Identity and Diversity on the International Bench: Who Is the Judge? By Freya Baetens. Oxford, UK: Oxford University Press, 2020. Pp. vi, 565. Index.
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International organizations, governments, arbitral institutions, the boards of academic journals, and academics themselves have aptly recognized that diversity matters. For instance, the UN links diversity and sustainability through the UN Sustainable Development Goals (UN SDGs), specifically SDG 5 on gender.[1] In 2022, the *American Journal of International Law*'s editors in chief published a "Diversity Statement and Agenda" and pledged to take specific actions to ensure that more diverse candidates participate in the *Journal*'s editing and publishing process.[2] Canada negotiated gender chapters in its free trade agreements with Israel, Chile, and Uruguay.[3] According to the government of Canada, one of the objectives of the chapters is to "[r]eaffirm commitment to international agreements on gender equality and women's rights."[4]

In this context, the edited volume *Identity and Diversity on the International Bench: Who Is the Judge?* by Freya Baetens is a timely contribution that adds critical voices to the conversation on diversity and advances ongoing efforts to keep the diversity debate on top of the agenda in international law. Baetens, a professor of public international law at the University of Oxford, and the contributors focus specifically on the issue of diversity on the benches of international courts and tribunals by carefully examining the issue across different international adjudicatory bodies.

The volume consists of three parts. The first part, "Towards the International Bench," focuses on the nomination and selection procedures for international adjudicators and offers a thoughtful analysis of the hurdles that stand in the way of candidates with diverse backgrounds. The second part, "On the International Bench," examines, *inter alia*, how diversity can impact the outcomes of judicial decision-making processes. The third part, "Beyond the International Bench," assesses the perspectives of other participants in international litigation on the judicial contributions of diverse actors and examines the roles that adjudicators play following their time on the bench.

The volume includes a total of twenty-six contributions, along with a foreword by Navanethem Pillay, a former judge of the International Criminal Court (ICC), and an epilogue by Janet Nosworthy, a former judge of the International Criminal Tribunal for the former Yugoslavia. Both Pillay and Nosworthy offer a glimpse of their personal experiences on the benches of international adjudicatory bodies (pp. viii, 538). Interestingly, both authors speak about the importance of an adjudicator's personal background (in Nosworthy's words "baggage") even in circumstances when adjudicators must let some of this "baggage" go to fulfill their function (p. 555).

Overall, the volume is well balanced in representing the views of different types of professionals, including contributions by former and current international judges,[5] junior and senior academics,[6] as well as governmental representatives (writing in their personal capacity).[7] This approach to the selection of the authors aligns with one of the overarching themes of the volume, which is that the representation of different perspectives is valuable because it can enrich the process of finding solutions. The volume, however, focuses mostly on the perspectives of professionals with backgrounds in legal studies. In future projects, legal researchers may wish to join forces with colleagues from different disciplinary backgrounds, for example, scholars who specialize in queer and identity studies. A turn to

[1] UN, *Do You Know All 17 SDGs?*, *at* https://sdgs.un.org/goals.

[2] *Diversity Statement and Agenda*, 116 AJIL 475 (2022).

[3] Government of Canada, *Trade and Gender in Free Trade Agreements: The Canadian Approach*, *at* https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng.

[4] *Id.*

[5] E.g., Solomy Balungi Bossa.

[6] E.g., Helen Keller and Laura Létourneau-Tremblay.

[7] E.g., Rolf Einar Fife.

interdisciplinarity can further enhance our understanding of possible tools that can make institutional environments more diverse. In addition, the diversity debate can be further enriched by a greater engagement with the academics from the Global South.

Beyond a balanced approach to the authors' representation, the volume is rich in different methodological approaches to analyzing the issue of diversity. Contributors to the volume utilize personalized storytelling, empirical quantitative analysis, and doctrinal examination of the foundations of diversity in international law.

