



Ca' Foscari
University
of Venice

Master's Degree Programme

in Comparative International Relations
Second Cycle (D.M. 270/2004)

Final Thesis

THE ROLE OF FEMALE JUDGES IN INTERNATIONAL COURTS AND A GENDER PERSPECTIVE IN PROMOTING JUDICIAL LEGITIMACY AND DIVERSITY

Supervisor

Ch. Prof. Sara de Vido

Graduand

Camilla Rampazzo
Matriculation Number 865678

Academic Year

2021/2022

Table of Contents

ABSTRACT	1
TABLE OF ABBREVIATIONS	5
INTRODUCTION	7
CHAPTER 1: WOMEN IN INTERNATIONAL COURTS	14
1. Identifying gender issues	14
2. An historical analysis of female international judges	18
3. Causes of the underrepresentation of women in international courts	27
4. Mechanisms and procedures of the election processes for international positions	30
4.1 Selecting national nominees	31
4.2 Examination of candidates	35
4.3 Election or appointment of candidates	36
CHAPTER 2: WHY DOES WOMEN REPRESENTATION IN INTERNATIONAL JUDICIARY MATTER?	40
1. Premise	40
2. Judicial legitimacy	42
2.1 Normative legitimacy	44
2.2 Sociological legitimacy	50
2.3 Democratic legitimacy	55
3. The improvement of women's rights	60
3.1 The impact of women underrepresentation on the rights to equality and non – discrimination	60
3.2 The impact of women underrepresentation on the right to equal participation in international decision-making	62
3.3 The impact of women underrepresentation on the right of access to equal opportunity in employment	65
3.4 The impact of women underrepresentation on the advancement in women's rights	66
4. Effectiveness of the rule of law	70
5. Critical examination of counterarguments	73

6. Do existing resolutions impose states to assure gender equality in the composition of international courts?	77
CHAPTER 3: THE CHALLENGING PATH FOR AFGHAN FEMALE JUDGES	89
1. Premise	89
2. Historical background	91
2.1 Post-war 2001 legal reconstruction in Afghanistan	91
2.2 The underrepresentation of female Afghan judges: which are the causes?	97
2.3 The Taliban's threat	101
3. What women are now fearing	107
3.1 The impact on female judges and the judiciary	108
4. Some recommendations	111
CHAPTER 4: CONCLUSIONS	115
1. The development of international law and the international law commission	118
2. Some suggestions to overcome the under-representation of women in international tribunals and monitoring bodies	122
BIBLIOGRAPHY	128

ABSTRACT

La parità di genere è uno dei principali obiettivi che le istituzioni e le organizzazioni perseguono in molti settori a livello internazionale. A volte lo si dà per scontato nonostante ci sia ancora un'enorme disparità tra donne e uomini a causa di schemi e stereotipi tradizionali che sono ancora fortemente inseriti nella nostra cultura e difficilmente scompaiono. Una delle principali sfide del sistema giudiziario internazionale è garantire la partecipazione paritaria di genere nelle corti al fine di promuovere la legittimità e la trasparenza all'interno dei tribunali internazionali. Alla luce di tali incalzanti questioni, appare ancor più urgente ragionare analiticamente sul significato sociologico e sulle eventuali ricadute normative della ridotta presenza femminile negli organi giurisdizionali internazionali. Analizzando i dati e le risoluzioni che promuovono l'equilibrio di genere nella proposta della lista dei candidati, la seguente tesi fornisce una prospettiva diversa per guardare al problema della sottorappresentanza delle donne negli organismi internazionali come indebolimento dell'integrità giudiziaria. Come già ampiamente argomentato dalle esponenti femministe, la genericità e l'ambiguità delle norme giuridiche contribuisce al mantenimento, e talvolta alla costruzione, di determinate realtà fondate su presunte distinzioni di genere che influenzano la neutralità delle norme stesse. Infatti, la questione della rappresentazione di genere nelle corti individua nella mancanza di neutralità nei meccanismi di nomina ed elezione dei giudici internazionali la principale causa. La seguente tesi esamina innanzitutto la storia della rappresentanza delle donne in diversi tribunali internazionali, come la Corte internazionale di giustizia, la Corte europea dei diritti dell'uomo e molti altri, spiegando il meccanismo del processo di elezione e gli effetti e le conseguenze nel funzionamento del sistema di tale fenomeno. In questo contesto l'analisi del caso di studio delle donne

Afgane si sofferma prevalentemente sulle cause interne allo Stato che limitano l'accesso alle donne alla magistratura internazionale e descrive la situazione precaria delle giudici afgane che sono state costrette abbandonare il paese dopo l'invasione talebana, minacciate dalle norme culturali e dalle intimidazioni di criminali che avevano processato prima della presa talebana. Naturalmente questa condizione influisce sul sistema giudiziario del paese in maniera negativa, poiché tutte le conquiste e gli sviluppi positivi degli ultimi 20 anni si vanificano. Il problema di fondo di una così marcata sottorappresentazione femminile nelle corti giudiziarie è profondamente radicato nella fase di nomina da parte dello stato, che per ragioni culturali non identifica le donne, seppur altamente qualificate, come potenziali candidate per ricoprire la posizione di giudice internazionale. Nel tentativo di estrapolare dai documenti, sia soft law, sia risoluzioni, trattati e convenzioni, le ragioni addotte dai vari organi internazionali a sostegno di una maggiore rappresentanza femminile nelle corti internazionali, è importante domandarsi se le norme e raccomandazioni ivi incluse nei documenti presi in considerazione impongono in capo agli Stati l'obbligo di assicurare l'uguaglianza di genere nella composizione delle corti internazionali. In ultimo, con un capitolo conclusivo sullo sviluppo del diritto internazionale e la Commissione di diritto internazionale, la tesi mira a dimostrare un cambiamento positivo nel sistema giudiziario internazionale promuovendo l'integrazione delle donne poiché esse possono portare una prospettiva diversa che aiuta e migliora il progressivo sviluppo del diritto internazionale. Le donne costituiscono la metà della popolazione mondiale, quindi perché mai non dovrebbero rappresentare questa parte della comunità internazionale?

Come sostiene GQUAL, una campagna globale per la parità di genere negli organismi internazionali, è importante monitorare progressi in merito alla parità di genere, pubblicare osservazioni e raccomandazioni sulle persistenti lacune e suggerire pratiche

per raggiungere l'obiettivo di una equa rappresentanza delle donne nelle corti internazionali. Adottare perciò un approccio volto ad un'equa rappresentanza di genere nella composizione delle corti internazionali è importante per l'identificazione di un sistema di giustizia globale più giusto.

TABLE OF ABBREVIATIONS

OHCHR: Office of the United Nations High Commissioner for Human Rights

ICTY: International Criminal Tribunal for the former Yugoslavia

ICJ: International Courts and Tribunals: International Court of Justice

ITLOS: International Tribunals for the Law of the Sea

ICTY: International Criminal Tribunal for the former Yugoslavia

ICTR: International Tribunal for Rwanda

ICC: International Criminal Court

SCSL: Special Court for Sierra Leone

ECHR: European Court of Human Rights

WTO: World Trade Organization

ECJ: Court of Justice of the European Communities

EFTA: European Free Trade Area Court of Justice

TJCA: Court of Justice of Andean Community

CCJ: Caribbean Court of Justice

IACHR: Inter American Court of Human Rights

CCJA: Common Court of Justice and Arbitration

ACHPR: African Court on Human and People's Right

PCA: the Permanent Court of Arbitration

PCIJ: the Permanent Court of Justice

CJEU: the Court of Justice of the European Union

EIGE: European Institute for Gender Equality

PACE: Parliamentary Assembly of the Council of Europe

WB: World Bank

NGO: non-governmental organization

CEDAW: Committee on the Elimination of Discriminations Against Women

ILC: International Law Commission

OECD: Organization for Economic Cooperation and Development

CESCR: Committee on Economic, Social and Cultural Rights

IO: International Organization

IAWJ: International Association of Women Judges

GQUAL: Campaign for gender parity in International Representation

EVAW: Elimination of Violence against Women

US: United States

EU: European Union

UN: United Nations

UNGA: United Nations General Assembly

UNSC: United Nations Security Council

UNAMA: United Nations Assistance Mission in Afghanistan

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social, and Cultural Rights

INTRODUCTION

“Each time that I gaze out at the delegations representing parties... I am struck that their composition bears too much resemblance to the groups of persons who gathered in 1945 to draft the Charter of the United Nations and the Statute of the Court. Very few of the counsel are from developing countries and almost all, regardless of nationality, are men. This is an unsatisfactory situation.”¹

These are the words of Judge Joan E. Donoghue, President of the International Court of Justice (ICJ), that perfectly summarize the current underrepresentation of women in international courts and tribunals, notwithstanding decades after women have entered legal studies and the legal profession in equal or greater numbers than men.

Article 2 of the Universal Declaration of Human Rights provides equal rights and freedoms without distinction of any kind, included gender². Nevertheless, the history has demonstrated huge inconsistency with the enrollment of women within the judiciary at national but especially at international level.

