Id at 215.

⁸⁹ NGO Coalition for an International Criminal Court, *Core Principles of the Women’s Caucus*, 8 Intl Crim Ct Monitor 13, 13 (June 1998). Further, the Women’s Caucus wrote that to promote and

in the composition and staffing of all organs of the ICC.⁹⁰ Overall, discussions during the drafting of the Rome Statute about gender balance and expertise on sexual violence revealed that ignoring these issues might harm “perceptions of States, their overall attitude towards the Court, and in the long run, the Court’s efficacy and credibility.”⁹¹

At least for some constituencies involved in the shaping of the post-World War II international criminal tribunals, sex representation was a prerequisite to impartial adjudication. Without both male and female perspectives, these tribunals lacked justified authority, even with no guarantee that the women appointed would in fact be more responsive to these constituencies’ concerns.

B. Traditionally Discriminated or Excluded Groups and Perceptions of Bias

Representation appears especially important to perceptions of impartiality, and thereby legitimacy, when a group has suffered discrimination in the adjudicative system, regardless of the subject matter jurisdiction of any particular court. How judges behaved historically toward an under-represented group, both in courtrooms and in their decisions, makes constituencies question judges’ and benches’ impartiality. Continued exclusion from the bench, as well as from traditional lawmaking bodies, perpetuates perceptions of unfairness and partiality in adjudication. On the other hand, inclusion of previously excluded groups can change perceptions of bias, as well as help to eliminate actual bias in the judicial system.

The experience of South Africa is instructive. At the dawn of South Africa’s new democracy in 1994, 161 of the 166 superior court judges were white males, and only 2 were women.⁹² Given the history of institutionalized discrimination against black South Africans, including by all-white courts, it is not surprising that post-apartheid South Africans demanded a diverse judiciary. Even if all white judges lost all prejudices the day after apartheid ended, how could black South Africans trust an all-white judiciary to be impartial? One need only review the transcript of the Nelson Mandela trial to imagine how most

dispense universal justice, “the Court must have the capacity to ensure that crimes against women are not ignored or treated as trivial or secondary. It must take account of the disproportionate or distinct impact of the core crimes on women. The Court should be equipped and enabled to eliminate common assumptions about and prejudices against women and their experiences.” *Id.*

⁹⁰ *Id.*

⁹¹ Medard R. Rwelamira, *Composition and Administration of the Court*, in Lee, ed., *The International Criminal Court* 153, 167 (cited in note 86).

⁹² Ruth B. Cowan, *Women’s Representation on the Courts in the Republic of South Africa*, 6 U Md L J Race, Relig, Gender & Class 291, 298 (2006).

black South Africans viewed the apartheid-era judicial system. Nelson Mandela asked the white magistrate: “Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?”⁹³ The magistrate questioned the logic of Mandela’s request for recusal: “After all is said and done, there is only one court today and that is the White Man’s court. There is no other court.”⁹⁴ Groups who suffer discrimination by a judicial system are unlikely to view it as legitimate during their continued exclusion. Similarly, an American Bar Association study posited that “[w]ithin communities of color [in the United States] . . . concern that they receive unequal, inferior treatment in the courts is compounded by a lack of confidence due to the lack of diversity throughout the judiciary.”⁹⁵

The mere presence of excluded groups can counteract both actual bias and perceptions of bias.⁹⁶ For example, United Kingdom Supreme Court Justice Lady Baroness Hale asserted: “I think women may make a difference in other ways too: for example by making it difficult for their male colleagues to voice certain views that they might otherwise have been happy to voice.”⁹⁷ In the United States, women judges were at the forefront of the movement to study and remedy gender bias in the courtroom. In 1985, a group of women judges created the National Task Force on Gender Bias in the Courts to study and formulate recommendations to eliminate gender bias in the United States court system.⁹⁸ These taskforces showed rampant bias against women at all levels of the judicial system, and they resulted in the creation of education programs about gender fairness and discrimination for judges.⁹⁹

Groups traditionally discriminated against in the international context, too, fear bias and seek to remedy it through representation of their perspectives. For example, the drafters of the WTO’s Dispute Settlement Understanding chose to

⁹³ Nelson Mandela, *The Struggle Is My Life: His Speeches and Writings Brought Together with Historical Documents and Accounts of Mandela in Prison by Fellow-Prisoners* 135 (International Defence and Aid Fund 1986).

⁹⁴ *Id.* at 134.

⁹⁵ American Bar Association Commission on the 21st Century Judiciary, *Justice in Jeopardy* *ix (July 2003), online at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (visited Oct 12, 2011).

⁹⁶ See, for example, Beiner, 6 Mich J Gender & L at 115–16 (cited in note 49).

⁹⁷ Hale and Hunter, 16 Feminist Legal Studies at 245 (cited in note 61).

⁹⁸ See generally Lynn H. Schafran and Norma J. Wikler, Forward to *Operating a Task Force on Gender Bias in the Courts: A Manual for Action* (Foundation for Women Judges 1986), online at <http://womenlaw.stanford.edu/pdf/gender-bias.pdf> (visited Oct 12, 2011).

⁹⁹ See *id.* See also Lynn H. Schafran, *Promoting Gender Fairness through Judicial Education: A Guide to the Issues and Resources* iii (Women Judges’ Fund for Justice 1989).

give developing states the right to demand adjudicators from developing countries on dispute settlement panels, although only in disputes between developed and developing states.¹⁰⁰ It is not surprising that developing countries demanded developing-country judges, given Third World critiques of international law and institutions.¹⁰¹

Like most of the courts in Section II of this Article, the world's most important international lawmaking bodies are usually sex un-representative. For example, only two of thirty-four members of the International Law Commission, the prestigious United Nations body charged with the "progressive development" of international law, were women in September 2011.¹⁰² Only two women currently serve on the eleven-member Inter-American Juridical Committee.¹⁰³ While the United Nations has made strides as a whole in improving sex representativeness in its staff, women remain under-represented at the senior level.¹⁰⁴ The chart below shows the number and percentage of women on the United Nations human rights treaty bodies as of February 20, 2011. Women make up less than 40 percent of the membership on half of these bodies. Only the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women have over 50 percent female members.

