

Panel 17: From Fragmentation to (R)evolution: Reconnecting Gender and International Law at the United Nations

CLE Reading Material:

- Convention on the Elimination of All Forms of Discrimination against Women 1979
- Gender and the international judge: Towards a transformative equality approach; Loveday Hodson, Leiden Journal of International Law Vol 35(4) (2022)

**Convention on the Elimination
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**RESERVATIONS TO THE CONVENTION ON THE ELIMINATION
OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**Report by the Secretariat**CONTENTS**

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I. INTRODUCTION

1. At its fifteenth session held in January 1996, the Committee on the Elimination of Discrimination against Women requested, in connection with its consideration of ways and means of expediting the work of the Committee, that the Secretariat provide it with information to facilitate discussion at its sixteenth session of reservations to the Convention on the Elimination of All Forms of Discrimination against Women. The Committee specifically requested a review of "what United Nations conferences have said about reservations to the Convention" and "of comments made by women's human rights non-governmental organizations concerning reservations". It also requested "a qualitative comparison of reservations to the Convention with reservations to those of other human treaties" and "an analysis of States parties' reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law".¹

2. The present report seeks to provide the Committee with the information it requested. To facilitate discussion, the first part describes the pattern of reservations and declarations made by States parties to the Convention on ratification or accession. The report then surveys the response of the Committee, States parties to the Convention, United Nations conferences and others, including non-governmental organizations and scholars, to these reservations and declarations. The final part of the report describes measures that have been taken in other contexts to address reservations and suggests options available to the Committee as it seeks to reduce and, ultimately, eliminate reservations. The report provides a comparison of the reservations and declarations to the Convention with reservations and declarations entered to other human rights treaties which can be used by the Committee and others in dialogue with States parties.

II. THE PATTERN OF RESERVATIONS AND DECLARATIONS TO THE CONVENTION

3. The Vienna Convention on the Law of Treaties, 1969, defines a reservation as a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State".² Declarations which offer a State's understanding of a provision sometimes seek to exclude or modify the legal effects of the treaty for that State and are thus properly construed as reservations.³

4. As at 8 November 1996, 154 States had ratified, acceded or succeeded to the Convention. Of these, 49 had entered declarations or reservations, many to more than one article. Some of these reservations are essentially procedural and relate to article 29(1) of the Convention, which provides for the jurisdiction of the International Court of Justice for the settlement of disputes arising out of the Convention.⁴ Reservations to article 29(1) are permitted by article 29(2) of the Convention and thus there is no question as to their admissibility. A significant number of reservations are, however, substantive

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and, as one commentator has suggested, go "to the heart of both values of universality and integrity"⁵ in international human rights law generally and in its application to women, in particular.

5. The majority of reservations have been made to individual articles, but a minority are general and do not refer to specific provisions of the Convention. Examples of general reservations include those of Malaysia, Maldives and Tunisia. Malaysia's reservation indicates that its accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic shariah and the Federal Constitution of Malaysia. Maldives makes clear that the Government of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic shariah, upon which the laws and traditions of Maldives are founded, and that it does not see itself bound by any provision of the Convention which obliges it to change its Constitution and laws in any manner. Tunisia has filed a "general declaration" stating that it will not take any organizational or legislative decision in conformity with the requirements of the Convention where such a decision would conflict with provisions of chapter 1 of the Tunisian Constitution. The first article of that chapter of the Constitution declares Islam to be the official religion of the State. A similar reservation, framed as a general declaration, has been filed by Pakistan, which states that its accession is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.

6. Commentators have stressed the significance of the first five articles to the fulfilment of the Convention's objectives. Nonetheless, a significant number of reservations and declarations have been made to these articles. A number of States parties have differently phrased reservations to these provisions to the effect that the Convention is not binding insofar as its provisions may conflict with the Islamic shariah or that the State party is willing to comply with the Convention, provided that such compliance will not be in contradistinction to the Islamic shariah.⁶ These reservations have been viewed by some as imprecise and indeterminate and thereby contrary to the certainty required for the acceptance of a clear legal obligation.⁷ The terms of the reservations sometimes do not explain their legal and practical scope. This is rendered more complicated by differing views among Islamic scholars as to the precise requirements of the shariah and whether the shariah may be subject to evolving interpretation and practice.

A. Articles 1-5

7. Reservations to articles 1-5 are not all framed in terms of Islamic law. A number of States parties have entered reservations which provide that their domestic law prevails over these and other articles. For example, Algeria states that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code. The Bahamas has entered an unexplained reservation to article 2(a). Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relating to succession to chieftainship and that none of the obligations in the Convention, particularly those in article 2(e), will be treated as extending to the affairs

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of religious denominations. New Zealand defers to traditional customs within the Cook Islands by reserving articles 2(f) and 5(a) "to the extent that the customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with those provisions". India declares that it will apply article 5(a) in conformity with its policy of non-interference with the personal affairs of any community without its initiative and consent, while Fiji has filed an unexplained reservation to article 5(a).

B. Article 7

8. Several States parties have made reservations to article 7, explaining these reservations variously. Malaysia has entered a reservation on the basis of Islamic Law and its Constitution, which it does not expand. Austria and Germany have limited their reservation to women's participation in the defence forces; Belgium, Luxembourg and Spain, to the royal prerogative; Israel, to the participation of women as judges in religious courts; and Kuwait, to equality in franchise.

C. Article 9

9. A significant number of reservations have been entered to article 9 of the Convention, which obliges States parties to grant women equal rights with men in relation to their nationality and that of their children.⁸ Commentators suggest that these reservations demonstrate deep-rooted assumptions about the appropriate role of women in society, with children born in marriage assumed to acquire the nationality of their father and married women that of their husband. Conversely, husbands do not acquire the nationality of their wives.⁹ These reservations not only entrench women's inequality with men in this sphere, but create significant practical disadvantages for them where residence and immigration status are concerned.

D. Articles 11-14

10. A small number of States parties have entered reservations to specific parts of articles 11-14. Reservations to article 11, providing for equality in employment, are drawn narrowly, but nonetheless may rest on stereotypical assumptions. Examples here are reservations, such as those of Austria, relating to night work and others entrenching special protection for working women.¹⁰ Some States parties have entered reservations to articles which oblige the introduction of equality in social benefits. These include Australia, which has made a reservation with regard to article 11(2)(b) on the basis that it is not at present in a position to introduce maternity leave with pay or comparable social benefits throughout the country, and Malta, which, in its reservation to article 13, has preserved its tax legislation which deems, in certain contexts, the income of a married woman to be that of her husband and the husband as head of household for the purposes of social security legislation. Other States parties that have entered reservations to article 13 include Bangladesh, which does not explain its reservation, and Ireland, which indicated that although legislation to ensure equality in services provided by non-governmental actors

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was under consideration, it reserved the right, in the meantime, to apply its existing law and measures in that context. Narrow reservations have also been entered by France to article 14(2) (c) and (h), concerning specific measures for rural women.

E. Article 15

11. Article 15, providing that women will be accorded equality with men before the law and in personal movement, choice of residence and domicile, is subject to a number of reservations. Insofar as equality before the law is concerned, Malta's reservation to articles 13, 15 and 16 indicates that it is removing all discriminatory aspects of property law but that in the period of transition it will apply extant discriminatory laws.¹¹ Jordan has explained that a woman's residence and domicile are with her husband, while Algeria, Morocco, Tunisia and Turkey accept the article subject to the relevant provisions of their personal status codes.¹²

F. Article 16

12. A large number of States parties have entered reservations to article 16, which guarantees equality between women and men in marriage and family life,¹³ either in part or in its entirety. Commentators have been particularly critical of these reservations, suggesting that they manifest rejection of the extension of human rights protection into the private sphere and entrench an inferior role for women in domestic life.¹⁴ Controversy surrounded the drafting of article 16 during the preparation of the Convention, with States attempting, even in the discussions in the Third Committee of the General Assembly, to amend the draft Convention to conform with their domestic law.¹⁵ Reservations and declarations to this article are diverse. A number are imprecise and offer no explanation.¹⁶ Others are explicit and explain why the State party has made the reservation. Some States parties, whose reservations are based on the Islamic shariah, argue that women are in fact advantaged by the domestic regime. For example, Iraq has indicated that its reservation is based on the view that the shariah accords women rights equivalent to those of their spouses so as to ensure a just balance between them. Similar, but more detailed, explanations, are offered by the reservations of Egypt and Morocco. Reservations to article 16 have attracted the particular concern of the Committee on the Elimination of Discrimination against Women which, in general recommendation 21, relating to equality in marriage and family relations,¹⁷ expressed alarm at the number and scope of reservations to article 16, particularly in those cases where the State party has also entered reservations with respect to article 2. The Committee has urged States parties to discourage any notions of inequality between women and men which are affirmed by law, or by religious or private law or custom, and has encouraged them to progress towards a stage where reservations to article 16 could be removed.

III. RESPONSES TO RESERVATIONS TO THE CONVENTION

13. The Vienna Convention on the Law of Treaties 1969 prohibits reservations which are incompatible with the object and purpose of a particular treaty. Article 28(2) of the Convention on the Elimination of All Forms of Discrimination against Women reiterates the Vienna Convention and prohibits reservations which are incompatible with its own object and purpose. Despite the prohibition of such reservations, there is no explicit mechanism, beyond the mechanism of objections by other States parties, in the Vienna Convention or in the Convention on discrimination against women itself by which a reservation can be adjudged incompatible with the Convention, and the Convention does not spell out the consequences of an incompatible reservation or an objection to such a reservation.¹⁸

14. Although there is no formal external or internal mechanism to determine the compatibility of reservations to the Convention, responses to these reservations by States parties to the Convention, the international community generally and others suggest that a significant number of extant reservations are incompatible with the Convention's object and purpose and thus contrary to article 28(2).

A. Response of other States parties

15. A number of States parties to the Convention have exercised the option available under the Vienna Convention on the Law of Treaties and objected to the reservations of other States. Of these, Germany, Finland, Mexico, the Netherlands, Norway, Portugal and Sweden have argued that the wide and often vague and indeterminate reservations of particularly those States which make reservations on the basis of religious law are incompatible with the object and purpose of the Convention and thus contrary to article 28(2). In all cases, objecting States parties have made clear that their objections should not be interpreted as impeding the entry into force of the Convention between themselves and the reserving party.

16. The question of reservations has also been discussed by the meeting of States parties to the Convention. The third meeting of States parties adopted a resolution (CEDAW/SP/8) urging full respect for article 28(2) of the Convention and requesting the Secretary-General to seek States parties' views on reservations that would be considered to come within this article and to report those views to the General Assembly at the following session. It also placed the issue on the agenda of the fourth meeting of States parties, which was to convene in 1988. Seventeen States responded to the Secretary-General's request for views, less than 20 per cent of the then States parties.¹⁹ The report of the Secretary-General²⁰ was considered by the Third Committee of the General Assembly at its forty-first session in 1986, when a number of States parties that had entered reservations alleged that the debate represented both cultural insensitivity and interference with the sovereign right of States to enter reservations. The General Assembly subsequently adopted resolution 41/108, of 4 December 1986, in which it made no specific reference to reservations, but "recalled the decision of the States parties" and "emphasized the importance of strictest compliance with their obligations under the Convention".