Diversity in methodological approaches is important for diversity discourse generally, and this volume specifically, as it highlights the need to examine the problem of insufficient diversity on the international bench from different angles. For example, Liesbeth Lijnzaad, judge at the International Tribunal for the Law of the Sea, employs a classic doctrinal analysis in her examination of the legal framework that sets the rules on "the composition of courts and tribunals within the UN system" (p. 34). After a thorough analysis of the relevant legal rules, Lijnzaad concludes that, *inter alia*, Article 8 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) can be used to promote the participation of women on international courts and should not be limited only to the UN system or to particular subfields, such as peace and security (p. 36). As Lijnzaad shows, states do not fully use the existing normative framework (pp. 33–35). In contrast, Mubarak Waseem, barrister at Essex Court Chambers, employs a quantitative methodology in his analysis of the individual opinions drafted by International Court of Justice (ICJ) judges to examine how frequently the judges relied on religious texts in their opinions (p. 265). This methodology helps to tease out whether religious texts have been relevant in the disposition of disputes at the ICJ. Relatedly, it examines whether religious diversity on the bench may matter from the perspective of substantive legal reasoning (p. 269). Whether or not one believes that religious diversity, indeed, matters for the adjudicators in international law, is not important. In my view, what counts is an open mind to evaluate different background characteristics in an empirical way.[8]

Further, the late James Crawford offers a first-hand personal experience as counsel and later as a judge at the ICJ. Given Crawford's wide-ranging experience, his storytelling feels deeply personal and appealing. According to Crawford, there were no significant observable differences between female and male judges where the interpretation or application of the legal rules and principles was concerned (pp. 420–22). Despite a lack of observable differences, Crawford concludes that the international bench should be diverse because suitably qualified women and men should enjoy equal opportunities to serve on the international bench, the strongest candidates of all backgrounds should be judges, and the public should see that the judiciary reflects the entire community. It is extremely difficult to disagree with Judge Crawford's perspective. Perhaps we are at the stage where we, as scholars, must figure out the best way to get to the goal Crawford identified.

Szilárd Gáspár-Szilágyi, lecturer in law at Keele University, and Laura Letourneau-Tremblay, doctoral fellow at Oslo University, (p. 280) and Cosette Creamer, law professor at the University of Minnesota, and Zuzanna Godzimirska, professor at Copenhagen University, (p. 427) conducted quantitative analyses of appointments. They focus on the impact of the professional background and education of the adjudicators on the decision-making processes in the investor-state dispute settlement (ISDS) and the World Trade Organization (WTO) contexts, respectively. Creamer and Godzimirska found a greater likelihood that a disputing government would issue "a critical statement on a report" if a woman participated in the WTO panel (p. 444). This troubling empirical finding does not sit well with calls to increase diversity as it reveals a potential bias against panels that include female panelists. The authors highlight that women constitute only "14.9%

[8] Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AJIL 1 (2012).

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of all panelists" and that "not a single female South Asian had been appointed to sit on a panel" (p. 436). Accordingly, women remain underrepresented in the WTO dispute settlement context, and some voices, such as of South Asian women are entirely absent. These findings are upsetting yet not surprising as it aligns with broader trends on gender diversity in international law.

The ISDS system reveals similar patterns of underrepresentation. Catherine Drummond, PhD candidate at the University of Cambridge, points to insufficient empirical data to explain why co-arbitrators in the ISDS context choose to appoint fewer women than the arbitral institutions, such as, for example, the International Centre for Settlement of Investment Disputes (p. 110). The absence of data on this issue creates opportunities for future research on diversity in the selection and appointment process. In my view, these future efforts would be particularly valuable if the researchers focus on qualitative analyses to identify the underlying reasons that hinder diversity in the context of international arbitration specifically and international law more generally. Such a qualitative turn to examining diversity will likely help to close the data gap and tease out more personalized narratives in international law.