For many feminist scholars, the exclusion of women from international law-making processes creates a presumption of bias in all kinds of international law, a presumption that requires sex representation to be rebutted.¹⁰⁵ Exclusion or severe under-representation of women profoundly shapes the law by allowing

¹⁰⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, Art 8(10), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125, 1232 (1994) ("When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.").

¹⁰¹ See generally Antony Anghie and B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 Chinese J Intl L 77 (2003); Makau Mutua and Antony Anghie, *What is TWAIL?*, 94 Am Soc Intl L Proc 31 (2000).

¹⁰² International Law Commission, *Membership*, online at <http://untreaty.un.org/ilc/ilcmembe.htm> (visited Oct 13, 2011).

¹⁰³ Inter-American Juridical Committee, *Members*, online at http://www.oas.org/cji/eng/members_iajc.htm (visited Oct 13, 2011).

¹⁰⁴ Women made up only 26.6 percent of staff at the Assistant Secretary General level in December 2009. See *The Status of Women in the United Nations System and in the Secretariat from January 1, 2008 to December 31, 2009*, online at <http://www.un.org/womenwatch/osagi/pdf/As-of-31-December-2009.pdf> (visited Oct 13, 2011).

¹⁰⁵ See Charlesworth and Chinkin, *Boundaries of International Law* at 308 (cited in note 25); Hilary Charlesworth, Christine Chinkin, and Shelley Wright, *Feminist Approaches to International Law*, 85 Am J Intl L 613, 625 (1991).

“male concerns” to continue to be construed as “human concerns,” while shunting “women’s issues” into a narrow, marginal category.¹⁰⁶

Treaty Body	Women/Total	Percent Women
Human Rights	5/18 ¹⁰⁷	27.8
Economic, Social and Cultural Rights	1/6 ¹⁰⁸	16.7
Elimination of Discrimination Against Women	22/23 ¹⁰⁹	95.7
Elimination of Racial Discrimination	1/9 ¹¹⁰	11.1
Against Torture	2/5 ¹¹¹	40.0
Rights of the Child	10/18 ¹¹²	55.6
Migrant Workers	2/7 ¹¹³	28.6
Rights of Persons with Disabilities	8/18 ¹¹⁴	44.4

¹⁰⁶ Charlesworth, Chinkin, and Wright, 85 Am J Intl L at 625 (cited in note 105). See also Charlesworth and Chinkin, *Boundaries of International Law* at 1 (cited in note 25).

¹⁰⁷ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, *Members*, online at <http://www2.ohchr.org/english/bodies/hrc/members.htm> (visited Feb 20, 2011).

¹⁰⁸ Office of the United Nations High Commissioner for Human Rights, Committee on Economic, Social and Cultural Rights, *Members*, online at <http://www2.ohchr.org/english/bodies/cescr/members.htm> (visited Feb 20, 2011).

¹⁰⁹ Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Discrimination against Women, *Membership*, online at <http://www2.ohchr.org/english/bodies/cedaw/membership.htm> (visited Feb 20, 2011).

¹¹⁰ Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, *Members*, online at <http://www2.ohchr.org/english/bodies/cecrd/members.htm> (visited Feb 20, 2011).

¹¹¹ Office of the United Nations High Commissioner for Human Rights, Committee against Torture, *Membership*, online at <http://www2.ohchr.org/english/bodies/cat/members.htm> (visited Feb 20, 2011).

¹¹² Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child, *Members* online at <http://www2.ohchr.org/english/bodies/crc/members.htm> (visited Feb 20, 2011).

¹¹³ Office of the United Nations High Commissioner for Human Rights, Committee on Migrant Workers, *Membership*, online at <http://www2.ohchr.org/english/bodies/cmww/members.htm> (visited Feb 20, 2011).

So long as constituencies believe the sex of the judge affects judging, overrepresentation of one sex on the bench inherently harms perceptions of impartiality and fairness, even if it makes no actual difference in case outcomes. In creating post-World War II international criminal courts, both non-governmental organizations and states pushed for the inclusion of women, in part, because of beliefs that the presence of women would influence the direction of the law or the development of facts. Further, when a group has suffered a history of discrimination or exclusion, it is difficult to overcome a presumption of bias without including the group on the bench, regardless of the subject matter jurisdiction of a particular court.

V. SEX REPRESENTATION, DEMOCRATIC VALUES, AND LEGITIMACY

Imagine a world court with judges from only one country or one region of the world. Even if its jurists were world-renowned scholars and diplomats, such a court would lack legitimacy. Regardless of the soundness of its rulings, its authority would be questioned. International courts' constitutive instruments frequently require geographic diversity on the bench or representation by national judges.¹¹⁵ Legitimate adjudication requires both impartial and independent judges as well as benches with some link to the states their rulings affect. While Sections III and IV of this Article focus on the relationship between sex representation, impartiality, and legitimacy, this Section examines the relationship between representativeness *qua* representativeness and legitimacy. Just as judges' geographical diversity matters to international courts' legitimacy, this Section proposes that sex representation strengthens the legitimacy of international courts by reflecting the population subject to their

¹¹⁴ Office of the United Nations High Commissioner for Human Rights, *Elected Members of the Committee on the Rights of Persons with Disabilities*, online at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> (visited Feb 20, 2011).

¹¹⁵ See, for example, ICJ Statute, Art 9 ("E]lectors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."); International Tribunal of the Law of the Sea, Statute of the Tribunal, Art 2 (1982), 1833 UN Treaty Ser 561, 561 (1994) ("In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured."); Consolidated Version of the Treaty on European Union, 2008 OJ (C115) 27 ("The Court of Justice shall consist of one judge from each Member State."); Statute of the Inter-American Court on Human Rights, OAS Res 448 (IX-0/79) (IACHR Statute) ("No two judges may be nationals of the same State."); Convention for the Protection of Human Rights and Fundamental Freedoms Art 20 (Nov 4, 1950), 213 UN Treaty Ser 221, § 4, Art 38 (1950) ("The European Court of Human Rights shall consist of a number of judges equal to that of the High Contracting Parties.").

authority, an important democratic value. Nonetheless, while representativeness as a democratic value may be an important contributor to normative legitimacy, it may harm perceptions of justified authority, or sociological legitimacy, for some constituencies.