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B. Response of the Committee

17. The Committee on the Elimination of Discrimination against Women has been preoccupied with the issue of reservations since its inception. At the third session of the Committee, the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat provided a legal opinion in which it indicated that neither the Committee nor the Secretary-General, as depositary of the treaty, had the power to determine the compatibility of reservations,²¹ but the question has been an item of discussion for the Committee at many of its sessions. During its sixth session in 1987, the Committee formulated general recommendation 4, which expresses concern at the significant number of reservations that appear to be incompatible with the object and purpose of the Convention, welcomes the decision of the States parties to consider the issue during their meeting in 1988, and suggests that all States parties concerned reconsider reservations with a view to withdrawing them.²² In 1988, the Committee suggested that, given the references by States parties to Islamic law and practices in their reservations, it would be useful for the Committee to have material on the subject.²³ The Committee has continued to question States closely on the issue of their reservations,²⁴ encouraging them to review and amend their laws and policies in compliance with the Convention so as to allow for withdrawal of the reservations. In 1992, the Committee formulated a further general recommendation concerning reservations.²⁵ This general recommendation, No. 20, suggested that States parties should, in their preparation for the 1993 United Nations World Conference on Human Rights, raise the question of the validity and legal effect of reservations to the Convention in the context of reservations to other human rights treaties, reconsider such reservations with a view to strengthening the implementation of all human rights treaties, and consider introducing a procedure on reservations to the Convention comparable with that of other human rights treaties.

C. Revised reporting guidelines

18. At its meeting in 1994, building on paragraph 39 of the Vienna Declaration and Programme of Action, the final document of the World Conference on Human Rights, which encouraged ways and means of addressing the particularly large number of reservations to the Convention and the continued review by the Committee of those reservations, as well as urging States to withdraw reservations that were contrary to the object and purpose of the Convention or which were otherwise incompatible with international treaty law,²⁶ the Committee amended its guidelines for the preparation of initial and periodic reports required by article 18 of the Convention to include guidance for States that had entered reservations.

19. The new guidelines require States parties to report specifically with regard to their reservations, why they consider them to be necessary, their precise effect on national law and policy and whether they have entered similar reservations to other human rights treaties that guarantee similar rights. States parties are also required to describe plans that they might have to limit the effect of the reservations or withdraw them and, where possible, specify a timetable for this process. Particular reference was made to those States parties which have entered general reservations or reservations to articles 2

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and 3, thereby suggesting that the Committee considers such reservations to be incompatible with the object and purpose of the Convention and requiring a special effort towards withdrawal or modification. States parties with such reservations are directed to report on the effect and interpretation of their reservations. The Committee also requested that a special letter be sent by the Secretary-General to those States parties that had entered substantive reservations to the Convention and recommended that the programme of advisory services of the Centre for Human Rights and the Division for the Advancement of Women be available to provide advice to States parties on the withdrawal of reservations.

D. Beijing Declaration and Platform for Action

20. The Committee's concern with reservations to the Convention was echoed by the international community at the Fourth World Conference on Women, which agreed in the Beijing Platform for Action that Governments should limit the extent of any reservations to the Convention, formulate any such reservations as precisely and narrowly as possible, ensure that no reservations were incompatible with the object and purpose of the Convention or international treaty law and review reservations regularly with a view to their withdrawal.²⁷

E. Response of scholars and non-governmental organizations

21. Reservations to the Convention have not only attracted the interest of States parties to the Convention, the Committee and other parts of the United Nations system, but also that of scholars and non-governmental organizations. At least four scholars have commented on the reservations, classifying those which they see as impermissible as contrary to the object and purpose of the Convention and suggesting strategies to confront them.²⁸

IV. RESPONSE OF OTHER HUMAN RIGHTS TREATY BODIES TO RESERVATIONS

22. The issue of reservations is also a concern of other human rights treaty bodies, with the fifth meeting of Chairpersons of Human Rights Treaty Bodies in 1994 recommending that the treaty bodies should require States parties to explain their reservations. At that meeting it was also recommended that treaty bodies should clearly state that certain reservations were incompatible with treaty law.²⁹

23. The absence of specific provisions for dealing with reservations in a number of human rights treaties, and the failure of the Vienna Convention on the Law of Treaties to specify the legal consequences of an impermissible reservation, led the Human Rights Committee, the treaty body established under the International Covenant on Civil and Political Rights, to adopt general comment 24,³⁰ concerning reservations, in November 1994. In paragraphs 8-11, the comment identifies the principles of international law that apply to the making of reservations and those reservations which the Human Rights Committee regards as contrary to the object and purpose of the Covenant. The Human Rights Committee's classification of reservations contrary to the Covenant's object and

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purpose is based on the obligations established in the Covenant, but the comment makes clear (para. 12) that widely formulated reservations which essentially render ineffective all Covenant rights, or which reveal a tendency of States not to want to change a particular law, are often contrary to the object and purpose of the Covenant.

24. General comment 24 also addresses the role of the Human Rights Committee in the context of reservations. The comment suggests that the classic rules on reservations contained in the Vienna Convention on the Law of Treaties are inadequate for the Covenant and other human rights treaties, which, because they concern the rights of individuals and not mutual obligations between States, do not arouse the legal interest of States to lodge objections. In the Committee's view, this has led to few States lodging objections to incompatible reservations as they are entitled to do under the Vienna Convention. The Committee's view (para. 18) is, therefore that:

"It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because ... it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 [the reporting obligation in the International Covenant on Civil and Political Rights] ... the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect for the reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."

25. General comment 24 goes on to make recommendations for States parties for the review of reservations, as well as to States that are not yet parties, but which might be considering ratifying with reservations. It stresses that reservations must be specific and transparent so that the obligations assumed by the ratifying State are clear. Reservations should be precise, rather than general, and States should take into account the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the treaty. Multiple reservations resulting in the acceptance of a limited obligation should be avoided and reservations should not be framed so as to reduce the obligations assumed to less demanding standards of domestic law (para. 19).

26. Strategies to address extant reservations are also proposed in the comment. States are asked to institute procedures to ensure that each reservation is compatible with the object and purpose of the treaty and States entering reservations should indicate in precise terms the domestic legislation or practices which it considers incompatible with the reserved provision,

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delineating a time period required to adjust its domestic laws and practices to conform with the obligation or indicating why it cannot render its domestic laws and practices compatible with the treaty. Reservations should be periodically reviewed, particularly in the light of the Committee's examination of periodic reports, which should include information regarding action that has been taken to review, reconsider and withdraw reservations. Withdrawal of reservations should occur as early as possible.

27. Some aspects of the Human Rights Committee's general comment on reservations have proved controversial with a number of States parties to the Covenant. In particular, the view that the Vienna Convention is inappropriate for human rights treaties, as well as the suggestion that the Committee has the power to make a binding pronouncement on the validity of reservations and sever those it determines offensive, have been criticized.³¹ It is to be noted, however, that in the context of its work on reservations,³² the International Law Commission has prepared a draft resolution on reservations to normative multilateral treaties, including human rights treaties, which is expected to be considered by the Commission in 1997.³³ In the draft resolution, the Commission suggests that although the Vienna Convention is fully applicable to reservations to human rights treaties, although these treaties do not explicitly provide for the competence of treaty bodies to determine the validity of reservations, such bodies necessarily have this competence. Taken together, the Human Rights Committee's general comment and the emerging views of the International Law Commission suggest an active role for human rights treaty bodies to determine whether reservations are contrary to the object and purpose of the treaty under consideration.

V. OPTIONS FOR THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN WITH REGARD TO RESERVATIONS

28. A former expert on the Human Rights Committee, and now a judge of the International Court of Justice, has stated that at the heart of the issue of reservations is "the balance to be struck between the legitimate role of States to protect their sovereign interests and the legitimate role of the treaty bodies to promote the effective guarantee of human rights".³⁴ Where the Committee on the Elimination of Discrimination against Women is concerned, the issue raises the question of how best to preserve the integrity of the Convention and the obligations that it establishes, while at the same time encouraging the widest participation in the treaty. A related question is how far even far-reaching reservations should be tolerated so as to encourage States parties with such reservations to subscribe to the aims of the Convention and, through the reporting process, gradually to remove their reservations.

29. While stress has been placed by the Committee on the Elimination of Discrimination against Women and others on the many substantive and far-reaching reservations to the Convention, less attention has been paid to the fact that an impressive number of reservations entered by States parties at accession or ratification have been modified or removed entirely. Indeed, although the number and reach of reservations to the Convention are second only to those for the Convention on the Rights of the Child, more reservations to it have been removed than in the case of any other human rights treaty.³⁵ For example, Malawi

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withdrew its general reservation in 1990 and far-reaching reservations relating to articles 15 and 16 were withdrawn by Brazil. In 1996, the United Kingdom of Great Britain and Northern Ireland withdrew most of its numerous reservations which it had made at the time of ratification in 1981. Significantly, Libyan Arab Jamahiriya modified its general reservation which subsumed its accession to the laws on personal status derived from the Islamic shariah. The modified reservation is specific and indicates that Libya intends to implement article 2 of the Convention in the light of the "peremptory norms" of the Islamic shariah relating to inheritance and article 16(1) (c) and (d) without prejudice to any of the rights guaranteed to women by the Islamic shariah. Modification of Libya's reservation occurred after it had presented its first report due under the terms of the Convention, at which time Libya's representative and members of the Committee discussed its earlier reservation in some detail, exploring ways in which it could be drawn more precisely.

A. Monitoring the Committee's general recommendation 20

30. This pattern of modification and withdrawal of reservations suggests that it is important for the Committee to continue its constructive approach to the issue of reservations. The Committee should, for example, continue to monitor closely the impact of general recommendation 20, particularly that part of the recommendation that suggests review by the Committee of States parties' reservations with a view to encouraging States to modify or withdraw them. Monitoring of the effect of the guidelines for reporting introduced in 1994 should also continue to be a priority for the Committee. Such monitoring could include assessment of whether States parties have followed the guidelines and if compliance with the guidelines has resulted in modification of reservations. The Committee might regularly assess the impact of its general recommendations and expanded reporting guidelines on reservations and declarations to the treaty. The Committee may wish to ask a State party for detailed explanation for its maintenance of certain reservations, as well as the effect such reservations have on the enjoyment by women of their human rights in that country.

B. Constructive dialogue with States parties on reservations

31. An important component of the Committee's dialogue with reserving States parties is a comparative discussion of States parties' approach to obligations in other human rights treaties that are similar to those in the Convention. Articles 2, 9, 15 and 16 of the Convention are subject to the largest number of far-reaching reservations, many of which may be defined as contrary to article 28(2). A number of other human rights treaties elaborate obligations which are similar to articles 2, 9, 15 and 16. Articles 2(1) and 3 of the International Covenant on Civil and Political Rights, articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights,³⁶ and article 2 of the Convention on the Rights of the Child³⁷ create similar obligations to article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. Articles 12, 14, 16 and 26 of the International Covenant on Civil and Political Rights create similar obligations to article 15 of the Convention. Again, similar obligations to article 16 of the Convention are to

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be found in article 23 of the International Covenant on Civil and Political Rights.

