INSTITUTE FOR AFRICAN WOMEN IN LAW

FLAGSHIP REPORTS

INTERNATIONAL COURTS AND WOMEN JUDGES

A Roundtable Discussion

In partnership with

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Executive Summary

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On December 5, 2017, the Wilson Center Women in Public Service Project and the Institute for African Women in Law hosted a panel discussion on "Global Voices in International Law: International Courts and Women Judges." This event was held on the heels of the then ongoing elections in New York for the new judges to the International Criminal Court, which was held from December 4-14, 2017. Central to the mission of the Women in Public Service Project is the acceleration of global efforts to increase the number of women in public service and leadership. International courts are important arenas where judicial decisions can produce lasting effects on the lives of global citizens.

Emerging scholarship has shown that women continue to occupy less than 20% of seats on international courts and tribunals. The desire to create inclusive and representative institutions at the domestic and global levels should not lose sight of the important roles women judges play on international courts. The panelists discussed the paucity of women judges on international courts, the role of international professional organizations such as the International Association of Women Judges, the role of governments in supporting the election of women, and the collective strategies of movements such as the GQUAL Campaign. Each panelist provided recommendations and best practices to change the current state of women on the benches of international courts and bodies.

PANELISTS

PROFESSOR NIENKE GROSSMAN

Professor of Law at the University of Baltimore, and Co-Director, Center for International and Comparative Law

LISA DAVIS

Former Executive Director of the International Association of Women Judges (IAWJ).

AMBASSADOR LIBERATA MULAMULA

Former Tanzanian Ambassador to the United States, and Acting Director of the Institute for African Studies at the George Washington University

VIVIANA KRSTICEVIC

Executive Director of the Center for Justice and International Law (CEJIL) and the GQUAL Campaign.

ROLE OF RESEARCH

Professor Nienke Grossman started the panel discussion, highlighting findings from her pioneering research on women on international courts and tribunals.

I want to begin by thanking Josephine for inviting me to be part of this panel, the Wilson Center for hosting this event, and my co-panelists. I very much look forward to learning from them. I was asked to address what factors explain the paucity of women judges on international courts. In case you are interested in learning more, the points I will be making today are drawn from two of my articles, one in the American Journal of International Law, and one in the Virginia Journal of International Law. They are rooted in statistics dating to mid-2015.

Causes - Pool

At first glance, the pool argument seems like a good explanation for the paucity of women on international court benches.

The idea is that judges are usually selected from the top echelons of legal academia, the judiciary and diplomatic corps, and women tend to be found in lower percentages in these groups. Consequently, there are fewer qualified female candidates than male candidates, which explains why there are so few women on IC benches.

There are a number of problems with this argument. First, it assumes that the selection process is aimed at choosing the most "qualified" or "meritorious" candidates. But many have called this assumption into question, arguing that political factors trump individual selection criteria. Second, one would assume that the pool of qualified women would grow over time, as the percentage of women in law schools has grown. Yet, on many courts, the percentage of female judges on the bench has stayed low, or virtually constant, although there have been some recent changes. For example, until this year, only one woman had ever served on ITLOS's 21 member bench. Now there are three. (Argentina, India, Netherlands). The African Court on Human and Peoples' Rights has also increased its percentage of women for the first time in its most recent election – to 5 out of 11. On many courts, the percentage of women on the bench has declined over time or vacillated. On 9 of the 12 courts I surveyed, fewer women sat on the bench in 2015 than in previous years.

One would also think that courts with similar qualifications requirements might have similar percentages of women, such as tribunals interpreting international criminal law. Yet in mid-2015, the ICC had 39% female judges, while the ICTY and the ICTR had only 11% and 22% female permanent judges, respectively.

Also, it turns out that states that are estimated to have a higher percentage of women lawyers do not necessarily appoint more women to the bench. E.g., it is estimated that in France, 50% of lawyers are women. Yet, as of today, France has appointed no permanent female judges to the ECJ, the ECHR, the ICC, the ICJ, ITLOS, and the ICTR or the ICTY, although French men have served on all of them. France did appoint one female ad litem judge to the ICTY.

Similarly, although women account for almost half of the lawyers in the UK, no British woman has ever served on the ECJ, the ICC, the ECHR, or the ICTY although British men have. The UK did, however, nominate Rosalynn Higgins, who became the first woman ever to serve on the ICJ, in 1995. 24 British men and 1 British woman had served as permanent international judges on these courts by mid 2015.