Due to recent developments and the growing importance of international courts and tribunals, it is particularly important to pay attention to judicial decisions about sovereignty over territory, serious human rights violations, international crimes, or vast economic interests³. In this context, the role of judges in general has assumed a remarkable relevance for the legitimacy and effectiveness of courts and tribunals. Since

¹ J. E., DONOGHUE, *Reflections on the 75th Anniversary of the International Court of Justice*. ICJ-CIJ/Frank van Beek. Courtesy of ICJ, 2021, available at <https://www.un.org/en/un-chronicle/reflections-75th-anniversary-international-court-justice>

² “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (Article 2, Universal Declaration of Human Rights).

³ F. BAETENS, *Identity and Diversity on the International Bench: Who is the Judge?*. Oxford University Press, 2020, p.2.

the procedures for the appointment of international judges are not transparent and have no clear requirements, the relationship between judicial independence and the national nomination process within the state has been the subject of an extensive debate.

In addition to the ambiguity of the system, such underrepresentation of international female judges are due to the unique barriers that women and minority judges face in their career development. These include discrimination, stereotyping, bias and structural inequalities in society as a whole, including in the judiciary itself. Moreover, unequal responsibilities for family commitments and a lack of female role models inhibit progress towards participation in international judiciary. In particular, traditional societies oppose women appointment to the position of international judge just on the basis of their gender.

Besides, female judges around the world face threats to their lives and safety. One extreme example is Afghanistan, especially after the Taliban takeover in August 2021. According to the Taliban view of the world, women have no place as judges and no right to judge men. Therefore, those women who were judges under the previous regime have lost their jobs, they are stuck in their houses or they fled the country in search of safety. To make matters worse, they are hiding from intimidations by the criminals and terrorists they have sentenced and who have now been released from prison by the Taliban.

There are no reasons why female should not be appointed as international judges. On the contrary, female judges interpret and implement the law, their reasons and opinions are reflections of their thought process, an insight into their perceptions, which produce a different approach, a different thinking process. Judicial perspectives must be representative of both men and women on the bench so as to ensure a fair and

appropriate response through judicial decisions⁴. Therefore, including women in the judiciary makes the gender perspective relevant because women can bring a different set of experiences and influences which then shape their thinking, and this is reflected in their reasoning in the judgments. As a matter of fact, bringing different perspectives and reasoning on the bench creates greater public trust and confidence since the whole society has been reflected.

Achieving equality for women judges, in terms of representation at all levels of the judicial system is also proven to create a more just rule of law. Indeed, women judges strengthen the judiciary and help to improve the public's trust, contributing significantly to the quality of decision-making, and thus to the quality of justice itself⁵. Not by chance, the importance of female judges in achieving gender equality has been widely recognized by the United Nations. For instance, one recent resolution adopted by the General Assembly designates the 10th of March each year as an official day for recognizing, celebrating and progressing the work of women judges around the world. The resolution represents clear support for the participation of women in the judiciary and recognizes the unique talents, perspectives and life experiences women bring to their roles on the bench. It specifically reaffirms that “active participation of women, on equal terms with men, at all levels of decision-making is essential to the achievement of equality, sustainable development, peace and democracy...”⁶

⁴ A. MALIK, *The Importance of Women in the Judiciary to Integrate the Gender Perspective and Bring Equal Visibility*. UNODC, available at <https://www.unodc.org/dohadecclaration/en/news/2021/152/the-importance-of-women-in-the-judiciary-to-integrate-the-gender-perspective-and-bring-equal-visibility-.html>

⁵ V. RUIZ, *The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity*. United Nations Office on Drugs and Crime, 2019, available at <https://www.unodc.org/dohadecclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html>

⁶ United Nations. General Assembly Resolution, (29 April 2021). A/RES/75/274.

The imbalance of female representation in international judicial bodies is one of the major issues underlying the criticisms of feminist approaches to international law, a topic at the center of the United Nations agenda for many decades⁷.

Reflecting the sex representation on international benches may matter for different reasons. This work analyzes the basis that encourage a greater participation of female judges, including the relationship between gender representation and legitimacy of international adjudication. In fact, understanding what drives legitimacy is essential to protect both the judicial institutions and the law they interpret and apply: without legitimacy, international courts simply could not function as a practical matter⁸. And if sex representation has an effect on legitimacy, it must become a higher priority to support the role of international courts.

The thesis is structured in four chapters: the first chapter analyzes the concept of gender and gender identity and its correlation with international judiciary. From a general overview of the numbers of female international judges, the section then focuses on the causes of the underrepresentation of women in international courts, especially analyzing the obstacles for women both to access to careers instrumental to the international judiciary and to the procedures for the appointment and selection of international judges, identifying the early stage of the process, the national nominee, as the main responsible for this issue. The second chapter explores the reasons why women representation in international judiciary matter and how their experiences and point a view are essential for the outcome of fair, integral and effective decisions. Particular attention will be paid on the extent, to which this under-representation can be configured as legally relevant

⁷ UN General Assembly Resolution on the "Improvement of the status of women in the United Nations system", UN Doc. A/RES/56/127, (30 January 2002).

⁸ N. GROSSMAN, *Sex on the bench: do women judges matter to the legitimacy of international courts*. Chi. J. Int'l L., 2011, Vol. 12, p. 650.

for the purposes of both the correct functioning of the activity of the courts in terms of democracy in the decision and transparency of their work, and to safeguard the characteristics of neutrality and legitimacy of the body at international level. In conclusion, the section contains the most important regulations and conventions introduced for the integration of women in global governance and examines whether they impose states to assure gender equality in the composition of international courts. The third chapter will specifically explore the current situation of female judges in Afghanistan, forced to leave after the Taliban invasion in August 2021, starting from an historical background since the post war 2001 reconstruction. This section aims at analyzing how the cultural background and history have made the appointment of female judges both at national and international level so challenging, even before the Taliban takeover. To conclude, the final chapter summarizes the important aspects examined throughout the dissertation with some recommendations to incorporate more women in the international judicial system. The section includes a new interpretation for promoting the importance and originality of the role of international female judges, whose perspectives are fundamental for the progressive development of international law.

In sum, several reasons have always limited the presence of women not only in the judicial sphere, but in all professional sectors and even today there are numerous obstacles that women have to face. Although in this study gender diversity refers mainly to the equal opportunities of women within the judicial domain, equality is a problem that involves all those people who are in conditions of oppression and discrimination and to whom the same rights are not equally recognized. Bridging the gender gap is therefore crucial not only for managing a better world, but above all because, despite the interventions for the promotion of equality, even today in the twenty-first century, gender inequality is one of the biggest problems that the world must face. The United

Nations, as well as the European Union and other regional organizations have introduced a wide range of tools to promote gender identity; however, the general lack of long-term strategies explains how progress in women's representation is still slow and limited.

The research agenda that was examined for the development of the entire thesis includes literature collected regarding gender and its relation to international judiciary, and how the academic study has faced both issues over the years. With the rise of feminist movements, and the several resolutions in favor of female integration in leadership positions, including the role of international judges, the study of the judicial system and gender and the correlation of these two components have been developed over last decades.

Early feminist approaches underline how the exclusion of women from international benches creates a condition of bias in international law, for which sex representation was automatically refused, marginalizing women into a separate, minor category. In this regard, the work of Charlesworth, Chinkin and Wright "Feminist approaches to international law" highlights that international law is a product of male thinking that does not speak for women.

After the first women was elected in 1995 in the International Court of Justice, scholars started to focus on the internal mechanisms and the cultural obstacle within the state itself. Føllesdal, for instance, in her article, demonstrates the presence of high qualified women, blaming states for not proposing female candidates in their lists.

To elaborate the following thesis, the research agenda encompasses literatures of the first mid 2000s, such as Grossman, Terris, Romano, Boyd, Hennette Vauchez as well as more recent articles and books of academics, such as Corsi, Føllesdal, Baetens, Torbisco-Casals, Marconi.

For the section concerning the case study of the Afghan female judges many articles from the UN Women and the International Association of women judges have been examined. Moreover, reports from Human Rights Watch, and articles from OpinioJuris and the New York Times have been relevant to develop the third chapter.

Among the literatures consulted, cases, resolutions, recommendations, general comments, legislations and reports have been mentioned throughout the writing of this study, and different databases, such as the World Bank, United Nations and ISTAT, have been used for the gathering of data necessary for the development of the argumentation.

CHAPTER 1: WOMEN IN INTERNATIONAL COURTS

The first chapter outlines an historical perspective, from the emergence of the concept of gender and gender identity, and its intrinsic link with the international judicial domain. Regarding to this specific field, gender issues will be interpreted on the account of gender inequality, a rather widespread problem that particularly affects women. Starting from a general overview of the number of female international judges, the section focuses on the causes of the underrepresentation of women in international courts and tribunals, especially analyzing the limitations of the early stage of the process, the national nominee, and the third phase, the appointment of judges, which clearly impede the judicial career for women.

1. Identifying gender issues

Gender identity refers to the awareness and perception that an individual has for themselves as man, woman, a blend of both or neither; it corresponds to the gender with which a person identifies themselves primarily⁹. It is usually intended as corresponding to biological differences, but the individual identification of gender is also influenced by the social environment within which people live and grow. Gender outlines the characteristics and behaviors that are associated to men and women and therefore expected by them within a particular society. In other words, gender defines the concepts of femininity, masculinity and androgyny and their respective real or assumed differences. The diversification between gender and sex is at the core of the concept of

⁹ Human Rights Campaigns Foundation. Available at: <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>

identity. According to Jean Scott (1998)¹⁰, gender refers to behavioral aspects inherent in a person as cultural products and not fixed as other aspects that belong to the natural. On the contrary, sex was intended as male-female differences that refers to both behavioral and physical features to which we have been used to identify as belonging to a specific gender from the society¹¹.