32. During its dialogue with individual States parties, the Committee on the Elimination of Discrimination against Women may wish to draw attention to the fact that a State party may have ratified the Convention with reservations, but at the same time, may have ratified other treaties, such as the Covenants, without reservations to articles 2 and 3 of those treaties. In the event the State party has ratified the Covenants with reservations, the Committee should be in a position to compare the reach of those reservations with the reservations to the Convention and suggest that inconsistencies be eliminated.

33. A sample comparison of reservations indicates that Algeria has not entered reservations to the Convention on the Rights of the Child, but has indicated, in regard to the International Covenant on Civil and Political Rights, that it reserves with regard to the rights and responsibility of spouses. The Bahamas, State party to both Covenants, reserved only with regard to article 2 of the Convention on the Rights of the Child. In this reservation it reserves the right to apply its own Constitution insofar as the conferment of citizenship on children is concerned. Bangladesh is not State party to either Covenant and filed no reservations to the non-discrimination provision on the Convention on the Rights of the Child, a position which appears to be inconsistent with its reservations relating to the Convention on discrimination against women. Belgium's reservations to this Convention are echoed in its reservations to the International Covenant on Civil and Political Rights. Egypt, State party to both international covenants and the Convention on the Rights of the Child, has entered no reservations to the equality guarantees of these treaties, although, as pointed out earlier, it has reserved to articles 2, 9(2) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. Iraq, similarly State party to the Covenants and the Convention on the Rights of the Child, entered no reservations to the equality provisions of these treaties, although maintaining substantial reservations to the Convention on the Elimination of All Forms of Discrimination against Women. Jordan, Libya, Morocco and Tunisia, also States parties to the Covenants and the Convention on the Rights of the Child, have not replicated their reservations to the Convention on the Elimination of All Forms of Discrimination against Women where these other treaties are concerned. In contrast, Malaysia and Maldives entered consistent reservations to that Convention and the Convention on the Rights of the Child.

34. The Committee on the Elimination of Discrimination against Women could enter into a fruitful discussion with States parties which maintain inconsistent reservations and should encourage the other treaty bodies to raise these issues also. The United Nations system, and especially the Division for the Advancement of Women, as the secretariat to the Committee, and non-governmental organizations, should also focus on these inconsistencies in their work with States parties.

C. Coordinated strategies to address reservations

35. The Committee should continue to urge the Division for the Advancement of Women and the Centre for Human Rights to develop cooperative and coordinated strategies to address reservations. Such strategies might include cooperative seminars and training sessions in States parties. The approach of the United Nations Children's Fund (UNICEF) to reservations to the Convention on the Rights of the Child might also be considered and emulated. UNICEF has arranged briefings for and discussions with high-level officials in States considering ratifying the Convention on the Rights of the Child with reservations, and those that have ratified with reservations. These briefings and meetings have been fruitful, with ratification without reservation achieved in some cases and the modification and withdrawal of extant reservations in others. The Committee might recommend such a strategy and might, within the framework of existing resources, nominate Committee experts prepared to participate in such briefings and discussions. It might also encourage the Secretariat to initiate high-level briefings, to reissue the letter of the Secretary-General to States parties with reservations and to analyse the results of that letter. The Committee might also encourage non-governmental organizations, at both the international and national levels, to consult with Governments with a view to withdrawal of reservations. Consultations might include studies of religious laws and their complementarity with the Convention. In this context, the Committee might take note of, and encourage, any seminar series, such as that planned by International Women's Rights Action Watch (Asia/Pacific) for South and South-East Asia in 1997, which seeks to compare extant reservations with the domestic legal regime. Studies of this nature frequently reveal that the States party's reservation is drawn more widely or generally than required, as the domestic situation, both legally and in terms of policy, promotes the idea of equality between women and men.³⁸

D. A new general recommendation on reservations

36. In the present report the Committee's general recommendations 4 and 20, which focus on reservations, and 21, which addresses reservations to article 16, have already been described. One of the long-term goals of the Committee could be the formulation of a new and comprehensive general recommendation combining the elements of existing general recommendations, as well as the experience resulting from those recommendations and the practice developed under the expanded guidelines on reservations. Such a general recommendation could take into account general comment 24 of the Human Rights Committee and the developing work of the International Law Commission on reservations. The Committee could develop such a general recommendation over a number of sessions, keeping other treaty bodies and the International Law Commission aware of its work and asking for comment from those bodies. As a short-term measure, the Committee may wish to submit any reaction it might have to the Commission's draft resolution on reservations.

VI. CONCLUSION

37. The Committee should continue to encourage other States parties to object to those reservations that are perceived to be contrary to the object and purpose of the Convention. It should also initiate some or all of the approaches proposed in section IV of the present report and maintain contact with other treaty bodies on this important issue through the regular meetings of chairpersons.

Notes

¹ Report of the Committee on the Elimination of Discrimination against Women (Official Records of the General Assembly, Fifty-first Session, Supplement No. 38 (A/51/38)), para. 346.

² Vienna Convention on the Law of Treaties 1969 (United Nations, Treaty Series, vol. 1155, No. 18232, p. 331), article 2 (1) (d).

³ Human Rights Committee, General Comment 24(52): General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (CCPR/C/21/Rev.1/Add.6).

⁴ Twenty-nine States parties have reserved with regard to article 29(1).

⁵ Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", Virginia Journal of International Law, vol. 30 (1990), p. 644.

⁶ See, for example, Bangladesh, Egypt, India (although framed as a declaration), Iraq and Morocco.

⁷ R. Cook, loc. cit., note 4, and B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women", American Journal of International Law, vol. 85 (1991), p. 281; C. Chinkin ("Reservations and objections to the Convention on the Elimination of All Forms of Discrimination against Women" in J. P. Gardner, ed., Human Rights as General Norms and A State's Right to Opt Out (British Institute of International and Comparative Law, 1996), p. 65.

⁸ Algeria, Bahamas, Cyprus, Egypt, Fiji, Jordan, Kuwait, Malaysia, Morocco, Republic of Korea, Tunisia and the United Kingdom on behalf of its dependent territories.

⁹ Chinkin, loc. cit.; regional and international human rights mechanisms have been quick to condemn discrimination in this sphere: see Abdulaziz, Cabales and Balakandali v. the United Kingdom, European Court of Human Rights, Series A, vol. 94 (1985); Aumeruddy-Cziffra v. Mauritius, No. 35/1978 adopted at the twelfth session of the Human Rights Committee; Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, International Law Reports, vol. 79 (1984), p. 282. Discrimination in matters of

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nationality has also been the subject of litigation at the domestic level: Dow v. Botswana. Law Reports of the Commonwealth (1992), Court of Appeal, Botswana, p. 623.

¹⁰ Malta and Singapore have similar reservations. The reservations of Mauritius to article 11 are unexplained.

¹¹ Belgium has a similar reservation limited to women in marriages that occurred prior to 14 July 1976.

¹² Reservations to this part of article 16 could be predicted from discussion in the Commission on the Status of Women during the preparation of the Convention at which the representative of Egypt, supported by the representatives of Indonesia and the Islamic Republic of Iran, explained that according to the Holy Quran, the husband must choose the site of the matrimonial home and the wife has the same domicile as her husband.

¹³ Bahamas, Bangladesh, Egypt, France, India, Iraq, Ireland, Israel, Jordan, Kuwait, Libyan Arab Jamahiriya, Luxembourg, Malaysia, Malta, Mauritius, Morocco, Republic of Korea, Singapore, Thailand, Tunisia, Turkey and United Kingdom.

¹⁴ Chinkin, loc. cit., p. 76; Cook, loc. cit., p. 703.

¹⁵ See A/C.3/34/SR.70-73. For example, the representative of Morocco argued that the roles of men and women were not "traditional" but had arisen in the deep consciousness of the human race and that to provide for equality for men and women would affect the "psychic and moral balance of children".

¹⁶ Bahamas, Bangladesh, Iraq, Israel, Jordan, Kuwait, Libya, Malaysia, Mauritius, Tunisia and Turkey.

¹⁷ See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 38 (A/49/38), chap. I.

¹⁸ This is in contrast to the International Convention on the Elimination of All Forms of Racial Discrimination which, in article 20, provides that a reservation shall be regarded as incompatible or inhibitive if objected to by two thirds of the other States parties to the Convention.

¹⁹ Note Clark's assessment of this response, Clark, loc. cit., pp. 284-287.

²⁰ See Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 45 (A/39/45), vol. II, annex III.

²¹ Ibid., Forty-second Session, Supplement No. 38 (A/42/38), para. 579.

²² Ibid., Forty-third Session, Supplement No. 38 (A/43/38), para. 66.

²³ See, for example, consideration of the reports of France, *ibid.*, Forty-second Session, Supplement No. 38 (A/42/38), para. 393, and the Republic of Korea, *ibid.*, paras. 147 and 154.

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²⁴ See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38).

²⁵ Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

²⁶ Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20), chap. IV.I, para. 230 (c).

²⁷ Chinkin, loc. cit.; B. Clark, American Journal of International Law, vol. 85 (1991), p. 281; R. Cook, Virginia Journal of International Law, vol. 30 (1990), p. 643; and L. Lijnzaad, Reservations to Human Rights Treaties: Ratify and Ruin (Dordrecht, the Netherlands, 1995).

²⁸ See A/49/537.

²⁹ General comment No. 24 (52) (CCPR/C/21/Rev.1/Add.6).

³⁰ The United Kingdom of Great Britain and Northern Ireland, the United States of America and France have lodged observations relating to general comment 24(52). Judge Rosalyn Higgins has responded to these criticisms in the preface to H. P. Gardner, op. cit.

³¹ Preliminary report of the Special Rapporteur on the law and practice relating to reservations to treaties (A/CN.4/470); second report (A/CN.4/477), bibliography (A/CN.4/478).

³² Report of the International Law Commission on the work of its forty-eighth session (Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)), chap. VI, para. 137.

³³ Rosalyn Higgins, preface to H. P. Gardner, ed., op. cit.

³⁴ Seventeen States parties have withdrawn reservations.

³⁵ For the texts of the Covenants, see General Assembly resolution 2200 A (XXI), annex, of 16 December 1966.

³⁶ General Assembly resolution 44/25, annex, of 20 November 1989.

³⁷ This was the case where the Libyan Arab Jamahiriya was involved (see para. 29 above).