Traditionally, international law scholars evaluated the legitimacy of international institutions by focusing on legal legitimacy alone: did states consent to subject themselves to an institution's authority, and did the institution act within the scope of that delegated authority?¹¹⁶ Whether authority derived from the will of the *people* was a question reserved for assessments of individual governments' legitimacy, not of international institutions' legitimacy.¹¹⁷ In the wake of challenges to consent as the basis for the legitimacy of international institutions,¹¹⁸ scholars are beginning to emphasize the relevance of democratic values to international courts' legitimacy. These democratic values may include transparency, accountability, participation, and representativeness.¹¹⁹ The extent to which international courts are infused with these values matters for legitimacy because international courts wield public authority by shaping the law¹²⁰ and because of the "powerful normative and social appeal of democracy as a governing ideal."¹²¹ This Article seeks to enrich our understanding of "representativeness" by arguing that it must include attention to the balance of the sexes on the bench.

New requirements for the appointment of international court judges from groups that transcend state boundaries suggest that the presence of various groups—not just women—on the bench matters to the legitimacy of international courts. These requirements are usually framed in terms of "representation," a fundamental democratic value. For example, the constitutive

¹¹⁶ Bodansky, 93 Am J Intl L at 605 (cited in note 18) ("The authority of the International Court of Justice, for example, derives from its Statute, to which UN member states consented. And the Court's continuing authority depends on its acting in accordance with the Statute. If it went outside or against the Statute, then its actions would lack legitimacy."). See also Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* 39 (Oxford 2009).

¹¹⁷ See, for example, Jean d'Aspremont and Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, 34 Fordham Intl L J 190, 197, 201–02 (2011).

¹¹⁸ Gráinne De Búrca, *Developing Democracy Beyond the State*, 46 Colum J Transnatl L 221, 226–27 (2008).

¹¹⁹ See, for example, Grossman, 41 Geo Wash Intl L Rev at 153–60 (cited in note 18); von Bogdandy and Venzke, *In Whose Name?* at **27, 36–37 (cited in note 11); Armin von Bogdandy and Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 Ger L J 1341, 1360 (2011). See also Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 Ger L J 1175, 1176 (2011).

¹²⁰ Von Bogdandy and Venzke, *In Whose Name?* at **2–3, 16–18 (cited in note 11).

¹²¹ De Búrca, 46 Colum J Transnatl L at 226–27 (cited in note 118).

instrument of the African Court of Human and Peoples' Rights states that electors of judges should not only ensure that "there is representation of the main regions of Africa and of their principal legal traditions," but also "that there is adequate gender representation."¹²² The Rome Statute of the ICC requires both individuals with legal expertise in violence against women and children and "a fair representation of female and male judges" on the ICC bench.¹²³ States' decision to include both of these groups suggests that an international criminal court with no women judges would be unacceptable, even if all the male judges were legal experts in violence against women and children.¹²⁴ It is not just expertise (or assumptions about expertise based on sex) that matters, but rather, actual representation of constituencies of the court. Among those constituencies are victims of violations of international criminal law. For example, in the Rome Statute negotiations, the Australian delegate justified his support for gender balance and expertise on sexual violence because "[w]omen and children were often the victims of the crimes which would fall within its jurisdiction."¹²⁵ The history of the debates over whether to include these provisions shows that many states and non-state actors thought including both sexes on the bench was not merely a "gesture in the direction of political correctness,"¹²⁶ but rather, that it is important to the legitimacy of the institution.¹²⁷

Similarly, Bosnia's ambassador to the United Nations, Mohamed Sacirbey, lamented the absence of Muslims from the bench of the ICTY: "It is absurd that most of the victims are Muslim, yet they have no representatives on the Tribunal."¹²⁸ Conrad Harper, United States State Department Legal Adviser, told the press that the Clinton Administration was interested in nominating a woman as ICTY judge "because of the use of rape as an instrument of warfare in the

¹²² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art 14(2), (3), OAU Doc CAB/LEG/665 (1998).

¹²³ Rome Statute, Arts 36(8)(a)–(b) (cited in note 35).

¹²⁴ Interestingly, it appears that only the Afghani representative conflated the two. He argued in favor of deleting the reference to gender balance, and instead, the language should be changed to state: "The expert on issues related to sexual and gender violence and violence against children should be a woman." *Adoption of a Convention on the Establishment of an International Criminal Court* at 215 (cited in note 87).

¹²⁵ *Id.* at 219.

¹²⁶ John R.W.D. Jones, *Composition of the Court*, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, eds, 1 *The Rome Statute of the International Criminal Court: A Commentary* 235, 255 (Oxford 2002).

¹²⁷ See generally, Grossman, 11 *Intl Crim L Rev* 643 (cited in note 21).

¹²⁸ Iain Guest, *On Trial: The United Nations, War Crimes and the Former Yugoslavia* 131 (Refugee Policy Group 1995).

Bosnian conflict.”¹²⁹ Because women were victims, they too should judge the perpetrators. Judge Wald made a similar point with regard to the Rwanda Tribunal: “In general, women had been woefully underrepresented on all international tribunals.”¹³⁰ After the Rome Statute was signed, the Security Council amended both the ICTY and the ICTR Statutes to add *ad litem* judges. Echoing the language of the Rome Statute, both Security Council resolutions required states nominating candidates for *ad litem* judge to take “into account the importance of a fair representation of female and male candidates.”¹³¹

Although the constitutive instrument of the ECHR contains no sex representation provision, in 2004 the Parliamentary Assembly of the Council of Europe stated it would not consider unisex lists of candidates to the ECHR.¹³² In 2005, the Committee of Ministers shared “the Assembly’s determination to secure a proper balance of the sexes in the composition of the Court” and agreed that lists of candidates should contain candidates of each sex.¹³³

The debate concerning the Parliamentary Assembly’s new requirement and Malta’s failure to include female candidates on its lists for almost four years suggests sex representation may play a role in assessments of the ECHR’s legitimacy. A Report from the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly argued that “it is in the interests of the

¹²⁹ Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* 66 (Carolina Academic 1997), citing Brenda Sapino, *Gabrielle McDonald’s Star Turn*, Tex Law 11 (Oct 2, 1995).

¹³⁰ Wald, 36 U Toledo L Rev at 991 (cited in note 54).

