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Sex Representation on the Bench and the Legitimacy of International Criminal Courts

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Abstract

This article examines the relationship between legitimacy and the presence of both male and female judges on international criminal court benches. It argues that sex representation – an approximate reflection of the ratio of the sexes in the general population – on the bench is an important contributor to legitimacy of international criminal courts. First, it proposes that sex representation affects normative legitimacy because men and women bring different perspectives to judging. Consequently, without both sexes, adjudication is inherently biased. Second, even if one rejects the proposition that men and women “think differently”, sex representation affects sociological legitimacy because sex representation signals an impartial bench and capacity to do justice to constituencies involved in the shaping of international criminal adjudication. The article concludes by raising questions for further study.

Keywords

legitimacy; women; International Criminal Courts (ICC); judges

The constitutive instruments of international courts typically require that judges come from different nationalities and legal cultures. The Rome Statute of the International Criminal Court goes further, requiring states to consider “the need for . . . fair representation of female and male judges” on the International Criminal Court.¹ While women make up over half the judges on the ICC bench,² other international criminal tribunals lag far behind: in mid-2010, women accounted for 58 per cent of sitting judges on the International Criminal Court,³ but only 6.3 per cent and 23.1 per cent, respectively, of the permanent judges on

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¹) Rome Statute of the International Criminal Court, Art. 36(8)(a)(iii), 1 July 2002, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].

²) See Biographical Notes: The Judges, <www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/>, 1 June 2010.

³) *Ibid.*

the International Criminal Tribunals for the Former Yugoslavia⁴ and for Rwanda.⁵ Does this mean the aspiration for sex representation – or an approximate reflection of the general population's sex ratio – on the ICC bench is merely “a gesture in the direction of political correctness”, as one prominent commentary to the Rome Statute asserts?⁶ Is the low percentage of women judges on the International Criminal Tribunals for the Former Yugoslavia and Rwanda irrelevant or a significant challenge to the success of these tribunals? While the presence of both men and women judges may be important for a number of reasons, this article explores the relationship between sex representation and the legitimacy of international criminal adjudication.

What undergirds and undermines legitimacy is worthy of study to those interested in protecting and promoting the objectives of international criminal law. International criminal courts face frequent challenges to their legitimacy, despite wide ratification of the Rome Statute and the United Nations' pivotal role in the creation of other tribunals. Prosecutorial initiatives and court rulings are subject to intense scrutiny. Is the court or tribunal acting *ultra vires*? Are its decisions morally justified? Will states cooperate even when they perceive it is against their interests to do so? Legitimacy matters to domestic criminal justice because, as Tom Tyler wrote, when authorities are viewed as legitimate, “the decisions they make and the rules they create are deferred to voluntarily”, rather than requiring the use of coercive power.⁷ With neither a police force nor independent sources of funding, international criminal courts and the law they interpret and apply are especially vulnerable to being ignored absent some alternative basis of authority.⁸ Legitimacy can help to fill this void.

Unfortunately, few have heeded the call of feminist scholars to devote serious attention to understanding the relationship between legitimacy and the

⁴ See *The Judges*, <www.icty.org/sid/151>, 22 May 2010.

⁵ See *The Chambers*, <www.unicttr.org/tabid/103/default.aspx>, 3 June 2010. Women make up a greater percentage of ad litem than permanent judges on the ICTY and the ICTR. Women accounted for 42% and 27% of *ad litem* judges on the ICTY and the ICTR, respectively, during the same period. See *The Chambers*, <www.icty.org/sid/151>, 22 May 2010; *The Chambers*, <www.unicttr.org/tabid/103/default.aspx>, 3 June 2010.

In August 2010, 33.3% of the judges on the Special Court for Sierra Leone were women. See *Judges*, <www.sc-sl.org/PRESSROOM/PhotoLibrary/Judges/tabid/129/Default.aspx>, 25 August 2010. Women made up 17.6% of judges in the pretrial chamber, trial chamber and Supreme Court of the Extraordinary Chambers in the Courts of Cambodia. See *Judicial Officers*, <www.eccc.gov.kh/english/judicial_officers.aspx>, 25 August 2010.

⁶ John R.W.D. Jones, ‘Composition of the Court’, in Antonio Cassese, Paolo Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, New York, 2002) p. 255.

