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AFRICAN WOMEN JUDGES ON INTERNATIONAL COURTS: SYMBOLIC OR SUBSTANTIVE GAINS?

Josephine J. Dawuni, Ph.D.*

I. INTRODUCTION

Scholarship on gender and judging has increased tremendously within the last decade.¹ Most of these studies have provided rich empirical and theoretical knowledge on how women have entered judiciaries along with some discussion on what contributions they bring to the bench.² However, a large part of this scholarship tends to focus on advancing arguments on why courts should be more open to women judges.³ Few studies have looked at women's

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1. See, e.g., NATHALIE LIEVEN, JUSTICE, INCREASING JUDICIAL DIVERSITY (2017), <http://justice.org.uk/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>; MALIA REDDICK ET AL., AM. JUDICATURE SOC'Y, RACIAL AND GENDER DIVERSITY ON STATE COURTS: AN AJS STUDY (2009), http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_State_8F60B84D96CC2.pdf; CIARA TORRES-PELLISCY ET AL., BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY (2d ed. 2010), http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.
2. See, e.g., Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243 (2002); INT'L COMM'N OF JURISTS, SER. NO. 1, WOMEN AND THE JUDICIARY (2014), <https://www.icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-ENG.pdf>.
3. See, e.g., Brian McNeill, *Gertner and Lithwick: More Women Judges Needed*, U. VA. SCH. L. (2011), <http://www.law.virginia.edu/html/alumni/uvalawyer/f11/women.htm>; *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CTR. 1 (Oct. 2016) [hereinafter *Women in the Federal Judiciary*], <https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf>.

contributions to the international bench beyond essentialist arguments on legitimacy, difference, representation, and diversity.⁴ The focus of scholars on developments at the domestic level has resulted in two observable outcomes.⁵ First, the scholarship on women judges at international courts has been largely understudied,⁶ and second, studies that have recently begun to address this topic have tended to reinvent and apply existing theoretical frameworks at the domestic level to the international level.⁷

Within the international arena, the turn of the twenty-first century ushered in a growing number of women appointed to serve on international courts such as the International Criminal Court (ICC),⁸ the African Court on Human and People's Rights (ACtHPR),⁹ the European Court of Human Rights (ECtHR),¹⁰ the European Court of Justice (ECJ)¹¹ and ad hoc tribunals such as the International Criminal Tribunals for Yugoslavia and Rwanda¹² and, at a much slower pace, the International Court of Justice (ICJ).¹³ Among the elite group of women judges serving on these courts are prominent African women judges, drawn from across the continent, with a wide variety of judicial and professional experience.¹⁴ Notwithstanding these developments, much remains unknown about the roles and contributions that the pace-setting women who sit on these courts bring to international law.¹⁵

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4. See, e.g., McNeill, *supra* note 3; *Women in the Federal Judiciary*, *supra* note 3, at 1.
 5. See *infra* notes 6–7 and accompanying text.
 6. See Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT'L L. 339, 344 (2016).
 7. See generally Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647 (2012) (analyzing the presence of women on eleven international courts and tribunals and comparing the findings with domestic courts).
 8. Grossman, *supra* note 6, at 354 fig.1.
 9. Josephine J. Dawuni, *African Women Judges and Gender Parity on the African Court on Human and Peoples' Rights*, INST. FOR AFR. WOMEN L. (Feb. 7, 2017), <https://www.africanwomeninlaw.com/single-post-ajg27/2017/02/07/African-Women-Judges-and-Gender-Parity-on-the-African-Court-on-Human-and-Peoples%E2%80%99Rights>.
 10. Grossman, *supra* note 6, at 352 fig.3.
 11. *Id.* at 353 fig.4.
 12. *Id.* at 354–55 figs.9 & 10.
 13. See *id.* at 354 fig.8 (providing a detailed discussion on the presence of women on international courts and tribunals); *All Judges Ad Hoc*, INT'L CT. JUST., <http://www.icj-cij.org/en/all-judges-ad-hoc> (last visited Dec. 30, 2017).
 14. See *infra* Part IV.
 15. See *infra* notes 192–93 and accompanying text.

This article contributes to existing scholarship on gender, judging, and international law by accomplishing two things.¹⁶ First, despite the variety of differences in the experiences of the judges, it develops general patterns and profiles of the women who sit on these courts.¹⁷ Second, it provides some preliminary observations on what women judges bring to international courts.¹⁸ The article focuses on two permanent courts—the African Court on Human and Peoples’ Rights¹⁹ and the International Criminal Court.²⁰ It draws on the experiences of a class of female judges—African women judges—and uses them as a proxy for opening the discussion on substantive and tangible contributions that women judges bring to international courts.²¹

The article traces the pathways to the bench, including the professional experiences that landed these women places on their respective courts.²² In analyzing their path-breaking records, the article assesses their contributions to international law, women’s rights, human rights, and the transformation of gender hierarchies within international courts.²³ By documenting the contributions of women on international courts and drawing attention to an area that remains generally understudied, this article provides a new set of lenses through which we can more generally understand the substantive representation of women judges on international courts.²⁴ The analyses contained herein are based on two major sources of information.²⁵ The first is a textual analysis of existing material and statistics about women judges drawn from multiple sources.²⁶ The second is based on interviews involving three African judges of the ICC and one former judge of the ACtHPR.²⁷

16. See *infra* notes 17–18 and accompanying text.

17. See *infra* Part IV.

18. See *infra* Part V.

19. See *infra* Part II.

20. See *infra* Part II.

21. See *infra* Parts IV–V.

22. See *infra* Part IV.

23. See *infra* Part V.

24. See *infra* Part V.

25. See *infra* notes 26–27 and accompanying text.

26. See *infra* Part IV.

27. See *infra* Part V.

II. THE COURTS IN PERSPECTIVE

The last two decades have been marked by a proliferation of international courts with varying jurisdictions, structures, and outcomes.²⁸ In this study, I focus on two supranational courts—the African Court on Human and Peoples’ Rights (ACtHPR) and the International Criminal Court (ICC). There are three main rationales for this selection. First, both courts have jurisdiction to hear cases affecting their member states who have signed and ratified the founding treaty,²⁹ though in both cases and in some limited circumstances, non-member state entities can bring cases before the court.³⁰ Second, both courts were established as permanent courts by their founding treaties.³¹ The ACtHPR was established by the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights

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28. See DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES* 4 (2007) (defining international courts to include courts that “[a]re permanent, or at least long-standing;” “established by an international legal instrument;” “[u]se international law to decide cases;” use rules of procedure to decide cases; and issue legally binding judgments on the parties to the dispute).
29. *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights*, AFR. COMMISSION ON HUM. & PEOPLES’ RTS., <http://www.achpr.org/instruments/court-establishment/> (last visited Dec. 30, 2017) [hereinafter *African Protocol*] (setting forth the jurisdiction of the ACtHPR in Articles 3, 4, and 5, and providing that “[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.”); Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*]. Article 12 of the Rome Statute provides that “[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” Rome Statute, *supra*, art. 12. Article 5 details the ICC’s jurisdiction over crimes. *Id.* art. 5. Additional grounds for jurisdiction are set out in Articles 13, 14, and 15. *Id.* art. 13–15.
30. Rome Statute, *supra* note 29, art. 13 (providing in Article 13(b) that the United Nations Security Council may refer a case to the Prosecutor of the ICC under Chapter VII of the United Nations Charter, and providing in Article 13(c) that the Prosecutor may initiate investigations subject to the conditions set forth in Article 15); *African Protocol*, *supra* note 29, art. 5, ¶ 3, art. 34, ¶ 6 (permitting non-governmental organizations “with observer status” and individuals to file complaints pursuant to Article 5, paragraph 3, but only if a member state has made a declaration “accepting the competence of the Court to receive cases” pursuant to Article 34, paragraph 6).
31. Rome Statute, *supra* note 29, Preamble; see also *African Protocol*, *supra* note 29, art. 1 (“There shall be established within the Organization of African Unity an African Court Human and Peoples’ Rights hereinafter referred to as ‘the Court’, [sic] the organization, jurisdiction and functioning of which shall be governed by the present Protocol.”).

(the Protocol), signed in 1998, and came into force in 2004 with twenty-four ratifications.³² Similarly, the Rome Statute established the ICC in 1998, which came into force in 2002.³³ Third, both courts have specific provisions in their constitutive treaties for achieving gender parity in the composition of the judges who sit on the bench.³⁴ Notwithstanding these similarities, there are also some major differences between the two courts, a few of which are relevant to the current discussion.³⁵ For instance, while the ACtHPR typically deals with cases among African member-states,³⁶ the ICC has jurisdiction to hear cases by referral from the United Nations Security Council.³⁷ The ICC has a current membership of 123 member-states who have signed and ratified the treaty.³⁸ The ACtHPR is made up of thirty member-states, out of the fifty-four nations on the continent.³⁹ Lastly and most importantly, the ICC has been beleaguered by growing agitation from some African member-states planning to withdraw from the court,⁴⁰ while the ACtHPR has not faced such a challenge.⁴¹

Judges on these courts are to hear and dispose of cases guided by principles of international law and rules of procedure for the

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32. See *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., <http://www.achpr.org/instruments/court-establishment/ratification/> (last visited Dec. 30, 2017). In addition to the twenty-four states that have signed and ratified the Protocol, twenty-five more states have signed, but not ratified, and only five states have neither signed nor ratified the Protocol. *Id.*
 33. Rome Statute, *supra* note 29.
 34. *Id.* art. 36, ¶ 8(a)(iii); *African Protocol*, *supra* note 29, art. 12, ¶ 2.
 35. See *infra* notes 36–41 and accompanying text.
 36. *African Protocol*, *supra* note 29, art. 3, 5.
 37. Rome Statute, *supra* note 29, art. 13(b).
 38. *The Court Today*, INT'L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf> (last updated Dec. 18, 2017).
 39. Steve Boyes, *Getting to Know Africa: 50 Interesting Facts...*, NAT'L GEOGRAPHIC: VOICES (Oct. 31, 2013), <https://voices.nationalgeographic.org/2013/10/31/getting-to-know-africa-50-facts/>; *Welcome to the African Court*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court> (last visited Dec. 30, 2017).
 40. See *African Leaders Plan Mass Withdrawal from International Criminal Court*, GUARDIAN (Jan. 31, 2017, 6:18 PM), <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> (“African leaders have adopted a strategy calling for a collective withdrawal from the [I]nternational [C]riminal [C]ourt.”).
 41. See *id.* (“[T]he strategy . . . recommends that African countries strengthen their own judicial mechanisms . . . ‘in order to reduce the deference to the ICC.’”).

respective courts.⁴² The decisions of these courts have far-reaching implications for ending impunity and providing justice and reparation for victims.⁴³ Consequently, the composition of these courts matter to the extent that their decisions are binding on and set important precedent for future cases.⁴⁴ Taking into account the poor record of international courts in attaining an equitable distribution of the sexes, the framers of the treaties establishing both courts took into account the need for gender representation in the nomination and selection processes.⁴⁵ For instance, in selecting judges to the ACtHPR, two provisions of the Protocol are instructive.⁴⁶ First, Article 12(2) details the nomination process and provides that in the nomination of judges, “[d]ue consideration shall be given to *adequate* gender representation in [the] nomination process.”⁴⁷ Article 14(3) addresses the election process, which is undertaken by the Assembly of Heads of State and Government, and states that “[i]n the election of the judges, the Assembly shall ensure that there is *adequate* gender representation.”⁴⁸

Thus, through the nomination and voting procedures, there appears to be emphasis placed on ensuring an *adequate* gender representation on the court.⁴⁹ The meaning of “adequate” is unclear, and thus leaves room for political maneuvering by States.⁵⁰ This provision tends to

42. Rome Statute, *supra* note 29, art. 21, ¶ 1; *African Protocol*, *supra* note 29, art. 3.

43. See, e.g., Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRON., Dec. 2012, at 12, 13; Oliver Windridge, *Another First: Reparations Awarded to Victims at the African Court on Human and Peoples’ Rights*, OXFORD HUM. RTS. HUB (Aug. 13, 2015), <http://ohrh.law.ox.ac.uk/another-first-reparations-awarded-to-victims-at-the-african-court-on-human-and-peoples-rights/>; see also *Africa*, INT’L COALITION FOR RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/africa> (last visited Dec. 30, 2017) (noting the ACtHPR’s power “to make final and binding decisions on human rights violations carried out by AU Member States”).

44. See generally, e.g., RUTH MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* (2010) (discussing international courts and judges); TERRIS ET AL., *supra* note 28 (discussing the selection of international judges); Grossman, *supra* note 7 (discussing the composition of international courts).

45. See *supra* note 34 and accompanying text.

46. See *infra* notes 47–48 and accompanying text.

47. *African Protocol*, *supra* note 29, art. 12, ¶ 2 (emphasis added).

48. *Id.* art. 14, ¶ 3 (emphasis added).

49. See *supra* notes 47–48 and accompanying text. The provision for achieving an adequate gender representation is an aspirational target that State Parties have in the past failed to invoke to reach a fair balance of the sexes on the court, until the most recent elections in 2017. See Josephine J. Dawuni, *Vive La Diversité! A Roadmap to Gender Parity on African Regional Courts?*, VÖLKERRECHTSBLOG (May 15, 2017), <https://voelkerrechtsblog.org/vive-la-diversite/>.