¹³¹ Security Council Res No 1329, UN Doc S/RES/1329 (2000), Annex I, Art 13; Security Council Res No 1431, UN Doc S/RES/1431 (2002), Annex I, Art 12. Neither statute was amended to include female and male permanent judges.

¹³² It decided that “political groups, when nominating their representatives to the sub-committee [for interviewing candidates] should aim to include at least 40% women, which is the parity threshold deemed necessary by the Council of Europe to exclude gender bias in decision-making processes.” Candidates for European Court of Human Rights, Eur Parl Assembly Res No 1366 (2004). Also, “one of the criteria used by the sub-committee should be that, in the case of equal merit, preference should be given to a candidate of the sex under-represented at the Court.” *Id.* In 2005, the Parliamentary Assembly amended the requirement to state that it would not consider lists of candidates where “the list does not include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong.” Candidates for European Court of Human Rights, Eur Parl Assembly Res No 1426 (2005).

¹³³ Nonetheless, it chose not to seek to amend the Convention to require gender balance on the ECHR, arguing that in exceptional circumstances, states should be permitted to derogate from this general rule. Reply from the Committee of Ministers on Candidates for the European Court of Human Rights, Eur Parl Assembly Doc No 10506, ¶¶ 7–8 (Apr 22, 2005). See generally Alastair Mowbray, *The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights*, 8 Hum Rts L Rev 549 (2008) (discussing the legislative history of the sex representation requirements).

effectiveness” of the ECHR to address the issue of under-representation of women on the Court.¹³⁴ Another committee linked the mandate of the human rights court to the presence of women judges, arguing that “the Court risks losing credibility if it is not seen to be fighting gender-based discrimination in its own ranks.”¹³⁵ Although the ECHR issued an Advisory Opinion in February 2008 stating that the Parliament could not reject a list for failure to include a female candidate,¹³⁶ Malta ultimately submitted a list with a female candidate.¹³⁷ In addition to the Assembly’s requirements, the Rules of Court require it to “pursue a policy aimed at securing a balanced representation of the sexes” in selecting the President, Vice President, and Sections of the Court.¹³⁸

Outside the realm of human rights and international criminal courts, scholars of the ICJ, too, question whether its most frequent litigants should be better represented on the bench.¹³⁹ In other words, general geographic diversity is not enough; what matters is whether the regions that include the states that most frequently utilize the Court are adequately reflected on the Court’s bench. Similarly, the WTO’s Dispute Settlement Understanding allows developing states that are parties to a dispute to request a panel member from a developing state.¹⁴⁰ Again, the emphasis is not on geographic diversity per se, but rather, on the inclusion of an adjudicator from a developing state.

Representation of the various groups that make up society on the judicial bench is a common theme in the domestic context as well, at least among Western states. For example, a European Union study of women and the

¹³⁴ Report of the Committee on Legal Affairs and Human Rights, Candidates for the European Court of Human Rights, Eur Parl Assembly Doc No 9963 (Oct 7, 2003).

¹³⁵ Opinion of the Committee on Equal Opportunities for Women and Men, Candidates to the European Court of Human Rights, Eur Parl Assembly Doc No 10048 (Jan 26, 2004).

¹³⁶ *Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights*, 49 Eur Hum Rts Rep 33, ¶ 54 (Grand Chamber 2009).

¹³⁷ See Council of Europe, Parliamentary Assembly, Third Part of the 2010 Ordinary Session, Election of a Judge to the European Court of Human Rights (June 22, 2010), online at http://assembly.coe.int/CommitteeDocs/2010/20100622_ElectionMalte.pdf (visited Oct 13, 2011).

¹³⁸ European Court of Human Rights, *Rules of Court*, Rule 14, online at <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/> (visited Oct 13, 2011). See also *id.* at Rule 25 (“The composition of Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties.”).

¹³⁹ Georges Abi-Saab, *Ensuring the Best Bench: Ways of Selecting Judges*, in Connie Peck and Roy S. Lee, eds, *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, 165, 174–75 (Martinus Nijhoff 1997).

¹⁴⁰ See Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 ILM at 1232 (cited in note 100).

judiciary asserts: "The balanced participation of women and men in decision-making is considered crucial to the legitimacy of representative and advisory bodies, and therefore also of our European democracies."¹⁴¹ Judge Gladys Kessler, a United States judge and former president of the National Association of Women Judges, asserted that "the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged."¹⁴² In Justice Ginsburg's words, in 2009, "it just doesn't look right" to have only one woman on the United States Supreme Court.¹⁴³ Similarly, an Israeli author argues on behalf of a "reflective judiciary" in Israeli society inclusive of women judges: "The judiciary is a branch of government, not merely a dispute-resolution institution. As such, it cannot be composed in total disregard of society. . . . Due regard must be given to the consideration of fair reflection."¹⁴⁴

Perhaps the strongest argument for sex representation on international courts is that women make up almost half the world's population.¹⁴⁵ Severe under-representation of women, or over-representation of men, thus threatens legitimacy. This argument becomes even more compelling when female presidents have served in countries as diverse as Argentina, Brazil, Chile, Costa Rica, Finland, Iceland, India, Indonesia, Ireland, Latvia, Liberia, Lithuania, the Philippines, Sri Lanka, and Switzerland, among others.¹⁴⁶ Over 20 percent of supreme court judges in Albania, Argentina, Austria, Costa Rica, Croatia, the Czech Republic, Honduras, Ireland, Norway, the Philippines, Switzerland, and Uganda were women in 2008.¹⁴⁷ Women have also served as ministers of justice in countries including Barbados, Bolivia, Canada, Denmark, Honduras, Norway, Peru, Suriname, and the United States.¹⁴⁸ Surely a female candidate worthy of an

¹⁴¹ Anasagasti and Wuiame, *Women and Decision-Making* at 7 (cited in note 63).

¹⁴² Wilson, 28 Osgoode Hall L J at 518 (cited in note 60).

¹⁴³ Bazelon, *The Place of Women* at MM22 (cited in note 58).

¹⁴⁴ Shimon Shetreet, *The Doctrinal Reasoning for More Women Judges: The Principle of Reflective Judiciary*, in Shimon Shetreet, ed, *Women in Law* 183, 190 (Kluwer 1998).