However, female scholars started to make a distinction between the two: “sex” for issues concerning biological and physiological characteristics that define women and men, and “gender” for categories of “feminine” and “masculine” “roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.^{12”}

This distinction of the term “gender” as a concept different from “sex” appeared in the United States in 1950s among sociological analysis. However, only in the 1970s and 80s these studies spread around Europe, focusing principally on a cultural and political circumstance. Ann Oakley was the first who attempted to debate gender studies, arguing that sex refers to the biological and anatomical difference between woman and man, while gender refers to a cultural and social matter¹³. But it was only through the study of Gayle Rubin that gender-sex dichotomy was transformed into an asymmetrical binary system, where the male character is in a privileged position with respect to the female¹⁴. At this point, gender studies started to increase and deeply analyze female condition as object of subordination and inferiority, since sociological differences can also cause social and political inequalities.

¹⁰ J. W. SCOTT, *Gender and the Politics of History*. In: *Gender and the Politics of History*. Columbia University Press, 1988

¹¹ *ibid*

¹² A. FØLLESDAL, *How many women judges are enough on international courts?*. *Journal of Social Philosophy*, 2021, p.3.

¹³ A. OAKLEY, *Sex, gender and society*. Routledge, 2016, p. 21-22

¹⁴ G. RUBIN, *The Traffic in Women: Notes on the "Political Economy" of Sex*. In R. REITER, *Toward an Anthropology of Women*. Monthly Review Press, 1975, p. 157--210.

Furthermore, gender stereotypes are the main tools through which discrimination takes place, especially towards women and even more particularly on the work field, including the judicial system. According to the National Institute of Statistics, in 2013 the majority of citizens, 57,7%, believed that the situation of men is more favorable than that of women and four out of ten citizens thought that women are victims of discrimination more than men¹⁵. This research underlines the great diffusion of stereotypes within the work environment, which can impede women's career progress. Stereotype is a preconceived notion about a thing, a person, or an attitude, developed according to an economization of thought. The prejudices are reflected and are referred to social, ethnic or professional groups. As the Office of the United Nations High Commissioner for Human Rights (OHCHR) defines, gender stereotype is a generalized view or preconception about attributes or characteristics, or the roles that are or ought to be possessed by or performed by women and men. A gender stereotype is harmful when it limits women's and men's capacity to develop their personal abilities, to pursue their professional careers and/or make choices about their lives¹⁶. If historically women have always been seen as inappropriate to participate to public life as emotional, non-rational characters and above all opposed to man and, thus, as figures to be avoided, it is due to social custom based on a purely stereotype preconception: "The denigration and stereotyping of female M.P.s at all times, is a shameful indicator of the extent and survival of institutionalized sexism in contemporary culture"¹⁷.

¹⁵ Research made by ISTAT in 2013. Stereotipi, rinunce e discriminazioni di genere, 2013. Available at <https://www.istat.it/it/archivio/106599>.

¹⁶ OHCHR and women's human rights and gender equality. Gender stereotyping. Available at <https://www.ohchr.org/en/women/gender-stereotyping>

¹⁷ P. M. THANE, *What difference did the vote make? Women in public and private life in Britain since 1918*. Historical Research, 2003, Vol. 76, p. 276, available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2281.00175>

Women have long been viewed through male stereotypes that depicted them as less important than men. The patriarchal society shaped gender inequality from the voting rights that were afforded to women much later than men, and only after harsh battles¹⁸. Moreover, women's livelihoods depended on their husbands and their roles were typically seen as being the family member who has to raise children and stay at home: the woman was the synonym of housewife while the man corresponded to the breadwinner of the family¹⁹. According to the general customs, wives fell under the protection of the husband and often became one person in the eyes of the law. Women had no rights to own property, and everything passed in their husbands' hands. As a result, women faced restricted inheritance rights, limited personal effects, and few rights also in the criteria for divorce on behalf of men. Discrimination was also widely spread within the education system which was strongly influenced by the social context. Educational needs were indeed perceived to be gendered to the extent that girls were not encouraged to go to school but were more likely to receive a home education to become the perfect wife and mother. By contrast, scientific subjects such as mathematics were typically reserved for boys who were prepared to be the decision-maker of the family.

As a matter of fact, the labor market has always been the main characteristic of a male chauvinist culture that see man as the only holder of a professional career. On the other hand, women are traditionally considered as care givers meaning that childcare responsibilities often fall exclusively on women. Like any other professional works, the international judicial career has always been influenced by this gender differentiation. Indeed, due the complex nature of gender being constituted of numerous implications, gender conflicts are present topics and are often expressed through a sexist hierarchy

¹⁸ E. C. DUBOIS, *Suffrage: women's long battle for the vote*. Simon and Schuster, 2020, p.3

¹⁹ B. BIANCHI, *Introduzione Ecofemminismo: il pensiero, i dibattiti, le prospettive*. Rivista Deportate, esuli, profughi DEP n.20/ 2012, p .XV-XVI-XVII

that still see patriarchy and chauvinism dominating in several spheres of public and private life.

Starting from the 20th century, women decided to impose themselves nationally and internationally and, above all, from a legal point of view. The laws and policies of a government played a key role in shaping relations of gender equality over time. Indeed, in its preamble, the Charter of the United Nations declares "the equal rights of men and women" and Article 55 states that "the organization shall promote universal respect for and the realization of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion²⁰". However, gender inequality is still pervasive throughout the world and a widespread concern that needs to be eradicated. For this reason, it constitutes the fifth objective in the sustainable development goals established by the 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015²¹. The second chapter will further analyze documentations that protect women's rights and support gender equality in the workplace, especially on the international bench.

2. An historical analysis of female international judges

As stated previously, gender has also shaped the international arena and has brought to transformation within the world system, including the international judiciary. Historically the field of international arbitration was mainly reserved to men, usually aristocratic men, who could attend a high-level education and afford a career in

²⁰ Charter of the United Nations, San Francisco, art. 55.

²¹ United Nations Sustainable Development Goals, 2015, available at <https://sdgs.un.org/goals>
See also United Nations, Sustainable Development Goals and the 2030 Agenda at <https://www.un.org/sustainabledevelopment/developmentagenda/>, and United Nations General Assembly Resolution, A/RES/70/01 (2015), September 25th, 2015

international ground. The judicial sector has always been linked to gender, adopting a policy of exclusion towards women. Indeed, the unequal representation of women in the international judicial system has long been questioned by many feminists in the field of international law²². Their approaches dealt with how social constructs of female and male impact the structure and processes of international law: the exclusion of women from international law-making processes creates an assumption of bias in all kinds of international law, an assumption that requires sex representation to be refused²³. Furthermore, Charlesworth and Chinkin underline that the strong underrepresentation of female judges profoundly shapes the international law, letting “male concern” to continue to be understood as “human concern” while underestimating “women’s issues” and marginalizing them into a separate, minor category²⁴. Since feminist scholarship started to advocate for gender – balanced international courts, insisting on how the sex of the judge affects judging, the underrepresentation of women on the bench inherently damages the perceptions of impartiality and fairness. To understand why more diversity and women representation matter for the legitimacy of international law, we should consider aspects of international Courts’ roles and how they are including more gender diversity on the bench since their establishment. Indeed, the first chapter outlines the

²² The early feminist critical analysis of international law dates back to 1990s with Charlesworth, Chinkin and Wright who wrote the academic article “Feminist approaches to international law”. For instance, C. MENKEL-MEADOW, *Portia in a different voice: Speculations on a women's lawyering process*. Berkeley Women's LJ, 1985, Vol. 1, that states that as long as different between female and male exist, the legal system that does not take into account women's experiences prevents the society as a whole to be represented. There was then a gradual building up of a growing feminist international law literature during the subsequent decade. Since early 2000s, feminist scholarship has continue expanding, especially in the English language among British, North American, and Australian universities. See D. OTTO, *The exile of inclusion: reflections on gender issues in international law over the last decade*. Melbourne Journal of International Law, 2009, Vol. 10, p. 11-26, who is shaken by feminist support to the hegemonic power of the increasingly emboldened Security Council, worried about what this means for the future of international law generally, and for feminist efforts to shape the law in particular.

²³ See H. CHARLESWORTH, C. M. CHINKIN, and A. EHRlich, *The boundaries of international law: A feminist analysis*. Manchester University Press, 2000, p.308; H. CHARLESWORTH, C. CHINKIN, and S. WRIGHT, *Feminist approaches to international law*. American Journal of International Law, 1991, Vol. 85, p.625.

²⁴ Ibid.

historical framework of different international courts, inter alia, some data and numbers of female judges, as well the causes of their scarce representation and some positive development that brought to an incrementation of female presence in the Courts thanks to important resolutions. Furthermore, another section provides an analysis of the general mechanism and procedure of the election process, based on three steps: national nomination, examination and finally election of the candidates. This part focuses on the proceeding stage, but also how this institutional system affects the failure of achieving gender equality in international Courts.