Turning from the volume's methodological approaches to it substantive contributions, one of the volume's notable strengths resides in the editor's decision to focus on a wide range of diversity characteristics, such as education, development status, gender, religious background, and nationality. This approach is valuable because it shows that the backgrounds of legal professionals encompass different characteristics and cannot be reduced to a single factor. Yet many individual chapters understandably focus on one aspect of diversity. For example, Rolf Einar Fife, ambassador of Norway to the European Union, examines the normative and policy incentives for governments to promote greater gender diversity on the international bench (pp. 50–61). David Bigge, attorney-adviser at the U.S. Department of State, carefully analyzes possible arguments that can justify the promotion of religious diversity among the judiciary of the international courts and tribunals (pp. 62–77). Jamal Seifi, judge at the Iran-United States Claims Tribunal, scrutinizes the role of development as a relevant factor in diversifying the pool of arbitrators and ensuring the credibility of ISDS (pp. 164–78). Helen Keller, law professor at the University of Zurich, Corina Heri, post-doctoral researcher at the University of Amsterdam, and Myriam Christ, former intern at the European Court of Human Rights (ECtHR), walk the reader through the developments on gender diversity advanced by the Council of Europe in the context of the ECtHR (pp. 179–208). Rebecca Emiene Badejogbin, director of academics at the Nigerian Law School, usefully draws our attention to the issue of intersectionality by examining the experiences of female judges from Africa (pp. 122–41).

The volume's contributors who address different diversity characteristics appear to share at least three common concerns. First is a concern for institutional legitimacy. For example, in the introduction, Baetens emphasizes that diversity is not simply a value on its own. Rather, diversity on the bench contributes to normative and sociological legitimacy, albeit in different ways (pp. 6–7). According to Baetens, diverse judges representing different viewpoints allow for richer judicial deliberations. It means that the court or tribunal will be able to overcome any bias associated with "a singular viewpoint," a factor that underpins normative legitimacy (p. 7). In contrast, sociological legitimacy is relevant because the participants in international courts and tribunals have a perception that such diverse viewpoints are represented on the bench (*id.*).

Bigge similarly suggests that "religious diversity [on the bench] could also enhance the normative legitimacy of international courts and tribunals" (p. 77), although does not address how, exactly, it does so. However, Bigge appropriately argues that "[n]o religious person should be subject to discrimination in the realm of international adjudication" (*id.*). In her discussion on African female judges on the benches of the international courts and tribunals, Badejogbin speaks about "greater institutional sustainability"

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(p. 125). I read Badejogbin's approach as the linkage between judicial representativeness and sustainability in the spirit of the UN SDG 5 on gender. SDG 5 calls for promoting women's participation in the decision-making processes "at all levels."[9] Finally, Paolo Palchetti, law professor at the Université Paris I and the University of Macerata, examines trends in the appointments of ad hoc judges at the ICJ and concludes that states tend not to use appointments of ad hoc judges to promote geographic and regional diversity (p. 87). Palchetti views this as a "missed opportunity" to enhance the sociological legitimacy of the Court "as an institution representative of the international community" (p. 88).

The second concern shared by multiple contributors to the volume relates to the role (if any) that identity plays in legal reasoning. Notably, the contributors do not delve deeply into interdisciplinary theoretical justifications to define the concept of identity or justify why specifically this concept is essential to analyze the issues of diversity on the international bench. The contributors seem to employ the term "diversity" in the sense of a combination of various characteristics (such as nationality, race, religious beliefs, and culture, among others) that define the background of an international judge (p. 9). None delves deeply into the issue of class in a socioeconomic sense and the impact of this factor upon diversity on the bench. Catharine Titi, professor at University Paris II Panthéon-Assas, only mentions that this factor can play a role in decision making (p. 210). Future efforts may wish to examine the role of socioeconomic background of candidates and engage with the concept of identity on a more theoretical level.