¹⁴⁵ See *World Population Prospects* (cited in note 4).

¹⁴⁶ These include Cristina Fernández de Kirchner, Dilma Rousseff, Michelle Bachelet Jeria, Laura Chinchilla Miranda, Tarja Kaarina Halonen, Vigdís Finnbogadóttir, Pratibha Patil, Megawati Sukarnoputri, Mary Robinson, Vaira Vike-Freiberga, Ellen Johnson Sirleaf, Dalia Grybauskaitė, Maria Gloria Macapagal-Arroyo, Chandrika Kumaratunga, and Ruth Dreifuss.

¹⁴⁷ United Nations Development Fund for Women, *Who Answers to Women? Gender & Accountability*, *78, online at <http://www.unifem.org/progress/2008/publication.html> (visited Sept 22, 2011).

¹⁴⁸ Mia Mottley (Attorney General), Nilda Copa Condori, Kim Campbell, Helga Pedersen, Vera Sofia Rubi, Elisabeth Schweigaard Selmer, Rosario Fernández Figueroa, Yvonne Reine Antoinette Raveles-Resida, and Janet Reno (Attorney General). See *Worldwide Guide to Women in*

international judgeship can be found in countries where women are presidents, judges of the highest courts, and government ministers. Sex unrepresentativeness threatens the normative legitimacy of international courts because these institutions wield public authority,¹⁴⁹ yet they fail to reflect fairly those affected by their decisions.

While sex representation may be important to normative legitimacy because representation is an important democratic value, representation *qua* representation may sometimes harm perceptions of justified authority, or sociological legitimacy, for some constituencies. For example, although several constituencies pushed hard for women judges on the ICC, there was no public uproar over the entirely male ITLOS bench for the fifteen year period from its founding until October 2011. Even during the negotiations over the ICC, some states were hostile, ambivalent, or silent about including women judges on the bench.¹⁵⁰ As one respondent to a European Union study reminded interviewers: “Justice was handed down by men and the fact of being male was an important component of the professional model. Authority was linked to physical presence, a powerful voice and the fear inspired.”¹⁵¹ A different respondent to the study asserted that “[t]he entry into the judiciary of women en masse could introduce uncertainty as to the image of its authority figures.”¹⁵² The world might view a World Court with thirteen women and two men as less authoritative than the current ratio.

Further, when constituencies perceive that a sex-representation requirement is inconsistent with other qualifications required by a court’s statute, the perceived authority of a court may decline. For example, in its rejection of the Parliamentary Assembly’s refusal to consider Malta’s all-male list of candidates, the ECHR asserted that the individual qualifications requirements of the European Convention on Human Rights are “of considerable importance for the Court, in the sense that it is vital to its authority and the quality of its decisions that it be made up of members of the highest legal and moral

Leadership, *Female Ministers of Interior, Home Affairs, Security, Civil Defence and Police*, online at http://www.guide2womenleaders.com/Security_ministers.htm (visited Oct 13, 2011).

¹⁴⁹ See generally von Bogdandy and Venzke, *In Whose Name?* (cited in note 11) (discussing the applicability of democratic principles to international courts).

¹⁵⁰ For example, China took no strong position with regard to the sex representation provision of the Rome Statute. *Adoption of a Convention on the Establishment of an International Criminal Court* at 212 (cited in note 87). The representative from the United Arab Emirates thought that subparagraphs (d) and (e) should be deleted, stating, “that did not mean that the Court would not have access to the necessary expertise on questions of sexual or gender violence.” *Id.* at 216.

¹⁵¹ Anasagasti and Wuiaume, *Women and Decision-Making* at 25 (cited in note 63).

¹⁵² *Id.*

standing.”¹⁵³ Interestingly, similar critiques are leveled at sex-neutral equitable distribution requirements: some argue that geographic diversity requirements resulted in lower staff quality in the United Nations Secretariat.¹⁵⁴

Nevertheless, it is worth questioning whether the qualifications argument holds water for the international judiciary, especially when women serve in high positions, including as presidents, ministers, and judges, around the globe. Further, perhaps perceptions of authority linked to male characteristics will change as women increasingly take on positions of power. Given the importance of including female judges on international courts for normative legitimacy, those who make these arguments bear the burden of proving no adequate female candidates are available.

Representation is an important democratic value and states’ decisions to require representation of groups transcending state boundaries suggest it is increasingly important to the legitimacy of international courts. Severe underrepresentation of women—and other groups—on the bench undermines normative legitimacy. Nonetheless, women’s presence may harm perceptions of authority for some constituencies.

VI. CONCLUSION

More international courts make decisions that affect our lives today than ever before.¹⁵⁵ They define the scope of our human rights, and they decide who will be held accountable for what kind of international crimes and how they shall be punished. They determine which communities will benefit from the exploitation of oil in disputed parts of the ocean, whether environmental harm has taken place, and what, if any, reparations must be paid and to whom. They play an integral role in defining fair trade practices and determining whether natural resources belong to the people within a state or to multinational corporations. The increasing judicialization of international dispute resolution requires serious inquiry into the legitimacy of these institutions.¹⁵⁶ It also

¹⁵³ *Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates*, 49 Eur Hum Rts Rep at ¶ 42 (cited in note 136).

¹⁵⁴ See William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 Colum J Transnatl L 299, 369–70 (2001).

¹⁵⁵ See generally The Project on International Courts and Tribunals, *The International Judiciary in Context*, online at http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (visited Oct 13, 2011) (listing numerous international courts and quasi-judicial institutions).

¹⁵⁶ See generally Schneider, 2006 J Disp Resol 119 (cited in note 15) (discussing the increased use of international courts to decide disputes between states); Koskeniemi, *The Ideology of International Adjudication* at 152 (cited in note 11). See also von Bogdandy and Venzke, *In Whose Name?* at *43 (cited in note 11).

mandates more careful investigation of international judges' identities and the sources of their legitimacy.¹⁵⁷

This Article seeks to advance our understanding of international courts' legitimacy and the relationship between legitimacy and who sits on the bench. In essence, this Article asks whether we should care that few women sit on international court benches. Its thesis is that we should. The Article proposes that under-representation of one sex affects normative legitimacy because it endangers impartiality and introduces bias when men and women approach judging differently. Even if men and women do not "think differently," a sex unrepresentative bench harms sociological legitimacy for constituencies who believe they think differently nonetheless. For groups traditionally excluded from international lawmaking or historically subjected to discrimination, inclusion likely strengthens sociological legitimacy, while continued exclusion perpetuates conclusions about unfairness. Finally, sex representation is important to normative legitimacy of international courts because representation is an important democratic value, although it may endanger sociological legitimacy for constituencies who associate authority with male judges or if women are unqualified or perceived as less qualified.