⁷ Tom R. Tyler et al. (ed.), ‘Legitimacy and Criminal Justice: International Perspectives’, in Tom R. Tyler (ed.), *Legitimacy and Criminal Justice: International Perspectives* (Russell Sage Foundation, New York, 2007) pp. 10–11.

⁸ See *ibid.*, p. 11.

participation of both sexes on international criminal court benches.⁹ This essay hopes to spark that conversation. Rather than craft a comprehensive theory of legitimacy for international criminal courts, it draws upon existing scholarship to suggest only a few ways sex representation may be linked to both normative and sociological legitimacy. 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.¹⁰ Those concerned with normative legitimacy query under what conditions international criminal courts should be considered legitimate: what justifies authority?¹¹ A student of sociological legitimacy might ask what drives relevant constituencies – individuals, victims of mass atrocities, nongovernmental organizations, international organizations, states, and the international community – to view international criminal courts as possessing justified authority.¹²

This article argues, first, that sex representation is necessary for normative legitimacy because men and women bring different perspectives to bear in judging, at least in cases involving experiences unique to each sex. Because neither sex’s viewpoint is “correct”, both are necessary for impartial adjudication, a recognized driver of normative legitimacy. Second, in spite of concerns about essentialism – or the belief that each sex shares some fundamental essence differentiating it from the other and transcending the multiplicity of identities within each sex¹³ – as a sociological matter, constituencies involved in the shaping of international criminal courts seem to believe that the presence of both male and female judges is necessary for fair adjudication and justice. The article concludes with a call for further research and inquiry into this important topic.

1. Sex Representation and Normative Legitimacy

The presence of both sexes on the bench matters to normative legitimacy if each sex brings a unique perspective to the act of judging. If men and women approach law or facts differently, or influence each other’s decisions based on either socially

⁹ See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, UK, 2000) p. 336.

¹⁰ Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’, in Rudiger Wolfrum and Vokler Roben (eds.), *Legitimacy in International Law* (Springer-Verlag, Dusseldorf, 2008) pp. 25-26 (emphasis in original).

¹¹ *Ibid.*, p. 26.

¹² Daniel Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, 93 *American Journal of International Law* (1999) 596, 601; see generally Buchanan and Keohane, *supra* note 10, p. 25.

¹³ Kelly Weisberg (ed.), *Feminist Legal Theory: Foundations* (Temple University Press, Philadelphia, 1993) p. 335.

constructed “gender”¹⁴ or biologically predetermined distinctions, benches with a disproportionate number of either sex are inherently flawed. In other words, if neither the female nor male approach is “right”, impartial process and results require both.¹⁵

Bias is “an inclination of temperament or outlook; especially: a personal and sometimes unreasoned judgment: prejudice.”¹⁶ Impartiality, or freedom from bias, is inextricably tied to legitimacy or justified authority.¹⁷ Like other international courts, the process and outcomes of international criminal bodies – determinations of guilt and punishment or sentencing, as well as the development of the law – must be fair, consistent, and grounded in generally accepted legal discourse for these institutions to retain legitimacy.¹⁸ The importance states place on impartiality is apparent in the constitutive instruments of the vast majority, if not all, international courts, requiring selection of judges with high moral character and independence,¹⁹ as well as benches with equitable geographic and other types of representation.²⁰ Further, when states or other constituencies believe the scales

¹⁴ Gender is defined as “the ascribed, social nature of distinctions between women and men – the excess cultural baggage associated with biological sex.” Charlesworth and Chinkin, *supra* note 9, p. 3.

¹⁵ Kate Malleson makes a similar argument for justifying gender equality on the bench. See Kate Malleson, ‘Justifying Gender Equality on the Bench: Why Difference Won’t Do’, 11 *Feminist Legal Studies* (2003) 10–11; see also Nienke C. Grossman, *Women judges and judicial legitimacy*, 20 May 2010, <intlawgrlrs.blogspot.com/2010/05/nienke-1.html>, 8 December 2010.

¹⁶ *Merriam Webster Dictionary*, Definition of Bias, 2010, <www.merriam-webster.com/dictionary/bias?show=0&t=1282916261>, 27 August 2010.