50. See Dawuni, *supra* note 49.

receive secondary consideration relative to the provisions aimed at achieving regional and geographic balance.⁵¹ Since the first judicial election was held in 2006, the ACtHPR has had only eight women, out of a total of twenty-three judges, that have served on the court when this project began, but these numbers have since changed with the last election in 2017.⁵² That breaks down to two women out of the eleven-member panel at any given time.⁵³ The consistently low number of women on the bench raises cause for concern, considering the number of institutional and legal frameworks available for achieving gender parity across all sections in African society.⁵⁴

In establishing the ICC, the Rome Statute ensured that the court achieved a balance in gender representation.⁵⁵ Article 36(8)(iii) provides that “State Parties shall, in the selection of judges, take into account the need . . . for . . . [a] *fair representation* of female and male judges.”⁵⁶

In 2003, the ICC made history when it appointed eighteen new judges to the court, seven of whom were women.⁵⁷ This record was broken in 2009, when eleven women, out of eighteen judges, were

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51. See *Current Judges*, AFR. CT. ON HUM. & PEOPLES’ RTS., <http://www.african-court.org/en/index.php/judges/current-judges> (last visited Dec. 30, 2017) (demonstrating that all eleven of the current judges on the ACtHPR are from different African countries, while only a minority of the judges are women); see also *Profiles for Former Judges*, AFR. CT. ON HUM. & PEOPLES’ RTS., <http://www.african-court.org/en/index.php/judges/former-judges> (last visited Dec. 30, 2017) (demonstrating that nine of the fifteen former judges to sit on the ACtHPR were from a different country than the current judges, while only a minority of the former judges were women).
 52. Dawuni, *supra* note 49.
 53. See *id.*
 54. Assembly of Heads of State & Gov’t of Member States of the African Union, *Solemn Declaration on Gender Equality in Africa*, Assembly/AU/Decl.12 (III) (July 6–8, 2004) (reaffirming commitment to the following international instruments: Dakar Platform for Action (1994), Beijing Platform for Action (1995), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999), Outcome Document of the Twenty-Third Special Session of the United Nations General Assembly Special Session on the Implementation of the Beijing Platform for Action (2000), UN Resolution 1325 (2000) on Women, Peace and Security, and Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003)).
 55. Rome Statute, *supra* note 29, art. 36, ¶ 8(a)(iii).
 56. *Id.* (emphasis added).
 57. UN Press, *First 18 Judges Including Seven Women Elected to the ICC*, GLOBAL POL’Y F. (Feb. 7, 2003), <https://www.globalpolicy.org/component/content/article/164/28408.html>.

elected to the court.⁵⁸ This was hailed as a landmark in the history of women on international courts, considering the poor gender record of the International Court of Justice (ICJ) that pre-dated the ICC.⁵⁹ Though the ICC's record on gender parity has wavered in recent years,⁶⁰ the near parity of women on the bench remains a reference point for gender activists and feminist scholars advocating for women in other international courts and tribunals.⁶¹ Efforts by the Coalition for the International Criminal Court (CICC), and other like-minded umbrella organizations, continue to lead advocacy efforts for the nomination and election of more women on the bench.⁶² Explaining the gender disparities between the ICC and the ACtHPR is an exercise beyond the scope of this current project, but it is one that I undertake to discuss elsewhere.⁶³ The preliminary observations presented here are indicative of feminist institutionalist arguments concerning the impact of institutional design, norms, cultures, and practices on achieving gender balance within institutions.⁶⁴ The

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58. See Grossman, *supra* note 6, at 379; see also Stéphanie Hennette Vauchez, *More Women – But Which Women? The Rules and the Politics of Gender Balance at the European Court of Human Rights*, 26 EUR. J. INT'L L. 195, 198 (2015) (reiterating the objective of gender balance in the Rome Statute, and providing evidence that since the ICC's inception, half of the judges have been women).
59. See, e.g., Grossman, *supra* note 6, at 356 (noting that the ICC "has had the most slots occupied by women since its establishment (47%)," while the ICJ has one of the lowest percentages of women on the bench (3%)); Grossman, *supra* note 7, at 678–79 tbl.1, 680 fig.A, 681 fig.B (depicting gender representation on international courts, including the ICC and the ICJ). See generally Claire L'Heureux-Dubé, *Outsiders on the Bench: The Continuing Struggle for Equality*, 16 WIS. WOMEN'S L.J. 15 (2001) (noting the challenges female judges face in their respective domestic courts).
60. Dawuni, *supra* note 49.
61. See Grossman, *supra* note 6, at 356–57.
62. See, e.g., Viviana Krsticevic, *Let's Talk About Gender Parity in International Justice*, GQUAL (Mar. 14, 2016), <http://www.gqualcampaign.org/lets-talk-about-gender-parity-in-international-justice-by-viviana-krsticevic/> (advocating for appointment of additional female leadership in international legal tribunals and bodies); *Election of Six New ICC Judges*, WOMEN'S INITIATIVES FOR GENDER JUST. (July 3, 2017), <http://4genderjustice.org/election-six-new-icc-judges/> (advocating for "State Parties to fill all of the six vacant posts [on the ICC] . . . with female candidates"); *Why Does Gender Balance Matter on the Judicial Bench?*, COALITION FOR INT'L CRIM. CT. (May 2, 2017), <http://www.coalitionfortheicc.org/news/20170502/why-does-gender-balance-matter-judicial-bench> (advocating for the need to maintain gender balance on the ICC).
63. Josephine Dawuni, *Two Sides of the Same Gender? Gender Disparity Between the International Criminal Court and the African Court on Human and Peoples' Rights* (undated) (unpublished manuscript) (on file with author).
64. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 171–200 (2000); Fiona Mackay et al., *New Institutionalism Through a Gender Lens: Towards a Feminist Institutionalism?*, 31

success of the Rome Statute in achieving a fair gender representation should not be taken as a given and self-replicating occurrence. Considering the many steps involved in the selection process, feminist scholars and gender activists will have to tread with cautious optimism on the trend set by the ICC in achieving near gender parity. Politics continue to play a role in the selection processes and international courts do not appear to be totally insulated from the politics of judicial selection.⁶⁵

III. CONTEXTUALIZING GENDER AND JUDGING IN INTERNATIONAL COURTS

International criminal law is still evolving, especially for women who serve as judges on international criminal tribunals and courts.⁶⁶ Increasingly, debates on the paucity of women judges on international courts have gained traction among scholars.⁶⁷ It appears that the theoretical explanations for why women are needed on international courts draw largely from those advanced for domestic courts.⁶⁸ There is an overwhelming need to support the promotion of gender balanced international courts for purposes of achieving normative legitimacy, fair representation, democratic legitimacy, and a voice for women and minority rights.⁶⁹

Notwithstanding the growing scholarship addressing the need for judicial diversity, the historical record presents a dismal picture on women's roles in international courts.⁷⁰ Previous tribunals such as the Nuremberg and Tokyo tribunals—set up to prosecute crimes after the First and Second World Wars—did not have a single female

INT'L POL. SCI. REV. 573, 573–84 (2010); *see also* Carole Boyce-Davies, *Writing Black Women into Political Leadership: Reflections, Trends, and Contradictions*, in BLACK WOMEN AND INTERNATIONAL LAW: DELIBERATE INTERACTIONS, MOVEMENTS, AND ACTIONS 23, 23–36 (Jeremy I. Levitt ed., 2015) (discussing cultural trends of black women, including their gains and struggles within international and domestic political institutions).

65. MACKENZIE ET AL., *supra* note 44 (providing a detailed discussion on the politicization of judicial selection for the ICJ and the ICC); *see also* TERRIS ET AL., *supra* note 28, at 4 (providing the definition for international courts).

66. *See generally* Grossman, *supra* note 6 (providing a detailed discussion on women that have served on international courts and criminal tribunals).

67. *E.g.*, Grossman, *supra* note 7, at 650 n.16, 651 n.17.

68. *See* Grossman, *supra* note 6, at 359–60.

69. *See id.* at 343–47.

70. *See id.* at 348–92; *see also* Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT'L CRIM. L. REV. 643, 643–44 (2011) (highlighting the “lag” in female representation on international criminal tribunals other than the ICC).

judge,⁷¹ though gender-based crimes were well documented in both wars.⁷² In 1995, for the first time in its fifty-year history, the ICJ appointed a woman, Judge Rosalyn Higgins of the United Kingdom, to the court.⁷³ After the appointment of Higgins, the promise of women judges joining international courts did not materialize until 2010 with the appointments of Judge Joan E. Donoghue, of the United States,⁷⁴ and Judge Hanqin Xue, of China.⁷⁵ Later, in 2012, Judge Julia Sebutinde, of Uganda, joined the bench.⁷⁶ The low number of women on international courts and tribunals appears to be a global phenomenon that cuts across the wide spectrum of international courts and tribunals, with only a few exceptions.⁷⁷

As women judges “trickle in” on international courts, it becomes clear that they are not token women, but rather that they are well qualified to be in those positions.⁷⁸ The profiles of these women indicate that they have stellar academic backgrounds and significant professional accomplishments, and that some of them are trailblazers, having earned the status of “first” in their various professional endeavors.⁷⁹ Notwithstanding these observations, women’s entry onto international courts continues to remain a long bumpy road for

71. See Stephen J. Rapp, *Achieving Accountability for the Greatest Crimes—The Legacy of the International Tribunals*, 55 *DRAKE L. REV.* 259, 265 nn.8–9 (2007).

72. See, e.g., Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 *BERKELEY J. INT’L L.* 288, 295, 300–02 (2003).

73. Renee Dopplick, *Judge Rosalyn Higgins on Her Term as President of the International Court of Justice*, *INSIDE JUST.* (Apr. 8, 2009), http://www.insidejustice.com/intl/2009/04/08/asil_icj_rosalyn_higgins/.

74. Nienke Grossman, *Why So Few Women on International Courts? It’s Time for a Change.*, *INTLAWGRRRLS* (Sept. 16, 2015), <https://ilg2.org/2015/09/16/why-so-few-women-on-international-courts-its-time-for-a-change/>; *All Members*, *INT’L CT. JUST.*, <http://www.icj-cij.org/en/all-members> (last visited Dec. 30, 2017).

75. *All Members*, *supra* note 74.

76. *Id.*

77. See Grossman, *supra* note 6, at 350 tbl.1. Grossman provides evidence to show that, as of mid-2015, the Andean Tribunal of Justice, the smallest court among those sampled and composed of four judges, was the only court with 50% representation of women. *Id.* This court was followed by the ICC with 39%, and the European Court of Human Rights with 33%. *Id.* The International Tribunal for the Law of the Sea trailed behind at 5%. *Id.* The ACTHPR is currently the most gender-balanced court as of May 2017, with 45% women representation. See Josephine J. Dawuni, *African Women Judges and Gender Parity on the African Court on Human and Peoples’ Rights*, *INTLAWGRRRLS* (Feb. 1, 2017), <https://ilg2.org/author/jdawuni/>.

78. See *infra* Section IV.A.

79. See *infra* Sections IV.A–B.

various reasons.⁸⁰ For one, the process of electing and appointing judges to international courts involves a great deal of domestic politics, and women must find strategies to combine their professional experiences with other political considerations in creative ways.⁸¹ Fionnuala Ní Aoláin, in her response to Stéphanie Hennette Vauchez,⁸² notes that, “by accessing elite judicial institutions, women exert agency by taking ‘strategic, creative and intuitive action,’ to generate individual opportunity as well as to enable dynamic entry to gendered institutional environments that have been, as a practical matter, closed to the female sex since their inception.”⁸³

The persistent trend of gender imbalance in international courts is more disturbing when viewed in light of the fact that international courts are perceived as arenas for fighting injustice and inequality.⁸⁴ Increasingly, research has demonstrated that courts, both domestic and international, continue to be informed by masculine expectations, often operating within institutional selection processes that view the qualifications of women as secondary to those of men.⁸⁵ In essence, the playing field is not equal.⁸⁶ That being said, there have been modest advances in the rise of women to international courts.⁸⁷ Judges on the ICC represent the different geographic regions of the world,⁸⁸ yet some regions have had success in nominating women to the court, and other regions have not.⁸⁹ For instance, France, which

80. See *infra* notes 81–83 and accompanying text. See generally Sally J. Kenney, *Choosing Judges: A Bumpy Road to Women’s Equality and a Long Way to Go*, 2012 MICH. ST. L. REV. 1499 (discussing the slow progress towards achieving gender equality by exemplifying women’s inequality in the judiciary).

81. See Fionnuala Ní Aoláin, *More Women – But Which Women? A Reply to Stéphanie Hennette Vauchez*, 26 EUR. J. INT’L L. 229, 231–32 (2015).

82. *Id.* at 229.

83. *Id.* at 232 (quoting McKay et al., *supra* note 64, at 583).

84. See *International Criminal Court*, HUM. RTS. WATCH, <https://www.hrw.org/topic/international-justice/international-criminal-court> (last visited Dec. 30, 2017) (discussing the role of the ICC in fighting injustice around the world).

85. Ulrike Schultz & Gisela Shaw, *Introduction: Gender and Judging: Overview and Synthesis*, in GENDER AND JUDGING 3, 24–36 (Ulrike Schultz & Gisela Shaw eds., 2013).

86. See *id.*

87. See *supra* notes 8–13, 57–58 and accompanying text.

88. See *The Judges of the Court*, INT’L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/JudgesENG.pdf> (last visited Dec. 30, 2017).