Although its focus is on sex representation, this Article gives rise to questions about other kinds of representation. Which other groups that transcend state boundaries deserve representation on benches and panels? What about the poor, the disabled, children, and indigenous peoples? What about non-governmental organizations or multinational corporations? What other groups have we not yet identified? To what extent does the composition of the bench required for legitimacy depend on the court's subject matter jurisdiction? In other words, is it important to include indigenous members on human rights courts but not the WTO's Appellate Body?

Finally, if women judges do matter to the legitimacy of international courts, as this Article proposes, we must seriously consider what practical steps must be taken to increase the number of credible female candidates for judicial offices around the world. What, if anything, about the selection process for international judges makes women less likely to become international court judges? Should world citizens, rather than just states—the classical international law actor—be involved in choosing judges on international courts?¹⁵⁸ Should committees of experts appointed by states, rather than states themselves, nominate candidates? As more cases with serious implications are decided in

¹⁵⁷ See Romano, 39 NYU J Int'l L & Pol at 800 (cited in note 15).

¹⁵⁸ Von Bogdandy and Venzke, 23 Eur J Int'l L at *45 (cited in note 11) (suggesting that "international adjudication in the postnational constellation should be guided by the idea of world citizenship").

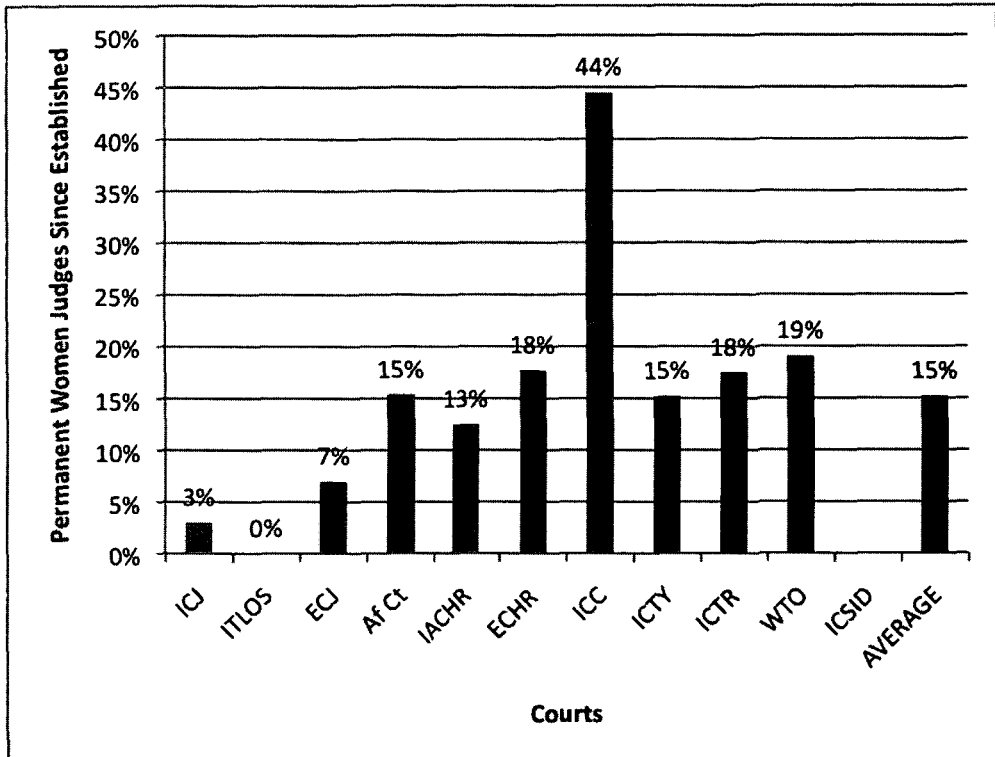
international courts, calls for sex and other kinds of representation are likely to grow louder. Both men and women interested in protecting international courts and the law they interpret and apply would do well to heed these calls.

TABLE I. Statistics on Women's Participation on International Courts

Court	International Court of Justice	International Tribunal for the Law of the Sea	European Court of Justice	African Court of Human and Peoples' Rights	Inter-American Court of Human Rights	European Court of Human Rights
No. Women/ Total (permanent)	2/15 =13% ⁱ	0/21 ⁱⁱ =0%	4/27 ⁱⁱⁱ =15%	2/11 ^{iv} =18%	2/7 ^v =29%	17/46 ^{vi} =37%
No. Women/ Total (ad hoc or ad litem)	0/24 ^{vii} =0%	n/a ^{viii}	n/a ^{ix}	n/a ^x	1/8 ^{xi} =13% (in 2009)	list unavailable ^{xii}
No. Women /Total (permanent and ad hoc)	2/39 =5%	0/21 =0%	4/27 =15%	2/11 =18%	3/15 =20%	17/46 =37% (ad hoc unavailable)
Percentage Women Since Established (permanent)	3/100 ^{xiii} =3%	0/35 ^{xiv} =0%	6/85 ^{xv} =7%	2/13 ^{xvi} = 15%	4/32 ^{xvii} =13%	26/147 ^{xviii} =18%
Percentage Women Since Established (ad hoc or ad litem)	2/155 ^{xix} =1%	0/7 ^{xx} =0%	n/a	n/a	1/66 ^{xxi} =2%	ad hoc unavailable
Year Established	1945 ^{xxii}	1994 ^{xxiii}	1952 ^{xxiv}	1998 ^{xxv}	1969 ^{xxvi}	1950 ^{xxvii}