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON THE EFFECTS OF
INTERNATIONAL JUDGES' PERSONAL CHARACTERISTICS ON THEIR JUDGING

Gender and the international judge: Towards a transformative equality approach

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Abstract

There is a dearth of women judges sitting on international courts and tribunals. This contribution pays attention to the question of why judicial gender matters. Demonstrating that sex-based differences play an important part in judging has challenged even the most committed essentialists. Legitimacy-based arguments are deemed inadequate in so far as they fail to address the structures of power and discrimination that create exclusions. In this contribution, I argue that the dearth of women judges matters because it is both symptom and cause of the highly gendered way in which international law and international institutions operate. Drawing on Erika Rackley's early work in which metaphor is used to reveal the gendered nature of the judicial role, I call forth the idea of the totemic judge of international law whose male gender is rendered invisible and unremarked and who functions to enrobe the gendered norms and institutions of international law. The female judge, conversely, is a disruptive force as her very presence places gender in the frame. Drawing on accounts from international courts and from the Feminist Judgments in International Law project, this contribution concludes that an approach to judging that acknowledges and challenges structures of power – including gender – contains transformative potential. However, it is potential that must find a way to operate within significant institutional and normative constraints.

Keywords: feminism; gender; judging; parity

1. Introduction

This contribution foregrounds the relationship between gender and international judging. It begins by looking at the question of sex/gender representation, acknowledging the readily apparent fact that there is a stark dearth of women judges on international benches. Efforts to increase the numbers of women on some tribunals, while having modest success, have also met with not inconsiderable institutional resistance. This notwithstanding that gender equality is a well-established norm of international law. Faced with clear and enduring disparity, the pressing question this article addresses is why gender is a matter that merits serious attention when it comes to international judges. In what ways might gender matter? Empirical studies informed by essentialist understandings of sex as a characteristic, which examine whether women and men judges perform their role in significantly different ways, have been largely inconclusive. This greatly weakens the case that gender matters when arguments are constructed on the basis of there being essential differences between male and female judges. Further, arguments that focus on legitimacy are

presented here as compelling but inadequate to fully account for why the lack of international female judges merits serious attention. I argue that such accounts risk shoring up institutional and normative structures of injustice and discrimination that serve to marginalize and exclude.

In this article I argue from a position that understands international judges to be actors operating within highly gendered contexts, in which structural exclusions, discrimination, and oppression are rendered invisible. Gender is everywhere, yet is apparent (almost) nowhere. I use metaphor to illustrate this point. The totemic international judge is male, yet his apparent genderless-ness mirrors the apparent genderless-ness of international law; he operates within international law's constraints and serves to normalize, rather than challenge, them. The female judge, in metaphorical terms, is taboo because her gender, by virtue of its counter-normative visibility, threatens to destabilize. What are the practical, real-world lessons to be drawn from this? Feminist accounts of judging are used to demonstrate how attention can be drawn to the structures that exclude women and other marginalized groups from the centres of international law. However, this contribution also places emphasis on the structural limitations under which judges operate. Ultimately, in adopting an approach informed by transformative equality, it is argued that when considering the role and function of international judges, gender matters because gender derives from social and legal systems that are steeped in injustice. Attention must turn to the highly gendered (racialized, heteronormative, ableist) exclusionary frameworks within which the judge operates. Enquiring into the ways in which gender operates in practice in international courts and tribunals – including how it is embodied, experienced, understood and replicated by judges – can point us to the structural injustices that undergird the stark statistical inequalities on international benches.

2. The problem of parity

There is a significant under-representation of women on international benches, which reflects a wider pattern of exclusion throughout international organs. Nienke Grossman has been at the forefront of highlighting international judicial gender/sex disparity. In a comprehensive survey of international courts published in 2012, she found that the percentage of female judges on 11 international courts *in total* since their establishment averaged at only 15 per cent (an average pulled up considerably at that point by the International Criminal Court's (ICC) 44 per cent). The International Tribunal for the Law of the Sea's (ITLOS) percentage then stood at 0 per cent (no woman had ever been appointed to it);¹ the International Court of Justice's (ICJ) percentage was just 3 per cent; the European Court of Justice's 7 per cent; the International Criminal Tribunal for the former Yugoslavia's (ICTY) 15 per cent; and the World Trade Organization (WTO) Appellate body's 19 per cent).² Cumulative statistics such as these that date from the creation of international courts might at least hold out the possibility that the problem is a historic one that is progressively improving. However, more recent data shows that while the number of women judges internationally is certainly increasing, progress is nevertheless slow, uneven, and not necessarily linear. The problem of representation is certainly an enduring one.

Continuing her work raising the importance of gender representation, Grossman, in an article published in the *American Journal of International Law* in 2016, summarized the findings of a large-scale statistical overview of gender representation on 12 international tribunals at that point in time. Her findings identified continuing disparity. On nine of the tribunals, 'women made up 20% or less of the bench'.³ Small progress, then. Further, Grossman cautions against any

¹Judge Elsa Kelly was appointed to the ITLOS on 1 October 2011, the first woman to be appointed to that bench.

²N. Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', (2012) 12(2) *Chicago Journal of International Law* 647.

³N. Grossman, 'Achieving Sex-Representative International Court Benches', (2016) 110 *American Journal of International Law* 82, at 82.

assumption that there is a clear and undeviating trajectory towards parity. In many cases, she found, 'the percentage of women on the bench has stayed constant, vacillated, or even declined over time'.⁴ At the time her article was written, for instance, only 20 per cent of the *ad litem* judges of the International Criminal Tribunal for Rwanda (ICTR) were women, when it had been 60 per cent in 2004. The WTO Appellate body – which is currently not sitting – then had only one female judge, where there had previously been two. A similar pattern of deviation away from parity was found in the Inter-American Court of Human Rights.⁵

These figures – which identify stark disparity and, at best, slow progress – inevitably raise the question of what might be impeding women's progress. Assuming that there are not decreasing numbers of high quality female lawyers, Grossman uses the picture of unevenness and occasional regression to puncture the 'quality of the candidate pool' argument that is often put forward to explain disparity, and she further argues against the assumption that merit is the driving factor behind international judicial appointments.⁶ She points out that even countries with high numbers of practising female lawyers are not fielding sufficient female candidates.⁷ She skewers arguments that there simply are not enough qualified women with the simple observation that:

it is difficult to believe that in a world of over 7 billion people, only one woman is qualified to sit on the seven-member benches of the ECOWAS, Inter-American Court of Human Rights and World Trade Organization Appellate Body, and on the 21-member bench of ITLOS.⁸

Looking more closely at the pattern of judicial appointments to even the more sex/gender representative benches indicates a legacy of resistance that holds contemporary relevance. In a study of the composition of the European Court of Human Rights (ECtHR) published in 2015, when 18 of the 47 Strasbourg judges were women, Stéphanie Hennette Vauchez reveals that it took until 1971 – that is, 12 years after it became operational – for a female judge to sit on the Court (Helga Pedersen, a Danish judge). For the first 30 years, there was only a total of three female judges. This is a significant legacy given the jurisprudential importance that much of the Court's early case law retains. Additionally, despite the clear trajectory towards increased numbers of women judges, Hennette Vauchez noted that 21 Council of Europe member states had yet to have a female judge sitting there.⁹ Thus, an improving picture overall can disguise serious barriers and resistance to further progress that still exist. She describes the progress made at that time on that particular court as resulting from 'a very tense, intense and much disputed deliberate enterprise' of the Parliamentary Assembly.¹⁰

How then do things currently stand with respect to gender/sex parity on international benches? The present-day picture points to an ongoing, albeit gradual, overall increase in women's representation, but also, startlingly, some areas particularly resistant to this trend. More recently, there has been some regression in the number of women on particular international benches. At the time of writing, the picture is as follows:

- The ICJ currently has four women on its bench of 15 judges (including President Joan E. Donoghue).

⁴*Ibid.*, at 82.

⁵*Ibid.*, at 85.

⁶*Ibid.*

⁷Grossman notes that the UK has sent only one female judge to the ICJ, and none to the ECHR, ICJ, ECJ, and ICTY. *Ibid.*, at 85.

⁸*Ibid.*, at 86.

⁹S. H. Vauchez, 'More Women – But Which Women? The Rule and Politics of Gender Balance at the European Court of Human Rights', (2015) 26(1) *European Journal of International Law* 195, at 200.

¹⁰*Ibid.*, at 201.

- The ITLOS has five female judges out of 21. In the most recent nominations for the ITLOS, seven out of ten nominees were men.
- The ICC has recently achieved parity, with nine women out of 18 judges.
- Three of the 22 judges (including reserve judges) across the judicial chambers of the Extraordinary Chambers in the Courts of Cambodia are women.
- The UN International Residual Mechanism for Criminal Tribunals presently has eight female judges out of 24 judges. In 2018, the UN General Assembly issued an all-male list for candidates for that tribunal.
- The ECtHR has 16 female judges out of 47; the African Court of Human Rights six women judges out of 11. The Inter-American Court of Human Rights has three female judges out of seven judges.
- The overall percentage of females sitting across the UN human rights treaty monitoring bodies is 49 per cent. However, if the CEDAW Committee and Committee on the Rights of the Child are excluded, the average figure for female membership of UN human rights treaty bodies stands at 39 per cent.¹¹ Perhaps unsurprisingly, the CEDAW Committee has 22 women sitting and only one man.¹²

Progress has undoubtedly been made towards gender parity, albeit from a startlingly low base point. Yet, as Grossman has demonstrated and the current data attests, any progress cannot be taken for granted: there is clear precedent for the numbers of women on international benches reducing. Certain tribunals – and certain states, it would seem – have been more resistant to change. There are pockets of international law (human rights particularly, but also, to a lesser extent, international criminal law) where women sit on the benches (tribunals and committees) in greater numbers. Conversely, there still seem to be important and vast swathes of international law that remain ‘no go’ areas for women judges. Finally, women are present in markedly higher number in ‘softer’ mechanisms, such as human rights treaty monitoring bodies, when compared with international courts.

3. The rocky road towards – and away from – parity

The ongoing resistance and barriers to greater female representation in international courts (tribunals, and committees) raises interesting and important questions. In terms of the stories that international law tells about itself and its normative values, striving for better representation of women on international benches should not be particularly controversial. Neither should it be terribly challenging as an aim. Equality on the basis of sex and/or gender is a fundamental norm of international law and provides a platform from which to argue for institutional reform. Enshrined in the Charter of the United Nations is a declaration that the organization ‘shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs’.¹³ Article 7 of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW)¹⁴ requires states to take measures ‘to eliminate discrimination against women in the political and public life of the country’ and, in particular, to ‘ensure to women, on equal terms with men, the right ... to hold public office and perform all public functions at all levels of government’. More particularly, Article 8

¹¹Study of the Human Rights Advisory Committee, *Current Levels of Representation of Women in Human Rights Organs and Mechanisms – Ensuring Gender Balance*, 10 February 2021, A/HRC/AC/25/CRP.1, para. 10.

¹²For updated data on the gender composition of international tribunals, see ‘The Current Composition of International Tribunals and Monitoring Bodies’, *GQUAL: Campaign for gender parity in international representation*, available at www.equalcampaign.org/1626-2/.

¹³United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Art. 8.

¹⁴UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, at 13.

requires states to 'ensure to women, on equal terms with men and women and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations'. It is worth noting that Article 4 of CEDAW also permits measures of positive discrimination that aim to redress historic gender inequalities.