On the other hand, only 16% of Japanese lawyers are women, yet Japanese women had served on the ICTY and the ICC by mid 2015. Also, it is important to remember that there are not that many international judge positions out there. On the twelve courts I surveyed, there are 195 judicial positions available. These positions turn over every few years, depending on the court.

In other words, you don't need a very large pool to fill these slots. For these and other reasons, the limited pool argument is a difficult one to credit. Relatedly, it is problematic to argue that the reason for the low percentage of women on the bench is the pool, because the pool for international court judges could itself be limited due to discrimination and exclusion at the domestic level. So using it to justify lower numbers of women at the international level, simply replicates and exacerbates exclusion at the domestic one.

Selection Procedures

National Nominations

Since the pool does not appear to explain the paucity of women judges we must look elsewhere. One place is selection procedures. Typically, judges are selected for international courts in a two-step procedure.

First, individual states nominate candidates, and then an assembly of state parties elects candidates from these nominees.

I looked for but could not find a clear relationship between the kind of national nomination procedure utilized and the percentage of women judges on the bench in mid-2015 or historically. A number of factors make it difficult to reach firm conclusions here. One is that the sample size of 12 courts is not statically significant. Two, procedures differ across courts and sometimes requirements are not complied with. Three, looking only at national nomination procedures leaves out what happens at the international elections stage, as well as sex representation requirements.

What is clear, though, from a number of studies, is that national nomination procedures for the vast majority of ICs are opaque and known only to a few well-connected insiders. These kinds of procedures make it more difficult for less well-connected candidates to make it onto the international election stage. In other words, if you don't know there's an election going on, and nobody taps you on the shoulder to invite you to be a candidate, it's tough to break into the world of international judging.

Elections Phase

What about screening that takes place once candidates are nominated and before states vote at the international level? Some courts have committees evaluate the candidates after nomination but before voting takes place. Most don't.

Three of the four courts that use committees to screen candidates had relatively high percentages of female judges in mid-2015. ECHR, ICC, ECOWAS although ECOWAS dropped dramatically in the latest election. And, the courts with the lowest percentages of slots occupied by women since establishment also had the least amount of institutional screening. Although it is difficult to disentangle the many different factors involved, the data suggest a correlation between institutionalized screening at the international voting stage, and a more balanced bench.

Sex Representation Requirements

What about quotas or aspirational statements in favor of a fair representation of the sexes? Unsurprisingly, it appears that quotas are more effective than aspirational statements.

The statute of the African Court on Human and Peoples' Rights provides that states should give "due consideration" to "adequate gender representation in the nomination process." Five of the 11 judges are now women, although previously, the court was stuck at only 2 out of 11 judges.

For the ICTY and the ICTR, states were supposed to take into account the need for a fair representation of both sexes only with respect to ad litem judges, but not for permanent judges. On both the ICTY and the ICTR, the percentage of women serving as permanent judges was substantially lower than the percentage serving as ad litem judges. On the ICTR, by mid 2015, 35% of all ad litem judge slots had gone to women, while only 21% of the permanent slots had. On the ICTY, 41% of ad litem slots had gone to women, while only 13% of permanent judge slots had.

There is no question that mandatory or virtually mandatory quotas correlate with a dramatically higher percentage of women on the bench. The ICC, which has a quota system at the international election level, has had 35% or more women judges since establishment.

The ECHR is particularly interesting to look at in this regard. Almost immediately after the Parliamentary Assembly of the Council of Europe began drawing attention to the issue of sex representation on the bench, the number of women elected rose dramatically, jumping from 3% to 18% between 1997 and 1998.The percentage of women again increased, from 17% in 1999 to 22% in 2001, shortly after states were encouraged to use open calls for candidates, to seek experience in human rights, and to include candidates of both sexes. In 2004, the PA said it would no longer consider unisex lists of candidates. The percentage of women judges jumped from 23% in 2004 to 40% seven years later. The percentage of women judges has not dropped below 33% since 2008, despite the softening of the parity requirement in an ECHR advisory opinion (currently 17 out of 47).

Turns out that, in mid 2015, six of the seven courts with the highest percentages of female judges had either quotas or aspirational language. Of the seven courts with the lowest percentages of slots going to women, none had quotas or aspirational language seeking fair representation. And in mid-2015, women accounted for 15% of judges on courts without sex representation requirements of any kind. On courts with such requirements or aspirations, women accounted for 32% of the judges.