¹⁷ See Brian Barry, *Justice as Impartiality* (Oxford University Press, New York, 1995) pp. 17–18; see also David Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’ (Georgetown Univ. Law Ctr., Working Paper No. 1154117, 2008) p.13; Tyler, *supra* note 7, p. 4; see also Nienke Grossman, ‘Legitimacy and International Adjudicative Bodies’, 41 *George Washington International Law Review* (2009) 115, 123.

¹⁸ See Luban, *supra* note 17, pp. 13–14; Steven Glickman, Note, ‘Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court’, 43 *Columbia Journal of Transnational Law* (2004) 265; 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* (Brandeis, Lebanon, NH, 2007) pp. 102–04, 147–49; Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, New York, 1990) pp. 147–48.

¹⁹ See e.g., Rome Statute, *supra* note 1, 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, 26 June 1945, 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, or are jurisconsults of recognized competence in international law.”); Grossman, *supra* note 17, pp. 132, 166–67 (comparing judicial qualifications mandated by the constitutive instruments of seven non-criminal international courts and tribunals).

²⁰ See e.g., Rome Statute, *supra* note 2, 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

of justice are tipped against them, they may withdraw from a court's jurisdiction or cease to cooperate with it.²¹

But do men and women bring different perspectives to bear in judging? Is this essentialist premise accurate in a world filled with men and women of different religious, cultural, sexual orientation, disability status, and class backgrounds? The evidence available suggests men and women do bring unique insights to the bench, particularly in cases involving life experiences unique to each sex. For example, although low numbers of women judges on international courts make empirical studies quite rare, one study of ICTY sentencing practices 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.²² Similarly, a recent survey of United States federal court opinions showed a sex discrimination plaintiff was 10 percentage points less likely to prevail if the judge was male, and a woman's presence on a judicial panel "actually causes male judges" to vote in favour of sex discrimination plaintiffs.²³

Absent an abundance of empirical evidence about gender's effect on international court judging, the perspectives of judges themselves are telling. Former ICTY Judge Patricia M. Wald proposed that a woman judge's "life experiences will inevitably, and should, influence ... judgment in many cases," and women have "unique experiences and insights" that "can and do make a difference. I have seen it on the courts, at home and abroad, in which I have judged."²⁴ Navanethem Pillay, formerly ICC Judge and ICTR President, and now U.N. High Commissioner for Human Rights, said she does not think women and men inherently "decide in a different way... And yet I do think women come with a particular

representation of female and male judges."); *Statute of the International Court of Justice*, Art. 9 ("the electors 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"); Grossman, *supra* note 17, pp. 138-40, 176-78 (comparing representativeness requirements mandated by constitutive instruments of seven non-criminal international courts and tribunals).

²¹ Edith Brown Weiss, 'Judicial Independence and Impartiality: A Preliminary Inquiry', in Lori Fisler Damrosch (ed.), *The International Court of Justice at a Crossroads* (Transnational, Dobbs Ferry, NY, 1987) pp. 123-124.

²² Kimi Lynn 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 *Social Science Quarterly* (2007) 1049, 1050 n.2, 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..."). *Ibid.*

²³ Christina Boyd, Lee Epstein, and Andrew Martin, 'Untangling the Causal Effects of Sex on Judging', 54 *American Journal of Political Science* (2010) 389-90, 406 (emphasis in original).

²⁴ Patricia M. Wald, *What do women want from international criminal justice? To help shape the law*, 5 October 2009, <intlwgrrls.blogspot.com/2009/10/what-do-women-want-from-international.html>, 2 December 2010.

sensitivity and understanding about what happens to people who are raped. You know, we understand when we are told that it's like getting a death sentence."²⁵ Former Inter-American Court of Human Rights Judge Cecilia Medina Quiroga has recounted how her womanly perspective affected the elicitation of facts relevant to reparations in a Guatemalan massacre and rape case.²⁶ Although not international court judges, women judges on several states' highest courts make similar statements. For example, Madam Justice Bertha Wilson, the first woman on Canada's highest court, asserted that some aspects of Canadian criminal law are grounded in a "distinctly male perspective" and "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."²⁷

Further, women judges have, in fact, impacted the development of law and facts on international criminal courts. Judge Pillay, the only woman judge on an ICTR panel trying Jean-Paul Akayesu, is widely credited with taking the initiative to question witnesses about evidence of sexual violence.²⁸ Her insistence, combined with the efforts of non-governmental organizations, resulted in amendment of Akayesu's indictment to include charges of sexual violence.²⁹ The Tribunal ultimately convicted Akayesu of crimes against humanity of rape and genocide founded on rape, for the first time in history.³⁰ According to Richard Goldstone, formerly Chief Prosecutor of the ICTY and the ICTR:

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.³¹

Similarly, even when ICTY prosecutors thought insufficient evidence was available to charge Dragan Nikolić with gender crimes, ICTY Judge Elizabeth

²⁵ Terris, *supra* note 18, p. 48.

