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Women as Judges at International Criminal Tribunals

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Women as Judges at International Criminal Tribunals

*Milena Sterio**

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I. INTRODUCTION

“The absence of qualified female candidates is untenable and undermines the United Nations’ commitment to gender equality. We call on Member States to nominate qualified female candidates for election as judges to the IRMCT.”¹

In November 2018, the United Nations General Assembly released a list of eleven judicial candidates for the newly created judicial positions on the United

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¹ *Atlas & GQUAL Call on the UN General Assembly to Reopen Nominations for Judges at the IRMCT to Encourage Greater Inclusion of Female Candidates*, GQUAL (Nov. 28, 2018), <http://www.gqualcampaign.org/atlas-gqual-call-on-the-un-general-assembly-to-reopen-nominations-for-judges-at-the-irmct-to-encourage-greater-inclusion-of-female-candidates/>.

Nations International Residual Mechanism for Criminal Tribunals.² Strikingly, all eleven candidates were male.³ While these candidates seemed well qualified and representative of geographic diversity, the lack of gender diversity in this round of judicial nominations and elections was both troubling and indicative of the necessity to examine the role of women as judges within international criminal tribunals. As this Article will discuss, as of 2019, despite women historically occupying twenty-five percent of judicial posts at international criminal tribunals, they now only occupy twenty percent of such posts. Women are thus significantly underrepresented as adjudicators in the field of international criminal law; it is this Article's aim to highlight this issue as well as to propose specific solutions to alleviate and possibly remedy the problem in the near future.

This Article will analyze the presence of female judges within international criminal tribunals, starting with the Yugoslavia and Rwanda Tribunals in the 1990s. In particular, this Article will discuss specific numbers of female judges at the Yugoslavia and Rwanda Tribunals, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the newly created Kosovo Specialist Chambers, as well as the International Criminal Court. While the presence of women as prosecutors, defense attorneys, victim representatives and other professionals at these tribunals is equally important, this Article will focus on the number of female judges, as such data is more readily available and as judges presumably occupy the most important role within an international criminal tribunal. This Article will leave the examination of the number of women in other professional roles at international criminal tribunals for future research. This Article will discuss whether the lack of meaningful gender diversity on the international criminal bench has negatively affected the delivery of international criminal justice. This Article concludes that the absence of appropriate gender diversity on the international criminal bench affects the legitimacy of these tribunals, as well as their ability to adequately investigate and prosecute all crimes, but in particular, gender-based violence.

This Article will proceed as follows. In Part II, this Article will explain the methodology and reasoning behind the research discussed below. In Part III, this Article will first focus on the number of female judges at non-criminal international tribunals, as a relevant comparison to the number of female judges at international criminal tribunals. This Article will present current and historical data regarding the number of female judges at both types of tribunals. This Article will then analyze the assembled data and conclude that

² Priya Pillai, *Women in International Law: A Vanishing Act?*, OPINIOJURIS (Mar. 12, 2018), <http://opiniojuris.org/2018/12/03/women-in-international-law-a-vanishing-act/>; see also GQUAL, *supra* note 1.

³ See GQUAL, *supra* note 1 (noting that the General Assembly decided to reopen the nomination process, presumably to allow for the nomination of qualified female candidates).

the number of female judges has been low at all international tribunals, and that current numbers are actually lower than historical numbers. In Part IV, this Article will discuss why the lack of appropriate gender diversity negatively affects both the legitimacy as well as the actual operations of international criminal tribunals, and the ability for the tribunals to contribute to the development of international criminal law. Finally, in Part V, this Article will propose concrete solutions to ensure that international criminal tribunals employ more female judges in the future.

II. METHODOLOGY

This Article discusses the number and role of female judges within the following international criminal tribunals: the International Criminal Court (ICC); the International Criminal Tribunal for Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR); the Special Tribunal for Lebanon (STL); the Special Court for Sierra Leone (SCSL); the Extraordinary Chambers in the Courts of Cambodia (ECCC); and the Kosovo Specialist Chambers. While this Article excludes some hybrid and “internationalized” domestic war crimes chambers, it is the author’s belief that the mentioned tribunals are the most relevant institutions to analyze this issue in the field of international criminal law, and that focusing on these institutions provides the best data set for a discussion of gender representation on the international criminal bench.

In addition, the author acknowledges that several of the mentioned tribunals are hybrid and not purely international—SCSL, STL, ECCC, and the Kosovo Specialist Chambers each have judicial benches composed of international and domestic judges. This Article includes these hybrid tribunals for two reasons. First, these tribunals have occupied important positions within the development of international criminal law and deserve to be included in any discussion of this field’s legitimacy, and the legitimacy of its institutions. Second, this Article will highlight the distinction between the number of female judges on the international bench versus the domestic bench of these hybrid tribunals in order to avoid conflating issues related to gender representation on the international versus domestic levels. While the lack of appropriate gender diversity on judicial benches is equally problematic within the international community as it is within particular countries’ systems, this Article’s aim is to discuss these issues within the international sphere. Lastly, this Article will include the Kosovo Specialist Chambers in its discussion of gender representation on the judicial bench because this institution is the newest in the field of international criminal law; this Article will compare the number of female judges at this institution to the number of female judges within earlier tribunals, to assess whether gender diversity has improved over the last two decades.

This Article focuses primarily on the number of female judges on the benches of various international criminal tribunals. If information is available, this Article will provide the number of current female judges within each tribunal discussed, as well as the overall numbers of current and past female judges for each of the relevant tribunals. Overall historical numbers of female judges may provide a more accurate representation of gender diversity within international criminal tribunals.

In addition, this Article will not discuss the number of female prosecutors, defense attorneys, and other lawyers for each relevant tribunal. Undoubtedly, the overall number of female practicing attorneys, including judges, before such institutions portrays a more complete image of the presence and importance of women therein. However, for the purposes of this Article, the number of female judges at international criminal tribunals provides an accurate snapshot of gender diversity and is relevant toward the purpose of evaluating gender balance and diversity overall. Also, judges occupy the most prominent roles within international criminal tribunals, as they adjudicate issues of international criminal justice. Evaluating gender diversity among judges may be the most valuable gender study for international criminal tribunals and as such will be the main aim and purpose of this Article.

Moreover, this Article will provide a brief discussion of the number of female judges at other international institutions, such as the International Court of Justice and other tribunals, as a point of comparison.⁴ This Article will assess whether women are better represented as judges before international criminal tribunals as compared to non-criminal international tribunals. For the field of international criminal law to develop in the most positive direction, this field must embrace women as equal participants. If women are represented more poorly as judges before international criminal tribunals as compared to non-criminal international institutions, this would be a sign of trouble for international criminal law, and a warning that this field needs to evolve toward embracing more adequate gender representation within its institutions.

Last, this author acknowledges that the lack of racial diversity within the field of International Law more broadly, as well as within international criminal law, is an equally important problem.⁵ It is this author's sincere belief

⁴ In addition, the underrepresentation of women on the international bench generally is equally troubling as the underrepresentation of female judges within international criminal tribunals. This Article focuses on the numbers of female judges and professionals at international criminal tribunals and not at other types of courts. However, the author recognizes that underrepresentation of women at any institution is a serious issue and hopes that others will choose to highlight and write about this problem.

⁵ See generally Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855 (2000) (arguing that critical race theory should be included in the study of international law); Deborah L. Rhode & Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives From Managing Partners and General Counsel*, 83 FORDHAM L.

that the discussion below regarding the lack of meaningful gender diversity at international criminal tribunals does not undermine any discussions about the lack of racial diversity at the same institutions. Diversity encompasses a myriad of factors, including race and gender, and excluding racial minorities and women from deliberative processes at the highest levels of international criminal justice is tremendously troubling. This Article focuses on the lack of gender diversity at international criminal tribunals; it is this author's hope that she and others will continue to discuss the lack of racial diversity at these tribunals.