The identity concern matters from the perspective of how certain identity characteristics, such as gender, can potentially impact reasoning and outcome. For instance, in the international criminal law context, Teresa Doherty, judge of the Special Court of Sierra Leone, studies the role of women judges in developing "victim jurisprudence" (p. 365) and Juan-Pablo Pérez-León-Acevedo, writes about the ICC, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia (pp. 366–411). Juan-Pablo Pérez-León-Acevedo, post-doctoral researcher at the University of Jyväskylä (Finland), concludes that the female judges of the ICC contributed immensely to the "development of the jurisprudence concerning victim rights to protection, participation, and reparations in criminal proceedings" (p. 386). In this instance, the gender background of the international judges of the ICC mattered. The reason for it is that some crimes can be gendered, for example, if many victims are women. Pérez-León-Acevedo's storytelling echoes some experiences that Justice Gabrielle Kirk McDonald, a former judge and president of the International Criminal Tribunal for the former Yugoslavia, shared in one of her interviews for the Ad Hoc Tribunals Oral History Project run by Brandeis University.[10] Valerie Hughes, law professor at Queen's University (Canada), offers a somewhat different perspective, albeit in the context of international trade law. Hughes examines trade disputes at the WTO and critically inquires whether gender makes any difference in legal outcomes, legal reasoning, or the institutional legitimacy of the WTO. Hughes concludes that gender-diverse benches contribute to the overall institutional legitimacy of the WTO dispute settlement. However, given the "paucity of data" and "the limited experience with women adjudicators on the WTO bench, and the fact that the WTO system requires adjudicator anonymity in decision-making, it is not possible to point to any empirical evidence on whether or not women, in fact, made a difference by bringing a unique perspective to WTO adjudication" (pp. 347, 354).

The third concern that appears in the volume goes to the "diversity versus merit argument." For example, Monika Prusinowska, professor at the China-EU School of Law, emphasizes that

[9] UN, *SDG 5*, *at* https://sdgs.un.org/goals/goal5.

[10] An Interview with Gabrielle Kirk McDonald: The Ad Hoc Tribunals Oral History Project by International Center for Ethics, Justice and Public Life, Brandeis University, at 9–11, 39 (2016), *at* https://www.brandeis.edu/ethics/international-justice/oral-history/interviews/mcdonald-gabrielle-kirk.html.

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"[f]ostering diversity should not happen at any cost: experience and quality will always remain critical" (p. 159). Seifi warns that "the diversity debate is not aimed at undermining meritocracy: the focus of diversity initiatives must be on how best to expand the pool without lowering professional standards" (p. 165). The merit versus diversity concern has been dominant in the diversity discourse for quite some time. The volume addresses this concern aptly and from different perspectives, yet does not take a radical stance on the necessity of this debate (p. 551).

As I have argued elsewhere, and as several contributors to the volume emphasize, meritocracy and diversity do not stand in opposition.[11] To tackle the terms of the debate critically, we must examine how we define "merit" for international adjudicators. Let us imagine that there is a hypothetical candidate with over twenty years experience in litigating land disputes between Indigenous communities and investors. Yet, the candidate gained this experience working for an NGO that protects and promotes the rights of indigenous communities. Do these qualifications make our candidate suitable for an ISDS appointment? The answer to this question depends on the symbolic capital of the candidate in the field (if any) and whether the field's participants choose to recommend the candidate for the appointment as an arbitrator. In her chapter, Drummond highlights the "subjective nature" of the "merit" assessments that in practice shape "the effective pool" of arbitrators (p. 94). In this context, future studies may wish to skip the diversity versus meritocracy debate and concentrate on approaches to construing merit in international law and how such social construction shapes representation on the bench (and beyond the bench).

Besides the focus on many aspects of diversity, the volume covers different international courts and tribunals, with particular attention to diversity on the benches of regional international human rights courts. For instance, J Jarpa Dawuni, professor at Howard University, examines the African Court on Human and People's Rights (pp. 516–37). Clara Maria López Rodríguez, PhD candidate at King's College London, analyzes the Inter-American Court on Human Rights (pp. 494–515). Finally, Angelika Nußberger, law professor at Cologne University, and Baetens examine diversity at the ECtHR (pp. 479–93). They focus on cultural background, political party affiliation, former profession, and gender. With respect to gender, the authors emphasize that certain countries, such as "France, Italy, Russia, the United Kingdom, and a number of other countries have never sent a woman to Strasbourg" (p. 487). Nußberger and Baetens further inquire whether a diverse international court can maintain "a "form . . . [of] corporate identity" (p. 493). They find that the ECtHR succeeded in achieving a "unified [c]ourt" by employing various tools to "integrate new judges into the institution" (*id.*).