Although this is not statistically significant due to the sample size of 12 courts, it nonetheless provides compelling circumstantial evidence that women have a much harder time making it onto courts without sex representation requirements or aspirations than onto courts with them.

Summary on Selection Procedures

My remarks today have focused on the pool, selection procedures and sex representation requirements or aspirations as drivers of the percentage of women on international court benches. Additional factors may also be responsible for the paucity of women judges, like, for example, a lack of knowledge and attention to this issue by domestic and international constituencies.

What do we do about it? If it is important to have women on the bench, then what steps should be taken? For one thing, national selection procedures could be made more open and accessible where they are now closed and opaque. States could be provided with greater guidance on how to go about selecting and vetting nominees at the national level, and states could be required to publicize and document steps taken. Non-state actors could play a bigger role in vetting candidates, both at the domestic and international levels.Screening could be institutionalized at the international level where it is currently absent. Best practices could be developed and distributed.

There are, of course, reasons why states may not want to open their procedures to the light of day. For example, if a state wants to select a specific person because he or she is more likely to vote in a particular way, the state is unlikely to support institutionalized screening mechanisms. If, on the other hand, the state wants to show commitment to the underlying normative regime the court is interpreting and applying, it may be less concerned about subjecting its candidates to such a vetting process.

States might also wish to consider including aspirational language in court statutes to encourage states to nominate and elect women to international judgeships. Alternatively, states could institute quota or quota-like requirements, like the ECHR and the ICC.

The question that remains is whether and how states will respond to the glass ceiling that remains on international courts and tribunals and what we can do to encourage them. Thank you again for the opportunity, and I look forward to your comments and questions.

ROLE OF PROFESSIONAL ORGANIZATIONS

Professional organizations play critical roles in the efforts at addressing the challenges women face in nomination and election to international courts. Below are the talking points of Lisa Davis, former Executive Director of the International Association of Women Judges (IAWJ).

Thank you Dr. Dawuni (Josephine) for the invitation to join this discussion.

- The IAWJ is an association by and for women judges. Our membership is comprised of over 5000 judges from all levels of court in over 82 countries. The association was created 27 years ago. We have experienced a growth due to a demand for women judges to have our supportive platform, and chapters have started in a number of countries within the last several years.
- IAWJ has the good fortune of having members who currently serve or have served on international courts as well as those who served as UN Special Rapporteurs, on Commissions of Inquiry, and other UN legal bodies.
- Two of the Judges whose terms are expiring on the ICC are members Judge Joyce Aluoch and Judge Sanji Monageng, who are IAWJ members.
- We are happy to announce - one of the Nominees and newly-elected judges to the ICC today is – Judge Solomy Bossa a long-time member of the IAWJ.
- Our membership cares very much about the need for and the importance of gender equality and inclusion on ICC and other courts. Our mission is to promote women in the judiciary and to advance equal access to justice through women's judicial leadership.
- As an association of judges, we are not an advocacy organization, like others here. However our membership wants to achieve more gender equality within the courts.
- We know that women judges on the bench, and judicial leadership by women judges, has made a positive difference on our courts, how litigants, witnesses, lawyers, and court employees are treated, and in the application of laws.

Let me describe for you our strategies for promoting and advancing the careers of women judges in domestic and international courts:

- Oral History Project. Because history too easily becomes history, not herstory, the IAWJ has documented the role of women judges on the international tribunals, so that future generations of scholars do not have to re-construct it (the way they are reconstructing the role of women code breakers in WWII, women mathematicians in

- the space race, women at the Nuremberg prosecutions, etc.) and that girls, young women and lawyers can witness the pathway to an international judicial position. On our website you will find 9 oral histories of pioneering women judges. In fact, I want to show you part of the oral history we've documented, in which Justice Sanji Monageng answers "Why Women Judges Matter". In Clip Six, in the first 3 minutes and 18 seconds, Sanji Monageng answers the question about why women judges matter.
- Networking. We bring judges together – nationally, regionally, and internationally. IAWJ leads delegations of our members to the UN (CSW). We have our members speak at expert fora. IAWJ is a platform for judicial exchange and support for women judges. Our next Biennial Conference takes place in Argentina in May 2018 where over 1000 women judges will join us.