III. NUMBERS: FEMALE JUDGES AT INTERNATIONAL TRIBUNALS

Women are underrepresented at almost all international institutions. This section will discuss the number of female judges at non-criminal international tribunals, to compare such numbers to the presence of women as judges at international criminal tribunals. While the focus of this Article is on the latter type of institutions, female judicial representation at non-criminal international tribunals is relevant nonetheless as a point of comparison. In addition, because women are underrepresented as key players at all tribunals, a discussion of the number of female judges at non-criminal international tribunals is important to underscore this point.

A. Non-Criminal International Tribunals

At the International Court of Justice (ICJ), out of fifteen judges, there are currently three female judges: Judge Xue Hanqin of China (elected in 2010), Judge Joan Donoghue of the United States (elected in 2010), and Judge Julia Sebutinde of Uganda (elected in 2012).⁶ Past ICJ judge, Dame Rosalyn Higgins, was elected to the bench in 1995.⁷ Of the total one hundred and eight judges at the world court, past and present, there have been only four women. In addition, out of a total of fifteen ad hoc judges currently serving on cases pending before the ICJ, there are two female judges.⁸ Up until 1995, when Dame Higgins was elected to the world court bench, there had been zero female

REV. 2483 (2015) (discussing the importance of diversity in the legal profession, including in international law); Vera Shikhelman, *Diversity and Decision-Making in International Judicial Institutions: The United Nations Human Rights Committee as a Case Study*, 36 BERKELEY J. INT'L L. 60 (2018) (discussing the importance of diversity, including both racial and gender diversity).

⁶ *Current Members*, INT'L COURT OF JUSTICE, <https://www.icj-cij.org/en/current-members> (last visited Feb. 21, 2020).

⁷ Pillai, *supra* note 2.

⁸ *Current Judges ad hoc*, INT'L COURT OF JUSTICE, <https://www.icj-cij.org/en/current-judges-ad-hoc> (last visited Feb. 22, 2020). The two female judges include Ad Hoc Judge Hillary Charlesworth (*Guyana v. Venezuela*) and Ad Hoc Judge Navanethem Pillay (*The Gambia v. Myanmar*). *Id.*

judges at the ICJ, despite relatively high numbers of female attorneys across various domestic jurisdictions.⁹

International and regional human rights tribunals similarly exhibit relatively low numbers of female judges. At the European Court of Human Rights (ECHR), fifteen out of the forty-seven judges are female.¹⁰ The Inter-American Court of Human Rights (IACHR) has one female judge out of six.¹¹ Among “the past fifteen presidents of the IACHR, the sole woman was Cecilia Medina of Chile.”¹² “The only court that does offer a glimmer of hope is the African Court on Human and Peoples’ Rights, where out of the eleven judges, six are female.”¹³ However, as this Article will discuss below, it may be argued that the more appropriate gender representation on this Court is due to this institution’s constitutive document that specifically requires gender balance. The statutes of other human rights courts do not contain such gender-based criteria for the selection of judges.

Other international tribunals reflect low numbers of female judges. At the International Tribunal on the Law of the Sea (ITLOS), out of the twenty-one current members, only three are women.¹⁴ Until 2011, there had been zero female judges on the ITLOS tribunal. ITLOS was created in 1996, and has had forty-six judges; Judge Elsa Kelly of Argentina became the tribunal’s first female member in 2011, and Judges Neeru Chadha of India and Judge Liesbeth Lijnzaad of the Netherlands became members in 2017.¹⁵ In the realm of international arbitration tribunals, the Iran-United States Claims Tribunal has one woman arbitrator out of the eleven members.¹⁶

Finally, gender diversity within the International Law Commission (ILC), a key institution in the world of international law, which contributes consistently to the development of this field, is particularly lacking. Out of 229

⁹ *International: Female Judges Bring New Perspective to ICJ*, PEACEWOMEN (Sept. 7, 2010), <https://www.peacewomen.org/content/international-female-judges-bring-new-perspective-icj> (reporting that Judge Higgins was the first female full-time judge on the International Court of Justice); see also Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113 (1999) (discussing gender diversity over time among U.S. judges).

¹⁰ *Composition of the Court*, EUROPEAN COURT OF HUMAN RIGHTS, https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n1368718271710_pointer (last visited Feb. 22, 2020).

¹¹ *I/A Court Composition*, INTER-AM. COURT OF HUMAN RIGHTS, www.corteidh.or.cr/composicion-en.cfm (last visited Feb. 22, 2020).

¹² Pillai, *supra* note 2.

¹³ Pillai, *supra* note 2; see also *Current Judges*, AFRICAN CT. ON HUM. AND PEOPLE’S RTS., <http://www.african-court.org/en/index.php/judges/current-judges> (last visited Feb. 22, 2020).

¹⁴ *Members*, INT’L TRIB. FOR THE LAW OF THE SEA, <https://www.itlos.org/en/the-tribunal/members/> (last visited Feb. 22, 2020).

¹⁵ Pillai, *supra* note 2.

¹⁶ *Arbitrators*, IRAN-U.S. CLAIMS TRIB., <https://www.iusct.net/Pages/Public/A-Arbitrators.aspx> (last visited Feb. 22, 2020).

ILC members since this body's inception seventy years ago, there have been only seven female members.¹⁷ Women have been included as ILC members only since 2002.¹⁸ In addition, out of seven female ILC members, three have held special rapporteur positions.¹⁹ "Currently, there are four women serving together out of a total of thirty-four individuals, a new record for the ILC."²⁰

In sum, except for the African Court on Human and Peoples' Rights, where female judges constitute a slight majority, women are underrepresented as judges within every single other international tribunal. At some international tribunals, women were first appointed as judges very recently, and such tribunals had no gender representation on their benches until very recently. The table below represents the number, and corresponding percentage, of female judges at various non-criminal international tribunals.

Table 1: Number of Judges and Female Judges at International Tribunals as of 2019 &

Tribunal	Total Number of Judges	Number of Female Judges	Percentage of Female Judges
ICJ	15	3	20 %
ECHR	47	15	32 %
IACHR	6	1	16 %
African Court	11	6	54 %
ITLOS	21	3	14 %
Iran-US Claims Tribunal	11	1	9 %

The table above demonstrates that women are severely underrepresented as judges within non-criminal international tribunals. Out of a total of 111 judges currently serving on these tribunals, there are only twenty-nine female

¹⁷ Pillai, *supra* note 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; see also *Membership*, INT'L LAW COMM'N, <http://legal.un.org/ilc/guide/annex2.shtml> (last visited Feb. 22, 2020).

judges, which means that women only occupy twenty-six percent of judicial posts. If one were to take the African Court, which has an unusually high number of female judges, out of this calculation, then female judges account for twenty-three judicial slots out of a total number of one hundred judges; thus, female judges represent twenty-three percent of the total number of judges within non-criminal international tribunals excluding the African Court. In other words, when excluding from these statistics the number of female judges within a tribunal that has a statutorily mandated gender-diversity requirement, then women are represented in even fewer numbers on the international bench.

Additionally, what is particularly striking is the extremely low number of female judges at some tribunals: the percentage of female judges at the Iran-United States Claims Tribunal is in single digits; women comprise merely fourteen percent of judges at ITLOS; and only twenty percent of judges on the most prominent judicial institution, the International Court of Justice. Not included in the Table above is the number, and relative percentage, of female members at the ILC: out of a total of thirty-four members currently serving, only four, or eleven percent, are women.

B. International Criminal Tribunals

At the International Criminal Court (ICC), there are currently six female judges out of a total of eighteen judges.²¹ Out of the twenty-nine former judges at the ICC, fourteen judges have been female.²² According to a 2010 study, as of May 2010, fifty-eight percent of judges on the ICC were women.²³ Today, the percentage of female judges at the ICC stands at only thirty-three percent.²⁴ Thus, the number of female judges at the ICC has actually significantly decreased over time.