89. See *id.*; see also *infra* notes 90–94 and accompanying text, Table 2 (detailing the ICC’s gender breakdown according to geographical classification).

is known for a record number of women judges,⁹⁰ has yet to nominate a woman judge to sit on the ICC.⁹¹ The same can be said of the United Kingdom, where the poor record of women judges on high courts has been reflected in the country's failure to nominate a woman to sit on the ICC.⁹² Yet, Uganda has succeeded in nominating two women to international courts, one on the ICJ,⁹³ and the other on the ACtHR.⁹⁴

Despite the low number of women on international courts, the representation of African women judges appears to be gaining momentum.⁹⁵ The ICC shows an interesting trend: of the forty-one judges total who have served since the inception of the court in 2003, fifteen have been women, making up 36% of the total number of judges during that period.⁹⁶ African women make up five of the fifteen, representing the highest number from a geographical region of the world.⁹⁷ It is important to draw attention to the danger of *essentializing* the experiences of African women judges. Consequently, this article cautions against interpreting the experiences and roles of the women discussed in this article as necessarily representative of the experiences of *all* African women in international courts and tribunals.⁹⁸

Having said that, one can argue that the experiences presented here are necessary to further the discussion and exploration into an arena which has not received as much scholarly attention as it deserves. To start, one may have to clearly define what it means to be an "African." This may be viewed from a racial perspective, where being "African" connotes anyone and everyone of African descent, including people who live in the Diaspora.⁹⁹ One may also view "African" as a geographical classification—people who derive their

90. See Grossman, *supra* note 6, at 362.

91. *Id.*

92. See *id.*; see also Owen Bowcott, *Proportion of Female Judges in UK Among Lowest in Europe*, GUARDIAN (Oct. 6, 2016, 7:21 AM), <https://www.theguardian.com/law/2016/oct/06/proportion-of-women-judges-in-uk-among-lowest-in-europe> (discussing a comparative study which revealed that the United Kingdom "has one of the lowest proportions of female judges on its benches," with only 30% of women judges).

93. Grossman, *supra* note 6, at 350 tbl.1, 351.

94. *Id.* at 350 tbl.1.

95. See *infra* notes 96–97, 129–32 and accompanying text, Table 2.

96. See *Who's Who*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/default.aspx#> (last visited Dec. 30, 2017).

97. See *infra* Table 2.

98. See *infra* Section V.D.

99. See *African*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993).

ancestry from the black heritage and who live on the continent.¹⁰⁰ The latter definition may be restrictive, especially in the case of South Africa and other southern African countries, such as Zimbabwe, Kenya, and to some extent Namibia, where white people are considered African, but do not necessarily trace their ancestry to a black heritage.¹⁰¹

For instance, Judge Navanethem Pillay of the ICC (2003–2008) is of Indian descent, but for purposes of racial classification in South Africa, she is identified as “black.”¹⁰² This distinction is further complicated when one looks at the schisms between race and gender in South Africa’s judicial appointment of women, where some scholars have argued that race appears to trump gender.¹⁰³ For purposes of conceptual clarity, I proceed by defining an “African woman” as one who self-identifies as an African and is placed in a category that qualifies her for judicial selection as an “African.”

It is not enough for scholars to keep justifying the need for more women on international courts by challenging norms of exclusivity. What remains to be done is to demonstrate, through various ways, *what* women do once they get to the courts and *how* they do it. It is worth bearing in mind that it will not always be easy to quantify in a tangible form what women bring to the court. This is especially so, considering the need for safeguarding fairness and ensuring impartiality—cardinal judicial principles by which all judges must operate.

In sum, African women judges are caught at the multiple intersections of race, gender, and class relations, both within their societies and the international sphere. By shedding light on the experiences and contributions of African women judges, this study provides an important contribution to the scholarship on gender and judging by examining the trajectories and contributions of African

100. *See id.*

101. *See supra* notes 99–100 and accompanying text; *see also* *African Countries with Highest White Population*, AFR. RANKING, <http://www.africanranking.com/african-countries-with-highest-white-population/> (last visited Dec. 30, 2017) (demonstrating the percentage of the population that is white in Zimbabwe, Kenya, and Namibia).

102. *See* Katy Glassborow, *Apartheid Legacy Haunts ICC Appeals Judge*, INST. FOR WAR & PEACE REPORTING (Aug. 18, 2006), <https://iwpr.net/global-voices/apartheid-legacy-haunts-icc-appeals-judge>; *see also infra* notes 115, 155–58 and accompanying text (detailing Judge Pillay’s professional accomplishments).

103. *See* Catherine Albertyn, *Judicial Diversity*, in *THE JUDICIARY IN SOUTH AFRICA* 245, 254–55, 280–81, 283–85 (Cora Hoexter & Morné Olivier eds., 2014) (explaining that “gender [in the judiciary] was subsumed by race until the late 1980s,” but noting that gender has now begun to garner more attention and action).

women who sit on international courts.¹⁰⁴ Diversity in perspectives and narratives of the actors who sit on international courts enriches the discourse in our attempts to understand what women judges do once they get to the international bench.

IV. THE WOMEN ON THE COURTS

This study represents the first attempt to compare the profiles of African women judges on two international courts.¹⁰⁵ Table 1 displays the women who have sat on these courts and the leadership positions they have held.¹⁰⁶ The data presented here does not include the other women judges elected to these courts after June 2016. Two factors informed the decision to focus on the composition of the courts before June 2016.¹⁰⁷ First, the project began at a time when elections to fill vacant positions on the two courts had not been held.¹⁰⁸ Second, at the time of completing this project, the ACtHPR had held new elections, resulting in the election of four more women judges to the bench.¹⁰⁹ Elections to the ICC were scheduled for December 2017 and resulted in the election of five women judges to the bench.¹¹⁰ However, because this article focuses on the substantive contributions of the judges under study, it was expedient to focus on those who had served on the courts and whose contributions could be measured.¹¹¹ The subsequent discussion in this section outlines four patterns that appear to be common across all the judges in this study.¹¹²

104. See *infra* Parts IV–V.

105. See *infra* notes 106–91 and accompanying text; see also *infra* Part V (detailing what the African women judges do upon their appointment to the courts).

106. See *infra* Table 1.

107. See *infra* notes 108–11 and accompanying text.

108. See *infra* notes 109–10 and accompanying text.

109. See Dawuni, *supra* note 77.

110. 2017 - Election of Six Judges – Results, INT’L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/elections/Pages/Results-elections-judges-2017.aspx (last visited Dec. 30, 2017). Of the five women judges elected, one judge, Solomy Balungi Bossa, was from Africa. *Id.*

111. See *infra* notes 113–33 and accompanying text; see also *infra* Sections IV.A–D (discussing patterns common in the studied African women judges).

112. See *infra* Sections IV.A–D.

Table 1. Women on the Courts

Name		Years Served	Leadership Position
Akua Kuenyehia ¹¹³	ICC	2003–2015	First Vice-President of the Court (2003–2009)
Fatoumata Diarra ¹¹⁴	ICC	2003–2014	
Navanethem Pillay ¹¹⁵	ICC	2003–2012	
Sanji Monageng ¹¹⁶	ICC	2009–present	First Vice-President of the Court (2012–2015) President of Appeals Division (2014–present)
Joyce Aluoch ¹¹⁷	ICC	2009–present	First Vice-President of the Court (2015–present)
Sophia A. B. Akuffo ¹¹⁸	ACtHPR	2006–2014	President of the Court (2012–2014) Vice President (2008–2010, 2010–2012)
Kelello Mafoso-Guni ¹¹⁹	ACtHPR	2006–2010	

113. Judge Akua Kuenyehia, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Akua%20Kuenyehia> (last visited Dec. 30, 2017). Judge Kuenyehia was one of the first judges elected after the court was established. *Id.* The terms of office for the first batch of judges was staggered, thus allowing her to sit on the court for more than the mandated nine-year non-renewable term. See Rome Statute, *supra* note 29, art. 36, ¶ 9(b)–(c).
114. Judge Fatoumata Dembele Diarra, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Fatoumata%20Dembele%20Diarra> (last visited Dec. 30, 2017).
115. Judge Navanethem Pillay, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Navanethem%20Pillay> (last visited Dec. 30, 2017). Judge Pillay left the ICC in 2008 and took up the position as the United Nations High Commissioner for Human Rights. Barbara Crossette, *Women's Advocate Is UN's New Human Rights Chief*, NATION (July 27, 2008), <https://www.thenation.com/article/womens-advocate-uns-new-human-rights-chief/>.
116. Hon. Sanji Monageng, INT'L ASS'N WOMEN JUDGES, <https://iawj-womenjudges.org/hon-sanji-mmasenono-monageng/> (last visited Dec. 30, 2017).
117. Judge Joyce Aluoch, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Joyce%20Aluoch> (last visited Dec. 30, 2017).
118. Profiles for Former Judges: Justice Sophia A. B. Akuffo - Ghana, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/index.php/judges/former-judges> (last visited Dec. 30, 2017). Judge Akuffo has served in two successive positions, as president and vice president of the ACtHPR. *Id.* She is the first woman to have held the position as president of the court. *Id.* In 2017, she was appointed as the second woman Chief Justice of Ghana after the retirement of her predecessor and first woman Chief Justice of Ghana, Justice Georgina Wood. Abdur Rahman Alfa Shaban, *Ghana's First Female Chief Justice Retires: 10 Facts About Georgina Wood*, AFRICANEWS (June 10, 2017, 2:00 PM), <http://www.africanews.com/2017/06/10/ghana-s-first-female-chief-justice-retires-10-facts-about-georgina-wood/>.

<i>Elsie Thompson</i> ¹²⁰	ACtHPR	2010–2016	Vice-President (2014–2016)
<i>Solomy B. Bossa</i> ¹²¹	ACtHPR	2014–present	

The gender representation on the ACtHPR does not mirror the legal and political frameworks put in place to achieve adequate and fair gender representation on the court.¹²² Since the court began operating in 2006 until June 2016, only four women have been appointed to the court.¹²³ The ICC presents a slightly different story.¹²⁴ Out of a total of forty-one judges, fifteen have been women,¹²⁵ five of whom are African women.¹²⁶ Table 2 below shows the gender breakdown of the court, as of March 2016.¹²⁷ The numbers reflect a total of forty-one judges, both past and current.¹²⁸ Of the country groupings, Africa leads with the highest number of women from any one geographical region.¹²⁹ On the contrary, the Western Europe and Other Group (WEOG), with only two women, is tied for lowest number of women and has the lowest percentage of women out of the total number of judges from that region.¹³⁰

119. *Profiles for Former Judges: Justice Kelello Justina Mafoso-Guni - Kingdom of Lesotho*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/index.php/judges/former-judges> (last visited Dec. 30, 2017).

120. *Profiles for Former Judges: Justice Elsie Nwanwuri Thompson - Nigeria*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/index.php/judges/former-judges> (last visited Dec. 30, 2017); *Vice President*, AFR. CT. ON HUM. & PEOPLES' RTS. (Oct. 24, 2014), <http://en.african-court.org/index.php/component/k2/item/7-vice-president>.

121. *Current Judges: Justice Solomy Balungi Bossa - Uganda*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://en.african-court.org/index.php/judges/current-judges> (last visited Dec. 30, 2017).

122. *See African Protocol*, *supra* note 29, art. 12, 14.

123. *See, e.g., Current Judges*, *supra* note 51; *Profiles for Former Judges*, *supra* note 51. These four female judges are former Justice Sophia A. B. Akuffo, former Justice Kelello Justina Mafoso-Guni, former Justice Elsie Nwanwuri Thompson, and Justice Solomy Balungi Bossa. *See supra* notes 118–21 and accompanying text.

124. *See infra* notes 125–28 and accompanying text.

125. *See infra* Table 2.

126. *See infra* Table 2.

127. *See infra* Table 2.

128. *See infra* Table 2.

129. *See infra* Table 2.

130. *See infra* Table 2.

Table 2. *Gender Breakdown of the ICC According to Geographical Classification*¹³¹

<i>Country Groupings</i>	<i>Total # of State Parties</i>	<i>Female</i>	<i>Male</i>	<i>% of Women Out of Total # of Judges from the Group</i>
AFRICA	34	5	3	62.5%
GRULAC	27	4	4	50%
EEG	18	2	3	40%
ASIA	19	2	5	28.6%
WEOG	25	2	11	15.4%

Rather than explaining what these numbers mean, this study is interested in answering the questions: Who are these women, and what do we know about them?¹³² As attempts are made to answer these questions, several patterns emerge, and through these patterns, we learn more about these women and their remarkable journeys to the courts.¹³³ The goal here is not to provide elaborate accounts on what each woman has done, but rather to highlight common patterns in the qualities they possess along a continuum of professional accomplishments.

A. *Pattern #1: Working Their Way to the Top*

Remarkably, these women have worked their way to the top of the judiciaries both within their countries of origin and within the two courts in this study.¹³⁴ Judge Akua Kuenyehia of the ICC was drawn from List B,¹³⁵ representing candidates with expertise in international

131. See *Who's Who*, *supra* note 96 (providing biographies for the forty-one former and current ICC judges, including their nationalities and classifications according to the following geographical regions: Western European and Other Groups (WEOG), Group of Latin American and Caribbean States (GRULAC), Eastern European Group of States (EEG), Asia-Pacific States (ASIA), and African States (AFRICA)).

132. See *supra* Table 1; see also *infra* Sections IV.A–D (discussing patterns common in the studied African women judges).