What is meant by international Tribunals? They have specific characteristics: they can be permanent and therefore established through a treaty or can be ad hoc and formed by a Resolution from the UN Security Council to judge serious violations of international law²⁵; they adopt rules of international law to settle disputes; they are composed by independent judges from different nationalities; they hear cases in which one party may be a state or international organization, hence disputes between states, states and international organizations, or states and private individuals where they can exercise their jurisdiction through legally binding sentences between the parties²⁶. According to their jurisdiction, the Courts' ability to judge a case is different from one another, so both

²⁵ For instance, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established by UN Security Council resolution 827 of 25 May 1993.

²⁶ International Courts and Tribunals: International Court of Justice (ICJ); International Tribunals for the Law of the Sea (ITLOS), International Criminal Tribunal for the former Yugoslavia (ICTY); International Tribunal for Rwanda (ICTR); International Criminal Court (ICC); Special Court for Sierra Leone (SCSL); European Court of Human Rights (ECHR); The Appellate Body of the World Trade Organization; Court of Justice of the European Communities (ECJ); European Free Trade Area Court of Justice (EFTA); Court of Justice of Andean Community; Caribbean Court of Justice (CCJ); Permanent Review Court of Mercosur; Inter American Court of Human Rights (IACHR), Common Court of Justice and Arbitration (CCJA); African Court on Human and People's Right (ACHPR). There are then other international courts that meet these criteria, but their impact has been marginal, such as the African Court of Justice. Plenty of other international or regional bodies carry out quasi-judicial or dispute settlement functions, but they do not meet one or more of the above criteria because they do not give binding decisions, or the parties choose who will decide the case and the procedure. The latter section includes include arbitral tribunals, administrative tribunals, and treaty-monitoring bodies with compliance-review functions. See D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 5.

in terms of geographic identity and subject matter²⁷. Each international court is indeed the product of particular historical, political and legal circumstances. Briefly to resume, the main function of International Tribunals is to provide an impartial adjudication of disputes on the basis of the rule of law that interests that particular case, therefore, to represent and apply the law. They are community oriented, so that they work for the understanding and protection of the international community and its values, according to basic premises of democracy²⁸. However, in addition to the primary adjudicative function, they have to interpret and develop international law norms, thus determining present but also future cases, in order to avoid future disputes and enhance cooperation²⁹. International courts are more involved in law development than domestic courts since international treaties are more incomplete than domestic law and leave room for interpretation. In this way, generally, international judges influence the application and interpretation of international law. This is especially important for human rights, whose protection is in the hands of international Tribunals, to which individuals can ask for a judgement when they have their rights violated or not recognized.

States have always solved disputes in front of ad hoc Tribunals until 1899, when a group of states adopted the Convention for Pacific Settlement of International Disputes, from which the first stable organism was formed, the Permanent Court of Arbitration (PCA)³⁰ with the duty of settling international disputes. Although the PCA was neither permanent

²⁷ Some courts have a geographical jurisdiction limited to a certain region of the globe (“jurisdiction rationae loci”) and others have no limits per se (universal courts). Jurisdiction can also be limited to particular issues (rationae materiae); subjects (rationae personae); and time periods (rationae temporis).

²⁸ A. VON BOGDANDY and I. VENZKE, *In whose name?: a public law theory of international adjudication*. Oxford University Press, 2014, p. 30-36.

²⁹ A. FØLLESDAL, *How many women judges are enough on international courts?*. Journal of Social Philosophy, 2021, p.3.

³⁰ Convention for the Pacific Settlement of International Disputes, 29 July 1899, UKTS 9 (1901), Cd 798, arts 1 and 20.

neither a court, its establishment represents a landmark for the creation of the world's first standing body charged with adjudicating international disputes. The Convention for Pacific Settlement of International Disputes was indeed a turning point in favor of international arbitration before standing bodies³¹. The transition from arbitration to judicial settlement started with the establishment of the Permanent Court of Justice (PCIJ) in 1922 in The Hague. It became a template for all future international courts, since then indeed, the idea that the bench of an international court should be representative of the membership of the organization of which the court is organ remains as a feature of all contemporary international judicial bodies. Indeed, according to Shany, all courts have generic common goals due to the development of international adjudication through a process of replication and adaptation³². The PCIJ then disappeared with the demise of the League of Nations, and it was reestablished after World War II as the International Court of Justice (ICJ) in 1945. Afterwards, the Court of Justice of the European Union (CJEU) in 1952³³ and the European Court for Human Rights in 1959. The establishment of these organisms demonstrate a custom of trusting more in international permanent judicial bodies, rather than in ad hoc tribunals moving towards a "judicialization" trend of world relations. These last developments are characterized by an increase of obliged

³¹ R. MACKENZIE, C. P. ROMANO, Y. SHANY AND P. SANDS, *Manual on international courts and tribunals*. International Courts and Tribu., 2010, p. ix.

³² Shany identifies 4 generic common goals: 1) Promoting compliance with the governing international norms: most international courts have been constituted in the context of a specific inter-state treaty, whose norms they were required to interpret and apply; 2) dispute resolution or problem-solving: international courts are also expected to help resolve specific disputes and problems, whose prolongation or exacerbation may harm international relations, cooperative structures, and peaceful co-existence; 3) Contributing to the operation of related institutional and normative regimes (regime support): most international courts operate within the framework of specific regimes (such as the EU, the WTO or the Council of Europe); 4) regime legitimization: international courts, like their national counterparts, are expected to confer legitimacy on the social institutions or political system that established them, and to partake in the advancement of the rule of law in international relations. See Y. SHANY, *Assessing the effectiveness of international courts: a goal-based approach*. American Journal of International Law, Cambridge University Press, January 20th, 2017, Vol. 106, p. 225-270.

³³ The predecessor CJEU is the Court of Justice of the European Coal and Steel Communities, With the entry into force of the Treaty of Lisbon in 2009, the court system obtained its current name (Court of Justice of the European Union).

jurisdictions for a higher number of areas in international law, the incrementation of the role of non-state actors in the settlement of disputes involving state or international organizations and finally the higher number of cases that are brought in front of international judicial organisms³⁴. With this evolution the concept of international court has changed: they are no more only settlers of disputes between sovereign states but 'agents of international justice'³⁵, since they have more power and are more interconnected with a high degree of interaction. In this way, international courts began to be opened to entities rather than governments, such as individuals, corporations and international organizations. Aware of the increasing power and number of international judicial bodies and the need of more qualified international judges, the interest of feminists focuses on the underrepresentation of women in the system. The legal sector has some of the largest gender gaps in leadership positions when compared to other professions. Indeed, the percentage of women in international courts have always been extremely low. Just to mention the ICJ members, among whom only 5 out of 106 since its institution in 1945 are women. Before explaining which are the cause for such underrepresentation of women, it is important to present some numbers in the international judicial system. To start with, the International Court of Justice (ICJ) is formed by 4 women judges out of 15 members, among them the first women president Joan E. Donoghue ³⁶. The International Criminal Court (ICC) is, instead, composed by 9 women out of 18 judges³⁷; this is one of the few cases where parity on the bench is achieved. The ITLOS, one of the oldest international Tribunals created in 1982 with the

³⁴ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 63.

³⁵ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 4

³⁶ <https://www.icj-cij.org/en/current-members>

³⁷ <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/current-judges.aspx>

aim to solve disputes regarding the law of the sea, has 16 male and 5 female members³⁸. The International Residual Mechanism for Criminal Tribunals increased the number of female judges at 8 in a total number of 25 members³⁹ after the election of E Margaret Anne McAuliffe deGuzman. In the European Court of Human Rights (ECHR) 15 women exercise the profession out of 45 judges⁴⁰. The Inter-American Court of Human Rights (IACHR) with last elections in 2022 count 3 female and 4 male judges, increasing the female presence to 42%⁴¹. The African Court on human and people's rights (ACHPR) is made up of 11 judges, among them 6 are women, including the President Imani Daud Aboud⁴². Comparing these numbers, it is clear there is still gender disparity among members in the international courts despite recent positive development, for instance in the ICC or ACHPR. Percentage of female judges in the international regional tribunals are not encouraging as well. In the court of Justice of the European Union (CJEU) there are only 6 women out of 27 judges⁴³ and in the Court of Justice of the European Union responsible of the three EFTA States which are parties to EEA Agreement (Iceland, Lichtenstein, Norway) no women are present as judges⁴⁴, as well as in the Court of Justice of the Andean community (TJCA)⁴⁵. The inter-American Court of Justice counts 2 female judges among 6 members⁴⁶, and the Caribbean Court of Justice is formed by only one female and 6 male judges⁴⁷. Finally, both the ECOWAS Court of Justice⁴⁸ and the East

³⁸ <https://www.itlos.org/en/main/the-tribunal/members/>

³⁹ <https://www.irmct.org/en/about/judges#current-judges>

⁴⁰ https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n1368718271710_pointer