As these chapters suggest, in her editorial role, Baetens made a deliberate decision to focus on multiple international adjudicatory bodies. This choice highlights that the problem of insufficient diversity is a cross-cutting issue for different adjudicatory bodies and subfields of international law. Examining this issue exposes many institutional limitations that can impede diversity on the international bench. One example of such limitations is the dominant role of horse-trading at the stage of judicial nominations. Another example is the unfortunate reluctance of states to select candidates that do not fit a conventional mould of "pale, male, and stale" (pp. 18, 66).[12]

While such a breadth of coverage (at least from the outset) may appear overwhelming, it constitutes (in my view) one of the main selling points of the volume. For readers who wish to familiarize themselves with the diversity debate either to craft better policies or, alternatively, to find their own footing, the volume offers a deep dive into these debates across different international adjudicatory bodies. It will be useful for anyone who

[11] Ksenia Polonskaya, *Diversity in the Investor-State Arbitration: Intersectionality Must Be a Part of the Conversation*, 19 MELB. J. INT'L L. 259 (2018).

[12] Françoise Tulkens, *More Women – But Which Women? A Reply to Stéphanie Hennette Vauchez*, 26 EUR. J. INT'L L. 223, 226 (2015).

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aims to understand the challenges and opportunities that diversity in the international judiciary can present.

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LEX PACIFICATORIA, JUS POST BELLUM, OR JUST "GOOD PRACTICE"?

International Law and Peace Settlements. By Marc Weller, Mark Retter, and Andrea Varga, eds. Cambridge, UK: Cambridge University Press, 2021. Pp. xxxiv, 704. Index.

Lawyering Peace. By Paul Williams. Cambridge, UK: Cambridge University Press, 2021. Pp. xii, 289. Index.
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At the international level, getting into an armed conflict is clearly easier than getting out of one. Resolving the underlying issues that led to the conflict in the first place—and that have likely been exacerbated during the fighting—almost always proves profoundly difficult. While those issues are unlikely to be primarily "legal" in nature, international law and international lawyers should and do play important roles both in crafting interim arrangements to bring the fighting to an end and in establishing the conditions for a sustainable peace between the contesting parties.

Against the backdrop of the continuing conflict in Ukraine (among other crises), it is worth asking what law, if any, applies to such efforts, whether there are any clear legal requirements or parameters for such agreements, and what the lawyers involved in the negotiations need to focus on. These are not new questions, of course, and since each conflict has its own unique origins, contours, and context, it is unrealistic to expect simple (much less uniform) answers. The two volumes under review address the issues from differing perspectives and offer practical insights into how international lawyers can play positive roles in constructing a durable post-conflict peace. In so doing they also illuminate doctrinal debates over recent developments in the evolution of international law.

I.

International Law and Peace Settlements, edited by Marc Weller, a law professor at the University of Cambridge, Mark Retter, of Oxford University, and Andrea Varga, of the University of Glasgow, focuses broadly on "the complex relationship between peace settlements and international law" (p. 2). It is a hefty work (over seven hundred pages including twenty-nine substantive chapters) undertaken as part of the Lauterpacht Center's "Legal Tools for Peace-Making Project"[1] and in collaboration with the United Nations. It is also ambitious, attempting a systematic and comprehensive assessment of the relationship between international law and peace settlement practice across a range of core settlement issues, such as transitional justice, human rights, refugees, self-determination, power-sharing, and wealth-sharing.

Weller's introductory chapter sets the stage by rejecting "an overly formulaic definition of peace agreements" (p. 8)—meaning one that focuses too narrowly on the existence of a legally binding text—in favor of a broader, more inclusive notion of "peace settlements," a term he defines as including "instruments concluded between two or more conflict parties—whether state or non-state—with the aim of achieving the suspension, termination or resolution of an armed conflict" (p. 14). Unsurprisingly, the book's table of peace agreements and instruments (pp. xxv–xxxiii) lists over two hundred entries, spanning the period from 1945 to 2018.

The twenty-seven substantive chapters that follow address a genuinely impressive range of

[1] *See* Lauterpacht Centre for International Law, *Legal Tools for Peace-Making Project*, *at* https://www.lcil.cam.ac.uk/researchcollaborative-projects-housed-lcil/legal-tools-peace-making-project.