At the ICTY, out of a total of forty-three judges who had served on the tribunal's bench, nine have been women.²⁵ Out of thirty-five ad litem judges,

²¹ *Judicial Divisions*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/about/judicial-divisions> (last visited Feb. 22, 2020).

²² *Former Judges*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/former-judges.aspx> (last visited Feb. 22, 2020).

²³ Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 654 (2012).

²⁴ *Current Judges*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/current-judges.aspx> (last visited Feb. 22, 2020).

²⁵ *Former Judges*, U.N. INT'L CRIMINAL TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/sid/10572> (last visited Feb. 22, 2020).

fourteen were female.²⁶ Currently, the eight remaining ICTY judges are all male.²⁷

At the ICTR, out of ten remaining judges, only two are female.²⁸ At the ICTR, according to a 2010 study, female judges constituted eighteen percent of all permanent judges, and thirty-six percent of ad litem judges.²⁹

The current roster of the International Residual Mechanism for Criminal Tribunals (IRMCT), a body established to perform essential functions previously carried out by the ICTY and the ICTR,³⁰ has a total of twenty-four judges, six of whom are female.³¹ Out of a total of thirty-one judges, past and current, having served on the Mechanism, six have been women.³²

At the Special Tribunal for Lebanon (STL), out of a total of twelve judges, both international and domestic, four are currently women (one of such four judges is Lebanese, and the other three are international).³³ Female judge, Ivana Hrdlickova, serves as the president of the tribunal.³⁴

At the Special Court for Sierra Leone (SCSL), out of a total of sixteen judges on the appellate and trial chambers, a total of five judicial posts were occupied by women (all female judges were international judges).³⁵

The situation is particularly drastic at the Extraordinary Chambers in the Courts of Cambodia (ECCC): out of a total of twenty-two judges currently sitting on this tribunal's bench, only three judges are women (both of these

²⁶ *Id.*

²⁷ *The Judges*, U.N. INT'L CRIMINAL TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/chambers/judges> (last visited Feb. 22, 2020).

²⁸ *Chambers*, U.N. INT'L RESIDUAL MECHANISM FOR CRIMINAL TRIB.'S, <http://unictr.irmct.org/en/tribunal/chambers> (last visited Feb. 22, 2020).

²⁹ Grossman, *supra* note 23, at 654. ("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."). *Id.*

³⁰ *About*, U.N. INT'L RESIDUAL MECHANISM FOR CRIMINAL TRIB.'S, <http://www.irmct.org/en/about> (last visited Feb. 22, 2020).

³¹ *Judges*, U.N. INT'L RESIDUAL MECHANISM FOR CRIMINAL TRIB.'S, <http://www.irmct.org/en/about/judges#block-views-judge-list-block-1> (last visited Feb. 22, 2020).

³² *Id.*

³³ *Chambers*, SPECIAL TRIB. FOR LEB., <https://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/chambers> (last visited Feb. 22, 2020).

³⁴ *Id.*

³⁵ *Trial Chamber I*, SPECIAL COURT FOR SIERRA LEONE, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, http://www.rscsl.org/Trial_Chamber_I.html (last visited Feb. 22, 2020).

judges are international).³⁶ Three additional female judges, Dame Silvia Cartwright, Catherine Marchi-Uhel, and Kathnka Lahuis served on this tribunal previously.³⁷ Out of a total of thirty-six judges, past and present, serving on the ECCC, a total of six women have occupied positions on the bench (all of these six female judges had been international).³⁸

The recently created Kosovo Specialist Chambers' bench is not particularly gender diverse either: out of eighteen international judges who have been appointed to the official Roster, women currently occupy five positions.³⁹

The Table below illustrates the number of female judges at international criminal tribunals as of 2019. This Table excludes the SCSL, which has ended its mandate and existence. In addition, this Table includes the ICTY and ICTR rosters of current judges who are working on "residual" cases, as these tribunals have also shut down.

Table 2: Total Number of Judges and Female Judges at International Criminal Tribunals as of 2019

Tribunal	Total Number of Judges	Number of Female Judges	Percentage of Female Judges
ICC	18	6	33 %
ICTY	8	0	0 %
ICTR	10	2	20 %
STL	12	4	33 %
ECCC	24	2	8 %
Kosovo Specialist Chambers	18	5	28 %
IRMCT	24	6	25 %

³⁶ *Judicial Chambers*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/organs/judicial-chambers> (last visited Feb. 22, 2020).

³⁷ *Former Judicial Officers and Legal Representatives*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://eccc.gov.kh/en/person/formers> (last visited Feb. 22, 2020).

³⁸ *Id.*; see also *Judicial Chambers*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/organs/judicial-chambers> (last visited Feb. 22, 2020).

³⁹ *Chambers*, KOS. SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE, <https://www.scp-ks.org/en/specialist-chambers/chambers> (last visited Feb. 22, 2020).

The next Table illustrates the overall number of female judges, past and present, at international criminal tribunals. This Table includes the SCSL, as well as “historical” numbers for other tribunals that have closed, such as the ICTY and the ICTR.

Table 3: Total Number of Past and Present Judges and Female Judges at International Criminal Tribunals

Tribunal	Total Number of Past and Present Judges	Number of Female Past and Present Judges	Percentage of Past and Present Female Judges
ICC	29	14	48 %
STL	12	4	33 %
ICTY	43	9	20 %
ICTR	21	6	28%
SCSL	16	5	31 %
ECCC	36	6	17 %
Kosovo Specialist Chambers	18	5	28 %
IRMCT	31	6	19 %

The data above demonstrates that women are also underrepresented as judges at international criminal tribunals. The percentage of female judges at such tribunals as of 2019 ranges from zero percent (ICTY) to thirty-three percent (STL). At three out of six international criminal tribunals, women constitute twenty-one percent or less of all judicial posts. The STL may be notable for its unusually high representation of women as judges. The ICC’s number of female judges, although seemingly “high,” is disappointing when put in more historical perspective—women have comprised a total of forty-eight percent of judges at this court historically, and the number of female judges has actually decreased over the past decade. In addition, the relatively high number of female judges at the ICC is due to the court’s statute’s explicit requirement of gender balance in judicial selection processes—as is the case

with the African Court, described above.⁴⁰ Out of a total of 114 judges serving on international criminal tribunals as of 2019, twenty-five are women—thus, only twenty-two percent of judicial posts at international criminal tribunals are currently occupied by women.

The overall number of female judges, past and present, at international criminal tribunals, is equally troubling. Women have comprised between fourteen and forty-eight percent of judges within international criminal tribunals. However, women have occupied only twenty-six percent or less of judicial posts at four out of six tribunals. As mentioned above, the ICC's high number of past and present female judges is most likely related to the Rome Statute's gender balance provision. In sum, women have occupied fifty-five judicial posts at international criminal tribunals, out of a total of 206 posts; thus, twenty-seven percent of judges at these institutions have been women.

C. Number Analysis: Which Tribunals Have (More) Adequate Gender Representation?

According to the data presented above, women are currently represented as judges in fewer numbers at international criminal tribunals than they are at non-criminal international tribunals. As of 2019, women occupy twenty-seven percent of judicial posts at non-criminal international tribunals, whereas they occupy only twenty percent of judicial posts at international criminal tribunals. Not only do international criminal tribunals fare worse in terms of gender balance on their respective benches as compared to other tribunals, but gender balance has actually decreased over time on the international criminal bench. The data above demonstrates that while female judges occupy twenty percent of judicial posts at international criminal tribunals as of 2019, historical data, including past and present judges on such tribunals, indicates that women have occupied a higher percentage of twenty-five percent of all judicial posts over the past several decades.