⁴¹ <https://www.corteidh.or.cr/composicion.cfm?lang=en>

⁴² <https://www.african-court.org/wpafc/current-judges/>

⁴³ https://curia.europa.eu/jcms/jcms/Jo2_7026/en/

⁴⁴ <https://eftacourt.int/the-court/judges-and-staff/>

⁴⁵ <https://www.tribunalandino.org.ec/index.php/nosotros/magistrados/>

⁴⁶ <http://portal.ccej.org.ni/ccj/magistrado/>

⁴⁷ <http://www.caribbeancourtsofjustice.org/about-the-ccj/judges/>

⁴⁸ <http://www.courtecowas.org/current-judges-2/>

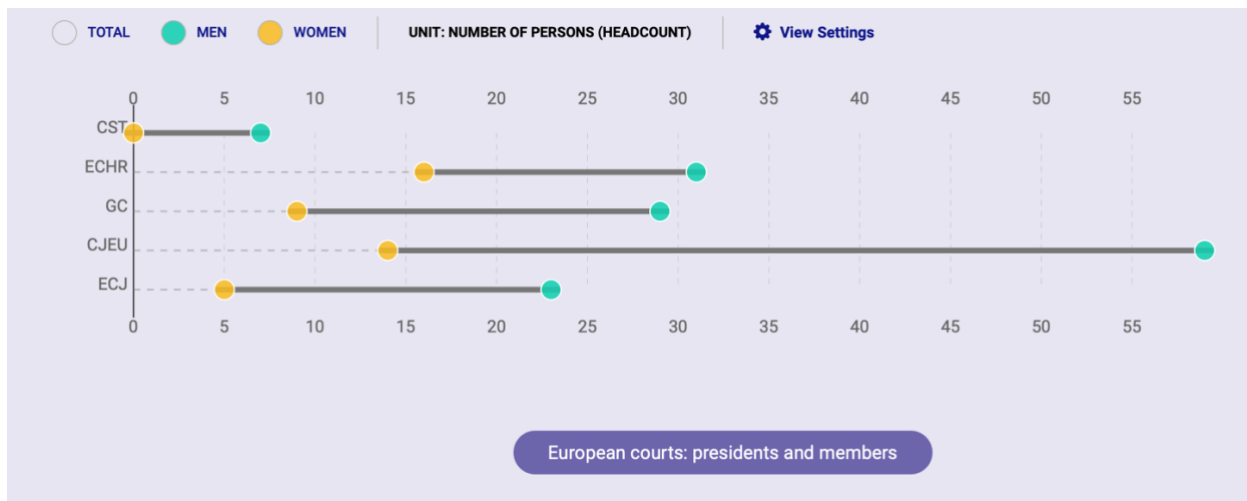
African Court of Justice⁴⁹ include two female judges out of respectively 5 and 11 total members.

Although there is still a long path towards equal gender representation in international courts, current data demonstrate an improvement of the presence of women in these last five years. For instance, in the European Judicial system, according to the European Institute for Gender Equality (EIGE), as figure 1 shows, in 2016 the CJEU counted only 14 out of 73 judges and the ECJ 5 female and 23 male members. After 5 years in 2021, as figure 2 indicates, the number of women representatives in Courts has raised to respectively 22 and 6. What is annoying is the percentage of female judges in the ECHR which remains the same in the last 5 years despite the 2004 PACE resolution, which calls for a minimal obligation for state to have at least one woman in the list of candidates⁵⁰. However, it is widely known the strong opposition that this resolution has raised within some members of the Council of Europe, which keep presenting lists without any female candidates.

⁴⁹ https://www.eacj.org/?page_id=1135

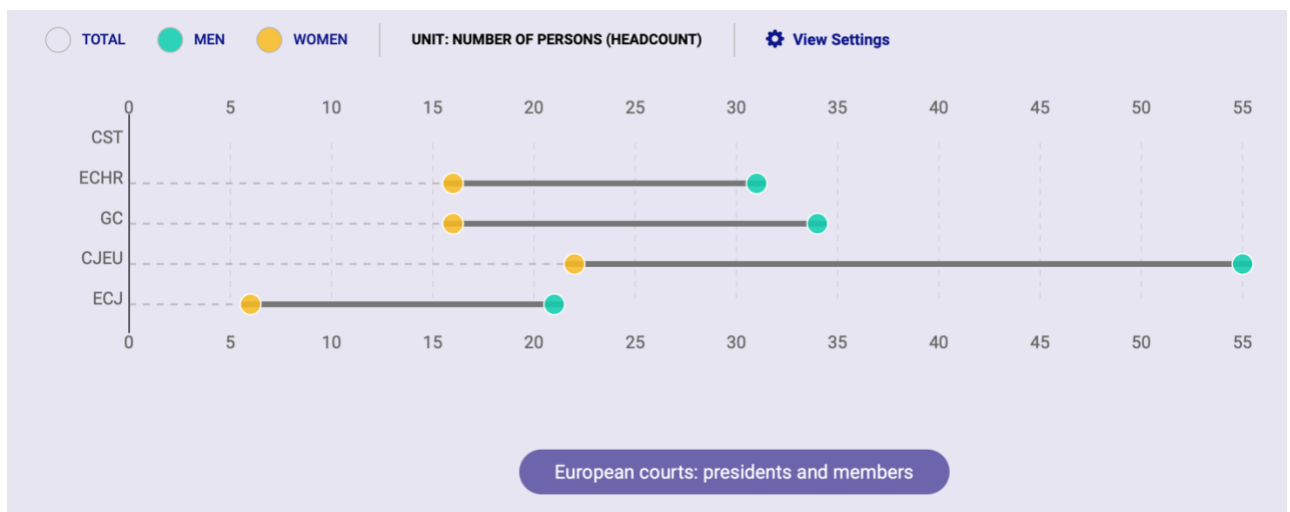
⁵⁰ Parliamentary Assembly of the Council of Europe, Candidates to the European Court of Human Rights, Resolution 1366 (2004), at pt 3.ii.

Figure 1



Source: European Institute for Gender Equality⁵¹.

Figure 2



Source: European Institute for Gender Equality⁵².

⁵¹Available at: https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_jud_eucrt_wmid_eucrt/hbar/year:2014/geo:EU/EGROUP:CRTS_EUR/s ex:M,W/UNIT:PC/POSITION:MEMB_CRT/ENTITY:CST,ECHR,GC,CJEU,ECJ

⁵² *ibid*

3. Causes of the underrepresentation of women in international courts

The analysis will now move to the following questions: Is the underrepresentation of women linked with limits of access in the international judicial system because of unconscious bias? Does this phenomenon reflect the scarce presence of highly qualified women to which can be confer such positions? And most important, even if the causes are identified, does it matter for the legitimacy and accountability of the practice of international law?

Many feminists started to study the international judicial system according to a gender perspective in the 90s, claiming that international judiciary is biased against women in its very conception. For instance, in Charlesworth, Chinkin, and Wright' view, international law is a product of male thinking that does not speak for women: "the structure of the international legal order reflects a male perspective and ensures its continued dominance"⁵³. This is because states choose their own representatives, thus preventing the empowerment of women in the international law structure since they do not nominate them. However, this perspective started to lose credit when the first woman, Rosalyn Higgins, was elected in the International Court of Justice in 1995. Since then, criticism started to be directed at the internal political processes and cultural obstacles within states themselves. The barriers for women being appointed as judges are identified by the Global Justice Center⁵⁴, which recognized the necessity to ensure equal participation in the judiciary by women in order to ensure the advancement of the rule of law, and non-discriminatory decisions. One of the reasons why women are not

⁵³ H. CHARLESWORTH, C. CHINKIN, and S. WRIGHT, *Feminist approaches to international law*. American Journal of International Law, 1991, Vol. 85, p. 613-645.

⁵⁴ Global Justice Centre, Written Submission on the General Recommendation on Access to Justice, February 1st, 2013

appointed is the unequal access to high-level education and the high cost of it. A common argument, used as a justification for a low percentage of female representatives in the judiciary is the lack of qualified women. This is related to the limited access for them to high-level education, since being a judge requires specific qualifications and expertise. However, recent studies demonstrate that 1/3 of the eligible pool are female⁵⁵, thus confirming the presence of a wide range of qualified women from which states choose for their nomination. Furthermore, women often have to balance family with work and easily renounce to build a career. The rooted patriarchal structure in many societies, where embedded gender roles impose a clear distribution of family's duties, really influence the possibilities for women to become a judge and their progress towards a professional career. In some countries, this old model is supported by national legislations or religious interpretation that also hinder the possibility for a woman to enter in a high office in the international judicial system. Not to mention the networks and political connections, from which male practitioners benefit in comparison to the disadvantaged female counterpart who lacks these connections. Indeed, where the selection of judges is based on merits, women tend to be represented in higher numbers, especially in civil law countries. Instead, in countries of common law, woman find more barriers to access a judicial career because the selection is based on a system of self-reproduction of male members of the profession, that does not consider the principle of equality between men and women. As Rachele Marconi states in her research, the logic of "the old boys' club", combined with deep-seated gender stereotypes according to which female judges would be more suitable for lower-grade or family courts, reduces the possibility for women to

⁵⁵ A. FØLLESDAL, *How many women judges are enough on international courts?*. *Journal of Social Philosophy*, 2021, p. 9

reach the top positions of the internal judiciary⁵⁶. This “old boys’ club” mentality seems to be spread in the nomination and selection process of international judges, that start within the state itself.