These normative commitments have led to specific measures being taken to improve the representation of women in international institutions. In February 1997, the UN General Assembly adopted Resolution 51/69 that calls on states to 'commit themselves to gender balance . . . in all international bodies, institutions and organizations, notably by presenting and promoting more women candidates'.¹⁵ This Resolution perhaps had some impact, since the data above indicates an upwards trajectory around this time. In 2010, for instance, two female judges were appointed to the ICJ. They had been preceded by only one female judge in the history of the Court, Judge Rosalyn Higgins.¹⁶ In 2015, the General Assembly adopted a further Resolution calling for gender parity throughout the UN.¹⁷ More recently still, in July 2019, the Human Rights Council adopted a Resolution on the Elimination of all form of discrimination against women and girls that 'Calls upon States, and encourages the United Nations and other international institutions, to promote a balanced gender representation and equitable geographical distribution in the composition of international bodies at all levels . . .'.¹⁸ On the basis of that Resolution, a report has recently been produced by the Council's Advisory Committee on the current level of women in human rights organs and mechanisms. Although the report details a lengthy institutional history of engagement with the problem of under-representation that has led to some improvements, it characterizes progress as incomplete, slow-paced, and uneven.¹⁹

A few international courts and tribunals even have founding instruments that make specific reference to sex/gender representation. For instance, sex/gender representation is a mandatory consideration for the appointment of judges to the African Court on Human and Peoples' Rights, which was established in 2004.²⁰ The ICC's statute requires a 'fair representation of female and male judges' (Article 36(8)(a)(iii)); it goes on to require states parties to 'take into account the need to include judges with legal expertise on specific issues, including . . . violence against women or children' (Article 36(8)(b)).²¹ Provisions such as these have demonstrable impact.

¹⁵Resolution Adopted by the General Assembly, A/RES/51/69, 10 February 1997, para. 27.

Grossman credits this change with raising the number of female judges from 3% in 1997 to 18% in 1998. Grossman, *supra* note 3, at 93.

¹⁶Rosalyn Higgins sat as a judge on the ICJ from 1995 to 2009 and was President of the Court from 2006–2009. For further discussion of parity and the ICJ, see J. L. Corsi, 'Legal Justifications for Gender Parity on the Bench of the International Court of Justice: An Argument for Evolutive Interpretation of Article 9 of the ICJ Statute', (2021) 34 *Leiden Journal of International Law* 977.

¹⁷UN General Assembly Resolution No. 70/133 on follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly, 23 February 2016, UN Doc. A/RES/70/133, para. 27.

¹⁸Resolution on the Elimination of all forms of discrimination against women and girls adopted on 11 July 2019 (A/HRC/RES/41/6), para. 15.

¹⁹Study of the Human Rights Advisory Committee, *Current Levels of Representation of Women in Human Rights Organs and Mechanisms – Ensuring Gender Balance*, 10 February 2021, A/HRC/AC/25/CRP.1.

²⁰Art. 12(2) of The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, provides that in the nomination of judicial candidates 'Due consideration shall be given to adequate gender representation'; Art. 14(3), in turn, provides that 'In the election of the judges, the Assembly shall ensure that there is adequate gender representation.'

²¹UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Treaty Series, vol. 2187, No. 38544. During the drafting of the Rome Statute of the ICC, the Women's Caucus – a coalition of more than 200 women's organizations – lobbied to include a specific reference to 'gender balance' and the need for 'expertise on issues related to sexual and gender violence' with regards to judicial appointments was hotly debated and ultimately very watered down.

See B. Frey, 'A Fair Representation: Advocating for Women's Rights in the International Criminal Court', *University of Minnesota*, available at www.hhh.umn.edu/center-women-gender-and-public-policy/teaching-and-training.

Grossman notes that the percentage of women on that court ‘has never dropped below 39 per cent since establishment, and 47 per cent of all judicial slots have gone to women since its establishment’.²² As can be seen from the data presented above, such provisions effect change as these two tribunals have consistently had some of the highest percentages of women on their benches.²³ Tribunals with a mandatory or aspirational requirement to consider gender in appointments had more than twice the number of female judges than tribunals without such a requirement,²⁴ and four of the five tribunals with the highest number of women judges have such a requirement.²⁵ Despite the apparent effectiveness of including provisions aimed at addressing gender imbalance and their consistency with the norm of gender equality, they have not been widely adopted and have not been without their detractors. An in-depth study of international judicial appointments published in 2010 by Ruth Mackenzie and colleagues, found that positive measures to address gender disparity were criticized by many of their interviewees, which serves as ‘a reminder’, the authors argued, that such measures ‘are still new and relatively controversial’.²⁶

Looking in more detail at the example of judicial appointments to the ECtHR underscores the controversy that measures aimed at increasing the number of female judges can generate. Although the European Convention on Human Rights²⁷ itself says very little about the criteria for judicial appointment, the Council of Europe’s Parliamentary Assembly has increasingly crafted judicial nomination criteria and tightened selection rules with an eye to enhancing the Court’s legitimacy. Hennette Vauchez dates the genesis of the Assembly’s concern with gender balance specifically to the early 1990s,²⁸ but it took until 2004 for it to attempt to formalize gender balance as a mandatory requirement for nominations. In Resolution 1366 (2004), the Parliamentary Assembly required lists of candidates for election to the ECtHR to include at least one candidate of each sex.²⁹ In Resolution 1426 (2005) paragraph 2,³⁰ the Assembly noted ‘the continued existence of a clear imbalance between the sexes in the membership of the Court’ – 11 out of 44 judges were female at that time. It amended the rule to prohibit single-sex lists, except ‘when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong’ (para. 8), a change that was prompted by Latvia’s submission of an all-female list in 2005.

The Committee of Ministers, while agreeing with the principle that candidate lists should generally include persons of both sexes, nevertheless rejected the Assembly’s call to amend the Convention to enshrine this approach. In fact, it invited the Assembly to consider modifying its own rules to allow for greater flexibility to ensure the nomination of suitably qualified candidates. Prompted by Malta’s insistent submission of an all-male list for selection in 2004, the matter was referred by the Committee of Ministers to the Court itself.³¹ In its first ever Advisory Opinion,

See also B. Bedont and K. Hall Martinez, ‘Ending Impunity for Gender Crimes under the International Criminal Court’, (1999) 6 *Brown Journal of World Affairs* 65, at 76.

²²Grossman, *supra* note 3, at 93.

²³UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, Art. 13(1)(b); UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, Art. 12(1)(b).

²⁴Grossman, *supra* note 3, at 82.

²⁵*Ibid.*, at 84.

²⁶R. Mackenzie et al., *Selecting International Judges: Principle, Process and Politics* (2010), at 49.

²⁷Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe Treaty Series 005, Council of Europe, 1950.

²⁸Vauchez, *supra* note 9, at 203.

²⁹Council of Europe Parliamentary Assembly. *Resolution 1366 (2004): Candidates for the European Court of Human Rights*. Each party to the European Convention submits three nominees for a judicial appointment, and the appointment is determined by election in the Parliamentary Assembly.

³⁰Council of Europe Parliamentary Assembly. *Resolution 1426 (2005): Candidates for the European Court of Human Rights*.

³¹The Slovak Republic had also submitted an all-male list of nominees in 2004 but capitulated and revised its list when challenged by the Parliamentary Assembly.

a Grand Chamber of the Court, considering that the gender requirement had no intrinsic link to the criteria for judicial appointment mandated in the Convention itself, concluded that the rule requiring the under-represented sex to be represented on lists of judicial candidates must be qualified:

... it is clear that, in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidatures ... the Assembly may not reject the list in question on the sole ground that no such candidate features on it.³²

It seemed almost inevitable that that would be the outcome, given that the idea was being vocally criticized within the Council of Europe organs and that the move to amend the Convention to ensure gender balance on the Court had been rejected during the negotiations of Protocol 14. Resolution 1627 of 30 September 2008 amended the rules on the nomination of judges to reflect the Court's Opinion. Hennette Vauchez notes that this had the almost immediate effect of regressing female representation, with the 40 per cent threshold becoming a 'ceiling rather than a floor'.³³ At the time of writing, there are currently 16 female judges sitting on the ECtHR (34 per cent).

Despite the clear improvement in the numbers of women that follow from treaties or rules of procedure including such provisions, the number of courts and tribunals for which consideration to their gender composition is mandatory remains very limited and much of the institutional public hand-wringing about disparity on the benches has not yet been translated into widespread, concerted action to improve gender representation. Such intransigence merits consideration. It further indicates that there is a need for coherent arguments upon which to base calls for treating gender as an important category of analysis with respect to the judiciary.

4. Gender is everywhere and nowhere

While the idea that the gender composition of courts and tribunals matters has broad academic and institutional, as well as normative, support, there is little agreement on the question of *why* it matters. Several studies of national judges have considered the question of gender representation from an *essentialist* perspective, looking for empirical evidence that demonstrates sex- or gender-based differences in the ways that men and women perform their judicial functions. The findings from these studies, however, have been inconclusive and inconsistent. Christina Boyd and colleagues summarize the findings of several studies of US judges and sex/gender difference as follows: 'roughly one-third purport to demonstrate clear panel or individual effects, a third report mixed results, and the final third find no sex-based differences whatsoever'.³⁴ They conclude, however, that while sex/gender rarely has a significant effect on judging, 'Rarely ... is not never'. They point particularly to data identifying significant differences in both individual and panel effects in sex discrimination cases, concluding that here informational accounts of sex/gender

³²Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights. ECtHR (GC), 12 February 2008, para. 54.

For further discussion of this Advisory Opinion see A. Mowbray, 'The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights', (2008) 8(3) *Human Rights Law Review* 549.

³³Vauchez, *supra* note 9, at 209.

³⁴C. L. Boyd, L. Epstein and A. D. Martin, 'Untangling the Causal Effects of Sex on Judging', (2010) 54(2) *American Journal of Political Science* 389, at 392.

difference – that is, accounts that argue women’s experiences equip them with unique and valuable information when deciding cases – might provide a useful explanation of difference.³⁵

When it comes to studying gender effects on international benches, the small number of female international judges, as well as the collaborative nature of much decision-making, makes empirical analysis of outcomes challenging.³⁶ Nevertheless, some social scientists have taken up this challenge. The establishment of a number of international criminal tribunals since the 1990s generated considerable scholarly interest in the judges sitting on those novel tribunals. In a 2005 study of the impact of personal characteristics on the decisions of the judges of the ICTY, James Meernik and colleagues concluded that ‘women are neither more nor less likely to sentence those found guilty to lengthier sentences’,³⁷ and that ‘despite a heightened awareness of the victimization of women in the Balkan wars, women sentence no differently than men’.³⁸ King and Greening, in a subsequent study of ICTY judges, found that, with regards to charges of sexual violence, ‘the interaction of judicial and victim gender matters for sentencing outcome’.³⁹ They conclude that, ‘Although women must achieve a tipping point before implementing substantive policy representation in institutions, our results indicate that presence alone may be sufficient to confer benefits and magnify differences.’⁴⁰ The rather modest take-home point here seems to be that sex/gender may matter somewhat, at least in an international criminal law context looking at two particular areas of outcome (guilt or innocence, and the length of sentence handed down).