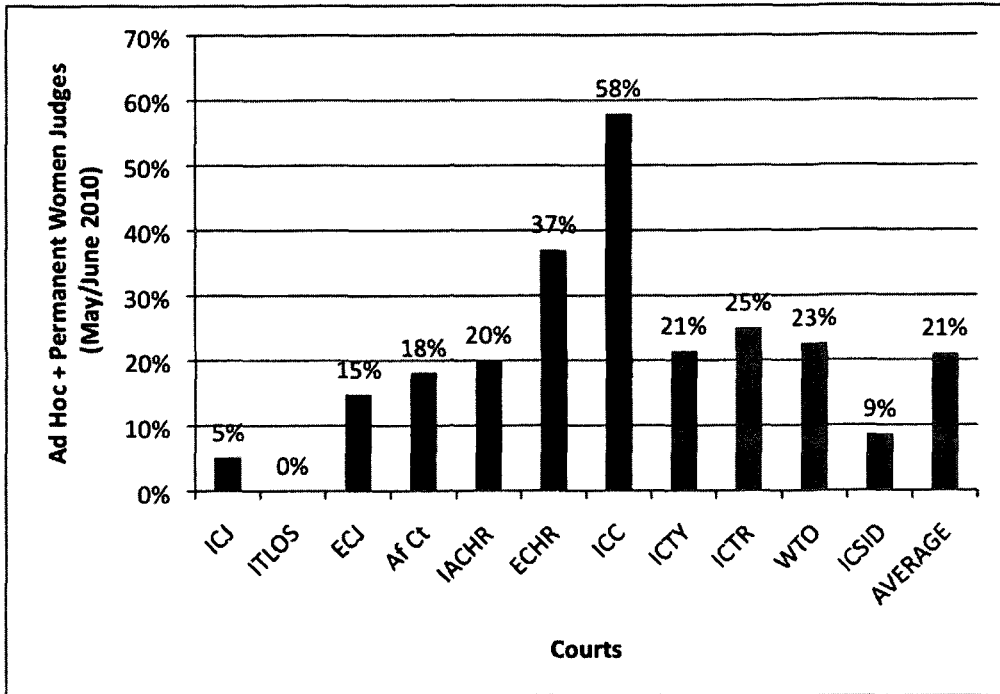
Court	International Criminal Court	International Criminal Tribunal for the Former Yugoslavia	International Criminal Tribunal for Rwanda	World Trade Organization	International Centre for the Settlement of Investment Disputes
No. Women/ Total (permanent)	11/19 ^{xxviii} =58%	1/16 ^{xxix} =6%	3/13 ^{xxx} =23%	3/7 ^{xxxi} =43% (App Body)	n/a ^{xxxii}
No. Women/ Total (ad hoc or ad litem)	n/a	5/12 ^{xxxiii} =42%	3/11 ^{xxxiv} =27%	4/24 ^{xxxv} =17% (Panels)	5/58 ^{xxxvi} =9%
No. Women /Total (permanent and ad hoc)	11/19 =58%	6/28 =21%	6/24 =25%	7/31 =23%	5/58 =9%
Percentage Women Since Established (permanent)	12/27 ^{xxxvii} =44%	7/46 ^{xxxviii} =15%	7/40 ^{xxxix} =18%	4/21 ^{xl} =19% (App Body)	n/a
Percentage Women Since Established (ad hoc or ad litem)	n/a	13/33 ^{xli} =39%	5/14 ^{xlii} =36%	94/586 ^{xliii} =16% (Panels)	32/582 ^{xliv} =6%
Year Established	1998 ^{xlvi}	1993 ^{xlvi}	1994 ^{xlvi}	1994 ^{xlvi}	1965 ^{xlix}

FIGURE A. Permanent Women Judges Since Established*



* Permanent women judges for the WTO are Appellate Body judges. No percentage is listed for ICSID because all arbitrations are ad hoc.

FIGURE B. Ad Hoc/Ad Litem plus Permanent Women Judges in May/June 2010[†]



i International Court of Justice (ICJ), *Members*, online at <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (visited Feb 27, 2011).

ii International Tribunal for the Law of the Sea (ITLOS), *Members*, online at <http://www.itlos.org/index.php?id=96> (visited May 25, 2010).

iii Court of Justice of the European Union (ECJ), *Members*, online at http://curia.europa.eu/jcms/jcms/Jo2_7026/ (visited June 1, 2010).

iv African Court on Human and Peoples' Rights (ACHPR), *Judges of the Court*, online at <http://www.african-court.org/en/court/judges/> (visited May 23, 2010).

[†] The numbers for the ICJ are from February 27, 2011.

- v Inter-American Court of Human Rights (IACHR), *Composition of the Court*, online at <http://www.corteidh.or.cr/composicion.cfm?&CFID=1266095&CFTOKEN=80315040> (visited May 23, 2010).
- vi European Court of Human Rights (ECHR), *Composition of the Court*, online at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Judges+of+the+Court/> (visited May 24, 2010).
- vii There were no women serving as judges ad hoc in the eleven cases pending before the ICJ on October 5, 2011. ICJ, *Current Justices Ad Hoc*, online at <http://www.icj-cij.org/court/index.php?p1=1&p2=5&p3=1> (visited Feb 27, 2011).
- viii ITLOS, *Judges Ad Hoc*, online at <http://www.itlos.org/index.php?id=18> (visited May 23, 2011); ITLOS, *Docket: List of Pending Cases and Current Status*, online at <http://www.itlos.org/index.php?id=34> (visited May 23, 2010).
- ix The Statute of the Court of Justice of the European Union does not allow for ad hoc or ad litem judges. Protocol (No 3) on the Statute of the Court of Justice of the European Union, OJC 83 (2010).
- x Neither the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights nor the Interim Rules of Court mention the appointment of ad hoc or ad litem judges. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art 14(2), (3), OAU Doc CAB/LEG/665 (1998) (Protocol to the Charter on Human and Peoples' Rights); ACHPR, *Court Establishment*, online at <http://www.african-court.org/en/basic-documents/court-establishment/> (visited Nov 22, 2011).
- xi List provided by the IACHR on June 3, 2010 (on file with author).
- xii Although Rule 29 of the Rules of the ECHR permits the appointment of ad hoc judges, the Court possesses no list of individuals who have been appointed as ad hoc judges. According to the ECHR library, such a list would contain many thousand names (June 2, 2010) (email on file with author). Consequently, this statistic is not included.
- xiii ICJ, *Members* (cited in note i).
- xiv ITLOS, *Members* (cited in note ii).
- xv Former members can be found at ECJ, *Former Members*, online at http://curia.europa.eu/jcms/jcms/Jo2_7014/ (visited May 23, 2010).
- xvi Derived from list of judges elected in 2006 and 2008 by the African Union. African Union, *List of the Judges of the African Court on Human and People's Rights Elected by the 13th Ordinary Session of the Executive Council in July 2006* (translation from original French), online at http://www.africa-union.org/root/au/organs/Court_of_Justice_en.htm (visited June 2, 2010); African Union, *List of the Judges of the African Court on Human and People's Rights Elected by the 13th Ordinary Session of the Executive Council in July 2008*, online at http://www.africa-union.org/root/au/organs/Court_of_Justice_en.htm (visited June 2, 2010).
- xvii List of judges provided by the IACHR on June 3, 2010 (on file with author).
- xviii Between the time this list was generated and May 24, 2010, Judge Guido Raimondi was appointed. ECHR, *Composition of the Court* (cited in note vi).
- xix When individuals served on more than one case as judge ad hoc, they were counted once for each time they served. See note vii.
- xx ITLOS, *Judges Ad Hoc* (cited in note viii).
- xxi List of ad hoc judges provided by the IACHR on June 3, 2010 (on file with author). Each judge was counted once for each time he or she was named as a judge ad hoc in any phase of a case.
- xxii ICJ, *The Court*, online at <http://www.icj-cij.org/court/index.php?p1=1> (visited Aug 15, 2010).