This data is troubling as it may display a lack of awareness by states and other relevant international community members about the necessity of adequate gender balance on the international criminal bench. If the issue of gender balance among international criminal tribunals' judges is not adequately considered and discussed, then future judicial nominations are not likely to take into consideration the need to nominate and ultimately select qualified non-male candidates. The recent nomination of eleven all-male candidates for the IRMCT underscores this issue and clearly demonstrates that gender balance seems irrelevant in the selection of future international criminal judges. As discussed above, among all international criminal tribunals' statutes, the Rome Statute of the ICC is the only court that actually

⁴⁰ Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

requires gender balance in the selection of judges.⁴¹ Unsurprisingly, the data above demonstrates that the ICC has had the highest percentage of female judges overall—although the number of female judges on this court has actually decreased over time.

This data is also troubling because it demonstrates that gender parity seems to matter less today than it did one or two decades ago. The ICC roster of judges included notably more women ten years ago than it does today, and the new Kosovo Specialist Chambers roster of judges, formed last year, includes just four women. The current roster of ICTY judges includes no women, although nine women served as ICTY judges in the past. In addition, the percentage of female ECCC judges is lesser in 2019 than it has been historically throughout the tribunal's overall existence. Thus, international criminal tribunals seem to be moving in the wrong direction when it comes to the representation of women as judges. As opposed to having increasingly more female judges, international criminal tribunals' rosters have fewer and fewer women on them. This is a serious concern and should be corrected in the near future.

As the section below will discuss, lack of adequate gender representation on the international criminal bench is troubling because it undermines the tribunals' legitimacy, and because it threatens the tribunals' ability to investigate certain types of crimes, such as those involving gender-based sexual violence.

IV. LACK OF ADEQUATE GENDER REPRESENTATION WITHIN INTERNATIONAL CRIMINAL TRIBUNALS: A SERIOUS PROBLEM

“ . . . women's voices and abilities are ignored all too often. It is also more fundamental than representation – it is a matter of access to justice, not just in regard to legal remedies but in the approach towards the law, and what is visible in the eyes of the law. And for this, half of the world's population deserves a say.”⁴²

The data analyzed above suggests that women are not adequately represented at international criminal tribunals. The number of female judges before these jurisdictions is not proportionate to the overall number of women in the world, or to the overall number of female attorneys in developed countries where international criminal tribunals heavily recruit.⁴³ Such a lack

⁴¹ Rome Statute, *supra* note 40, art. 36.

⁴² Pillai, *supra* note 2.

⁴³ As of 2015, women constitute roughly 49.5% of the world population (almost half). See *Population, Female (% of Total Population)*, WORLD BANK, <https://dataworldbank.org/indicator/SP.POP.TOTL.FE.ZS> (last visited Feb. 22, 2020). Women thus constitute almost half of the world

of adequate gender representation at the tribunals causes legitimacy problems for these institutions.

In addition, the presence of women at international criminal tribunals contributes to the evolution of international criminal law by developing jurisprudence on gender-based and sexual violence crimes. Because of female voices at the ICTY and the ICTR, in judicial but also in prosecutorial and other professional roles, gender-based and sexual violence crimes have been more consistently investigated and prosecuted.⁴⁴ Further, these crimes are now widely perceived to be as serious as “other” war crimes or crimes against humanity.⁴⁵ Women need to remain present in adequate numbers as judges within international criminal tribunals, in order to continue to contribute to the development of the field of international criminal law. If women continue to be underrepresented on the international criminal bench and as practitioners of international criminal law, international criminal tribunals will experience serious legitimacy as well as operational problems.

A. Legitimacy

Legitimacy for international criminal tribunals is important on both a theoretical as well as a practical level. International adjudication is an exercise of public authority, which requires theoretical justification. Moreover, international criminal tribunals cannot function as a practical matter without legitimacy: these tribunals lack enforcement powers; they rely on funding from member states; they derive their jurisdictional regimes from state consent. In

population—whereas women only occupy 20% of judicial posts at international criminal tribunals. In addition, in the United States, one of the countries where the international criminal tribunals have recruited heavily, as of 2016 there were 38% female attorneys overall. See Jennifer Cheeseman Day, *Number of Women Lawyers At Record High But Men Still Highest Earners*, U.S. CENSUS BUREAU (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html>. In the United Kingdom, another country where international criminal tribunals recruit, female solicitors outnumber male solicitors as of 2018. See Jonathan Ames, *Women Solicitors Now the Majority*, TIMES (June 18, 2018, 12:01 AM), <https://www.thetimes.co.uk/article/women-solicitors-now-the-majority-2qmlbc3ws>. In France, roughly half of all lawyers are women, and in Germany, the percentage of female lawyers was at more than 34% as of 2016. In Canada, nearly half of all practicing lawyers are women. See *Women in Law: Quick Take*, CATALYST (Oct. 2, 2018), <https://www.catalyst.org/research/women-in-law/>. In sum, in many developed countries, from where international criminal tribunals recruit frequently for judicial posts, women constitute significantly higher percentages of attorneys, and it may be argued that international criminal tribunals have significant numbers of qualified candidates for consideration for judicial posts. For a detailed analysis about the participation of women throughout the world, see Ethan Michelson, *Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers*, 20 IND. J. GLOB. LEGAL STUD. 1071 (2013).

⁴⁴ See *infra*, Part IV.B.

⁴⁵ Until the ground-breaking work of the ICTY and the ICTR regarding the prosecution of crimes of sexual violence as genocide, rape, or as war crimes, “[i]t was common . . . to hear the assertion that genocide is killing, not rape, and that the women who were raped and survived were lucky that they were not dead.” Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 224 (2001).

sum, without legitimacy, international criminal tribunals cease to exist. The lack of adequate gender representation at international criminal tribunals negatively affects the tribunals' legitimacy. Because all-male judicial chambers cannot be legitimate, adequate gender representation on the international criminal bench should be a matter of great concern to all practitioners of international criminal law and to all States involved with various international criminal tribunals. "If sex representation affects legitimacy, it must become a higher priority for international court supporters."⁴⁶ In other words, if legitimacy of international criminal tribunals matters, so should the gender composition of their benches and their practicing attorneys. Conversely, tribunal benches composed of men only undermine those tribunals' legitimacy, as this Article will discuss below.

Much has been written about international tribunals' legitimacy.⁴⁷ Scholars have distinguished between normatively legitimate institutions—those that have "the right to rule" because of the presumably objective criteria which they fulfill—and sociologically normative institutions, which are "believed to have the right to rule" according to subjective determinations.⁴⁸ Scholars who study normative legitimacy typically examine whether an institution is actually legitimate, as well as what should matter to perceptions of justified authority. This type of research is traditionally based on philosophy and/or political theory.⁴⁹ Scholars who study sociological legitimacy research instead why relevant constituencies perceive international courts as legitimate; this type of research can be conducted through empirical studies.⁵⁰

In addition, scholars have proposed legitimacy frameworks for international tribunals. Nienke Grossman, a Professor at the University of Baltimore School of Law and a prominent scholar in the field of international law and the role of women within international institutions, has argued that international courts are perceived as legitimate when they are fair and unbiased, when they interpret and apply norms consistent with what states believe the law is or should be, and when they are transparent and infused

⁴⁶ Grossman, *supra* note 23, at 650.

⁴⁷ On the legitimacy of international criminal tribunals, *see, e.g.*, Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 LEIDEN J. INT'L L. 491 (2012); *see also* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L. L. 7 (2001); Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L. L. 43 (2012).

⁴⁸ Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, in LEGITIMACY IN INTERNATIONAL LAW 25, 25–26, 31 (Rudiger Wolfrum & Volker Rothen eds., 2008).

⁴⁹ *See* Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW 309 (Rudiger Wolfrum & Volker Rothen eds., 2008).

⁵⁰ *Id.*

with democratic norms.⁵¹ Gender representation at international criminal tribunals is important for these institutions' legitimacy—whether normative or sociological, and no matter what legitimacy framework one may adopt.