A recent study by Erik Voeten of the effects of sex/gender on the judgments of the ECtHR, using matching method that compares the decisions of a male and female judge with otherwise ‘similar’ characteristics, provides only limited support for difference-based arguments. Overall, Voeten’s study found no evidence that female judges were generally more favourable to female applicants except, importantly, in discrimination claims filed by women (which his study suggests women judges may be more receptive to). Female judges were somewhat more likely to find a violation of the Convention, especially in cases involving physical integrity claims.⁴¹ His study supports the suggestion that sex/gender may be a significant characteristic in specific, limited circumstances.

There is only limited evidence to suggest that sex/gender is an important differential in how judges perform their role. As finding data that conclusively demonstrates important essential differences in the ways men and women judge has proved elusive, arguments based on sex/gender differences that directly correlate to outcome provide only weak support for the argument that gender on the bench matters. Consequently, some have preferred arguments for parity based on *legitimacy*. Nienke Grossman, for instance, suggests that we turn away from focusing on difference, asserting that ‘Whether or when men and women judge differently is irrelevant.’⁴² Achieving gender parity on international benches, she argues, would itself have the important effect of enhancing the sociological legitimacy of international courts and tribunals.⁴³ She further cites democratic legitimacy as a compelling argument to strive for gender parity: ‘Sex

³⁵*Ibid.*, at 406.

³⁶Grossman, *supra* note 2, at 656.

³⁷J. Meernik, K. L. King and G. Dancy, ‘Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National and International Factors’, (2005) 86(3) *Social Science Quarterly* at 683, 698.

³⁸*Ibid.*, at 701.

³⁹K. L. King and M. Greening, ‘Gender Justice or Just Gender?: The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia’, (2007) 88(5) *Social Science Quarterly* 1049, 1065.

⁴⁰*Ibid.*, at 1066.

⁴¹E. Voeten, ‘Gender and judging: evidence from the European Court of Human Rights’, (2021) *Journal of European Public Policy* 1453.

⁴²Grossman, *supra* note 3, at 94.

⁴³Further arguments that do not depend on ‘difference’ in outcomes are based on the importance of demonstrable equality of opportunity and the need for female role-models to secure the progression of women. See B. Hale, ‘Equality and the Judiciary: Why Should we Want More Women Judges?’, (2001) *Public Law* 489.

unrepresentativeness threatens the normative legitimacy of international courts because these institutions wield public authority, yet they fail to reflect fairly those affected by their decisions.⁴⁴

Legitimacy-based approaches have the advantage of removing the need for empirical demonstration of gender differences. They also swerve the essentialist thinking that underpins such investigations.⁴⁵ However, they have little resonance for international institutions, which make very limited claim when compared with their national counterparts to democratic or sociological legitimacy. International institutions – including courts and tribunals – are born of the state-centric, highly political, largely unaccountable (in any democratic sense), structures of international law. The appointment of international judges is far from being free from the politicking and the furthering of national interests – not to mention the patriarchal norms and practices – that underpin the work of international institutions.

Legitimacy arguments – which are compelling because they rest on the straightforward and unarguable assertion that there *should* be more women judges – steer us away from asking why that seemingly unproblematic imperative proves to be so elusive. They fail to place under scrutiny the structures of discrimination that undergird international institutions and that can help to explain why women (to use one identity category) are in fact largely absent from international judicial positions. Legitimacy-based arguments take international law's commitment to equality at face-value and do not point to the urgent need for institutional transformation. The work that gender does within institutions, and the need to address institutional structures of power and discrimination, remains unaddressed. If our aims end with parity for the sake of legitimacy, if the women judge is primarily there to even up numbers, there as a figurehead who in her representational positioning shores up the institution and provides it with a veneer of respectability, then the institutional resistance to addressing questions of gender remains untouched.

Paying attention to the gender of the judge can open the door to probing the role that gender plays within the institutions and structures of international law. In figurative terms, the judge can be understood as a male figurehead; he is a totem who operates from within, reflecting – yet at the same time concealing – international law's highly gendered structures. Viewed in this light, the woman judge is both a conundrum and a taboo. Erika Rackley's early work laid the path for thinking about women judge in such figurative terms:

Her physical appearance threatens to upset aesthetic norms; her presence is an inescapable irritant, simultaneously confirming and disrupting the established masculinity of the bench. As such, the woman judge is almost a contradiction in terms.⁴⁶

In the hands of the totemic male judge, the authority of international law and its institutions is upheld and the work (read, discrimination and exclusions) that gender does is rendered invisible. The female judge, on the other hand, is taboo. She is the impossible judge because she can never be genderless. The female judge is a troubling and disruptive force whose very presence places gender in the frame; by her very existence she threatens to chaotically reveal the contingency and the discriminatory practices and values of international law. She is, thus, a 'bad fit' who is generally to be resisted, and who may be tolerated only in so far as her gender is either cloaked or, alternatively, inflated and emphasized to the point that the judge herself becomes a 'stand in', representative every-woman. Recognizing this presents an opportunity to turn our gaze to the structures that make the female judge taboo. The dearth of women judges is not, then, just undemocratic, and it does more than render the judgments of such institutions illegitimate; it is both the product of, and an illustration of, sustained and systemic injustice and discrimination. To recognize that

⁴⁴Grossman, *supra* note 2, at 674. See also Grossman, *supra* note 3, at 88.

⁴⁵K. Malleon, 'Justifying Gender Equality on the Bench: Why Difference Won't Do', (2003) 11 *Feminist Legal Studies* 1.

⁴⁶E. Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid and the Vain and Naked Emperor', (2002) 22(4) *Legal Studies* 602.

judges are situated, to accept the relevance of identities (including gender and sex), opens the door to acknowledging the power structures that exclude and shape experiences of discrimination. In the words of Sandra Berns and Paula Baron, 'For a judge to simultaneously speak as a woman is to speak without authority, to speak in defiance of law.'⁴⁷

5. The potential of positionality

Feminists in international law have drawn attention to the powerful political and legal structures that entwine to sustain power and to marginalize. The totemic judge does not make waves, but rather reflects and sustains structures of power and discrimination and is thereby an institutional conformist. This idea has real-world implications on the practice of judging. Daniel Terris and colleagues identify three reasons why internationally, judicial transformation is slow: (i) International judges operate more collectively, creating a community of knowledge-based experts; (ii) international judges are reluctant radicals; (iii) international judges operate in fragile institutions, subject to the consent of states for their survival.⁴⁸ This all makes intuitive sense and reflects the considerable institutional constraints under which judges operate; but what of those judges who self-consciously embody taboo and conflict? I turn now to individual accounts from international judges that place emphasis on the impact that a self-conscious attention to structural inequalities and difference (including paying to attention to sex and gender) might have made to their judging. The picture is a complex one that reveals a to-ing and fro-ing between resistance to and compliance with the normative and institutional structures of international law.

Gender is one dimension of identity that informs our experiences, including experiences of inequality and discrimination. A number of judges have acknowledged the ways in which experience and identity, including gender, inform their judging. The examples here are drawn from women judges not because they are the only ones with transformative potential to call out the structural limitations under which international law operates, but because their gender identity contains an ever-present threat to expose the patriarchal values that the totemic judge protects. Some judges react self-consciously to their metaphorically taboo status. Françoise Tulkens, the Belgian judge who sat on the ECtHR from 1998 to 2012, has, for instance, argued for the need to expose as myth the ideal of the impartial and neutral judge, particularly in a human rights context:

Despite their universal and highly abstract nature – perhaps precisely for this reason – fundamental rights lead to a contextualisation of the norm which, when assumed by the judiciary, translates into interpretative practices that are sensitive to the diversity of interests and values involved. These practices spell the end of the myth of literal meaning of norms and of the fiction of the neutral judge . . .⁴⁹

She further draws from personal experience to suggest that women judges bring 'something different':

So, precisely, a more contextualised approach to the rights of the European Convention on Human Rights; likewise, a preference for a complex and concrete internal point of view rather than a simplified and abstract external point of view; also, a sense of mistrust regarding the public/private division and a greater openness to the horizontal application of the

⁴⁷S. S. Berns and P. Baron, 'Bloody Bones: A Legal Ghost Story and Entertainment in Two Voices', (1994) 2 *Australian feminist Law Journal*, at 125.

⁴⁸D. Terris, C. P. R. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (2007), xix-xx.

⁴⁹F. Tulkens, 'Parity on the Bench: Why? Why Not?', (2014) 6 *European Human Rights Law Review* 587, at 593.

Convention; a stronger commitment to the idea that there is “no water-tight division” between civil and political rights and economic and social rights.⁵⁰

This is not so much, I would suggest, an essentialist argument based on difference, but rather, a more political and overt recognition of the ways in which gender shapes institutional human rights norms, a recognition that stems from acknowledging (her own) positionality.

What implications might such overt positionality have on the practice of judging? One potential and highly significant outcome of acknowledging the ways in which identities shape individuals’ relationship to structures of power is that exclusions can be identified and voices that have been marginalized by the mainstream can be foregrounded. Trying to demonstrate how theory has translated into real-world impact is rife with traps and temptations. Nonetheless, the adoption by judges of feminist framings of sexual and gender-based violence as forms of discrimination have particularly been identified both by judges and academics as informing important recent developments in international criminal law and human rights law, developments which I turn to now.

Judicial gender has frequently and particularly been associated with developments in international criminal law relating to sexual offences. According to Barbara Bedont and Katherine Hall-Martinez, the dramatic move towards taking sexual crimes seriously ‘can be traced to the participation of women in the ICTY and ICTR as investigators, researchers, judges, legal advisors, and prosecutors’.⁵¹ Normative and institutional developments in this context have been directly attributed to women judges, even when they are in a minority. Kimi Lynn King and colleagues, for instance, identify that several significant developments took place at the ICTY with respect to prosecuting sexual violence offences, in spite of that tribunal having only two female judges. These authors conclude that ‘women have the ability to shape outputs that are part of a “woman’s domain” even when their numbers do not constitute majorities’.⁵² Attentiveness to gender-based violence and discrimination has often been attributed to the sex/gender of the judge. Julie Mertus, for instance, cites Chief Prosecutor of the ICTY Richard Goldstone as recalling that without having women involved in the Tribunal’s early days, ‘there may not have been *any* indictments for gender-based crimes’.⁵³

At the ICTR, Judge Navanethem Pillay famously responded to witnesses’ accounts of rape and sexual violence in the case of *Prosecutor v. Jean-Paul Akayesu*⁵⁴ by insisting on the inclusion of charges relating to them, even though such charges were not initially brought by the prosecution.⁵⁵ It is well known that the outcome was a judgment that was both far-reaching in terms of the definition of rape in international law and was the first delivered by an international tribunal to recognize criminal responsibility for genocide resulting from a systematic and targeted pattern of rape.⁵⁶ For four years, Judge Pillay was the only female on the ICTR’s bench, so the conclusion that her gender was the causal factor here is *seemingly* irresistible. Louise Chappell identifies both the increased representation of women on the bench and ‘an increasing sensitivity to gender issues in the procedures of the court’ as hand-in-hand developments and, quite rightly, as significant advances.⁵⁷ Following careful analysis of five judgments delivered by the ICTY and ICTR that

⁵⁰*Ibid.*, at 593.