Let me speak more directly to what IAWJ has been doing in support of women judges and the ICC judicial vacancies:

- As I mentioned, IAWJ has the good fortune of having within our membership judges who have served on international courts, as UN Special Rapporteurs, Commissions of Inquiry, and other UN legal bodies.
- Over the years, these members meet in a special session of our Biennial Conferences to discuss issues just like this but also improvements to our courts. One of the judges who I will not name incorporated a sexual harassment clause in an international court's judicial code of conduct.
- Our Board created a committee to focus on the ICC judicial vacancies this past year.
- We notified our members of the nomination process and calendar, inquired as to which of our members were candidates seeking nomination, and advised over 35 of our members who sought advice and further support.
- We reviewed and gave feedback on CVs, and their own letters to officials expressing their interest as a potential candidate. Some of our members provided more direct support by authoring reference letters and accompanying one nominee to meet with State Parties about her nomination and her qualifications.
- We sent an official letter to the Director of the Secretariat of the Assembly of State Parties and the head of the Advisory Committee on Nominations of Judges on the importance of the fair gender representation on the court. On a separate point in those letters, we also highlighted the need for judges with expertise on violence against women or child, as this is a defining character of all conflicts.

What we did learn over the last 15 months is that the process and the positioning of women candidates for the ICC needs to start years in advance. It is a very political

process. We believe, the IAWJ offers the platform to raise the visibility of women judges, provide the opportunity for networking and skills building, and increase women's judicial leadership. But what we might be do more of moving forward through our committee is to help steer our interested members to those within our membership and other organizations who can help them navigate the political path to nomination within the international bodies.

ROLE OF GOVERNMENTS

Her Excellency Ambassador Liberata Mulamula, former Tanzanian Ambassador to the United States and current Acting Director of the Institute for African Studies at the George Washington University discussed the important role governments play in the nomination and election processes.

Thank you Dr. Josephine Dawuni for the opportunity to share my humble experience from my participation in the campaign and election of candidates to the International Courts in the successive UN General Assembly sessions, which I attended for years in the past as a Tanzanian delegate.

Let me, at the outset, underline the fact that government support is very crucial for winning an election in an international judicial body. I do not recall any independent candidate who was elected a judge in these bodies. In addition, financial support by the government is critical, especially when the contest is close and highly competitive.

Admittedly, there have been instances where candidates have been elected without government support and finances, and have even been elected by governments of which they are not a national. For example, this has happened in other UN bodies where some candidates, including a Tanzanian candidate, were once elected without government support. It has also happened that a British candidate was elected a Judge to the International Law of the Sea Tribunal (ITLOS) after being nominated by France. Additionally, there was a case in which a Tanzanian judge seeking re-election to the ITLOS did not get any government financial support but was elected overwhelmingly due to his network and good track record in his first term. However, these instances do not change the fact that government support, for most candidates, is an important factor in the electability of a candidate.

Another important factor is the endorsement by the regional bodies, such as the AU for African candidates. These propel candidates, but are not a guarantee for election as the situation on the ground dictates the final vote. While one could have full support by the government, the reality on the ground always dictates otherwise. Hence there is need for strategizing and regrouping, as the African Group in New York often does during those nerve-racking elections, to win seats for African candidates on those international

courts. The electability of a candidate also depends on how much weight the government puts behind them, and how much importance they attach to the respective international court or judicial body. As an example, at the on-going ICC election in New York, Uganda has its Attorney General and its team on the ground to ensure their judge- a woman- is elected. This has paid off as she has been elected a judge to the ICC. Other countries do not give their nominees similar weight.

Governments also need to nominate their candidates and agree on campaign strategy at the very early stages in order to win those highly competitive seats. Unfortunately, most African countries submit their candidates late and often leave the campaign for the nominee to fend for themselves. This becomes very challenging especially for the women candidates.

Reciprocal arrangements between Member States and countries are also very important for being elected. Most of the reciprocal arrangements in many cases have no connection with judicial or legal matters. It is horse trading according to each country's interests. For example, you could trade support with country X for a seat in the UN Security Council while seeking reciprocal support for your Judge to be elected to the ICJ.

Furthermore, the role of Permanent Representatives and "election officers" is very crucial in these elections to marshal support of colleagues in New York to support his/her countries candidate. The hosting of receptions and dinners is the most applied diplomatic tool, though it does not always translate into actual votes.