Without adequate representation of female judges and practitioners at international criminal tribunals, the tribunals may not deliver gender-neutral, impartial justice, and will suffer from both actual as well as perceived illegitimacy. Studies demonstrate that men and women approach both facts and legal issues differently.⁵² To the extent that gender influences judicial deliberations and decision-making, tribunals with few female judges cannot deliver impartial judgments.⁵³ As Nienke Grossman has argued, “benches with a disproportionate number of either sex are inherently flawed.”⁵⁴ International criminal tribunals are involved in extremely important processes, such as the determination of individual guilt, which typically results in the deprivation of liberty and lengthy imprisonment, as well as the normative development of the field of international criminal law. To remain legitimate, international criminal tribunals must accomplish these processes in a fair and impartial manner.⁵⁵ Moreover, because men and women adjudicate differently and may exhibit biases toward particular types of defendants or victims, tribunals need both men and women in order for a tribunal to produce unbiased and fair results.

To emphasize the importance of impartiality, judicial selection procedures for international criminal tribunals typically require that candidates possess high moral character and independence, and that benches have equitable geographic representation.⁵⁶ However, other than the Rome Statute of the ICC, which requires member states to take gender representation into account when selecting judges, the constitutive documents of other international criminal

⁵¹ Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 115 (2009).

⁵² For a general study of “gender” and international law, see HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 336 (2000).

⁵³ For a detailed analysis of the effect of gender on judging, see Christina L. Boyd, Lee Epstein & Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010) (concluding that the judge's gender influences his or her judicial determinations).

⁵⁴ Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT'L CRIM. L. REV. 643, 646 (2011).

⁵⁵ See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* (Georgetown Pub. Law Research, Paper No. 1154117, July 1, 2008), <https://ssrn.com/abstract=1154177>.

⁵⁶ See, e.g., Rome Statute, *supra* note 40, art. 36(3)(a) (“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 Court of Justice, art. 2 (“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 . . .”).

tribunals are silent on the issue of gender and judicial selection procedures.⁵⁷ This lack of statutorily-mandated gender representation requirement for judges at most international criminal tribunals has most likely been a strong factor with women occupying a low percentage of judicial posts at such tribunals. As the data above demonstrates, women occupy a total of nineteen percent of judicial posts at all international criminal tribunals—although women comprise nearly half of the world population, and although many states' bar associations are by now composed of much higher percentages of women.⁵⁸

Returning to the argument above—that men and women approach adjudication differently—one may ask whether this assertion can be tested and proven. Skeptics would argue that a highly competent impartial judge would decide the outcome of a case in the same way, regardless of that judge's gender. This Article argues, however, that judges' gender does matter, that female judges may approach adjudication differently than their male counterparts, and that the lack of adequate gender representation on international criminal tribunals' benches undermines these courts' legitimacy.

This Article acknowledges that proving the argument that men and women judge differently is difficult. To date, no extensive studies have been conducted on the issue of whether a judge's gender influences his or her decision-making. Limited studies and anecdotal evidence suggest that gender does play a significant role in judicial determinations. A study of ICTY sentencing practices has demonstrated that ICTY panels with female judges imposed more severe sanctions on defendants who had assaulted women, while male

⁵⁷ Rome Statute, *supra* note 40, art. 36(8)(a) ("The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for (i) the representation of the principal legal systems of the world; (ii) equitable geographical representation; and (iii) a fair representation of female and male judges."). It should be noted that the constitutive instrument of the African Court of Human and Peoples' Rights, a non-criminal international adjudicative body, requires that there be adequate gender representation within the court's 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 (June 9, 1998).

⁵⁸ In the United States, female attorneys are present in significantly higher percentages within many state bar associations. See, e.g., Diversity & Inclusion Plan: 2019 – 2020 Biennial Report to the Legislature Pursuant to Business and Professions Code Section 6001.3, ST. B. OF CAL., 6 (Mar. 15, 2019) <http://www.calbar.ca.gov/Portals/0/documents/reports/Diversity-Inclusion-Plan-Report.pdf> (noting that 42% of California attorneys are female); Women in the Law/Gender Bias, FLA. B., (Feb. 13, 2017) <https://www.floridabar.org/about/diversity/diversity003/issue-04/#IV.%20Facts%20and%20Statistics> (noting that women made up 38% of Florida attorneys as of February 2017); Diversity Report Card 6th ed., N.Y. ST. B. ASS'N, 6 (2016) <https://www.nysba.org/DR2015/> (noting that women made up 32.79% of the New York State Bar Association in 2015); 2012 Status of Women in the State Bar of Texas, ST. B. TEX. DEPT RES. & ANALYSIS (2012), <https://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=23530> (noting that women made up 33% of the State Bar in 2012).

judges tended to impose more severe sanctions on those who assaulted men.⁵⁹ A survey of United States federal court opinions has shown that a sex discrimination plaintiff had a lesser chance of prevailing if the judge was male, and that a woman's presence on a judicial panel may actually cause male judges to vote in favor of sex discrimination plaintiffs.⁶⁰

Nonetheless, several prominent judges have argued that judicial gender matters. Former female international criminal tribunal judges have argued that gender makes a difference in judicial determinations. Former ICTY Judge Patricia Wald asserted that women have "unique experiences and insights" that "can and do make a difference."⁶¹ Further, Navanethem Pillay, former ICC judge and ICTR President, stated that "women come with a particular sensitivity and understanding" about sexual assault crimes.⁶² Similarly, women who have served as high-level judges within domestic jurisdictions have argued that judicial gender diversity is important. Madam Justice Bertha Wilson, the first female judge on the Canadian Supreme Court, argued that aspects of Canadian criminal law are based on a "distinctly male perspective" and "cry out for change."⁶³ United States Supreme Court Justice Ruth Bader Ginsburg argued that gender may play a role in adjudicating cases. Justice Ginsburg has claimed that the presence of women on the judicial bench contributed toward the inclusion of sexual harassment claims within Title VII.⁶⁴ In addition, in a case involving the constitutionality of a strip search conducted against a 13-year-old girl, Justice Ginsburg argued that her male colleagues misunderstood the issues because "they have never been a 13-year-old girl."⁶⁵ Lady Baroness Hale, the first female justice on the Supreme Court of the United Kingdom, also recognized that her gender has contributed toward

⁵⁹ Kimi Lynn King & 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, 1065–66 (Nov. 6, 2007).

⁶⁰ Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010).

⁶¹ Patricia M. Wald, *What Do Women Want From International Criminal Justice? To Help Shape the Law*, INTLAWGRRLS (Oct. 5, 2009), <http://www.intlawgrrls.com/2009/10/what-do-women-want-from-international.html>.

⁶² DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 48 (2007).

⁶³ Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 515 (1990).

⁶⁴ Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES (July 12, 1999), https://go-gale-com.proxy.lib.uiowa.edu/ps/retrieve.do?tabID=T003&resultListType=RESULT_LIST&searchResultsType=SingleTab&searchType=AdvancedSearchForm¤tPosition=1&docId=GALE%7CA203432179&docType=Interview&sort=RELEVANCE&contentSegment=ZONE-MOD1&prodId=AONE&contentSet=GALE%7CA203432179&searchId=R1&userGroupName=hardinlibrary&inPS=true (interviewing Justice Ruth Bader Ginsburg).

⁶⁵ Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, N.Y. TIMES, (June 4, 2009), <https://www.nytimes.com/2009/06/04/us/politics/04women.html>.

a difference in her judging. Lady Hale stated that women “[bring] different perceptions to the task of fact-finding—which is what most judges do much of the time.”⁶⁶ Similar assertions—that gender plays a role in judicial decision-making, and in particular in the adjudication of specific crimes such as sexual assault, discrimination, and family issues—have also been made by female judges in Northern Ireland and in Israel.⁶⁷

Some may argue that gender does not affect judicial determinations in every case, but it does appear, based on the above examples, that gender affects judicial determinations in some cases. It may be argued then that all tribunals’ ability to render fair and impartial judgments depends on adequate gender representation on their respective benches. As argued above, a tribunal which is not fair and impartial suffers from normative legitimacy problems. International criminal tribunals, which adjudicate crimes of the most serious nature, including crimes of gender-based violence, may be even more negatively affected in terms of their legitimacy if their benches are not gender-diverse. While the lack of gender diversity is problematic for all tribunals, it may be argued that this is a particularly serious problem for international criminal tribunals, because of the type of judicial work that the latter are engaged in. International criminal tribunals where benches are predominantly male cannot engage in balanced, fair, neutral and impartial judicial decision-making; they thus remain illegitimate in the normative sense.