Indeed, this is due to the criteria set by the states to select candidates:

qualified women abound, but, if member states set as the criterion cabinet member the best friend to the prime minister, rather than competent jurist, fewer women may have the necessary ‘qualifications’. If the Council, or even member states, made judicial appointments in groups rather than singularly, they would be more likely to look for balance and representativeness⁵⁷.

Lot of the debate about the striking underrepresentation of women judges in ICs benches is related to the normative debate about legitimacy and diversity in the international judiciary. As we have previously recognized, this is not attributable to the lack of qualified women available for these positions, but to the lack of transparency in the judicial selection process⁵⁸. In the following sections it will be discussed how the mechanism and procedure for the selection of international judges affect female representation on the bench.

⁵⁶ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 68

⁵⁷ S. J. KENNEY, *Breaking the silence: gender mainstreaming and the composition of the European Court of Justice*. Feminist Legal Studies, 2002, Vol. 10, p. 257-270.

⁵⁸ N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. Journal of Social Philosophy, 2021, Vol. 52, p. 8-9, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>

4. Mechanisms and procedures of the election processes for international positions

The effectiveness of international courts depends on the quality of women and men who are appointed to the courts. According to this, the power of international benches has been challenged a lot, especially in the last decades. First of all, there is a general lack of individuals who have the proper qualities required to be a “good” international judge combined with the growing demand to staff an increasing number of international courts. Moreover, the selection processes for international judge’s appointment are in many ways flawed. There is not a uniform procedure for the selection of international judges within different international tribunals. Every court has a different statute and each government decide a different procedure to recruit judges. There is very few information about the internal mechanisms, only the formal system is public, because states never release information about it to the public and all decision making remains with governing elites, such as politicians, senior civil servants, academia or members of the bench. As Baetens points out in her book, the election of international judges is often based on other considerations than the merit, due to the low number of available seats on international benches, so that only few qualified candidates are required. Moreover, there are no specific rules or qualifications for an “ideal” international judge⁵⁹.

However, generally the international judge passes three stages before obtaining the office: the candidates’ nomination by the government, the close examination and finally the election or nomination at international level.

⁵⁹ F. BAETENS, *Identity and Diversity on the International Bench: Who is the Judge?*. Oxford University Press, 2020, p. 13.

4.1 Selecting national nominees

The national nominee is the first step of international judge's appointment. One cannot apply to become an international judge but, generally, one is called. Although the basic legal instruments of international courts require minimal qualifications that judges should have, it is not always clear how states assess candidates. Elections are particularly a complex phase where several considerations, apart from qualifications, such as national's interest, power politics, and the need to ensure representativeness, interact to determine the results.

As we have previously mentioned, there is not a specific model of qualifications for the perfect candidate. It is extremely difficult to know the qualities of a good international judge since very little research exists. Usually, states receive general guidelines about the qualifications that judges should have. For instance, the article 2 of the ICJ states:

the Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law⁶⁰.

According to the rule, each States is called to identify high moral character candidates, with a certain degree of competence, based on subject-matter expertise and candidates' knowledge of international law, and the "right" nationality⁶¹. The

⁶⁰ Statute of the International Court of Justice, , art. 2, available at <https://www.icj-cij.org/en/statute>

⁶¹ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 16.

generality of the requirements for nominees and the procedure that states follow in selecting candidates make “the choice of candidates at national level the most crucial part of the chain, and at the same time, the weakest, since it depends on the competence and integrity of the government”⁶².

How do states select their candidates? It is, indeed, largely a domestic function, and the process is made through informal networks by the head of government and the ministry of foreign affairs. Civil servants have a fundamental role, since they are responsible of the ultimate decision-making and decide which nominee is going to be presented. Unfortunately, only few states have a high level of responsibility, transparency and judicial independence that seek open and clear selection process. Sometimes they neither inform potential nominees, who discover their nomination only once the decision is already made.

On the contrary, when the application is submitted spontaneously, there is a first screening and who is selected, meets with a panel made up of governmental officials, national judges, and current international ones. The interview lasts on hour, where especially linguistic skills are verified. The panel afterwards, make its advice to the government, that may or may not follow it. Judicial independence is jeopardized by the fact that the proceeding is neither transparent nor accountable because governments usually exercise control over the nominees.

Furthermore, the generality of the characteristic of candidates, gives power and space to government for maneuvering nomination process. As Terris, Romano and Swigart points out, one requirement for nominee is “the right nationality”⁶³. This point is really interesting: nationality of international judges should be irrelevant,

⁶² Ibid, p. 23

⁶³ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 15-16.

but since governments are the responsible for the presentation of their candidates' list, nationality does matter. States indeed have also the possibility to present a propose of candidates who are not their nationals but very few of them have ever done it, just when they do not have enough internal suitable candidates or when they want that a specific nominee is selected, so they present candidates from neighbor countries that have less experience or competences respect to their national ones.

As a consequence of the vagueness of national nomination's mechanism, women seem disadvantaged respect to male because they do not have connections or networks within intertwining of power. According to the Report on "Judicial Independence of the European Courts of Human Rights" of the International Centre for the Legal Protection of Human Rights, if states and the Council of Europe adopted more transparent and independent nomination processes, the gender unbalance of the Court would automatically be partially readdressed⁶⁴. This low level of female candidates is often attributed to the lack of high qualified women. However, as it is previously outlined, this is not an argument well supported by evidence. For instance, in the United States, despite the wide pool of female judges both at national and federal level, women are rarely nominated in the international judicial organisms. This is probably due to the less priority that States give to the issue of women representation and to the presence of barriers for women at national level⁶⁵. Moreover, very few states advertise vacancies, therefore,

⁶⁴ J. LIMBACH, P.C. VILLALÓN, R. ERRERA, T. MORSCHTSCHAKOWA and A. ZOLL, *Judicial independence: law and practice of appointments to the European Court of Human Rights*, International Centre for the Legal Protection of Human Rights, May, 2003, p. 26, available at <https://www.corteidh.or.cr/tablas/32795.pdf>

⁶⁵ J. LINEHAN, *Women and Public International Litigation. Background paper for the Project on International Courts and Tribunals*, London Meeting, 2001, p. 4-5

spontaneous applications are very uncommon since people do not even know about certain opportunities.

Some regional organizations established by Regional Courts have raised some critics and pressure for changes, such as the Parliamentary Assembly of the Council of Europe which, in 1999, recommended States to advertise vacancies in the European Courts of Human Rights through different media sources, select nominees with certain knowledges and experience especially in the field of human rights and choose candidates of both sexes in every case⁶⁶. More impacting, Resolution 1366 in 2004, which the PACE decided not to take into consideration lists of candidates that does not include at least one candidate of each sex and Resolution 1426 in 2005, which allowed lists of candidates of the same sex, providing it is the underrepresented gender (less than 40% of the total number of judges). Despite the strong resistance of some states, such as Malta and Slovakia that presented a list of only male candidates, these Resolutions brought a radical change in the composition of the national candidates' lists: before 2004, the majority of the lists was totally made up of male (58%); since April 2004 most of the lists were formed by two men and one woman (84%). In this way, theoretically, the Parliamentary Assembly could select one female candidate for each list, but it elected only female judges until 2007 (30%)⁶⁷. Nevertheless, it is an increase. The example of the ECHR demonstrates that national nominees represent fundamental stage of the procedure: the lack of female candidates at national level prevents the access of women in the international judicial bodies from the outset. The next stages of the

⁶⁶ Parliamentary Assembly of the Council of Europe Resolution 1429 (1999), National procedures for nominating candidates for election to the European Court of Human Rights, September 24th, 1999 available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16755&lang=en>.

⁶⁷ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 74.

appointment represent other difficult steps, through which often the limited possibility for women's nomination is greatly reduced.

4.2 Examination of candidates

The second phase of the procedure consists of the examination of candidates' qualifications. The quality and depth of assessments of candidates' expertise may considerably differ from court to court. Sometimes the procedures are carried out within the court, otherwise they are combined with the nomination processes of candidates at national level after a "vetting" stage. In the first case, after the nomination step, the candidate is examined by a regional or international body as well as for the International Court of Justice and the European Court of Human Rights, which have the most complex mechanisms that may discourage States to put forward nominees of inferior qualities. However, the secrecy, that characterizes the evaluation of national nominee, and the generality of the requirements for candidates worsen the already unequal gender representation on the international bench. For instance, the Consultative Committee of the Court of Justice of the European Union, which gives an opinion on candidates' suitability to perform the duties of Judges of the Court⁶⁸, manages a private interview with the candidate, a close-door deliberation and at the end it gives a reasoned opinion only to the representatives of the Member States' governments. As Dumbrovský and Van Der

⁶⁸ The Judges and Advocates General at the Court of Justice and the General Court of the European Union are appointed by mutual agreement of the Governments of the Member States, after consulting the panel provided for in Article 255 of the Treaty on the Functioning of the European Union. The panel was created by the Treaty of Lisbon, which entered into force on 1 December 2009. It began its work on 1 March 2010, immediately after the entry into force of the two decisions of 25 February 2010, 2010/124/UE and 2010/125/UE. More information about composition, functioning and work are available at: <https://comite255.europa.eu/en/home>

Sluis pointed out in their review, "the working methods of the Article 255 TFEU Panel are not transparent", although the Committee has contributed to reduce the arbitrariness of the selection of candidates at national level and even considering the wide discretion that the body enjoys in the interpretation of the norms of the Treaties concerning the necessary requirements for the assignment of the duty⁶⁹. Finally, it is important to highlight that even though the vetting procedures themselves are not determining factors in the appointments to the bench, they may contribute to the lack of transparency and fairness of the nomination process, thus influencing the scarce representation of international female judges.