⁵¹Bedont and Hall-Martinez, *supra* note 21, at 75.

⁵²K. L. King, J. D. Meernik and E. G. Kelly, ‘Deborah’s Voice: The Role of Women in Sexual Assault Cases at the International Criminal Tribunal for the Former Yugoslavia’, (2017) 98(2) *Social Science Quarterly* at 548, 560–1.

⁵³J. Mertus, ‘When Adding Women Matters: Women’s Participation in the International Criminal Tribunal for the Former Yugoslavia’, (2008) 38 *Seton Hall Law Review* 1297, at 1306.

⁵⁴*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, judgment of 2 September 1998.

⁵⁵L. Chappell, ‘Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court’, (2003) 22(1) *Policy and Society* 3, at 10–11.

⁵⁶*Akayesu* judgment, *supra* note 54, para. 731.

⁵⁷Chappell, *supra* note 55, at 20.

significantly developed international jurisprudence concerning gender-related crimes, Kelly Askin notes that in each:

a female judge was a member of the Trial Chamber hearing the case, and occasionally it was her skillful intervention, expertise in women's issues, or judicial competence that facilitated the judicial redress process and impacted the development of gender crimes.⁵⁸

According to Mertus, Judge Odio Benito (Judge of the ICTY, 1993–1998) used 'every opportunity' to ensure the indictment in the *Nikolić* case was amended to include gender-based crimes.⁵⁹ Later, as a member of the ICC (2003–2012), Judge Odio Benito issued a well-known dissent in the *Lubanga* judgment relating to the use of child soldiers, in which she argued that 'sexual violence is an intrinsic element of the criminal conduct of "used to participate actively in the hostilities"'.⁶⁰

Female judges have themselves articulated that their gender may mark them out in terms of their understanding of, and approach to, sexual violence. Patricia Wald (Judge of the ICTY, 1999–2001), has hypothesized that women judges might exhibit 'special sensitivity' to crimes of sexual violence and forced labour, on the basis that women shoulder a particular burden of victimhood with respect to these crimes.⁶¹ Navanethem Pillay (Judge of the ICTR, 1995–2003 and the ICC, 2003–2008), says that 'women come with a particular sensitivity and understanding about what happens to people who are raped'.⁶² She reports that international female judges, herself included, have had to push prosecutors to charge defendants with rape-based offences.⁶³ Julia Sebutinde (Judge of the Special Court for Sierra Leone, 2005–2011 and the ICJ, 2012–), who delivered a noteworthy separate opinion on forced marriage in the *AFRC* trial, says that:

As a female judge, listening to the horrendous stories, I always felt that the women bore a much harder brunt ... of this conflict than the men ... somehow the perpetrators always found a way of exerting a heavier burden on the female victims, on top of the crimes they committed against them. They would use the women like personal possessions.⁶⁴

Gabrielle Kirk McDonald (Judge of the ICTY, 1993–1999), also recalls insisting on rape indictments, describing herself as being able to 'feel it in my body' in a way that her male colleagues could not.⁶⁵

While the gender of the judge is clearly significant in these examples drawn for international criminal law, my argument is that gender operates in more complex ways here than 'woman judge = difference'. We need to work harder to understand the institutional role that gender is playing. Rosemary Grey and colleagues' study of gender and judging on the ICC concludes that a gender-sensitive approach makes a difference to the way in which the law is interpreted, the

⁵⁸K. D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances', (2003) 21(2) *Berkeley Journal of International Law* 288, at 346.

⁵⁹Mertus, *supra* note 53, at 1306.

⁶⁰*The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para. 20.

⁶¹P. M. Wald, 'Women on International Courts: Some Lessons Learned', (2011) 11(3) *International Criminal Law Review* 401, at 403.

See also P. M. Wald, 'Strategies to Promote Women's Participation in Shaping International Law and Policy in an Era of Anti-Globalism', (2017) 46(1) *Georgia Journal of International and Comparative Law* 141, at 143; J. S. Martinez, 'International Law at the Crossroads: The Role of Judge Patricia Wald', (2011) 11 *International Criminal Law Review* 391, at 395.

⁶²Terris et al., *supra* note 48, at 48.

⁶³*Ibid.*, at 44.

⁶⁴N. Grossman, 'Judge Sebutinde: An Unbreakable Cloth', in J. Jarpa Dawuni and A. Kuenyehia (eds.), *International Court and the African Woman Judge: Unveiled Narratives* (2018), at 43.

⁶⁵S. Sharratt and G. Kirk McDonald, 'Interview with Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia', (1999) 22(1) *Women & Therapy* 23.

finding of facts and to procedural decisions.⁶⁶ While it is tempting to conflate women on the bench with developments in international criminal law, the correlation is not precise. What is important is the conscious way in which these judges acknowledge the varied significance of gender, including its institutional significance. With respect to Pillay's transformative decisions, it is her conscious decision to address the significance of gender (including her own), and her resultant principled commitment to women's rights and gender justice – not her sex/gender alone – that was pertinent to her contribution to the court's jurisprudence in *Akayesu*.⁶⁷ Merely identifying the sex of the judges does not explain the differences that the judges made here: The procedural and jurisprudential developments in international criminal tribunals were wrought by judges who identified the significance of gender and who were willing to challenge structures of power in the pursuit of gender justice.

Of course, it is probably uncontroversial to suggest that a female is more likely to become aware of her gender by virtue of its poor fit with institutional norms and frameworks. Although women do not inhabit a universalizable category from which they can be demonstrated to judge in a particular way or have particular knowledge or experiences, judges who embody the judicial conundrum – that is, those whose identities are at odds with the patriarchal norms and structures of international law – may more readily recognize and call out its exclusions and blind spots. Such 'calling out' is not a given (it is brave and exhausting choice to recognize and call out structural discrimination), is not exclusive to women (gender here operates as an example, and men might, of course, be aware of structures of discrimination), and the judge may find herself vacillating between resistance and compliance, between totem and taboo, even in the context of a single judgment. While the totemic judge is apparently genderless in so far as his masculinity is taken for granted, the woman judge is taboo because through her, gender becomes overt. Gendering the (invariably, female) judge can have real-world effect and play out in the experiences of, and the expectations we place on, judges. One is not born, but rather becomes, a woman judge.

The question of gender is thus an institutional and structural one. The architecture of international criminal law institutions – in so far as they make direct reference to gender is also significant here. In the words of Chappell:

... feminist-oriented judges must work with their peers and convince them of the relevance of the gender justice elements of the case. However, feminist judges on the ICC do have an advantage over many of their colleagues in domestic settings in that they have a strong "constitutional" base on which to mount their arguments: that is, the gender justice architecture built into the Rome Statute.⁶⁸

The ICC's architecture goes beyond recognizing binary sex-based differences and calls for sensitivity to gender in all its dimensions (including, but not restricted to, gender-based violence). In the context of sexual crimes, however, the gender (of the event and of the judge) becomes overt and it is the *female* judge who is allowed a space at the table – her gender is allowed to be on display, even to the point that we *insist* here in this context on the central importance of gender. One might then ask why the gendered dimensions of these crimes operates in such a way that the woman judge in all her gendered glory is finally here permitted to come to the fore. Why *here*?

⁶⁶R. Grey, K. McLoughlin and L. Chappell, 'Gender and Judging at the International Criminal Court: Lessons from Feminist Judgments Projects', (2021) 34 *Leiden Journal of International Law* 247.

⁶⁷For a personal account of her victim-centred positioning see N. Pillay, 'Sexual Violence: Standing by the Victim', (2010) 35(4) *Law and Social Inquiry* 847.

⁶⁸L. Chappell, 'Gender and Judging at the International Criminal Court', (2010) 6(3) *Politics and Gender* 484, 490. For further discussion of the ICC's 'gender justice architecture' see R. Grey, 'Interpreting International Crimes from a "Female Perspective": Opportunities and Challenges for the International Criminal Court', (2016) 17 *International Criminal Law Review* 325.

The work of Karen Engle⁶⁹ and Hilary Charlesworth⁷⁰ has provided us with good reason to exercise caution where the female judge is *over-gendered* and when the same tropes and examples come to be intrinsically associated with women judges; questions of sexual violence, to the exclusion of other forms of gendered, racialized, and economic discrimination and injustice, become her domain and her plight. The *female* judge's function is to reveal the feminized, disempowered, and shamed victim of sexual violence. One question this provokes is whether international criminal law can envisage, and adequately respond to, sexual and gender-based violence that is perpetrated on male or masculine bodies. Transformation – that is, transformation beyond particular, permissible 'ghettos' of international law – requires us to recognize that gender and gendered bodies are not exclusively a women's realm.

There has been far less discussion about the operation of gender and the international benches outside of the contexts of sexual violence and gender discrimination. There are undoubtedly remarkable women judges we can point to beyond those who sit on the criminal benches. As a member of the Human Rights Committee, prior to her appointment to the ICJ, Rosalyn Higgins led the way in drafting General Comment 24, which was ground-breaking on the question of reservations to human rights treaties. She would, of course, go on to be hugely influential as a judge on the ICJ, particularly in her separate/dissenting opinions in the *Nuclear Weapons Advisory Opinion*;⁷¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*;⁷² the *Arrest Warrant* case;⁷³ and *Armed Activities on the Territory of the Congo*.⁷⁴ Her influence as President of the ICJ – for instance, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case – is clear.⁷⁵ Thomas Buergenthal notes that Rosalyn Higgins was a very active member of drafting committees while sitting as a judge on the ICJ, thereby contributing considerably to the 'initial formulation' of its jurisprudence.⁷⁶ While unquestionably a huge and remarkable judicial presence, at least some of her vision is exceptionlized by its containment in dissenting judgments. Judge Julia Sebutinde too has, as outlined above, an impressive background in women's rights and, sitting on the ICJ, issued an important separate opinion in the court's recent *Chagos Islands Advisory Opinion*, in which she placed under a sharp lens questions of colonialism and self-determination.⁷⁷ Nonetheless, in a 2014 interview conducted with three of the current female ICJ judges (prior to Rosalyn Higgins' recent appointment), all, but especially Judges Donoghue and Xue, were at pains to de-centre questions of gender, in spite of the inevitability of them being raised.⁷⁸ Gender, for women judges on most international benches in most contexts, remains both inescapable and

⁶⁹K. Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (2020). See also K. Engle, 'Feminist Governance and International Law: From Liberal to Carceral Feminism', in J. Halley et al. (eds.), *Governance Feminism: Notes from the Field* (2019).