Even if one takes the view that gender representation on international criminal benches is irrelevant for the purposes of these tribunals’ normative legitimacy, evidence suggests that sex representation matters for the purposes of sociological, or *perceived* legitimacy. Presumably, because gender representation at the more recently created international criminal tribunals, such as the ICTY and the ICC, mattered, States and NGOs mobilized to ensure that women were included as judges within these institutions. Women’s groups lobbied strongly for the election of ICTY judges, Gabrielle Kirk McDonald and Elizabeth Odio-Benito.⁶⁸ The Lawyer’s Committee for Human Rights argued that criteria for the selection of ICTY judges be “designed to ensure diversity in terms of geographic origin, gender and religion.”⁶⁹ Judge Wald herself

⁶⁶ Brenda Hale & Rosemary Hunter, *A Conversation with Baroness Hale*, 16 FEMINIST LEGAL STUD. 237, 245 (2008).

⁶⁷ Grossman, *supra* note 23, at 659–60.

⁶⁸ Jennifer Green, Rhonda Copelon, Patrick Cotter & Beth Stephens, *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, 176–77 (1994).

⁶⁹ Letter from the Lawyer’s Committee for Human Rights to United Nations Secretary General (Apr. 19, 1993), in VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, 2, at 463, 465 (Vol. 2 1995).

expressed the view that women needed to be included as adjudicators of international criminal justice at the ICTY:

The need for women was especially urgent on a court dealing with the laws of war and international human rights. For centuries, women and children had been the predominant victims of war crimes. But they played no significant role in the peace negotiations or punishment of war criminals. Even the nature of the crimes committed against them, principally rape, was disguised in international law linguistics under generic terms, such as outrages against dignity or honor. Women were basically invisible in the war calculus.⁷⁰

As mentioned above, the ICC Rome Statute includes an article about the need for gender diversity on the court's bench. During the Rome Statute negotiations, representatives from the United States and Senegal in particular urged for the inclusion of female judges—presumably based on the assumption that men and women adjudicate cases differently.⁷¹ In addition to States, NGOs such as the Women's Caucus for Gender Justice advocated for gender balance in the staffing of the ICC. It appears that states as well as NGOs present at the Rome Statute negotiations understood the importance of establishing a court where women would be adequately represented as judges. "Although the presence of women judges might signal *less* authoritative decision-making for some constituencies of international criminal courts, overall, discussions about gender balance and expertise on sexual violence in Rome Statute drafting revealed that ignoring these issues might harm States' perceptions and attitudes towards the court, as well as the court's credibility and efficacy."⁷² Significantly, in the wake of the Rome Statute negotiations, the statutes of the ICTY and ICTR were amended to include a gender representation requirement for ad litem judges.⁷³ Disappointingly, neither statute was amended to require the same gender balance for permanent judges.

When international criminal tribunals' benches lack gender and racial diversity, this may influence the institutions' perceived legitimacy. "Continued exclusion from the bench, as well as from traditional lawmaking bodies, perpetuates perceptions of unfairness and partiality in adjudication."⁷⁴ Judicial institutions consisting of predominantly white and male judges can be viewed as unfair and thus illegitimate. An American Bar Association study concluded that within communities of color, concern that their members may

⁷⁰ Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 991 (2005).

⁷¹ Grossman, *supra* note 23, at 663.

⁷² *Id.* at 651; *See also* Grossman, *supra* note 54, at 651.

⁷³ S.C. Res. 1329, art. 13, (Nov. 30, 2000); S.C. Res. 1431, art. 12 (Aug. 14, 2002).

⁷⁴ Grossman, *supra* note 23, at 664.

be negatively treated in the judicial system is exacerbated by the lack of racial and gender diversity throughout the judiciary.⁷⁵ Similarly, in post-apartheid South Africa, a strategic policy decision was made to include persons of color and women in the judiciary, because a predominantly white and male judiciary could not “expect legitimacy.”⁷⁶ Thus, a lack of diversity seems to affect an institution’s perceived legitimacy. It may be argued then that inadequate gender representation on the international criminal bench undermines international criminal tribunals’ perceived legitimacy, even if their actual or normative legitimacy remains intact. Studies cited above, as well as other evidence, demonstrate that States and NGOs seem to believe that gender representation at international criminal tribunals matters; if this is true, then the lack of such representation undermines these institutions’ perceived legitimacy.

Lack of gender representation on the international criminal bench also affects tribunals’ perceived legitimacy from the standpoint of feminist scholarship. “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.”⁷⁷ A lack of women as judges in the international criminal tribunal arena may contribute to the prioritization of male concerns over female concerns, and may relegate “women’s issues” to a less important category. Moreover, because women have historically suffered from bias and discrimination, their noninclusion on the international criminal bench emphasizes the perception of bias and unfairness, regardless of any actual or normative lack of legitimacy. Thus, the underrepresentation of women on the international criminal bench is highly problematic from a feminist point of view, as it reinforces the perception that female voices are not sufficiently heard in the international criminal tribunal realm.

In sum, when women are underrepresented as judges at international criminal tribunals, their normative and sociological legitimacy suffers. Further, a lack of gender balance on the international criminal bench reinforces the feminist critique of international criminal law as a male-dominated field exclusionary to female voices.⁷⁸ In addition to legitimacy issues, the underrepresentation of women as judges at international criminal tribunals

⁷⁵ *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, OPEN SOCIETY FOUND. (July 2003), <https://www.opensocietyfoundations.org/reports/justice-jeopardy-report-american-bar-association-commission-21st-century-judiciary>.

⁷⁶ Ruth B. Cowan, *Women’s Representation on the Courts in the Republic of South Africa*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 291, 299 (2006).

⁷⁷ Grossman, *supra* note 23, at 666.

⁷⁸ *See id.*

may impede such tribunals' ability to investigate and prosecute gender-based sexual violence crimes.

B. Lack of Gender Representation and the Prosecution of Gender-Based Sexual Violence Crimes

In addition to creating actual or perceived legitimacy problems for international criminal tribunals, the underrepresentation of women as judges at such institutions can seriously undermine the development of the field of international criminal law, and in particular, can jeopardize the investigation and prosecution of crimes of sexual violence. Until the groundbreaking work of female judges at the ICTY and the ICTR who pushed for the prosecution of crimes of gender-based sexual violence, there was a "widespread perception among the Tribunal investigators that rape is somehow a 'lesser' or 'incidental' crime not worth investigating."⁷⁹ Without the presence of female judges at the ICTY and the ICTR, despite the fact that crimes of sexual violence had been included in these tribunals' statutes under the definitions of genocide, crimes against humanity, and war crimes, it may be argued that many crimes of sexual violence would have never been investigated and that many defendants would have never been charged with such crimes. Thus, female judges at international criminal tribunals have influenced the development of international criminal law, by pushing for the prosecution of crimes of sexual violence and by elevating these crimes to the level of crimes against humanity and genocide.

Judge Pillay, who was at the time the only female judge on the ICTR panel adjudicating Jean-Paul Akayesu's case, "is credited with taking the initiative to question witnesses about evidence of sexual violence."⁸⁰ Her efforts, combined with the efforts of several NGOs, resulted in the amendment of Akayesu's indictment, to include charges of sexual violence.⁸¹ The ICTR ultimately convicted Akayesu of crimes against humanity of rape and genocide founded on rape.⁸² The court held in the Akayesu judgment that rape and sexual violence "constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part,

⁷⁹ See BINAIFER NOWROJEE, SHATTERED LIVES SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (Human Rights Watch/Africa 1996).