4.3 Election or appointment of candidates

The final phase is the election or appointment of candidates. It depends on the number of the judiciary of the Court: elections are held in the case of those Courts where there are many more member states, over which the judicial panel exercises its jurisdiction, than the available seats on the bench. For instance, the International Court of Justice, where 15 judges operate on behalf of 192 member States of the United Nations, or the ICTY and the ICTR, where respectively 17 and 12 judges represent UN member States. On the contrary, election is not necessary and thus, the nomination is sufficient when the number of judicial members is the same of that of states, such as in the case of the Andean Court of Justice or the EFTA Court. This latter situation is particularly spread in the major European Courts: the statute

⁶⁹ T. DUMBROVSKÝ, B. PETKOVA and M. VAN DER SLUIS, *Judicial appointments: The article 255 TFEU Advisory Panel and selection Procedures in the member states*. Common market law review, 2014, Vol. 51, p. 482, available at <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/51.2/COLA2014034>

of European Court of Justice and of the European Court of Human Rights guarantee each state to have a judge on the bench. The election indeed, is held to nominate one of the three national candidates.

As a matter of course, elections raise the issue of how to ensure that the composition of the Court reflects the structure of the larger organization of which the Court is a party⁷⁰. The statutes of international Courts, indeed, usually require that the electors consider not only the qualification of nominees, but also that the body represents the membership of the organization. Therefore, it concerns the guarantee of the representativeness of the judicial body through a low number of international judges. Representativeness is, indeed, safeguarded through the criterion of equitable geographical distribution and the representation of the principal legal system of the world written, for instance, in the Statute of the International Tribunal for the Law of the Sea⁷¹. These kinds of provisions in the statutes of International Courts suggest the importance of the overall representativeness of the judicial body for states. Not surprisingly, the presence or absence of balancing provisions may serve to strengthen or undermine the legitimacy of the tribunal⁷². Diversity parameters are essential to increase the legitimacy of international tribunals to the eyes of some international actors, as well as gender diversity, a criterion that still misses among the requirements for the representation at international benches. Just very few International Courts include in their Statutes “gender” as a parameter to take into account for the composition of the bench.

⁷⁰ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 32.

⁷¹ Statute of the International Tribunal for the Law of the Sea, article 2(2).

⁷² N. GROSSMAN, Legitimacy and International Adjudicative Bodies. *Geo. Wash. Int'l L. Rev.* 41 2009, p. 140

For instance, the International Criminal Court (ICC) Statute's Article 36(8)(a)(iii) refers to a fair representation of female and male judges⁷³, and the African Court on Human and People's Right also mandates that gender balance on the court must be an objective⁷⁴. As previously outlined, other Statutes, such as the ICJ or the ITLOS, mainly speak about geographical diversity and representation of the principal legal systems of the world but not about equal gender representation. The "gender" criterion was integrated thanks to the influence of NGOs, that made extensive efforts to bring forward name of women for the election in the international bench⁷⁵. Indeed, some courts, such as the ICC, have no formal mechanism to scrutinize nominees, no interviews, but during the first two rounds of elections, non-governmental organizations play an important role in trying to call states' attention to unqualified nominees and promote candidates with strong human rights and humanitarian law records, particularly women. However, the gender parameters integrated in the criteria for the election of judges in many international courts does not mention how gender equality should be pursued, in terms of numbers and modality. The issue of female underrepresentation in the international judicial bodies seems to be attributable especially to the nomination of candidates from governments and to the third stage, that is election or appointment at international level. Since very few women are nominated at

⁷³ The International Criminal Court is one of the many successes claimed by the feminist advocacy groups during the negotiation and drafting of its Statute with the imposition of an obligation upon States Parties to 'take into account the need for ... a fair representation of female and male judges' when selecting judges (Article 36(8)(a)(iii)). See S. BARRIGA, *Election Rules for ICC Judges: A Balanced Bench Through Quasi-Quotas*. EJIL:Talk!, December 4th, 2017, available at www.ejiltalk.org/election-rules-for-icc-judges-a-balanced-bench-through-quasi-quotas/

⁷⁴ Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev. 2 (1997), Art. 12 reads: '2. Due consideration shall be given to adequate gender representation in the nomination process.'

⁷⁵ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *Toward a Community of International Judges*. *Loy. LA Int'l & Comp. L. Rev.*, 2008, Vol. 30, p. 429, available at <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1638&context=ilr>

national level, the possibility to elect female international judges is very low. This context seems to suggest a scenario where general rules of nomination process are intertwined with non-written laws and practices that represent a male-dominated institutionalized culture.

Analyzing the procedure of election and appointment of international judges in International judicial bodies, it is clearly emerged especially how the first stage of national nomination is the most crucial part of the chain and, at the same time, the one more responsible of the underrepresentation of women on the bench. The lack of transparency and openness of the procedure, for which government usually exercise control over the nominees, threaten the possibilities of women's appointment. Again, the problem is that the qualities of the individual judge matter less, as Terris and Romano underlined⁷⁶. States have usually a conservative view about the development of the law and the proactive role of the Court, they indeed nominate candidates that expect to succeed, turning a blind eye on the potential of women.

Although in the last decades mainstreaming of gender issues within political and legal discourse has resulted in efforts to promote greater gender diversity within international judicial system, and indeed the number of women in International Courts has been increasing overall, there is still a long path to do towards equal gender-balanced benches.

The following chapter identifies three components of gender parity: human rights, democracy and sustainable development, which constitute fundamental basis to address the reasons why women representation in international judiciary matters.

⁷⁶ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 32.

CHAPTER 2: WHY DOES WOMEN REPRESENTATION IN INTERNATIONAL JUDICIARY MATTER?

1. Premise

The power of international Tribunals has enormously increased over the last decades. International courts play a key role in deciding international disputes and in defining the content of international law. Yet women are still excluded from high official career in the international judicial system and although they comprise almost one-half of the world⁷⁷, they represent a really low percentage of international judges, rarely making up 50% of judges of world's most important judicial bodies⁷⁸. The underrepresentation of international female judges is an expression of power's unbalanced relation between women and men and as it is pointed out in the first section, this issue is deeply related to culture: we live in a patriarchal society which influences every aspect of our life, including both the personal and professional growth of women. As long as the distribution of roles between women and men do not change, we cannot speak about equality.

Recent scholars have been trying to analyze the reason why the representation of female judges matters in international law to raise awareness of this issue and promote new mechanisms that favour the appointment of women. In a more general view, gender diversity is indispensable, whether in terms of legitimacy, credibility, recognition of ability, policy consistency, balanced outcomes, and most of all true representation. According to this, women are important for current affairs and the future of humanity. International law affect society, commerce, migration, human rights, the environment

⁷⁷ Source: World Bank, 2020. Population, Female (% of total population) – World. See <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=1W>

⁷⁸ See section 1.2.

and since women are part of this, they should be included. But what women can bring to international courts? Why does their absence matter? The answer is easy: better justice. The lack of women within international Tribunals and monitoring bodies failed to tap on the different background and experiences that women can bring to the table, the legitimacy, and the impact of these entities. Without legitimacy, international courts could not function as a practical matter⁷⁹. Not by chance, sociological research shows that people are more likely to listen to decisions and rules when they consider deciding authorities as legitimate⁸⁰. In the same way, states may withdraw from the jurisdiction of international courts or impede their functioning when they no longer perceive them as legitimate. And if gender representation affects legitimacy, it must become a higher priority for international courts' supporters. Women judges shape international law so that women's rights are part of human rights.

This section examines the reasons why women representation in international judiciary matter and how their experiences, viewpoints and opinions are essential for the outcome of fair, integral and empathetic decisions. Starting from the enhancement of judicial legitimacy, it will be analyzed how a fair representation improves women's rights and the effectiveness of the rule of law. Finally, the chapter presents a series of existing regulations and explores whether they impose states to assure gender equality in the composition of international courts.

⁷⁹ N. GROSSMAN, *Sex representation on the bench and the legitimacy of International Criminal Courts*. *International Criminal Law Review*, 2011, Vol. 11, p. 650.

⁸⁰ T. M. TYLER, *Legitimacy and criminal justice: An International perspective*. Russell Sage Foundation, 2007, p. 9-29.

2. Judicial legitimacy

An international judicial body can define itself as legitimate only if its authority is perceived as justified. It is now well known the importance of the composition of the court for the relationship between the representativeness of the judicial body and its legitimacy. The absence of regulatory provisions for balancing the representativeness of the judicial body can undermine the legitimacy of the court⁸¹. According to Grossman (2009), an international court is perceived legitimate when it is fair and unbiased, interpreting and applying norms consistent with what states believe the law is or should be, and transparent and infused with democratic norms⁸². However, it is difficult to identify criteria that can effectively affect the representativeness in the international judicial bodies since diversity parameters can change and evolve in the future⁸³. This understanding of legitimacy goes beyond legal and normative legitimacy, for which an institution simply has the right to rule, based on objective criteria. Instead, it includes aspects of sociological legitimacy, for which an institution is believed to have the right to rule, according to a subjective determination⁸⁴. An international judicial body achieves legal legitimacy when a state decides to use it for the adjudication of a dispute, or a set of disputes and the court limits its action to that mandate. In other words, legal legitimacy is what connects an institution's continuing authority to its original basis in state consent.