133. See *infra* Sections IV.A–D.

134. See *infra* notes 135–53 and accompanying text.

135. Judge Akua Kuenyehia, *supra* note 113. The Rome Statute provides two lists—A and B—from which judges can be chosen. Rome Statute, *supra* note 29, art. 36, ¶ 5. Article 36, paragraph 5 provides:

For the purposes of the election, there shall be two lists of candidates: List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii). A candidate with sufficient qualifications for both lists may choose on which list to appear.

law.¹³⁶ Though she never served as a judge in her native country of Ghana, she met the required qualifications for appointment as a judge on Ghana's highest court.¹³⁷ Judge Kuenyehia qualified as a lawyer in 1970,¹³⁸ and in 1972, she was employed as a law lecturer at the University of Ghana Faculty of Law,¹³⁹ making her the first woman law professor in the history of Ghana.¹⁴⁰ Eventually, in 1996, she became the first female Dean of the Faculty of Law at the University of Ghana,¹⁴¹ a position she held until 2003 when she left to join the ICC bench.¹⁴² During her academic profession, she was actively engaged in both domestic and international activities aimed at promoting and advancing the rights of women.¹⁴³ This led her to serve as her country's representative on the committee for the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁴⁴ In addition, as a scholar, she has published in various areas on women's and children's rights in Africa.¹⁴⁵

At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

Id.

136. Rome Statute, *supra* note 29, art. 36, ¶¶ 3(b)(ii), 5.

137. *See id.* 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."); *see also Judge Akua Kuenyehia*, *supra* note 113 (indicating that Judge Kuenyehia did not serve as a judge on Ghana's court); *infra* notes 138–45 and accompanying text (discussing Judge Kuenyehia's qualifications).

138. Permanent Mission of Ghana to the United Nations, *Statement Submitted in Accordance with Article 36.4(a) of the Rome Statute of the International Criminal Court and Paragraph 6 of the Resolution of the Assembly of States Parties Relating to the Nomination of Professor (Mrs.) Akua Kuenyehia for Re-Election to the International Criminal Court*, INT'L CRIM. CT. (Aug. 3, 2005), https://www.icc-cpi.int/NR/rdonlyres/02733178-6231-4BB4-B64A-5D08CD958AF2/277420/ICCASP_ej2_ghastatementpdf.pdf.

139. Mariam Ogunlana, *Akua Kuenyehia, Henry Baye Join Standard Chartered Bank Ghana*, PAGEONE (Aug. 10, 2017), <https://pageone.ng/2017/08/10/akua-kuenyehia-standard-chartered-bank/>.

140. *Id.*

141. *Id.*

142. *Id.*

143. Katy Glassborow, *Meet Judge Akua Kuenyehia in Office*, MODERN GHANA (Feb. 10, 2008), <https://www.modernghana.com/lifestyle/259/16/meet-judge-akua-kuenyehia-in-office.html>.

144. *Id.*

145. *See Judge Akua Kuenyehia*, *supra* note 113.

Judge Kelello Mafoso-Guni, who served as a judge on the ACtHPR for a four-year term,¹⁴⁶ exemplifies another remarkable achievement of a judge working her way up through the ranks.¹⁴⁷ She was the first woman to be appointed as a magistrate in Zimbabwe.¹⁴⁸ Back in her native country of Lesotho, she also became the first woman appointed to the High Court of Lesotho.¹⁴⁹ In 2006, she was elected to the ACtHPR, where she served for four years.¹⁵⁰ Remarkably, Judge Sanji Monageng of the ICC and Mafoso-Guni of the ACtHPR started their judicial careers from the lowest level of the court rank as magistrates.¹⁵¹ Each woman worked her way to earn a seat at a supranational court.¹⁵² In all, these women bring with them diverse professional backgrounds, including judgeships, academia, diplomatic representation, and service on various boards and professional organizations.¹⁵³

B. *Pattern #2: Trailblazing Records*

Each one of these women has set a trailblazing record in her career.¹⁵⁴ Take for instance Judge Pillay from South Africa, who was appointed as one of the first eighteen judges to the ICC in 2003.¹⁵⁵ She was the first black woman lawyer from KwaZulu-Natal Province in her native South Africa.¹⁵⁶ Being the first black woman at a time of institutionalized racism,¹⁵⁷ she had many other barriers to break. Due to her race, she could not find a law firm to employ her, thus she had no choice but to open her own law firm, making her the first

146. *Profiles of Former Judges: Justice Kelello Justina Mafoso-Guni - Kingdom of Lesotho*, *supra* note 119.

147. *See infra* notes 148–51 and accompanying text.

148. *Profiles of Former Judges: Justice Kelello Justina Mafoso-Guni - Kingdom of Lesotho*, *supra* note 119.

149. *Id.*

150. *Id.*

151. *See, e.g., id.*; Judge Sanji Monageng, INT'L COMMISSION ON MISSING PERSONS, <https://www.icmp.int/about-us/governance/commission/judge-sanji-monageng/> (last visited Dec. 30, 2017).

152. *See, e.g., Profiles of Former Judges: Justice Kelello Justina Mafoso-Guni - Kingdom of Lesotho*, *supra* note 119; Judge Sanji Monageng, *supra* note 151.

153. *See supra* notes 135–52 and accompanying text.

154. *See infra* notes 155–67 and accompanying text.

155. Judge Navanethem Pillay, *supra* note 115.

156. *Id.*

157. Christof Heyns, *Interview with Navi Pillay, United Nations High Commissioner for Human Rights*, 37 S. AFR. Y.B. INT'L L. 9, 12–15 (2012).

woman to own a law practice in South Africa.¹⁵⁸ She eventually went on to become the first woman selected to sit on the International Criminal Tribunal for Rwanda (ICTR).¹⁵⁹ In this role as the only female judge, Judge Pillay has been credited for her instrumental role in the *Akayesu* case,¹⁶⁰ which redefined and codified systematic rape as an act of genocide punishable under international criminal law.¹⁶¹ Judge Joyce Aluoch, a Kenyan national and current First Vice President of the ICC,¹⁶² was the first woman to be elevated to the Court of Appeals in Kenya in 2008,¹⁶³ which was the highest court in the country at that time.¹⁶⁴ In 2001, Judge Solomy Bossa of the ACtHPR was appointed as one of the first female judges to sit on the East African Court of Justice.¹⁶⁵ In addition, she served as an *ad litem* judge for the ICTR¹⁶⁶ and is currently a judge of the Court of Appeal/Constitutional Court in Uganda.¹⁶⁷

C. Pattern #3: Leadership Skills

A majority of the women judges in this study have demonstrated leadership skills at various levels in their judicial and legal careers.¹⁶⁸ Prior to joining the ICC, Judge Kuenyehia was the first female law professor and later first female Dean of the Faculty of Law at the

158. *Id.* at 12–13.

159. *Id.* at 16. *See generally* Navanethem Pillay, *Equal Justice for Women: A Personal Journey*, 50 ARIZ. L. REV. 657 (2008) (providing a detailed discussion of Judge Pillay's journey to the bench).

160. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 731–34 (Sept. 2, 1998). *See generally* Askin, *supra* note 72 (providing further discussion of Judge Pillay's role in the *Akayesu* case and the role of women judges in helping to codify sex-based offenses under international law).

161. *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 731–34; Alexandra A. Miller, Comment, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN ST. L. REV. 349, 363–66 (2003).

162. *Judge Joyce Aluoch*, *supra* note 117.

163. *Id.*

164. *Judiciary*, KENYA Y.B., <http://kenyayearbook.co.ke/?p=2661> (last visited Dec. 30, 2017).

165. *Hon. Solomy Balungi Bossa*, INT'L ASS'N WOMEN JUDGES, <https://iawj-womenjudges.org/hon-solomy-bossa/> (last visited Dec. 30, 2017); Press Release, United Nations Mechanism for Int'l Criminal Tribunals, Trial of Emmanuel Ndindabahizi Opens (Sept. 1, 2003), <http://unictr.unmict.org/en/news/trial-emmanuel-ndindabahizi-opens>.

166. *Hon. Solomy Balungi Bossa*, *supra* note 165.

167. *Id.*

168. *See infra* notes 169–79 and accompanying text.

University of Ghana.¹⁶⁹ Upon joining the ICC, Judge Kuenyehia served as the First Vice President from 2003 to 2009, a position which required fulfilling both judicial and administrative duties.¹⁷⁰ Judge Monageng of Botswana, a judge at the ICC, was appointed as a member on the African Commission on Human and Peoples' Rights from 2003 to 2009,¹⁷¹ and subsequently served as the Chair of the Commission in 2007.¹⁷² Since joining the ICC in 2009, she has served as First Vice President and President of the Appeals Division.¹⁷³ In March 2015, Judge Aluoch of Kenya was elected by her peers as First Vice President of the ICC for a three-year term.¹⁷⁴ At the ACtHPR, Judge Sophia Akuffo of Ghana was elected the Vice President of the court in 2008¹⁷⁵ and again in 2010.¹⁷⁶ She was also elected President of the court in 2012.¹⁷⁷ Judge Thompson of Nigeria took over the Vice President position for the ACtHPR from 2014 to 2016.¹⁷⁸ Outside of the courts they sit on, these women have held various positions as Chairs and Vice Chairs of many professional committees at the domestic and international levels.¹⁷⁹

D. *Pattern #4: Activism in Women and Children's Rights*

At various points in their judicial careers, women judges have been engaged in different activities aimed at advancing the rights of women, children, and other minorities.¹⁸⁰ Judge Fatoumata Dembele Diarra of the ICC had a long record of engaging in women's issues

169. *Hon. Judge Akua Kuenyehia*, INST. FOR AFR. WOMEN L., <https://www.africanwomeninlaw.com/hon-judge-akua-kuenyehia> (last visited Dec. 30, 2017); *supra* notes 139–40 and accompanying text.

170. *See Hon. Judge Akua Kuenyehia*, *supra* note 169.

171. *Judge Sanji Monageng*, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Sanji%20Monageng> (last visited Dec. 30, 2017).

172. *Sanji Mmasenono Monageng*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., <http://www.achpr.org/members/sanji-mmasenono-monageng/> (last visited Dec. 30, 2017).

173. *Hon. Sanji Monageng*, *supra* note 116.

174. *The Presidency*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/presidency?ln=en> (last visited Dec. 30, 2017).

175. *Profiles for Former Judges: Justice Sophia A. B. Akuffo - Ghana*, *supra* note 118.

176. *Id.*

177. *Id.*

178. *See* Francis Ameyibor, *African Court Elects New President*, GHANA NEWS AGENCY (Sept. 7, 2016), <http://www.ghananewsagency.org/africa/african-court-elects-new-president-107655>.

179. *See supra* notes 169–78 and accompanying text.

180. *See infra* notes 181–88 and accompanying text.

prior to joining the ICC.¹⁸¹ Her engagement with women's issues led her to occupy positions of leadership, such as Vice President of the International Federation of Women in Legal Careers,¹⁸² as well as Vice President of the African Women Jurists' Federation.¹⁸³ In addition, her unwavering passion for defending the rights of women led her to establish and direct the Women's Pro Bono Center in Mali.¹⁸⁴ Similarly, Judge Pillay's active and illustrative engagement with women's rights issues was acknowledged in 2003 when she was awarded the Gruber Prize for Women's Rights.¹⁸⁵ Judge Aluoch also demonstrated activism for women's rights by serving as Chair of the African Union Committee of Experts on the Rights of the Child.¹⁸⁶ Additionally, Judge Aluoch was appointed the Vice Chair of the United Nations Committee on the Rights and Welfare of the Child.¹⁸⁷ At the ACtHPR, Judge Bossa's engagement with women's issues led her to establish many non-governmental organizations focusing on gender issues in her native country of Uganda.¹⁸⁸

The foregoing patterns provide several snapshots of the illustrious professional trajectory of women judges.¹⁸⁹ From the foregoing discussion, it becomes evident that these women judges bring a wealth of diverse experiences, educational backgrounds, and professional achievements to the various courts on which they sit.¹⁹⁰ Their ascents to the seats of justice at the international level are remarkable achievements, but what is more interesting is what they do once they get to these courts.¹⁹¹

V. WOMEN JUDGES ON THE BENCH

Earlier studies have suggested that examining the impact of women judges on international courts may be a difficult task due to the small number of women judges on these courts.¹⁹² This article challenges

181. Judge Fatoumata Dembele Diarra, *supra* note 114.

182. *Id.*

183. *Id.*

184. *Id.*

185. See 2003 Women's Rights Prize, GRUBER FOUND., <http://gruber.yale.edu/womens-rights/navanethem-pillay> (last visited Dec. 30, 2017).

186. Judge Joyce Aluoch, *supra* note 117.

187. *Id.*

188. See *Current Judges: Justice Solomy Balungi Bossa - Uganda*, *supra* note 121.

189. See *supra* notes 134–88 and accompanying text.

190. See *supra* notes 105–88 and accompanying text.

191. See *infra* Part V.

192. See Kimi Lynn Ling & 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 (2007).

that orthodoxy and argues that as the number of women judges begins to rise steadily, more empirical work is needed to systematically investigate and document what women judges bring to international courts.¹⁹³ As Hauwa Ibrahim prudently notes:

Critical legal scholarship has taught us that the legal and social lives of the law are not always congruent, and our analysis will never be complete without the qualitative narratives and oral histories from female judges themselves, who can shed light into their role in enhancing justice, and into their journeys, challenges and hopes.¹⁹⁴

I argue however, that the contributions of women judges may not always be easy to separate from their contributions as *judges per se*. And neither should we be fixated on their contributions as *women per se*. For that reason, in assessing these contributions, one must undertake this task in an open-minded fashion, which looks for both tangible and intangible contributions. Tangible contributions refer to actions that are easily quantifiable and measurable in terms of judicial output in the law.¹⁹⁵ This is easy to see through the lens of what all judges and international judges are expected to do.¹⁹⁶ Intangible contributions refer to actions that are not necessarily quantifiable, but nevertheless are instrumental in effecting positive change and achieving the intended ends of justice.¹⁹⁷

A. *Challenging Gender Hierarchies*

The appointment of women to the top of judiciaries across Africa may suggest that gender hierarchies in judiciaries are changing.¹⁹⁸ The ascent of African women on international courts may therefore be indicative of what is going on within some domestic judiciaries in Africa.¹⁹⁹ For instance, Ghana, which has had women on both the ACtHPR and ICC, also has a female chief justice and a Supreme

193. See *supra* notes 95–104 and accompanying text.

194. Hauwa Ibrahim, *Nigeria: Women Judges Enhancing the Judiciary*, in *GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY?* 67, 76 (Gretchen Bauer & Josephine Dawuni eds., 2016).