⁸⁰ Grossman, *supra* note 23, at 656.

⁸¹ *Id.* Despite witness testimony indicating that several rapes and other types of sexual violence had been committed by individuals under the authority of Defendant Akayesu, it appeared that ICTR prosecutors had not planned to amend Akayesu's indictment to include charges of rape. Through the work of Judge Pillay, as well as the work of several NGOs, which had filed an amicus brief with the court urging for the inclusion of rape charges within Akayesu's indictment, the indictment was ultimately amended. Copelon, *supra* note 45, at 225.

⁸² Copelon, *supra* note 45, at 231.

a particular group, targeted as such.”⁸³ As one commentator noted, the Akayesu judgment is particularly significant because “rape and sexual violence are understood as instruments of genocide based primarily on the physical and psychological harm to the woman, and secondarily on the potential impact of this on the targeted community.”⁸⁴ Richard Goldstone, former Chief Prosecutor of the ICTY and ICTR, has credited the efforts of Judge Pillay, as well as Patricia Sellers, a prominent female prosecutor, in contributing to “the significant progress that the Tribunals have made in their recognition and prosecution of gender crimes.”⁸⁵ Without the efforts of women, such as Judge Pillay and Patricia Sellers, there would not have been an Akayesu-type judgment because crimes of sexual violence would not have been included in the charging documents. It may be argued that without Akayesu and similar judgments, the field of international criminal law would not have grown in the same manner. Excluding women from the work of important institutions, such as the ICTR, would have thus had a detrimental effect on the growth and development of international criminal law. Moreover, it may be argued that if women continue to be excluded from judicial posts at international criminal tribunals, the field of international criminal law will not be able to grow and develop. If international criminal benches continue to be male-dominated, future crimes of gender-based violence may not be properly investigated, and the work of future tribunals may be jeopardized.

Similarly, ICTY Judge Elizabeth Odio Benito demanded that ICTY prosecutors include gender crimes in the indictment of Dragan Nikolic who ultimately pled guilty to a number of charges including aiding and abetting rape, which is a crime against humanity.⁸⁶ One commentator noted that the presence of female judges “was crucial to the gender advances in the two ad hoc tribunals.”⁸⁷ In the Tadic case, Judge Odio-Benito questioned the lack of sexual violence charges in a new indictment; her efforts, combined with the efforts of prominent NGOs, contributed to bringing the issue of sexual violence into this case.⁸⁸ In sum, at least partially because of efforts by female judges, the ICTY has built a solid record of prosecuting rape and other crimes of sexual violence.

⁸³ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 731 (Sept. 2, 1998).

⁸⁴ Copelon, *supra* note 45, at 228.

⁸⁵ Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 282 (2002).

⁸⁶ *Id.* at 281; Terris, *supra* note 62, at 44; Prosecutor v. Nikolic, Case No. IT 94-2-S, Sentencing Judgment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003), https://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf.

⁸⁷ Copelon, *supra* note 45, at 238.

⁸⁸ *Id.* at 229; *see also* Prosecutor v. Tadic, Case No. IT 94-1-T, Opinion of Judge McDonald and Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

In several cases, including Tadic, Furundzija, Gagovic (Foca Indictment), Delalic (Celebici), the ICTY prosecuted defendants for rape and other crimes of sexual violence as a form of torture and egregious violence.⁸⁹ The work of the ICTR and the ICTY, influenced by the presence of female judges as well as the advocacy of feminist NGOs, has contributed significantly to the development of international criminal law in the area of gender-based violence. Additionally, this work has undoubtedly contributed to the inclusion of gender-based sexual violence crimes in the Rome Statute of the ICC. It should be noted that the ICC Rome Statute negotiations were influenced by a prominent feminist NGO, the ICC Women's Caucus, which contributed to the Statute's successful inclusion of such crimes. The Rome Statute "has codified not only crimes of sexual and gender violence as part of the jurisdiction of the Court, but also a range of structures and procedures necessary to ensure that these crimes and those victimized by them will remain on the agenda and be properly treated in the process of justice."⁹⁰

The presence of female judges may have influenced the investigative and adjudicatory work of other tribunals. For example, former Inter-American Court of Human Rights Judge Cecilia Medina Quiroga has described how her gender perspective influenced the examination of facts relevant to reparations in a mass rape case in Guatemala.⁹¹

Conversely, the absence of women on the international criminal bench results in not investigating crimes of sexual violence and in not charging defendants with such crimes. Women were absent as judges from the Nuremberg and Tokyo tribunals.⁹² Despite massive allegations of rape and other sexual crimes committed on a wide scale against women during World War II, no sexual assault crimes were within the jurisdiction of either tribunal.⁹³ In addition, Nuremberg prosecutors did not charge any defendants with crimes of sexual violence.⁹⁴ Under the Allied Local Council Law No. 10, which investigated lower-level Nazi offenders, rape was listed as a crime against humanity but no defendants were actually charged with rape offenses.⁹⁵ Further, although the International Military Tribunal for the Far East included rape as a war crime, Asian women, unhappy with the work of

⁸⁹ For a more detailed discussion of these cases, see Copelon, *supra* note 46, at 230–31.

⁹⁰ *Id.* at 233.

⁹¹ Terris, *supra* note 62, at 186–87.

⁹² See, e.g., Copelon, *supra* note 45, at 221–23.

⁹³ *Id.*

⁹⁴ Rhonda Copelon has suggested that rape was not explicitly prosecuted at Nuremberg "because some of the Allied troops were equally guilty of raping women—an example of the banality of evil in militarized patriarchal culture." Copelon, *supra* note 45, at 222.

⁹⁵ Copelon, *supra* note 45, at 221.

this Tribunal regarding the prosecution of crimes of sexual violence, created their own Women's International War Crimes Tribunal.⁹⁶

Additionally, female judges at international criminal tribunals have enabled prosecutions of sexual violence crimes because of their sensitivity to this issue and their ability to work with victims of such crimes. Most victims of sexual violence are female and may experience additional trauma if forced to work with male court officials.⁹⁷ The presence of women as judges, and also as lawyers and victims' advocates within international criminal tribunals has facilitated victims' willingness to cooperate with the tribunals and to have their voices heard within international criminal processes.

In the start-up period of the ICTY, two female judges, Judge Gabrielle Kirk McDonald and Judge Elisabeth Odio-Benito, pushed for the adoption of Rule 96 (of Procedure and Evidence), to prevent the intimidation and harassment of victims and witnesses of sexual crimes. The ICTY procedural rules also include other protective measures at trial and the creation of a victims and witnesses unit.⁹⁸ These procedural protective measures have been confirmed by ICTY judges in the Tadic and Celebici cases where the court outlined criteria for keeping witness identities confidential (Tadic) and disallowed the introduction of evidence regarding a witness' prior abortion (Celebici).⁹⁹ In many of these cases, ICTY judges "had the benefit of two feminist amicus briefs."¹⁰⁰ Thus, it appears that the court was influenced by the presence of women both on the bench and as amici curiae in developing its own procedures and case law

⁹⁶ Christine Chinkin, Shelley Wright & Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Country*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 26 (Doris Buss & Ambreena Manji eds., 2005).

⁹⁷ According to the National Sexual Violence Resource Center, one in five women will be raped at some point in her life, whereas only one in 71 men will be raped. *National Sexual Violence Resource Center Info & Stats for Journalists, Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR. (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf. In addition, according to the World Health Organization, "the vast majority of victims of sexual violence are female and most perpetrators are male." WORLD HEALTH ORG., *Sexual Violence: Prevalence, Dynamics and Consequences*, in GUIDELINES FOR MEDICO-LEGAL CARE FOR VICTIMS OF SEXUAL VIOLENCE, https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap2.pdf (last visited Feb. 22, 2020).