In the past the issue of gender balance or women's representation in these bodies was not so much a factor. Preoccupation was getting your national(s) elected in these highly placed international courts regardless of gender. The issue of equitable gender representation gained prominence with the ICC Rome Statute that introduced a form of affirmative action in the composition of the court in which criterion of gender equality was given a legally binding commitment. However, support by the government is often political and the process of nominating candidates is not transparent, which often denies women the opportunity.

All these elections are painstaking for both men and women. The current ICC elections to fill the 6 seats out with at least 5 females has gone into 9 rounds of voting for two days to get the candidates elected. Fortunately, 5 female candidates and only 1 man were elected.

Recommendations:

- To get women elected in these bodies requires affirmative action or a quota system, as in our national parliaments.
- Governments and State Parties need to push for a change of rules and procedures, or founding legal instruments, in order for international courts to gain meaningful gender representation, as in the ICC. It might not be easy as is the case of the ICJ— its Statute is part of the UN Charter, which has proved difficult to amend over the years. It took fifty years since its founding to have a female judge. It can, however, be done with deliberate and concerted efforts, and with active support from Civil society coalitions, such as that of ICC.
- Candidates nominated by governments have to be highly reputable and with international experience— domestic standing is not sufficient to win a seat in the International courts.
- At the national level, the selection process for candidates for election to international courts must be transparent. Currently, there is no openness in the selection procedure. In the case of ICJ, national groups consult the academia and other legal and civil society bodies. There is no advertising for applications both in the case of ICJ and other international judicial bodies. The Secretariat of the relevant judicial body notifies only the State Parties of the relevant body. This needs to change.
- There should be meaningful effort to adopt policies and legislative changes at the national level that would provide for better representation in domestic judiciaries, in order to widen the template of women judges and potential candidates for international courts.
- Finally, the poor representation of women in international courts and tribunals cannot be attributed to lack of qualified women lawyers, as there are many in most countries, including Tanzania where women occupy high judicial and other legal offices; other countries in Africa have Chief justices, Presidents of Constitutional Courts and Attorneys general. Even in the cooperate world, there are women holding senior legal positions.
- What is lacking is the female voice and political will for many governments to put up and support female candidates. Therefore, I commend the organizers of this event to discuss the importance of the global voice for gender equality in the representation on international courts and tribunals.

ROLE OF CIVIL SOCIETY

Viviana Krsticevic, Executive Director of the CEJIL and GQUAL Campaign, discussed her outrage when she found out about the low numbers of women in international courts and bodies. She indicated how she turned her "positive rage" into a movement to increase the number of women in international organizations and bodies.

We will not be able to move forward with the agenda of increasing the number of women in IOs if we do not broaden the debate and find different actors and supporters to move the campaign forward. CEJIL begun by looking at available data and research to look broadly at tribunals and treaty bodies and special procedures of the United Nations to see where these spaces of international adjudication were showing poor numbers in terms of women's representation. CEJIL identified some of the silos where women are and some places where women have never been, such as the United Nations Special Rapporteurs on health, torture, freedom of expression and many others perceived as highly political. But we noticed that the data was not enough to move the discussion, so we decided to organize a campaign, because international justice is important and needs to have women's representation. We believe that the project of equality and nondiscrimination has to bring us all together—including men.

We identified the leverage points for an international campaign and laid out three strategies. First is ***knowledge base***—we do not have a lot of data yet on the causes, solutions and interventions, not only globally but in specific countries. We use many tools such as our website and social media to send out information on where elections are held and the outcomes. Second is ***commitment base***, identifying that nominations and elections are key, we try to get governments to nominate women and set a commitment to make the nomination process open and accessible for women. Third is contributing to the ***development of rights and obligations*** as well as policies to further this development. Through this third strategy we work with some researchers to draw up these obligations and guidelines that can be followed by governments and nominating bodies to follow these rules that seek to increase diversity. I encourage everyone interested in promoting gender equality to sign-on to the GQUAL PETITION.

REPORT

INSTITUTE FOR AFRICAN WOMEN IN LAW (IAWL)

The Institute for African Women in Law is a non-profit, non-governmental organization committed to supporting the formidable works of women in law across the continent of Africa and the Diaspora. Our mission is to be a focal point for addressing issues across the legal and judicial professions.

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