²⁶ *Ibid.*, pp. 186-87 (Profile of Cecilia Medina Quiroga).

²⁷ Bertha Wilson, 'Will Women Judges Really Make a Difference?', 28 *Osgoode Hall Law Journal* (1990) 515.

²⁸ Richard Goldstone, 'Prosecuting Rape as a War Crime', 34 *Case Western Reserve Journal of International Law* (2002) 282; see also Navanethem Pillay, 'Equal Justice for Women: A Personal Journey', 50 *Arizona Law Review* (2008) 665-66; Terris et al., *supra* note 17, pp. 44-45; Beth Van Schaack, 'Engendering Genocide: The Akayesu Case Before the ICTR', in Deena R. Hurwitz, Margaret L. Satterthwaite, and Douglas B. Ford (eds.), *Human Rights Advocacy Stories* (Foundation, New York, 2009) pp. 198-201 (showing that male judges were also solicitous of testimony on crimes of sexual violence in the Akayesu case).

²⁹ Goldstone, *supra* note 28, p. 282.

³⁰ See Prosecutor v. Jean-Paul Akayesu (Trial Judgment), 2 September 1998, International Criminal Tribunal for Rwanda, ICTR-96-4-T, <www.unhcr.org/refworld/publisher/ICTR,,,40278fbb4,0.html>, 22 November 2010; José E. Alvarez, 'Lessons from the Akayesu Judgment', 5 *ILSA Journal of International and Comparative Law* (1999) pp. 362-63.

³¹ Goldstone, *supra* note 28, p. 282.

Odio Benito “publicly exhorted” prosecutors to include gender crimes in the indictment.³² Nikolić ultimately pleaded guilty to a number of charges including aiding and abetting rape, a crime against humanity.³³ Judge Wald has pointed to five major gender-crime precedents crafted when at least one woman judge sat on the bench.³⁴ Rhonda Copelon wrote that “[t]he presence of women judges who also had expertise in gender and of the gender legal adviser in the OP was crucial to the gender advances in the two *ad hoc* tribunals.”³⁵

When women were absent from international criminal court benches at Nuremberg and Tokyo, crimes against them went virtually ignored. Despite horrendous tales of rape and other sex-based violence against women in World War II, the Nuremberg prosecutors chose not to prosecute or introduce evidence about these crimes.³⁶ Although the International Military Tribunal for the Far East did include rape as a serious war crime and ensured rape crimes were included in the public record, no sexual assault crime was listed as a crime within the jurisdiction of either tribunal.³⁷ Asian women went so far as creating their own Women’s International War Crimes Tribunal in response to “an overwhelming sense among surviving comfort women and their supporters that international human rights and criminal law had failed to address war-time sexual violence.”³⁸

2. Sex Representation and Sociological Legitimacy

Even if one rejects the evidence that the sexes bring different perspectives to bear in judging as fatally flawed in a world with diverse communities of men and women, or if the sexes can educate each other about their partiality as Dean Martha Minow has suggested,³⁹ important constituencies involved in the shaping of international criminal courts rely on essentialist assumptions nonetheless.

³² *Ibid.*, p. 281; see also Terris, *supra* note 18, p. 44.

³³ Prosecutor *v.* Nikolić (Sentencing Judgment), 18 December 2003, International Criminal Tribunal for the Former Yugoslavia, IT-94-2-S, para. 5, <www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf>, 22 November 2010.

³⁴ Wald, *supra* note 24.

³⁵ Rhonda Copelon, ‘Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law’, 46 *McGill Law Journal* (2001) 238.

³⁶ Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, The Hague, 1997) pp. 138, 202-03.

³⁷ *Ibid.*, pp. 202-03. “At the Nuremberg and Tokyo Trials, gender based war crimes against women were essentially ignored.” *Ibid.*, p. 14.