195. See *Tangible*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993).

196. See TERRIS ET AL., *supra* note 28, at xii–xiii (providing a detailed analysis of the role of international judges).

197. See *Intangible*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993).

198. Josephine Dawuni & Alice Kang, *Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa*, 62 AFR. TODAY 45, 62–63 (2015).

199. See *infra* notes 200–25 and accompanying text.

Court with a 38% representation of women.²⁰⁰ Nigeria has also been at the forefront in challenging domestic gender hierarchies.²⁰¹ In 2012, Justice Mariam Aloma Mukhtar was appointed Nigeria's first female Chief Justice.²⁰² As Ibrahim has argued, women judges in Nigeria have served the international community, including Justice Hansine Donli,²⁰³ a former judge of the Economic Community of West African States Court of Justice,²⁰⁴ and Justice Nkemdilim Izuako,²⁰⁵ one of three *ad litem* judges on the United Nations Dispute Tribunal.²⁰⁶ The Kenyan judiciary also has a female Deputy Chief Justice, Philomena Mbete Mwilu, and it is expected that more progress will be made with the 2010 Constitution of Kenya requiring one-third of women in public office and the establishment of the Judicial Services Commission for judicial appointments.²⁰⁷

Justice Solomy Balungi Bossa, a Ugandan woman judge, previously sat on the ACtHPR bench and was one of the five women judges elected to the ICC in the December 2017 elections.²⁰⁸ Judge Sebutinde of Uganda is one of three women currently sitting on the ICJ, and is the first African woman to serve on that court.²⁰⁹

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200. Josephine Dawuni, *Ghana: The Paradox of Judicial Stagnation*, in GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY?, *supra* note 194, at 120, 124; *Ghana's Progress in Gender Equality Slow – Prof Kuenyehia*, GHANAWEB (Mar. 18, 2017), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-s-progress-in-gender-equality-slow-Prof-Kuenyehia-520084>; *Profiles for Former Judges*, *supra* note 51.
 201. See *infra* notes 202–06 and accompanying text.
 202. Ibrahim, *supra* note 194, at 67.
 203. *The Hon. Justice Hansine Donli*, CEDERO ECOWAS, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=57&Itemid=6 (last visited Dec. 30, 2017).
 204. Ibrahim, *supra* note 194, at 67.
 205. *Judges of the United Nations Dispute Tribunal (UNDT): Nkemdilim Amelia Izuako (Nigeria)*, UNITED NATIONS, <http://www.un.org/en/oaj/dispute/judges.shtml> (last visited Dec. 30, 2017).
 206. Ibrahim, *supra* note 194, at 67–68.
 207. *Supreme Court Judges: Hon. Lady Justice Philomena M. Mwilu, Deputy Chief Justice & Vice President of the Supreme Court of Kenya*, REPUBLIC KENYA: JUDICIARY, <http://www.judiciary.go.ke/portal/page/supreme-court-judges> (last visited Dec. 30, 2017); see also Winifred Kamau, *Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions*, in GENDER AND JUDGING, *supra* note 85, at 167, 171, 175 (discussing the impact that the 2010 Kenya Constitution's “one-third” gender rule and the Judicial Service Commission have had on increasing the number of women in the judiciary).
 208. *Current Judges: Justice Solomy Balungi Bossa - Uganda*, *supra* note 121; *2017 - Election of Six Judges – Results*, *supra* note 110.
 209. *Current Members: Judge Julia Sebutinde*, INT'L CT. JUST., <http://www.icj-cij.org/en/>

Domestically, Uganda appears to be making very slow progress in terms of the number of women within the rank and file of its judiciary,²¹⁰ though it has been suggested that the government's policy is to replace an outgoing female judge with another female judge.²¹¹ Nonetheless, the composition of women on Uganda's Supreme Court is remarkable, with four out of nine judges being women,²¹² though the numbers diminish in the lower courts.²¹³ Overall, the empirical record has demonstrated that women in judiciaries across Africa are making incremental headway in achieving gender parity.²¹⁴ There appears to be a continent-wide push for more women in judiciaries, a process that appears to be most active in South Africa²¹⁵ with some gains also being made in Rwanda.²¹⁶

The ascent of African women judges to international tribunals can be viewed as a logical progression of the success being made at the domestic level in African countries. What do these systemic changes and developments in individual countries portend for international law? Or better still, is it too early to hypothesize that the entry of women on the international field may have some impact at the domestic level? Here, I argue that the developments at the international scene have the potential to lead to a loopback mechanism whereby the rise of women at the international level will set in motion and trigger women's rise within the ranks of domestic

current-members (last visited Dec. 30, 2017); Simon Allison, *Africa's Most Senior Female Judge: 'Would These Men Even Listen to Me?'*, DAILY MAVERICK (Nov. 27, 2016), <https://www.dailymaverick.co.za/article/2016-11-27-africas-most-senior-female-judge-would-these-men-even-listen-to-me/#.Wezv4ZrxAa>.

210. See *The Honorable Judges of the High Court*, JUDICIARY: REPUBLIC UGANDA (Aug. 15, 2017), <http://www.judiciary.go.ug/data/incourt/16/The%20Honorable%20Judges%20of%20The%20High%20Court.html> (showing that, out of fifty-three judges in Uganda's lower domestic courts, only twenty-three of them are women).

211. See INT'L COMM'N OF JURISTS, *supra* note 2, at 55.

212. *The Honourable Justices of the Supreme Court of Uganda*, JUDICIARY: REPUBLIC UGANDA (Dec. 31, 2015), <http://www.judiciary.go.ug/data/incourt/3/The%20Honourable%20Justices%20of%20the%20Supreme%20Court%20of%20Uganda.html>.

213. See *The Honorable Judges of the High Court*, *supra* note 210.

214. See Josephine Dawuni, *Gender and the Judiciary: An Introduction*, in GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY?, *supra* note 194, at 1, 11–12.

215. Tabeth Masengu, *It's a Man's World: Barriers to Gender Transformation in the South African Judiciary. Perspectives from Women Advocates and Attorneys*, 23 INT'L J. LEGAL PROF. 305, 305–06 (2016).

216. Jean-Marie Kamatali, *Rwanda: Balancing Gender Quotas and an Independent Judiciary*, in GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY?, *supra* note 194, at 137, 143 tbls.10.1 & 10.2.

judiciaries.²¹⁷ But a word of caution must be sounded here: women's entry into judiciaries will not happen in vacuum. As the profiles of the women in this study demonstrate, women will have to prepare themselves for these positions. Judge Monageng sees the transformation happening in two ways: first through self-agency, and second through government commitment.²¹⁸ During the interview, she pointed out:

One thing I have learned is that women should have a goal and be focused on something and work towards it. . . . I am a self-made judge. . . . Don't sit back and wait for things to happen; you have to empower yourself and make yourself available for promotion. Women should learn to do what men do. When you feel ready, go to the Chief Justice and tell him you are ready to be promoted. If you see a vacancy, for example, on the ICC, go for it. I had been waiting for the ICC. At a meeting of judges in 2004, two judges called me and encouraged me to prepare myself for the ICC in 2009. I cannot mention their names. For five years I was waiting quietly and preparing myself for my government to nominate me. If you are looking for a job, demonstrate to your government that you are ready; if it is a competition, compete. Write good judgments that cannot be overturned on appeal and this makes you a strong candidate.²¹⁹

The lesson from this is simple; women judges must learn from the experiences of their senior colleagues and make a personal commitment to climb the judicial ladder. No doubt there will be obstacles—not least of which are the persistent masculine institutional norms and processes²²⁰—but women judges are beginning to break these barriers and are paving the way for others to follow.²²¹ The standards women judges are setting on the international scene are obvious to all who encounter them. In an interview with Judge Antoine Kesia-Mbe Mindua, a male judge from the Africa group of the ICC,²²² I asked him about how he would

217. See *infra* notes 218–25 and accompanying text.

218. Interview with Sanji Mmasenono Monageng, Judge, Int'l Criminal Court, in *The Hague, Neth.* (Dec. 9, 2015).

219. *Id.*

220. See *supra* notes 85–86 and accompanying text.

221. See *supra* notes 198–216 and accompanying text.

222. Judge Antoine Kesia-Mbe Mindua, INT'L CRIM. CT., <https://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Antoine%20Kesia-Mbe%20Mindua> (last visited Dec. 30, 2017).

respond to those who argue that women judges are biased on women's issues, and he responded:

I have worked with a lot of women. It is once again a matter of individual personality; some could be biased, but in general, they are very good and well qualified for the job. For example, at the ICC this year we elected all the members of the presidency as women. If we thought they [we]re biased we could not have done that. Maybe of course they are more sensitive to the situation, and I think it is natural for a human being to think and understand what someone else may be going through.²²³

Women's rise to judicial positions—both domestically and internationally—would not be a debate if societal and institutional structures accorded gender equality in the first place. Overwhelmingly, there is strong cross-disciplinary research to support the argument that women are qualified to occupy positions of authority.²²⁴ The presence of women judges plays an important role in challenging and breaking down gender hierarchies both in and out of the judicial sphere.²²⁵ This calls for systematic and empirical documentation of what women are doing on courts, and for the transformation of institutional structures and norms of practice to allow women more opportunities to achieve equality in both domestic and international institutions.

B. *Enriching International Law Through Diversity*

It is now well accepted that judicial diversity enriches courts in various ways.²²⁶ The Rome Statute has set the standard for achieving judicial diversity by establishing a selection process which aims to achieve geographical and gender diversity.²²⁷ Additionally, the Rome Statute aims to ensure diversity for judges with expertise on

223. Interview with Antoine Kesia-Mbe Mindua, Judge, Int'l Criminal Court, in The Hague, Neth. (Dec. 9, 2015).

224. See Dawuni & Kang, *supra* note 198, at 63; see also Linda L. Carli & Alice H. Eagly, *Gender, Hierarchy, and Leadership: An Introduction*, 57 J. SOC. ISSUES 629, 630 (2001) (discussing gender quality in the United States and explaining that women make up nearly half of the workforce, possess over half of the bachelor's degrees awarded, and possess nearly half of other advanced degrees awarded).

225. See Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 J.L. & Soc. 490, 494–95 (2008).

226. See *supra* note 69 and accompanying text.

227. Rome Statute, *supra* note 29, art. 36, ¶ 8(a).

violence against women and children.²²⁸ In my interview with Judge Monageng, I asked: “Are there any observable differences between you as an African judge and other judges from outside the continent of Africa, especially relating to cases, jurisprudence, and decision making?”²²⁹ Judge Monageng opined:

When it comes to our work the focus is to get the best out of the situation. We discuss the different traditions, but it does not affect our work. . . . Most of us have already been exposed to each other’s laws and traditions in other places. . . . The differences are very minimal. Geographical background does not affect us.²³⁰

The women who have sat on the two courts under discussion are well-accomplished women.²³¹ Their journeys to the top have been marked by “firsts,” and their skills and experiences have been demonstrated on the courts through the leadership qualities discussed earlier.²³² Most of these women have served on other regional and ad hoc courts either as permanent or *ad litem* judges, in addition to the court on which they currently serve.²³³ Consequently, the diversity African women judges bring to the benches of the courts they sit on go beyond gender diversity.²³⁴ They contribute to judicial diversity through their experience, perspectives, opinions, skills, and leadership.²³⁵ Such diversity has the potential to enhance the legitimacy of international courts and contribute to the richness of decisions that have wide and long-lasting implications for the international community.²³⁶

The ICC’s selection mechanism makes room for geographical diversity, and since the creation of the court, women have been represented from the major regions of the world.²³⁷ African women serving within the ICC have been largely drawn from the Eastern, Western, and Southern regions of the continent,²³⁸ with no

228. *Id.* art. 36, ¶ 8(b).

229. Interview with Sanji Mmasenono Monageng, *supra* note 218.

230. *Id.*

231. *See supra* Sections IV.A–D.

232. *See supra* Sections IV.A–D.

233. *See supra* notes 162–67 and accompanying text.

234. *See supra* Sections IV.A–D.

235. *See supra* Sections IV.A–D.

236. *See* TERRIS ET AL., *supra* note 28, at 62–63.

237. Rome Statute, *supra* note 29, art. 36, ¶ 8(a)(ii); *supra* Table 2.

238. *See, e.g., Judge Akua Kuenyehia, supra* note 113 (showing that former Judge Kuenyehia is from Ghana); *Judge Fatoumata Dembele Diarra, supra* note 114

representation from the North and Central regions.²³⁹ The same trend appears to be the norm at the ACtHPR.²⁴⁰ What this means is that more work needs to be done, not only to achieve gender representation but also to achieve geographical equity within the gender distribution of the courts. This task is dependent on multiple factors, including the nature of the executive power; the state of gender equality in domestic courts; the impact of culture, tradition, and religion; and the pool of qualified candidates within the African group of states for each election cycle.