⁷⁰See particularly, H. Charlesworth, 'Feminist Methods in International Law', (April 1999) 93(2) *American Journal of International Law* 379.

⁷¹*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226.

⁷²*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136.

⁷³*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3 (Judges Higgins, Kooijmans, Buergenthal, Joint Separate Opinion).

⁷⁴*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep. 3.

⁷⁵*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43.

⁷⁶T. Buergenthal, 'Rosalyn Higgins: judge and president of the International Court of Justice', (2009) 22(4) *Leiden Journal of International Law*, at 703, 707.

⁷⁷Separate Opinion of Judge Sebutinde, *Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice General List no. 169 (25 February 2019).

⁷⁸*Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 108, 'The Effectiveness of International Law' (2014), at 386.

impermissible. If the transformation of international law and its structures is the aim, is not enough to call out the role that (institutional and judicial) gender plays in the spaces of international law where gender has permission to reveal itself.

6. The problems of institutional and normative constraints

Rosemary Hunter has argued that raising the question of gender parity falls short of asking the critical question: what *should* women judges do once appointed?⁷⁹ An equally, or perhaps even more pertinent question, might be, what *may* women judges do once appointment? The institutional and normative constraints are considerable. The gender dimension of much of international law may be deeply entrenched and so normalized as to not be readily apparent and the constrictions such that genuinely transformative judging appears to be all-too-frequently out of reach.

Entering the realm of the imaginary – that is, meeting the metaphorical, totemic judge on his terms – provides us with tools to tackle the seemingly superhuman task of using judgment to reveal the entrenched, structural patriarchal (heteronormative, racialized, ableist) foundations of international law. A recent collection of international judgments reimagined and rewritten from feminist perspectives, *Feminist Judgments in International Law*,⁸⁰ identifies the structural aspects of mainstream international law and reveal the ways in which apparently neutral rules operate in gendered and other ways to marginalize and exclude. It also demonstrates in concrete ways the transformative possibilities that feminist approaches to judging might offer if institution constraints permit. Navigating those constraints is, however, an ever-present challenge evident throughout the collection; and, even in the realm of fiction, conceiving oneself as a judge free to identify and reveal the gendered foundations of international law and to challenge structural discrimination takes not a small leap of imagination.

The collection of reimagined judgments in *Feminist Judgments in International Law* takes a broad view of the gendered dimensions of international law – not excluding, but certainly not confined to, questions of women's victimhood and sexual violence. Adopting a feminist approach, the concerns become structural – particularly challenging the centring of states in the international legal system. This collection, for instance, interrogates the ways in which the Security Council wields unparalleled power and the limited accountability that exists with respect to the exercise of that power.⁸¹ In the re-written *Lotus* judgment – renamed the *Bozkurt* case by the feminist chamber, after the Turkish vessel involved in the collision with the French vessel whose name international lawyers are far more familiar with – the case is placed in historical context and questions about the rights of women that were not posed by the original tribunal are opened up. In finding that Turkey's exercise of jurisdiction did not violate international law, the chamber established the 'Bozkurt Principle', which de-centres state sovereignty and establishes international co-operation as a hallmark of international society.⁸²

It is possible to imagine a transformative equality approach to judging that adopts a particular and deliberate positioning, attentive to the operation of power structures and their relationship to gender and other axes of discrimination. Sally Kenney's review of the literature refers to work showing that 'feminist ideology may well be more important than gender in predicting different votes in hypothetical cases'.⁸³ Hunter lists the following expectations that she might have of a

⁷⁹R. Hunter, 'Can Feminist Judges Make a Difference?', (2008) 15(1) *International Journal of the Legal Profession* 7, at 7. See also F. Ni Aoláin, 'More Women – But Which Women?: A Reply to Stéphanie Hennette Vauchez', (2015) 26(1) *European Journal of International Law* 229.

⁸⁰L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (2019).

⁸¹*Ibid.* The *Lockerbie* case (*Libyan Arab Jamahiriya v. United States of America*), Ch. 4.

⁸²*Ibid.* *Bozkurt* case, aka the *Lotus* Case (*France v. Turkey*): *Ships that Go Bump in the Night*, Ch. 2.

⁸³S. J. Kenney, 'Thinking about Gender and Judging', (2008) 15(1) *International Journal of the Legal Profession* 87, at 95.

feminist judge: (i) She will identify the relevance of gender; (ii) she will judge inclusively, recognizing the partiality of narratives laid before the courts and identifying with the interests of women; (iii) she will challenge bias; (iv) she will adopt ‘feminist practical reasoning’, drawing from the women’s lived experiences; (v) she will promote a substantive view of equality that foregrounds systemic disadvantage and injustice; (vi) faced with the uncertainties of making choices, she will make feminist choices; (vii) she will commit herself to full-time feminism; (viii) finally, she will support other women. Hunter also argues that feminist judges arguably have a ‘responsibility’ to ‘maintain familiarity with feminist legal literature . . . and to make use of it to consider whether and if so how a feminist analysis may be undertaken in every case coming before them’.⁸⁴ This is quite an ask. The experiences of those involved in the *Feminist Judgments in International Law* collection demonstrate that even for those setting out with clear-eyed, feminist purpose, the institutional and normative barriers to judging in such a way are considerable.⁸⁵

Questions about ‘difference’ in judging need to look beyond sex/gender as a category towards an understanding of how awareness of gender and other power dynamics can/does/should – and, crucially, is *allowed* to – inform and shape judicial approaches. Hennette Vauchez asserts, in her review of the judicial candidates, that female candidates are typically ‘women who are essentially *des hommes comme les autres* – that is, women whose profiles are very comparable to those of their male counterparts’.⁸⁶ Judicial replication of international law’s masculine, traditional values will not engender change or end discrimination, regardless of the sex of the judge. For a judge to operate at once from within international law and in a self-consciously gendered way that challenges its patriarchal structures requires her to adopt and articulate a position that is bordering on the superhuman. Rosemary Hunter has referred to the ‘invidiousness of difference’ and the ‘disciplinary techniques’,⁸⁷ which restrain (domestic) judicial efforts at transformation. Patricia Wald notes that women ‘have to be recognised as smart, fair and hardworking if they are to wield influence’, which she understands to mean that those seeking to promote gender parity must nonetheless be cautious ‘regarding whom they support for crucial judicial and prosecutorial positions’.⁸⁸ Her own experience, however, was of being ‘criticised at times for intervening too often or pushing my point too hard’.⁸⁹ Judging in a way that is committed to gender justice, in a way that works to reveal structures of injustice from within structures that are themselves steeped in patriarchy, is exhausting work. The feminist judge – the transformative judge, the superwoman judge, the gendered judge – is, by definition, swimming against both the jurisprudential and institutional tide.

7. Conclusion

While gender is an unquestionable important aspect of international judging, in this contribution I have suggested that more is at stake than calls for women to be given an equal space on international benches suggest. I have focused attention on the question of *why* gender is an important consideration. In doing so, I turned enquiry away from seeking to demonstrate essential sex/gender differences in how judges judge, directing it instead towards consideration of the ways in which gender operates as a social construct, how it relates to international legal processes, and how it both shapes and constrains the judicial role. In the words of Kenney, ‘. . . we can learn

⁸⁴Hunter, *supra* note 79, at 15.

⁸⁵Ní Aoláin, *supra* note 79.

⁸⁶Vauchez, *supra* note 9, at 216.

⁸⁷R. Hunter, ‘More than Just a Different Face?: Judicial Diversity and Decision-making’, (2015) 68 *Current Legal Problems* 119, at 127–8.

⁸⁸Wald, *supra* note 61, at 402.

⁸⁹*Ibid.*, at 404.

a lot from using sex as a variable, but only if it is coupled with an understanding of gender as a social process that is more complex than binary and essentialist understandings of sex differences allow.⁹⁰ The gender question is an important one for international courts and tribunals, not just to ensure their legitimacy or because of some innate difference in the ways men and women think: addressing questions of gender representation on international courts and tribunals in a meaningful way means laying bare axes of discrimination that undergird concern about the lack of women on international benches. To explain this, drawing on Rackley's work, I called upon a metaphorical totemic judge who embodies and enrobes international law's patriarchal norms. Gender is everywhere and nowhere on the international benches: the woman judge is taboo because her very presence unveils a foundational fiction of international law, that its norms and structures are without gender. To take her place on the international bench she must, but can never, be without gender. To pose questions about gender and the international bench is thus to pose an impossible conundrum.

In this contribution, I have agreed with those who assert the importance of positionality. Some international judges certainly can be said to judge, at times and in particular spaces, with a self-conscious gendered awareness – and this can, and sometimes does, make a difference in so far as it lays bare the structures of power and discrimination at play. With that awareness in mind, I turned to highlighting the normative and procedural differences (or developments) that have been attributed to (judicial awareness of) gender. These were most readily associated with important developments made in the fields of international criminal law and human rights. However, despite recognizing and celebrating the judicial creativity and bravery that underpins the developments outlined, I have been at pains to stress that judicial positionality is shaped by, and interacts with, institutional and normative structural limitations. My argument has thus aimed to hold a mirror up to that which makes the adoption of such positionality both remarkable and a formidable challenge.

There is, further, risk in adopting the term 'gender' as a shorthand for 'women', from which position it is a short step to essentializing women as, for instance, inherently peace-loving and nurturing. I have argued against this too. I have called attention to that which is taboo and resisted, in all its forms. In simplest terms, paying full attention to the significance of gender and other forms of situatedness requires intersectional analysis. In the words of Josephine Jarpa Dawuni: 'The experiences of women judges on international courts are different and spread along a continuum of race, class, and social status . . . thereby requiring a more nuanced analysis of who these women are.'⁹¹ The quest for more female judges should avoid the ghettoization of women into specialized areas of international law, based on stereotypes of women's special knowledge. In the words of Dianne Otto:

If women are admitted on the understanding that their special contribution arises from their womanly instincts, it follows that their political agency will be limited to what is made possible by that representation and restricted to "feminized tasks" involving nurturing and mothering.⁹²

There is limited work that points to significance of judicial gender in areas beyond international criminal and human rights tribunals, which prompts the question of why gender has been given space to do overt work (has been over-worked?) in these particular spaces of international law.

⁹⁰S. J. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (2013), at 4.

⁹¹J. Jarpa Dawuni, 'Introduction: Challenging Gender Universalism and Unveiling the Silenced Narratives of the African Woman Judge', in J. Jarpa Dawuni and A. Kuenyehia (eds.), *International Court and the African Woman Judge: Unveiled Narratives* (2018), at 7.

⁹²D. Otto, 'A Sign of "Weakness"?': Disrupting Gender Uncertainties in the Implementation of Security Council 1325', (2006) 13 *Michigan Journal of International Law* 113, at 139.

The starkly contrasting invisibility of gender in other spaces of international law marks this question as an urgent one. There is clearly work to be done in revealing the gendered nature of international law more widely and the power structures that operate beyond international criminal law and human rights. This is a strategic, political work. Appointing women to international benches is both an outcome of such work and a potential catalyst for ongoing transformation.