³⁸ Christine Chinkin, Shelley Wright and Hilary Charlesworth, ‘Feminist Approaches to International Law: Reflections from Another Century’, in Doris Buss and Ambreena Manji (eds.), *International Law: Modern Feminist Approaches* (Hart Publishing, Oxford, 2005) 26; see also The Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, <www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/whatstribunal.html>, 10 October 2010.

³⁹ Martha Minow, ‘Foreword: Justice Engendered’, 101 *Harvard Law Review* (1987).

In other words, even if one takes the position that sex representation is irrelevant to normative legitimacy, it matters for sociological legitimacy.

Both non-governmental organizations and states mobilized for the inclusion of women judges in post-WWII criminal tribunals, especially the ICTY and the ICC, based in part on assumptions about unique contributions by female judges and their capacity to do justice. The National Alliance of Women's Organizations, a British umbrella organization concerned with women's human rights and equality, saw the establishment of the ICTY and the inclusion of women judges 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."⁴⁰ Again, Judge Wald:

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.⁴¹

For such reasons, women's groups lobbied hard for the election of Gabrielle Kirk McDonald and Elizabeth Odio Benito to the ICTY bench.⁴²

During the Rome Statute negotiations, representatives from the United States and Senegal, among others, urged the inclusion of women judges to better respond to women's concerns, presumably premised on the assumption that men and women make different contributions to adjudication.⁴³ The Rome Statute's requirement that states take into account the need for both individuals with

⁴⁰ National Alliance of Women's Organizations, 'Letter 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' (31 March 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*, vol. 2 of 2 (Transnational, New York, 1995) pp. 399-403.

⁴¹ Patricia M. Wald, 'Six Not-so-easy Pieces: One Woman Judge's Journey to the Bench and Beyond', 36 *University of Toledo Law Review* (2005) 991.

⁴² Jennifer Green, Rhonda Copelon, Patrick Cotter, and 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 Law Journal* (1994) 176-77.

⁴³ For statements by the representatives of the United States and Senegal, see '14th Meeting, 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 52/207 of 17 December 1996 and 52/160 of 15 December 1997 (A/CONF.183/2/Add.1 and Corr.1 and A/CONF.183/C.1/L.16)' [hereinafter *14th Mtg.*], reprinted in M. Cherif Bassiouni (ed.), *The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference* (Transnational, New York, 2005) pp. 208, 215.

expertise in sexual violence and “a fair representation of female and male judges” on the ICC bench, similarly suggests that an international criminal court with no women judges would be unacceptable to states, even if all the male judges had expertise in sexual violence.⁴⁴ 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, asserted gender balance in the composition and staffing of all organs of the court was important to enable the ICC to “dispense and promote universal justice.”⁴⁵ Although the presence of women judges might signal *less* authoritative decision-making for some constituencies of international criminal courts,⁴⁶ 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.⁴⁷ Shortly after the Rome Statute was ratified, the statutes of the ICTY and the ICTR were amended to include a sex representativeness requirement for *ad litem* judges.⁴⁸ In Security Council debate on the ICTY resolution, the President remarked that during consultations on the draft resolution, it became apparent that the issue of gender balance was one of four “urgent issues” that needed to be addressed.⁴⁹

Further, all-male benches may undermine confidence in the competence of the judiciary to do justice, just as the homogeneous judiciary at the dawn of post-Apartheid South Africa did. The strategic plan of the South African Department of Justice, Justice Vision 2000, called for greater representation on the bench of blacks and women, recognizing that “the judiciary could not consist of ninety-seven percent white male judges and expect legitimacy. Justice, in other words, had to be seen to be believed.”⁵⁰ Black and women judges were necessary to relate

⁴⁴ Rome Statute, *supra* note 1, Art. 36(8). It appears only the Afghani representative conflated the two. He argued in favour of deleting the reference to gender balance, and instead, changing the language to: “The expert on issues related to sexual and gender violence and violence against children should be a woman.” 14th Mtg, *supra* note 43, p. 214.

⁴⁵ ‘Core Principles of the Women’s Caucus’, The International Criminal Court Monitor, June 1998, <www.iccnw.org/documents/monitor08.199806.pdf>, 22 November 2010, p. 13.