C. *Contributions to Jurisprudence*

The primary role of a judge is to adjudicate cases and make decisions between litigating parties.²⁴¹ Not only does this role place a great deal of power and discretion in the hands of a judge, but it also gives the judge the power to create jurisprudence, especially under the Anglo-Saxon common law legal tradition.²⁴² The zenith of international law traces back to a predominantly masculine origin, or at least that is what history makes us believe.²⁴³ What one often hears are references to Hugo Grotius and many other figures, credited as the “fathers” or “founders” of international law.²⁴⁴ Little to nothing is known about “mothers” of international law.²⁴⁵ Yet, in recent decades, as women have managed to break institutional barriers and enter the international law arena as important actors, the discourse on the role of gender and judicial decision-making at the

(showing that former Judge Diarra is from Mali); *Judge Navanethem Pillay*, *supra* note 115 (showing that former Judge Pillay is from South Africa); *Hon. Sanji Monageng*, *supra* note 116 (showing that Judge Monageng is from Botswana); *Judge Joyce Aluoch*, *supra* note 117 (showing that Judge Aluoch is from Kenya).

239. See *Who's Who*, *supra* note 96 (listing all current and former judges, of which five are African women, all from either Eastern, Western, or Southern Africa).

240. See, e.g., *Current Judges*, *supra* note 51 (highlighting that, prior to July 2016, there was almost no female representation from North or Central Africa and showing that the only female judge on the court prior to July 2016 was Justice Solomy Balungi Bossa from Uganda); *Profiles for Former Judges*, *supra* note 51 (highlighting that there was no former female representation from North or Central Africa on the court).

241. I. L. M. Richardson, *The Role of Judges as Policy Makers*, 15 VICTORIA U. WELLINGTON L. REV. 46, 46 (1985).

242. See *id.* at 46, 52.

243. See Grossman, *supra* note 7, at 652–54.

244. See Amos S. Hershey, *History of International Law Since the Peace of Westphalia*, 6 AM. J. INT'L L. 30, 30–31 (1912).

245. See *id.* at 33–38 (discussing many notable “successors” of Grotius, none of whom were women).

international level, and the roles of women as rule-making actors in international law, is gradually beginning to develop.²⁴⁶

There is no doubt that women judges are critical actors in international law and in the development of various bodies of international jurisprudence.²⁴⁷ For international courts especially, the building of jurisprudence and case law is crucial to the success of the court.²⁴⁸ In the case of the ICC, the newly appointed judges had the duty of building an institutional framework that would last.²⁴⁹ Judge Kuenyehia reflected on that role:

Working with the Rome Statute was a novelty for all of us. The civil and common law divide was always a big problem for all of us. Now I think nothing of it, but the blending of the traditions has been a big challenge and I really had to sit down and understand that this is a new institution and we are doing something new and so we had to give each other a chance. Working in a multicultural environment has its own challenges—not racism, but the different attitudes—and in a meeting, you must work out how to deal with it so it does not become an issue. For me, I had to remind myself to get along with everyone and show respect for everyone. When it comes to legal principles, everyone is working according to their conscience.²⁵⁰

Women's roles in building institutional norms and cultures, therefore, must be recognized. This is especially important in the case of international courts, where decisions handed down by such courts will subsequently have far reaching global consequences. While most existing scholarship remains inconclusive as to the impact of gender on decision-making in international courts,²⁵¹ some point out that women judges have contributed to making progressive

246. See generally, e.g., Grossman, *supra* note 6 (providing a detailed discussion on the representation of female judges in international courts and tribunals); Grossman, *supra* note 7 (discussing the presence of women judges on international courts and the impact they have on a court's legitimacy).

247. See generally Grossman, *supra* note 7 (suggesting that the presence of female judges bolsters the legitimacy of international courts and tribunals).

248. See F. S. C. Northrop, *Contemporary Jurisprudence and International Law*, 61 YALE L.J. 623, 653–54 (1952).

249. See *infra* note 250 and accompanying text.

250. Interview with Akua Kuenyehia, Former Judge & First Vice President, Int'l Criminal Court, in Accra, Ghana (Mar. 16, 2016).

251. But see Askin, *supra* note 72, at 317–49 (discussing several notable international cases, including the *Akayesu* case, in which gender and women's rights played a role in the decision making).

decisions aimed at promoting and expanding women's rights in international law.²⁵² One such important development credited to the presence of women on the bench, is the gradual incorporation of women's rights into international law and the recognition of rape as a form of genocide during armed conflict.²⁵³

In the *Akayesu* case for instance, defense counsel objected to Judge Pillay sitting on the case because she allegedly "showed prejudice" against *Akayesu*.²⁵⁴ In another instance, Judge Florence Mumba's impartiality was challenged in the ICTY *Furundžija* rape case.²⁵⁵ Defense counsel cited her previous participation as a delegate in the U.N Commission on the Status of Women.²⁵⁶ Such gender-based challenges may be suggestive of the fact that the professional experiences that female judges bring to the bench do have an impact on their ability to set the tone for the development of case law and new legal principles.

Though the objection by the defense in *Akayesu* was not couched in terms of Judge Pillay's gender, it is nonetheless telling that she was the only female judge on the panel, and was the only judge whose alleged bias was called into question.²⁵⁷ One cannot credit Judge Pillay alone for the decision in the *Akayesu* case, for it took a panel of three judges—including two men—to hand down the decision.²⁵⁸ Yet, there is evidence to suggest that her human rights background, fighting for the rights of minorities and building shelters for female victims of violence in apartheid South Africa,²⁵⁹ may have played a crucial role in her line of questioning; and more importantly, it is suggested that she insisted that charges of sexual violence be added to the original charges brought by the Prosecutor in the case.²⁶⁰ Listening to the stories of the women victims, being sensitive to their experiences, and bringing her male counterparts to understand the

252. *See id.* at 346.

253. *See id.*; *see also* Prosecutor v. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 731–34 (Sept. 2, 1998) (recognizing rape as a form of genocide in a landmark decision).

254. *Akayesu*, Case No. ICTR-96-4-T, ¶ 195; *see also* Pillay, *supra* note 159, at 666 (explaining that Judge Pillay's impartiality was questioned, but her male colleagues' impartiality was not).

255. Pillay, *supra* note 159, at 666; Prosecutor v. *Furundžija*, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

256. Pillay, *supra* note 159, at 666.

257. *Id.*

258. *Id.*

259. *See id.* at 657–58, 662.

260. *See* Askin, *supra* note 72, at 318.

gendered nature of the crime of violence on women must have been instrumental actions that led to the eventual outcome of the case.

The *Akayesu* case reopened existing demands for bringing charges against perpetrators of violence against women in conflict situations.²⁶¹ It will be instructive to see how the ICC develops new jurisprudence on sexual and gender-based violence crimes, following the recent judgment in the *Bemba Gombo* case.²⁶² Will an increase in the number of female judges on international courts increase charges of gender-based and sexual violence? Will the decisions and punishments for such crimes be gender-based? These and many questions remain to be explored. Yet, the challenges remain, and male and female judges will have to keep fighting for victims of rape in violent conflict. Trial chambers in the ICTY, ICTR, and Special Court for Sierra Leone (SCSL) have drawn from the definition of rape in the *Akayesu* case.²⁶³ However, in the ICTY *Furundzija* case, rape as defined in the *Akayesu* case, was found not to fit the merits.²⁶⁴

With the Rome Statute, the framework exists for pursuing gender-based crimes.²⁶⁵ Yet, what follows from that framework through the ICC and how “loud” we may be able to hear the voices of women and male judges who are sensitized to sex-based crimes in conflict situations remains to be seen. Judges can only do so much unless the charges are brought before them, and this charging is exactly what the ICC is equipped to do.²⁶⁶ With the appointment of Gender Advisors to the Office of the Prosecutor, the court is poised to address more gender-based crimes.²⁶⁷ In a statement, the Chief Prosecutor of the ICC, Fatou Bensouda,²⁶⁸ noted the commitment of her office to hold accountable those committing heinous crimes.²⁶⁹

261. *See id.*

262. *See* Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision on Sentence pursuant to Article 76 of the Statute, ¶ 97 (June 21, 2016) (sentencing Bemba Gombo to eighteen years in prison for murder, rape, and pillaging).

263. Pillay, *supra* note 159, at 667.

264. *Id.*

265. Rome Statute, *supra* note 29, art. 7, ¶ 3; e.g., Solange Mouthaan, *The Prosecution of Gender-Based Crimes at the ICC: Challenges and Opportunities*, 11 INT’L CRIM. L. REV. 775, 785–86 (2011).

266. *See* Olga Jurasz, *Gender-Based Crimes at the ICC: Where Is the Future?*, AM. SOC’Y INT’L L., 429, 430, 432 (2014).

267. *Id.* at 432.

268. Press Release, Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, Publishes Comprehensive Policy Paper on Sexual and Gender-Based Crimes, ICC-OTP-20140605-PR1011 (June 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1011&In=en>.

269. *Id.*

The statement further stressed efforts by the Office of the Prosecutor to ensure that sexual violence and gender-based crimes are given the attention they deserve when accused persons are charged.²⁷⁰

At the regional level, neither individuals nor the African Commission have successfully brought specific cases relating to gender-based violence to the ACtHPR.²⁷¹ The Economic Community of West African States (ECOWAS) Community Court of Justice, on the other hand, made history in January 2017 when it held that the court had jurisdiction to hear a matter of domestic violence filed against the government of Nigeria.²⁷² While this ruling relates only to the jurisdiction of the court to hear the case, it has been celebrated by some commentators as a landmark development.²⁷³ In

270. *Id.*

271. See OXFORD PRO BONO PUBLICO, A REPORT ON REPARATIONS AND REMEDIES FOR VICTIMS OF SEXUAL AND GENDER BASED VIOLENCE 32–34 (2016), <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/01/REDRESS-Project-on-Reparations-and-Remedies-for-SGB-Victims-FINAL-28-January-20166.pdf>.

272. See Press Release, Cmty. Court of Justice, ECOWAS Court Delivers Judgment in a Case of Human Rights Violation Involving Nigeria (Oct. 14, 2017, 4:25 PM), http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=386:ecowas-court-delivers-judgment-in-a-case-of-human-rights-violation-involving-nigeria&catid=14:pressrelease&Itemid=36. This action was brought by the Institute for Human Rights and Development in Africa (IHRDA) and the Women Advocates Research and Documentation Centre (WARDC) in August 2015 on behalf of Mary Sunday, a woman who suffered domestic abuse by her fiancé. *IHRDA & WARDC on Behalf of Mary Sunday v the Federal Republic of Nigeria (Mary Sunday Case)*, IHRDA, <http://www.ihrda.org/2015/12/ihrda-wardc-on-behalf-of-mary-sunday-v-the-federal-republic-of-nigeria-mary-sunday-case/> (last visited Dec. 30, 2017). The action alleged that the Nigerian government had failed to conduct a transparent or effective investigation into the abuse, which was a violation of Ms. Sunday's fundamental rights. *Id.*

273. Siobhan Airey, *Landmark Decision in First Case of Domestic Violence Brought to ECOWAS Community Court of Justice (ECCJ) (Ruling ECW/CCJ/APP/26/15, 24th January 2017)*, INTLAWGRRLS (Feb. 19, 2017), <https://ilg2.org/2017/02/19/landmark-decision-in-first-case-of-domestic-violence-brought-to-ecowas-community-court-of-justice-eccj-ruling-ecwccjapp2615-24th-january-2017/>. More recently, the ECOWAS Court made a remarkable decision in the case of *Njemanze v. Federal Republic of Nigeria*. No. ECW/CCJ/JUD/08/17, Judgment, ECOWAS Community Court of Justice (Oct. 12, 2017), http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2017/ECW_CCJ_JUD_08_17.pdf. On October 12, 2017, in a precedent-setting decision, the court held that the government of Nigeria had failed to protect the rights of the women plaintiffs under the government's legal obligations pursuant to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol (2003). *Id.* at 41–42; Osai J. Ojigbo, *A First for the Maputo Protocol*, INST. FOR AFR. WOMEN L. (Nov. 24, 2017), <https://www.africanwomeninlaw.com/single-post-nvpea/2017/11/24/A-First-for-the-Maputo-Protocol>.

Koraou v. Niger,²⁷⁴ a 2008 case, the court held that the government of Niger was liable for charges of slavery due to its failure to protect the victims under Niger's international and regional treaty obligations.²⁷⁵ With discussions underway to equip the court with criminal jurisdiction for international crimes, we will have to wait and see how this develops at the regional level. The international context has already set the stage for the application of universal jurisdiction to address gender-based violence and, thus far, we have seen some evidence of the role female judges have played in making these decisions fundamental parts of international jurisprudence;²⁷⁶ it is now left to the courts to apply the principles.

D. *The "Different" Voice*

Whether female judges make decisions that are different from male judges has occupied a front row seat in debates on gender and judging, producing different conclusions on the impact of gender on judicial decision making.²⁷⁷ Most female judges will agree that their gender places them in a unique situation to understand women's issues, but they are often quick to emphasize that their gender does not impact their partiality.²⁷⁸ For this reason, it may be instructive to focus on examining the impact of feminist judges, rather than *essentialize* all women judges as necessarily advocates of women's rights. This has led to a shift away from the difference gender makes and a refocusing on women who have a feminist orientation in their thinking. The issue of whether female judges necessarily represent the substantive rights of women remains moot. Rosemary Hunter argues that women judges can nonetheless contribute to women's presence in court by questioning "the current legal construction of

274. No. ECW/CCJ/JUD/06/08, Judgment, ECOWAS Community Court of Justice (Oct. 27, 2008), https://www.unodc.org/res/cld/case-law-doc/traffickingpersonscrimetype/ner/2008/h_m_v_republic_of_niger_html/Hadijatou_Mani_v._Republic_of_Niger_Community_Court_of_Justice_Unofficial_English_translation.pdf.