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- xxiii Although established in 1982, ITLOS became operational in 1996. ITLOS, *General Information*, online at <http://www.itlos.org/index.php?id=8&L=0> (visited Aug 15, 2010).
- xxiv The ECJ was created in 1952 and became the judicial organ of all three European Communities in 1957. Project on International Courts, online at <http://www.pict-pcti.org/courts/ECJ.html> (visited Nov 20, 2011).
- xxv The Protocol came into force in 2004, and judges were first elected in January 2006. Protocol to the African Charter on Human and Peoples' Rights (cited in note x).
- xxvi Organization of American States, American Convention on Human Rights (Nov 22, 1969), 1144 UN Treaty Ser 123 (1979).
- xxvii Convention for the Protection of Human Rights and Fundamental Freedoms, Art 20 (Nov 4, 1950), 213 UN Treaty Ser 221 (1950). Although established in 1950, the Court began functioning in 1959. Project on International Courts, online at <http://www.pict-pcti.org/courts/ECHR.html> (visited Nov 20, 2011).
- xxviii International Criminal Court (ICC), *Judges*, online at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/> (visited June 1, 2010).
- xxix International Criminal Tribunal for the Former Yugoslavia (ICTY), *Judges*, online at <http://www.icty.org/sid/151> (visited May 22, 2010).
- xxx International Criminal Tribunal for Rwanda (ICTR), *Chambers*, online at <http://www.unict.org/tabid/103/default.aspx> (visited June 3, 2010).
- xxxi World Trade Organization (WTO), *Dispute Settlement Appellate Body Members*, online at http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (visited May 26, 2010).
- xxxii There are no permanent judges on International Centre for Settlement of Investment Disputes (ICSID), only ad hoc panels. International Centre for Settlement of Investment Disputes Convention, Regulations and Rules, 15 ICSID (World Bank Apr 2006) (ICSID Convention).
- xxxiii ICTY, *Judges* (cited in note xxix).
- xxxiv ICTR, *Chambers* (cited in note xxx).
- xxxv Based on List of Panels Composed in 2009 provided by Enquiries Section of WTO on June 7, 2010 (on file with author).
- xxxvi I divided the number of times women were appointed to sit on panels by the total number of arbitrators appointed for cases registered in 2009 for which panels had been appointed by May 23, 2010. Individuals who served on more than one panel were counted each time they served on a panel. ICSID, *List of Concluded Cases*, online at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (visited May 26, 2010). ICSID, *List of Pending Cases*, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (visited May 26, 2010).
- xxxvii ICC, *Judges* (cited in note xxviii).
- xxxviii These statistics are derived from a document provided by the ICTY listing the names of judges who have served in both ad litem and permanent positions. The document is dated October 20, 2009 (on file with author).
- xxxix These statistics were obtained by counting the male and female judges listed in the ICTR Annual Reports. ICTR, *Annual Reports to the General Assembly*, online at <http://unict.org/tabid/117/default.aspx> (visited June 4, 2010).
- xl WTO, *Dispute Settlement Appellate Body Members* (cited in note xxxi).
- xli ICTY, *Judges* (cited in note xxix).
- xlvi These statistics were obtained by counting the male and female judges listed in the ICTR Annual Reports. See note xxxix.

- xliii This was determined by adding up the number of times a woman served on a WTO panel and by dividing by the total number of WTO panels from January 1, 1995 to December 15, 2009. List of Panelists by Nationality (January 1, 1995 to December 15, 2009) provided by Enquiries Section of WTO on January 20, 2010 (on file with author).
- xliv The following women have served on concluded cases at ICSID: Rosalyn Higgins (British, one time), Marie Madeleine Mborantsuo (Gabonese, one time), Maureen Brunt (Australian, one time), Maureen Ponsonby (British, one time), Gabrielle Kaufmann-Kohler (Swiss, twelve times), Antonias Dimolitsa (Greek, two times), Brigitte Stern (French, ten times), Carolyn B. Lamm (American, one time), Sara Ordoñez Noriega (Colombian, one time), Catherine Kessedjian (French, one time), and Sandra Morelli Rico (Colombian, one time). The statistics are drawn from ICSID, *List of Concluded Cases* (cited in note xxxvi).
- xlvi The Rome Statute of the International Criminal Court (1998), 37 ILM 999 (2002).
- xlvii ICTY, *About the ICTY*, online at <http://www.icty.org/sections/AbouttheICTY> (visited Nov 20, 2011).
- xlviii ICTR, *About ICTR: General Information*, online at <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (visited Nov 20, 2011).
- xlix Understanding on Rules and Procedures Governing the Settlement of Disputes (April 15, 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 ILM 1125 (1994).
- l The ICID, *About ICID*, online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICID_Home (visited Nov 20, 2011).