⁹⁸ Copelon, *supra* note 45, at 228; see also Jennifer M. 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 (1994).

⁹⁹ Prosecutor v. Tadic, Case No. IT 94-1-T, Decision of the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995), <https://www.icty.org/x/cases/tadic/tdec/en/100895pm.htm>; Prosecutor v. Delalic, Case No. IT 96-21, Decision on the Prosecution's Motion for the Redaction of the Public Record, (Int'l Crim. Trib. for the Former Yugoslavia June 5, 1997), <https://www.icty.org/x/cases/mucic/tdec/en/60605MS2.htm>.

¹⁰⁰ Copelon, *supra* note 45, at 232.

regarding the protection of victims and witnesses in cases involving gender-based sexual violence. Also at the ICTY, the Office of the Prosecutor appointed Patricia Sellers as the gender legal advisor; it appears that the ICTY Prosecutor viewed this appointment as necessary to facilitate the prosecution of gender-based sexual violence crimes.¹⁰¹ While it is not possible to argue that without the presence of a gender advisor, the ICTY prosecutors would not have pursued crimes of sexual violence at all, it is highly probable that the presence of such a capable female advisor helped to bolster the prosecution of these crimes.

The presence of females on the international criminal tribunal bench has, as described above, contributed toward more prosecutions of crimes of sexual violence, and has encouraged victims to participate at trials and to tell their stories. Not including adequate numbers of women as key players at international criminal tribunals could jeopardize the further development of the field of international law and could undermine future prosecutions of crimes of sexual violence.

V. WHY GENDER REPRESENTATION MATTERS AND WHAT ARE SOLUTIONS TO A LACK OF GENDER REPRESENTATION?

As discussed above, adequate gender representation at international criminal tribunals matters because of the tribunals' actual as well as perceived legitimacy. Moreover, appropriate gender representation on the international criminal bench advances the field of international criminal law and contributes to the development of case law and doctrine regarding gender-based and sexual violence crimes.

Additionally, adequate gender representation would strengthen the international criminal tribunals' legitimacy by accurately reflecting the gender balance of populations subjected to the tribunals' authority. As Nienke Grossman argued, this "democratic value" would be an important contributor to the tribunals' normative legitimacy.¹⁰² Women make up almost one half of the world's population.¹⁰³ If women are severely underrepresented on the international criminal bench, such underrepresentation threatens the relevant tribunals' legitimacy and crates a perception of "undemocratic" bias. "Sex unrepresentativeness threatens the normative legitimacy of international courts because these institutions wield public authority, yet they fail to reflect fairly those affected by their decisions."¹⁰⁴ Women have occupied presidential and ministerial posts in many countries; surely, a larger number of qualified female candidates to serve as judges in international criminal tribunals can be

¹⁰¹ *Id.*

¹⁰² Grossman, *supra* note 23, at 668–69.

¹⁰³ *See* Population, *supra* note 43.

¹⁰⁴ Grossman, *supra* note 23, at 674.

found within such countries where women have been deemed worthy of serving as presidents and ministers. It is thus difficult to argue that there is a lack of qualified female judicial candidates for prestigious posts on the international criminal bench, and that such a lack of female judicial candidates is causing a disproportionate number of men to be selected for these positions.

To ensure that women are adequately represented on the international criminal bench in the future, several initiatives could be undertaken. First, the statutes of future international criminal tribunals should include a gender balance requirement in the selection of their judges; ideally, such a gender balance requirement should also apply to all other professional posts within a tribunal, to ensure that women are present not just in chambers but also in prosecutorial suites, defense offices, the registry, and all other court organs. The data above clearly demonstrates that women are more adequately represented as judges at tribunals with statutes, which require gender balance, such as the ICC and the African Court.¹⁰⁵ It should not be overly difficult to ensure that such gender balance provisions are included in the statutes of future international criminal tribunals. Moreover, it is plausible to argue that statutes of existing tribunals, which are still pursuing new cases, such as the STL and the ECCC, could be amended to include gender balance as a requirement in the selection of judges and other professional staff.

Second, States that are parties to international criminal tribunals, as well as nominating bodies such as the United Nations, should adopt formal policies requiring gender balance in the selection of their nominees for judicial appointments, as well as other tribunal posts. Each State which is a member of an international criminal tribunal or which nominates its own nationals for judges on such tribunals should revisit its judicial selection criteria, practice and policies. Each State should ensure that it consistently promotes lists of judicial candidates that are gender-diverse. If judicial candidates are nominated through a regional organization, then such organizations should equally subscribe to promoting gender diversity. Finally, the United Nations should not endorse lists that include all-male judicial candidates; instead, the United Nations and other bodies involved in nominating and selecting professionals for these high-level positions should operate pursuant to formal policies requiring gender balance. Preferably, such gender balance policies—for States, regional organizations, and the United Nations—should be in written form and stated in clear terms. Gender balance can be easily forgotten and overlooked if nominating bodies are not held to concrete gender diversity-ensuring criteria.

Third, scholars as well as NGOs, including male scholars and non-feminist NGOs, should continue to focus on this issue. While the work of female scholars,

¹⁰⁵ See *supra* Part III.

such as Nienke Grossman, and the advocacy of feminist NGOs have been highly influential and have raised awareness about the issue of the underrepresentation of women at international criminal tribunals, their work needs to be re-emphasized and supplemented. Male scholars and non-feminist NGOs should take up this issue because the underrepresentation of women in international criminal law generally and on the international criminal bench should not be perceived as a women's issue. The underrepresentation of women on the international criminal bench harms our entire professional field, including its prominent institutions.

Fourth, professional women's networks should promote female judicial candidates for positions with international criminal tribunals. Such advocacy and networking would contribute to putting female names on the table and to ensuring that female candidates are adequately considered. If female candidates are not put forth and promoted for prestigious positions, this negatively affects other women in the field of international criminal law, as well as future generations of women interested in entering this field. "The undervaluing of female experience at the senior levels of the legal profession has adverse consequences for women working in international law, as well as those contemplating a career in their field."¹⁰⁶ In other words, if women are not represented within the profession, they may not be able to help other women, and this may actually discourage young women from pursuing a career in the field of international criminal law. Women should not be afraid to help other women and to engage in the type of networking and colleague-promotion which has traditionally been reserved for men. In sum, all of us who practice, research, or advocate in the international criminal law community should continue to discuss the lack of gender balance at international criminal tribunals, and serious and concrete efforts, such as those outline above, need to be undertaken to ensure that women have better access to judicial posts in the future.

VI. CONCLUSION

The underrepresentation of women as judges on international criminal tribunals is a serious issue. When women's voices are excluded from international criminal adjudication, tribunals render judgments that are not impartial and fair, causing serious legitimacy issues for the tribunals themselves. "Diversity of perspectives—which necessarily include the varying perspectives of women—enriches the quality of judicial decisions and lends legitimacy to international bodies."¹⁰⁷ Without female voices present on the bench, international criminal tribunals render judgments and engage in other types of adjudication that may be perceived as lacking legitimacy. Moreover, if female voices are not heard from the bench, cases involving gender-based and sexual violence may not be pursued, and the field of international criminal law

¹⁰⁶ GQUAL, *supra* note 1.

¹⁰⁷ GQUAL, *supra* note 1.

may not develop in the right direction. Excluding women from the international criminal bench is also undemocratic, as very low numbers of female judges do not correspond to global and regional population numbers of women. Thousands of women become subject to court rulings by a predominantly male bench, and the tribunals themselves become unrepresentative and thus “undemocratic.” Adequate representation of women on the international criminal bench is thus extremely important for the legitimacy of the tribunals, for the development of international criminal law, as well as for the tribunals’ democratic value.