275. *Id.* ¶¶ 72, 75, 81, 85–86, 90.

276. *See supra* notes 254–55, 259–62 and accompanying text.

277. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 149 (1982) (noting how transition to achieving greater rights has resulted in a difference in the way women reach moral judgments); Fred O. Smith, Jr., Note, *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 STAN. L. REV. 2087, 2087–90 (2005) ("[The study found that] there were not significant differences in the way men and women . . . ruled in two areas—obscenity and criminal search and seizure—but that there were gender differences in the way judges ruled in sex discrimination cases.").

278. *See infra* notes 279–99 and accompanying text. The following observations are based on my personal interviews with the female judges.

‘woman’, [sic] rejecting ‘stock stories’ about women’s reactions and behaviour, not relying on stereotypical or gender-biased assumptions about sexual difference or behaviour, challenging myths and stereotypes about women, and critiquing previous judgments or the decisions of ‘brother’ judges that adopt such myths and stereotypes.”²⁷⁹

In response to whether women judges make a difference, Judge Monageng of the ICC believes “we should be open-minded and believe that men and women are equally efficient.”²⁸⁰ However, in an interview, she went on to recount a story concerning a decision she made as a magistrate in a rape case, in which she ordered damages to be paid to the victim.²⁸¹ On appeal, the male presiding judge affirmed her decision on the charges of rape, but overturned her decision on the payment of damages, claiming that rape cannot be quantified.²⁸² Judge Monageng used this story as an illustration that, while judges may agree on the merits and evidence presented to them, the gendered nature of a crime such as rape may elicit different responses from men and women.²⁸³ Thus, she noted that if murder can be quantified and damages paid, why not a case of rape, where the victim has suffered obvious physical violation of her person?²⁸⁴ Women’s presence on courts not only affords victims of sexual violence a sense of security, but also provides a modicum of guarantee that the judge will understand the physical nature of the offense.²⁸⁵

In my interview with Judge Monageng, I asked her: “What will be your response to those who argue that some women judges are biased towards women’s rights?”²⁸⁶ Her answer was simple, yet impactful:

279. Rosemary Hunter, *Can Feminist Judges Make a Difference?*, 15 INT’L J. LEGAL PROF. 10, 11–12 (2008) (footnotes and citations omitted).

280. Int’l Ass’n of Women Judges, *Hon. Sanji Mmasenono Monageng - The Difference Women Judges Make*, YOUTUBE (Mar. 26, 2015), https://www.youtube.com/watch?list=PLSchyWJQmTgvf9GZGyEOfephWBQ5M4onW&time_continue=143&v=vITUnB6TlxM.

281. *Id.*

282. *Id.*

283. *See id.*

284. *Id.*

285. *See id.*; *see also, e.g.*, Pillay, *supra* note 159, at 661 (noting that women had come to Judge Pillay with their legal problems because she had “a woman’s perspective”); Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge’s Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 991–93 (2005) (discussing the progress international courts have made in increasing women’s presence in the courtroom and noting that more women judges will foster “this kind of lawmaking”).

286. Interview with Sanji Mmasenono Monageng, *supra* note 218.

“If those women do not, then who will? Some women who are not feminists will not, so I have never apologized for that.”²⁸⁷

This response comes as no surprise considering that Judge Monageng has been a women’s rights activist throughout her career.²⁸⁸ As she recalls, from the very beginning of her judicial career, she has been involved in fighting for the rights of women, children, and indigenous people.²⁸⁹ These life experiences, without a doubt, play a central role in her judicial work and enrich her judicial decisions. But a female judge’s boldness in stating that women judges have a special ability to understand the gendered nature of crimes comes at a cost.²⁹⁰ Martha Chamallas observes:

When women are reluctant to appear too feminist, they are less likely to object to decisions that seem biased, particularly if the decisions are explainable on other grounds. One big downside to such covering behavior, of course, is that it discourages active opposition to sexism. Additionally, we also know from . . . social science research that, if decision makers are never called on their questionable decisions, they will have little reason to examine their behavior and presumably will continue to believe that they are unbiased and egalitarian.²⁹¹

Women judges have to operate within existing masculine structures and it is up to them to break these structures and balance the scales of justice, even if this includes challenging institutional boundaries and assumed professional ethics and norms. Patricia Wald, who served as a judge on the Court of Appeals for the District of Columbia in the United States,²⁹² and as a judge on the ICTY,²⁹³ had this to say about the presence of women on the court and the difference they can make to victims:

Women judges may well have a special sensitivity to the degradation suffered by victims of such crimes. They should not be hesitant to express their unique perceptions of

287. *Id.*

288. *Hon. Sanji Monageng*, *supra* note 116.

289. Interview with Sanji Mmasenono Monageng, *supra* note 218.

290. *See infra* note 291 and accompanying text.

291. Martha Chamallas, *Backlash, Covering, and the State of Feminist Legal Theory*, 9 ISSUES LEGAL SCHOLARSHIP 1, 12 (2011).

292. *Hon. Patricia Wald*, ABA-ICC PROJECT, <https://www.aba-icc.org/board-of-advisors/hon-patricia-wald/> (last visited Dec. 30, 2017).

293. *Id.*

such harms when relevant. Nor should they hesitate to counteract the imperviousness of some men – even some judges – to the more subtle facets of gender-biased assaults.²⁹⁴

I asked Judge Monageng, “Should women judges be expected to make a difference in women’s lives?”²⁹⁵ Judge Monageng responded:

For me, once you believe in . . . [women’s rights], you have to do it. I can’t measure myself and my contributions in this present organization[, the ICC]. I am a member of . . . [the International Association of Women Judges], and we are training women judges in some jurisdictions. I remain an activist judge; what happens inside the courtroom has to be done within the confines of the law, but the sensitivities to a traumatized woman will always be there. . . . If I have to ask a direct question on what happened, I cannot do that. I was trained not to do that. You have to express yourself as a judge who is knowledgeable about the rights of women.²⁹⁶

Thus, for Judge Monageng, the difference that women can and should make is not limited to the courtroom alone.²⁹⁷ Straining the law to provide a woman her rights under the law requires tact and is one that has to be carefully and skillfully balanced within the confines of the law. This is where the expertise and experience of a human rights-minded and women’s rights-minded judge is critical. Knowing the law is essential, but finding creative ways to apply it to enhance the rights of victims is also important.

Beyond making a difference on the bench, one area which extant studies have failed to analyze is the difference women judges make on the lives of women outside of the courtroom. Through various organizations, boards, and mentoring networks, women judges help to mentor the new generation of judges.²⁹⁸ For instance, Judge Aluoch has actively trained judges on the use of human rights

294. Patricia M. Wald, *Women on International Courts: Some Lessons Learned*, 11 INT’L CRIM. L. REV. 401, 403 (2011).

295. Interview with Sanji Mmasenono Monageng, *supra* note 218.

296. *Id.*

297. *See supra* note 296 and accompanying text.

298. *See, e.g., supra* Section IV.A; *infra* note 299 and accompanying text.

instruments, a mentoring role which was recognized when she received the Human and Civil Rights Minerva Prize in 2015.²⁹⁹

E. *Women's Rights as Human Rights*

The judges in this study have been ardent defenders of women's rights through their judicial careers.³⁰⁰ Judge Pillay, former judge of the ICC, who in addition to standing up against the apartheid establishment in South Africa,³⁰¹ went on to develop a commendable record as a human rights defender.³⁰² Her work in defending women's rights led her to establish a domestic violence shelter for women,³⁰³ and she was a key player in the Women's Coalition that negotiated for the equality clause in the Constitution of South Africa.³⁰⁴ Judge Kuenyehia of Ghana broke the proverbial glass ceiling by becoming the first woman law lecturer at the University of Ghana in 1972.³⁰⁵ Subsequently, she rose to become the first female Dean of the Faculty of Law at the University of Ghana.³⁰⁶ Judge Kuenyehia also played a fundamental role in organizations that advocated for women's rights across the nation, culminating in her nomination as Ghana's representative on the CEDAW Expert Committee in 2003.³⁰⁷

In criminal trials involving women, it is important that the victims are protected during the trial to prevent a process of re-victimization.³⁰⁸ The presence of female judges in human rights courts has especially contributed to more informed prosecutions and better understanding of crimes that target women.³⁰⁹ Sometimes, just

299. *ICC First Vice-President Judge Joyce Aluoch Awarded the Minerva Prize*, INT'L CRIM. CT. (Nov. 30, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=inf-30-11-2015>.

300. *See infra* notes 301–07 and accompanying text.

301. *See Judge Navanethem Pillay, supra* note 115.

302. *See* Crossette, *supra* note 115 (indicating that Judge Pillay continued on after the ICC to serve as the United Nations High Commissioner for Human Rights).

303. Navi Pillay, *UN High Commissioner for Human Rights, to Receive 2012 Rule of Law Award*, A.B.A. (June 2012), https://www.americanbar.org/advocacy/rule_of_law/newsroom_events/general_news/news_event_navi_pillay_rule_of_law_award_0612.html.

304. *See id.*

305. Ogunlana, *supra* note 139.

306. *Id.*

307. Glassborow, *supra* note 143; Ogunla, *supra* note 139.

308. Amanda Beltz, Note, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused*, 23 ST. JOHN'S J. LEGAL COMMENT. 167, 188–80 (2008).

309. *Id.* at 185.

the presence of a woman judge can be empowering to a female victim.³¹⁰ This is similar to the preference for female nurses to examine female victims of sexual violence.³¹¹ Judge Monageng, a member of the International Commission of Jurists, agrees that female victims of sexual violence feel more comfortable with a female judge.³¹² She points out the need for women judges to be sensitive to victims by ensuring that, when necessary, they are given counseling and treated well in victim protection programs.³¹³ In response to the question, “Should women judges be expected to make a difference in women’s rights issues?,” Judge Akuffo, formerly of the ACtHPR,³¹⁴ shared some of her experiences from the domestic court, including her participation in a groundbreaking case that expanded the rights of women to equal distribution of property in divorce.³¹⁵ She noted:

Until the balance equalizes, you do need to [make a difference in women’s rights issues]. What is wrong with it? My first year of being on the bench, it was one of the thoughts bothering me. . . . A judge should be impartial and unbiased, etc. I thought that it was not going to be easy as a judge—how do you keep the balance when the balance is tilted against women? So, I have to keep pushing until it equalizes, as it is. Don’t feel embarrassed or ashamed; it is when you are perversely playing favoritism, then that is a problem. But when it comes to tilting the balance, I would rather add more to what a woman is entitled in a divorce settlement, because when you look at the equities, she has

310. See Int’l Ass’n of Women Judges, *supra* note 280.

311. *Id.*

312. *Id.*; Interview with Sanji Mmasenono Monageng, *supra* note 218.

313. Interview with Sanji Mmasenono Monageng, *supra* note 218.

314. *Profiles for Former Judges: Justice Sophia A. B. Akuffo - Ghana*, *supra* note 118.

315. See *Mensah v. Mensah*, No. J4/20/2011, Judgment, Superior Court of Judicature in the Supreme Court of Accra, 27 (Feb. 22, 2012), <http://ww3.lawschool.cornell.edu/AvonResources/GLADYS-MENSAH-VRS.-STEPHEN-MENSAH.pdf>. The case involved the dissolution of a marriage and the equal distribution of marital property. *Id.* at 3. The court’s decision to award the wife an equal distribution of the marital property set an important precedent in Ghana concerning a woman’s equal rights to property in a marriage. See *id.* at 27. Judge Akuffo was the presiding judge in the case, along with two other female judges and two male judges. *Id.* at 27–28.

given out more than the man, only that her contributions are often intangible.³¹⁶

Similarly, Judge Monageng's quote is worth repeating: "[T]he sensitivities to a traumatized woman will always be there. . . . If I have to ask a direct question on what happened, I cannot do that. I was trained not to do that. You have to express yourself as a judge who is knowledgeable about the rights of women."³¹⁷

To Judge Monageng, women judges have a duty to stand up and correct social ills, including those that come from their male counterparts on the bench who may make derogatory comments about victims of rape.³¹⁸ Women judges appear to have taken the cue from one another in addressing gender stereotypes in society that play out in courtrooms, and some of these stereotypes may well come from male judges.³¹⁹

We see a striking similarity in Judge Akuffo of the ACtHPR's response to the question: "Should women judges be expected to make a difference in women's rights issues?"³²⁰ She said:

Rights are not given by instruments, they confirm them! All judges are supposed to make a difference, but if all judges won't, then certainly women lawyers and women judges should, because when you see the wrong you should recognize it, and when the law seems to be encouraging the wrong, you should look at it critically and see if there is room for judicial creativity.³²¹

All judges have a duty to protect and enforce the rights of litigants, and it is the hope that all judges will do the same. However, the unique life experiences of women judges may place them in a position to go a step further, and that is where creativity comes in.

Once again, Judge Wald's reflection on this point is instructive:

Women judges, I found, also need to be assertive at critical points, though like all judges they must choose their spots carefully. Some judges who come from countries not used to women in judicial roles expect and feel more comfortable

316. Interview with Sophia A. B. Akuffo, Former Judge & President, African Court on Human & Peoples' Rights, in Accra, Ghana (Mar. 14, 2016).