⁴⁶ For example, one respondent to a study on the participation of women in the European Union judiciary suggested that “[t]he entry into the judiciary of women en masse could introduce uncertainty as to the image of its authority figures.” Miriam Anasagasti and Nathalie Wuiame, European Commission, *Women and Decision-making in the Judiciary in the European Union* (1999) p. 25.

⁴⁷ Medard R. Rwelamira, ‘Composition and Administration of the Court’, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999) pp. 166-67.

⁴⁸ Security Council Resolution 1329 (U.N. Doc. S/RES/1329), Art. 13 quater (ICTY); Security Council Resolution 1431 (U.N. Doc. S/RES/1431), Art. 12 quater (ICTR). Neither statute was amended to require sex in the appointment of permanent judges, however.

⁴⁹ *U.N. Security Council Official Records* (U.N. Doc. S/PV.4240).

⁵⁰ Ruth B. Cowan, ‘Women’s Representation on the Courts in the Republic of South Africa’, 6 *University of Maryland Law Journal of Race, Religion, Gender and Class* (2006) 299.

to the experience of all South Africans: “Diversity... is a quality without which the Court is unlikely to be able to do justice to all the citizens of the country... The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection...”⁵¹ If the day after Apartheid ended, every white male judge in South Africa became instantaneously sensitized to the perspectives of women and other social groups, a homogenous judiciary would still lack legitimacy in the eyes of many South Africans. Similarly, an American Bar Association study concluded that “[w]ithin communities of color... 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.”⁵²

Even if one rejects the proposition that men and women think differently, the fact is that both states and non-governmental organizations influential in the shaping of international criminal adjudication seem to believe they do. Consequently, sex representation on the bench is likely to impact sociological legitimacy.

3. Conclusion

This article suggests that sex representation is essential to normative legitimacy because men and women make different contributions to international criminal adjudication. With a unisex bench, adjudication, at least in cases involving experiences unique to each sex, is biased. Even if one rejects the evidence that each sex shares some core essence, sex representation matters to sociological legitimacy because constituencies involved in the shaping of international criminal adjudication appear to adopt essentialist logic regardless. Just as individuals might use political party as a heuristic to facilitate decision-making on Election Day,⁵³ sex composition appears to be a signal of whether a court is capable of rendering impartial justice. Determining the extent to which these views are generalisable to broader constituencies requires empirical research beyond the scope of this article.

This article anticipates a number of additional questions that merit further attention. For example, in what other ways might sex representation matter to

⁵¹ Carmel Rickard, ‘The South African Judicial Service Commission’, Doc. No. 879, University of Cambridge Centre for Public Law conference, 4 October 2003, <www.law.cam.ac.uk/docs/view_doc_info.php?doc=879>, 22 November 2010 (discussing the South African Judicial Service Commission’s judicial candidate interview process).

⁵² Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary, July 2003, p. ix, <www.abanet.org/judind/jeopardy/pdf/report.pdf>, 22 November 2010.

⁵³ See e.g., David C. King and Richard E. Matland, ‘Sex and the Grand Old Party: An Experimental Investigation of the Effect of Candidate Sex on Support for a Republican Candidate’, 31 *American Political Science Research* (2003) 595. In studies of United States voters, political party has a significant effect on voting decisions. See *ibid.*, pp. 601, 595.

normative or sociological legitimacy for international criminal (and other kinds of) adjudication?⁵⁴ How is democratic legitimacy tied to sex representation? And finally, what other groups' participation would enhance the legitimacy of international criminal adjudication? In other words, whose interests remain invisible to many of us today? Rather than diverting attention from Women and International Criminal Law, such queries will help us both to critique and strengthen international criminal adjudication and to ensure that the concerns of all people, in their various and multiple identities, are taken into account.⁵⁵

⁵⁴ A forthcoming article analyzes the relationship between legitimacy and the paucity of women judges on the majority of the world's most important criminal and non-criminal international courts and tribunals. See Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', 12 *Chicago Journal of International Law* (forthcoming, Winter 2012).

⁵⁵ See Katharine T. Bartlett, 'Feminist Legal Methods', 103 *Harvard Law Review* (1990) 848-49 (rejecting the notion that expanded inquiries will "dilute the coherence of the feminist critique", and instead, asserting that "[c]oherence, or unity, is possible only when feminism's underlying assumptions speak the truth for many, not a privileged few.").