317. Interview with Sanji Mmasenono Monageng, *supra* note 218.

318. See Int'l Ass'n of Women Judges, *supra* note 280.

319. See Wald, *supra* note 294, at 403.

320. Interview with Sophia A. B. Akuffo, *supra* note 316.

321. *Id.*

with a silent and compliant ally; but this is not what women are on the bench for. While at the ICTY, I was criticised at times for intervening too often or pushing my point too hard. But when it seemed necessary, I felt I had to persevere.³²²

Women judges have played a part in the eventual recognition of sexual violence as crimes under international law.³²³ In these cases, spearheaded by the ICTY and ICTR, decisions were reached with the presence of women judges on each of these panels.³²⁴ This is not to say that men alone cannot reach such decisions. It has been suggested that Judge Pillay played a critical role in getting her fellow male judges in the *Akayesu* case to understand the complexities of sexual violence—something noteworthy of women judges' special role in bringing a gendered voice in efforts to protect women's rights.³²⁵ Other judges have challenged gender-based stereotypes, and in the process contributed to making a difference in developing the jurisprudence on women's experiences in conflict.³²⁶ To mention a few examples, Professor Louise Chappell³²⁷ notes the work of Justice Carmen Argibay on the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery,³²⁸ and Justices Elizabeth Odio Benito³²⁹ and Florence Mumba³³⁰ in the ICTY.

As Judge Bossa noted on her experience as a judge on the ICTR:

It was our decision—my decision, as well as the other judges. . . . We heard horrendous stories about women who were abused, raped, and killed . . . throughout the commune and the prefecture. I was happy because I thought that justice was done in that case, even if it was a woman or man, everybody. We were all agreed on the positions because we saw that the evidence was overwhelming and if we heard that the evidence was overwhelming we had to

322. Wald, *supra* note 294, at 404.

323. See *supra* notes 160–61 and accompanying text.

324. See *supra* notes 261–64 and accompanying text.

325. See Askin, *supra* note 72, at 318, 346–47.

326. See *supra* notes 315, 318–19 and accompanying text.

327. Professor Louise Chappell, UNSW SYDNEY: SCH. SOC. SCI., <https://socialsciences.arts.unsw.edu.au/about-us/people/louise-chappell/> (last visited Dec. 30, 2017).

328. Louise Chappell, *Gender and Judging at the International Criminal Court*, 6 POL. & GENDER 489, 490 (2010).

329. *Id.*

330. *Id.*

convict. It is true that we acquitted the accused of many other charges, but I thought that the victims were vindicated³³¹

Essentially, in a criminal case such as this one, the standard of proof is key to convicting an accused.³³² Yet, Judge Bossa's statement is suggestive of a duty of extra care and maybe a higher sense of satisfaction for women judges when victims of gender-based crimes and other horrendous crimes receive justice.³³³

F. Collegiality and Socialization

International courts are important arenas for collegial learning among international judges of high repute.³³⁴ Members of these courts come from different legal traditions, different legal training and experience, and most certainly different geographical backgrounds.³³⁵ Sitting in different chambers of these courts and having to deliberate on matters in which their colleagues may have no contextual understanding can be an opportunity for cross-pollination of knowledge. Collegiality has been cited as an enabling factor in how judges address ideological differences.³³⁶ Some research points to the fact that the more collegial a court is, the higher the chances are that the judges will decide cases based on the legal grounds.³³⁷

Regarding the relationship with her colleagues on the bench, Judge Monageng remarked that "[i]t is good—respectful. The nice thing about international organizations [is that] we regard ourselves as equal; it is respectful. But again, we come from different legal cultures, [so] there will always be those differences."³³⁸

331. Int'l Ass'n of Women Judges, *Hon. Solomy Balungi Bossa - Significant Decisions*, YOUTUBE (Mar. 6, 2015), <https://www.youtube.com/watch?v=LAVBi0U4weU&list=PLSchyWJQmTgtrcqH-OG7D--qH1hI8WLIR&index=4>.

332. See Christopher M. Henson, *Superior Orders and Duress as Defenses in International Law and the International Criminal Tribunal for the Former Yugoslavia*, EAGLE FEATHER (2004), <https://eaglefeather.honors.unt.edu/2004/article/3#.We6-dIZrxAZ>.

333. See *supra* note 331 and accompanying text.

334. See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision-Making*, 151 U. PA. L. REV. 1639, 1646 (2003).

335. See *supra* Part IV (detailing the backgrounds and experiences of the women judges featured in this study).

336. See Edwards, *supra* note 334, at 1668.

337. *Id.* at 1689.

338. Interview with Sanji Mmasenono Monageng, *supra* note 218.

And so, as with the general socialization that happens on such panels, women judges can bring a feminine perspective to the gendered cases by socializing their male counterparts. By this, I mean providing their male colleagues with gender-specific understandings of the legal issues and the social and normative context within which the facts evolve.

The socialization that takes place among judges is very important, especially for international courts considering the diversity in legal traditions, judicial systems, training, and experiences the judges each bring.³³⁹ For instance, in an interview with Judge Antoine Mindua, I asked, “How do you see yourself contributing to international law?”³⁴⁰ In response, Judge Mindua alluded to an aspect of socialization which is relevant to the current discussion:³⁴¹

I, like any other judges apply the laws and statutes and rules of evidence and I don't see my “Africanness”³⁴² as making any difference. But from a socio-legal perspective, I can see that I may bring some difference—for example, for Europeans, maintaining eye contact is necessary to establish credibility—some of my colleagues may use that to discredit witnesses. While in the context of most African cultures it is a sign of respect not to maintain eye contact when talking to someone in a position of authority. Another example is about witchcraft; in law we look at *mens rea* and *actus reu* *Mens rea* could be affected or motivated by something like witchcraft, for example, if a defendant says that his uncle has some powers and if he did not obey the order to kill someone, the consequences may be death. My colleagues had a difficult time to understand how the supernatural could affect an action. For example, in the case of testimonies of flesh-eating by soldiers, a commander ordered that as a way to make the band stronger they had to

339. TERRIS ET AL., *supra* note 28, at 49.

340. Interview with Antoine Kesia-Mbe Mindua, *supra* note 223.

341. *Id.*

342. Initially, Judge Mindua indicated his objection to the question asking him if he was making special contributions to the court because he was an African. In his opinion, he sees himself as a judge first, before an African. However, I pushed him further, taking into account that most of the cases before the court now are from Africa and whether he felt that provided a special context for him to bring critical perspectives to the court. His response on how he helped to explain social norms, such as not maintaining eye contact as a sign of respect, is very crucial to how judges interpreted witness credibility in this case.

kill and eat the flesh of victims. I had to explain to my colleagues how this could be a possible defense from a social and religious context in African societies.³⁴³

While socialization is important, it can be a challenge in courts with limited diversity, and is especially a challenge in courts where there are only one or two women, such as the ACtHPR.³⁴⁴ It may therefore be the case that the degree and effect of socialization may depend on the number of women on the court. But this can still happen if the few women judges, or even a single female judge, decides to seize the opportunity to advocate for women's rights in cases under deliberation, just as Judge Pillay did in the ICTR.³⁴⁵ The personal experiences of judges can provide a context for their ability to socialize their colleagues. This will require the adoption of different strategies and, in the words of Judge Wald, women judges will have to "be assertive at critical points, though like all judges they must choose their spots carefully."³⁴⁶

VI. CONCLUSION

Increased global interconnectivity and the growing human rights violations have led to an increase in the variety of demands placed on international law and international human rights law in ways we could never have imagined a decade ago.³⁴⁷ As international human rights issues get more complicated and nuanced, so does the need for understanding not only the institutions responsible for addressing these complexities, but also the actors involved.³⁴⁸ As the legitimacy and diversity of international courts increase, now more than ever before, we need to investigate more closely what these diverse actors bring to the courts.³⁴⁹

This article contributes to the existing scholarship on gender and judging and international human rights by highlighting the

343. Interview with Antoine Kesia-Mbe Mindua, *supra* note 223.

344. See *Current Judges*, *supra* note 51.

345. See *supra* notes 160–61, 261 and accompanying text.

346. Wald, *supra* note 294, at 404.

347. See Marilyn Croser, *Human Rights Violations Have Increased 70% Since 2008 Globally*, GUARDIAN (Sept. 9, 2014, 7:37 AM), <https://www.theguardian.com/sustainable-business/2014/sep/09/human-rights-violations-increase-corporate-responsibility>.

348. See *supra* Parts II–IV. This article is intended to help further that understanding by discussing the two international courts, the ICC and the ACtHPR, and their female judges.

349. See *supra* Parts IV–V.

contributions women judges bring to the bench.³⁵⁰ Two major contributions stand out. First, it explains why moving away from essentialist arguments for putting more women on international courts is necessary.³⁵¹ It opens a new paradigm in the study of women and courts by emphasizing the need to focus on documenting the contributions women judges bring to international courts.³⁵² Such documentation is a necessary and important strategy in advancing arguments for gender representation in international courts—showing that women judges do more than just bring a woman’s voice. International courts have been in existence for quite a while, and it is time to begin to assess and evaluate women judges’ contributions as an important strategy in advocating for equitable distribution of the sexes on the bench.

Second, by highlighting the commonalities among the women who sit on these courts, this article demonstrates that women have the necessary experience and leadership qualities to sit on international courts.³⁵³ This argument lends a death knell to those who may argue that there are not enough women in the pool of qualified international law judges. There is strong evidence to demonstrate that African women jurists have the requisite educational, professional, and technical expertise to occupy judicial positions.³⁵⁴ Women have risen to the top judicial positions in many African countries, either as Chief Justices or Presidents of constitutional courts.³⁵⁵ As an increasing percentage of women judges occupy international and regional courts, the time is ripe for adopting multi-pronged approaches to sustain the number of women acceding to these courts. One such approach is what this article has done by analyzing and documenting what women judges bring to international courts.³⁵⁶

I would like to conclude with this important point, which may sound self-contradictory to those who think that my central argument is about increasing women’s numbers relative to men. My argument for gender parity is premised on the assumption that women judges bring many qualities to the bench, including the all-important feminine perspectives on issues such as rape, gender-based violence,

350. *See supra* Part V.

351. *See supra* Part V.

352. *See supra* Part V.

353. *See supra* Part IV.

354. *See supra* Part IV.

355. *See supra* Table 1.

356. *See supra* Part V.

and acts of aggression.³⁵⁷ However, defeating the goal of achieving justice for women may be more likely when scholars on gender and judging narrowly focus on the symbolic representation of women and risk losing important male allies. I make this argument because female judges who have been touted as advancing the rights of women in international criminal law could not have done so without reaching a consensus with their male peers on the same case.

Achieving equitable distribution of the sexes on international courts should not remain a romanticized idea or a battle of the sexes. Equity among the sexes is simply the right thing to do. But it should not be pursued to the extent of alienating male judges who can be important allies and whose decisions and interpretations of the law are equally important for purposes of promoting women's rights. The appointment of women is a necessary step for addressing institutional gendered hierarchies in the letter and spirit of the law. But gender parity should not be advanced to the extent that it alienates the possibility of male advocates who are gender-aware.

The two courts discussed here have presented interesting similarities and differences.³⁵⁸ For one, the institutional design and composition of the courts vary widely, with the ICC having been built on a foundation of gender equality, not only in terms of the composition of the court, but also in terms of its functioning mandate.³⁵⁹ In 2017, the ACtHPR has joined the ranks of the most gender-balanced international courts with its record 45% women representation.³⁶⁰ Both the ACtHPR and the ICC are still in their early phase, and while this article has sought to compare the gender composition and outcomes of the two courts, it has not been an attempt to assess the gendered nature of the corpus of jurisprudence emanating from their decisions. This is an area for future research.

In conclusion, getting women on the bench, especially on international courts, is a legally and morally binding obligation on States. These courts are charged with handling cases, some of which may affect women in the most horrendous ways. For that matter, as has been argued elsewhere, we should focus not only on creating a critical mass, but the desire should be targeted at creating a mass of "critical actors"³⁶¹ who are gender-minded and who have the

357. See *supra* notes 251–70 and accompanying text.

358. See *supra* notes 29–41 and accompanying text.

359. See *supra* notes 55–56 and accompanying text.

360. See *Current Judges*, *supra* note 51 (showing that, out of eleven judges on the court, five are women).

361. See Sarah Childs & Mona Lena Krook, *Should Feminists Give Up on Critical Mass? A Contingent Yes*, 2 POL. & GENDER 522, 528–29 (2006). See generally Drude

knowledge and skills to address gender-based violence and other forms of crimes that directly affect women. These critical actors should include men. Today, international law is tackling cases involving gender-based violence in international crimes,³⁶² but as the world evolves and the complexities of globalization increase, all international court judges, and not just the women judges, will be called upon to address important legal issues which may or may not have distinct gender dimensions.

The field of gender, women, and judging at international courts is ripe for scholarly research, as many questions remain unexplored. Future research may consider textual analysis of judgments to more closely analyze gender outcomes by men and women judges. Other studies may want to investigate the impact of domestic political arrangements on the probability that a female judge will be nominated for elections to an international court. Lastly, another interesting question might be the impact of prior professional experiences on the selection of female judges as compared to male judges on international courts.

Women judges and the voices they bring to the bench will no doubt be instrumental in the decisions of these courts. International crimes may be directed at men, children, or other racial or ethnic minorities and environmental matters. The bench will require the totality of its members with varying expertise to hear such cases. A diverse bench will be crucial in reaching decisions that will have wide implications for citizens of this world.

Dahlerup, *The Story of the Theory of Critical Mass*, 2 POL. & GENDER 511, 511 (2006) (examining “the theoretical foundation and underlying assumptions of the critical mass theory”).

362. See Rosemary Grey, *Gender-Based Persecution on the International Criminal Court's Radar*, INTLAWGRRRLS (Jan. 6, 2017), <https://ilg2.org/2017/01/06/gender-based-persecution-on-the-international-criminal-courts-radar/>.