⁸¹ Many authors dealt with the concept of legitimacy. See R. O. KEOHANE and J. S. NYE JR, *The club model of multilateral cooperation and problems of democratic legitimacy. Power and governance in a partially globalized world*. Routledge, 2002, p. 219-276; D. BODANSKY, The legitimacy of international governance: a coming challenge for international environmental law?. *American Journal of International Law*, 1999, Vol. 93, p.600.

⁸² N. GROSSMAN, *Legitimacy and International Adjudicative Bodies*. *Geo. Wash. Int'l L. Rev.* 41 2009, p. 115.

⁸³ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. *Rivista Deportate, esuli, profughi DEP* n. 48, 2022, p. 79.

⁸⁴ A. BUCHANAN and R.O. KEOHANE, *The legitimacy of global governance institutions. Ethics & international affairs*, 2006, Vol. 20, p.429.

The authority of the International Court of Justice, for instance, derives from its Statute to which UN member states consented. And the Court's continuing authority depends on its acting in accordance with the Statute. If it went outside or against the Statute, then its actions would lack legitimacy⁸⁵. With the emergence of other actors in the international arena, such as international organizations, non-governmental organizations and civil associations, scholars started to ask what drive relevant constituencies - individuals, states and the international community - to perceive international courts as possessing justified authority. Since states are not the only actors in the international realm, legitimacy can be understood as "agent - relative" because different actors may have different perceptions and their views are relevant to legitimacy to the extent they are reflected in state preferences. This is why we speak about sociological legitimacy. Indeed, as Neus underlined in his article, legitimacy, in a sociological sense, is important at international level as international courts can only use coercive measures in a very limited way to force state actors to comply with their decisions. And unless states recognize their mandate and exercise of public authority as binding, the compliance of domestic norms may be limited, making the system ineffective⁸⁶.

The exponents of feminist approaches argue that greater attention must be paid to the relationship between the principle of legitimacy of the judicial body and the participation of both sexes in international courts. Gender representation affects both normative and sociological legitimacy of international courts. Indeed, this paragraph argues that sex representation is essential for normative legitimacy because women and men bring different perspectives in judging a case, resulting in an impartial adjudication, a

⁸⁵ D. BODANSKY, *The legitimacy of international governance: a coming challenge for international environmental law?*. American Journal of International Law, 1999, Vol. 93, p. 605.

⁸⁶ N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. Journal of Social Philosophy, 2021, Vol. 52, p. 4, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>

fundamental driver of normative legitimacy. As a matter of fact, courts where one sex is over or under – represented lack normative legitimacy because they are inherently biased. Most important, representativeness is a major democratic value and without it, the legitimacy is weakened.

At the same time, as a sociological matter, the presence of both female and male judges is necessary for a fair adjudication and justice.

2.1 Normative legitimacy

The perception that international judges are impartial or unbiased is fundamental for any court's legitimacy. Bias is a personal judgment, often unreasoned, known also as prejudice. Bias produces unfairness and there cannot be a fair trial before a biased bench. As previously mentioned, international court outcomes must be fair, consistent and grounded in generally accepted legal discourse to retain legitimacy. Gender representation matters to normative legitimacy because each sex can bring its own perspective in the act of judging. Indeed, acknowledging that sexes approach the law or facts differently and their perspectives influence each other's decision due to the existence of biological differences or derived from gender distinct life experiences, it must be concluded that bench with a disproportionate number of either sex are inherently flawed. If women and men bring varying viewpoints to bear on judging, and neither sex's approach is constitutionally "correct", both are necessary for unbiased process and decisions. In the constitutive instruments of the majority of international courts, impartiality, is indeed evident, requiring selection of judges with high moral character and independence, as well as benches with equitable geographic and other

types of representation⁸⁷. This essentialist view would be supported by the peculiar point a view introduced in international Tribunals by female judges, especially in case concerning life experiences unique to women⁸⁸. A study of the United States federal appellate opinions showed a sex discrimination prosecutor was ten percentage points less prone to prevail if the judge was male. When, instead, a woman is present on the bench, male judges were more likely to decide in favor of the plaintiff, so that the female had an effect on the panel⁸⁹. This survey found that the presence of a female judge actually causes male judges to vote in a way they otherwise would not. However, there is a lack of sufficient empirical evidences according to which it can be theorized the effects of female presence on the international benches, so that the theory of the uniqueness of women contribution can be supported only by individual experience of female judges. Female judges, indeed, argue that their gender affects judges, at least in some areas of the law. For instance, Cecilia Medina Quiroga, elected judge of the Inter-American Court of Human Rights in 2004 and appointed as the first female President in an international court (IACHR) for the mandate of 2007-2008, considers extremely important the presence of women in the international tribunals since they can represent the rights of women and sensitive to female problems as women. Medina underlines the relevance of her participation as judge in a process involving a massacre in Guatemala where raped occurred for a reconstruction of the facts that required womanly perspective. Her outlook as a woman brought out certain aspects of human rights violation that have been ignored in her absence. A psychologist was called as an expert witness to talk about the effects of

⁸⁷ N. GROSSMAN, *Legitimacy and International Adjudicative Bodies*. Geo. Wash. Int'l L. Rev. 41 2009, p. 646.

⁸⁸ The essentialist theory is based on the thesis of a "different voice", according to which women develop a different model of decision-making and problem-solving respect to men. The theory is grounded in the work of Carol Gilligan (C. GILLIGAN, *In a different voice: Psychological theory and women's development*. Harvard University Press, 1993)

⁸⁹ C. L. BOYD, L. EPSTEIN and A.D. MARTIN, *Untangling the causal effects of sex on judging*. American journal of political science, 2010, Vol. 54, p. 393.

the massacre on victims and how they might guide the determination of reparations. In the discussion with the psychologist, Medina asked:

Could you please explain to me what is the additional suffering of a woman who has been raped in a case such as this?" I knew the answer, but I wanted it on record. And she answered, "Well, there is an additional suffering because not only have these women been raped, but they are later repudiated by their husbands if they are married or they cannot find a husband if they are single. They have to leave the community. So they are punished twice." I said, "I think this is important for reparations". And I thought, "I'm glad I was here today and asked my question!"⁹⁰

Another famous example is Navanethem Pillay, former judge in the ICTR and subsequently elected in the ICC judging panel, promotes the entry of women into international courts "not because I think women judges decide in a particular way and men judges decide in a different way", but rather because women deal with cases concerning sexual violence with particular sensitivity: "You know, we understand when we are told that it's like getting a death sentence"⁹¹. Moreover, also Françoise Tulkens, previous judge of the ECHR, claims that "[Female judges] do, however, sometimes and even often, bring 'something different'. Simply because they occupy a very different space because of their gender and other elements that form part of their own history"⁹². This

⁹⁰ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 186-187.

⁹¹ *Ibid*, p. 47-48

⁹² F. TULKENS, *Parity on the Bench. Why? Why not?*. European Human Rights Law Review, 2014, Vol. 19, p. 593

attitude of female judges to adjudicate in a “different way” would be justified by the different experience of women, where gender is a substantial component.

In a survey carried out by a European Commission of both male and female judges, advocates and public prosecutors in fifteen European Union states, has been found that in cases involving violence against women or children, family issues and sexual discrimination, it is recognized that gender has an influence⁹³. When there were not any women on the international benches at Nuremburg and Tokyo, crimes against them went ignored. Despite tremendous stories of rape and other massive sexual violation against women in World War II, the Nuremberg prosecutors chose not to prosecute or introduce evidence about these crimes. This remains such until female judges appeared in international courts declaring sexual violation as a war crime, crime against humanity or a constitutive act with respect to genocide⁹⁴.

These testimonies and the survey we mentioned above demonstrate that, although being a woman does not necessary imply a closeness towards women victims of sexual abuses, nor does being a man express a complete incomprehension for this type of crimes, “women tend to be better at it because they are closer to the victims’ experiences”⁹⁵. For this reason, Richard Goldston, former ICTY President, admits that gender crimes would

⁹³ M. ANASAGASTI, and N. WUIAME, *Women and Decision-making in the Judiciary in the European Union*. Office for Official Publications of the European Communities, 1999

⁹⁴ UN Security Council Resolution on women and peace and security. Conflict-related sexual violence. S/RES/1820. (June, 2018). This Security Council resolution recognized for the first-time conflict-related sexual violence as a tactic of warfare and as a serious threat to international peace and security. The resolution calls for an end to widespread conflict-related sexual violence, the accountability of all actors to counter impunity for such crimes and calls on the United Nations to develop appropriate mechanisms to provide protection from violence and respond to sexual violence and other forms of violence against civilians.

⁹⁵ J. MERTUS, *When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia*. Seton Hall L. Rev., 2008. The essay examines the relevance of female participation in the institution and action of the International Criminal Tribunal for the former Yugoslavia. Reference is made to four different ways of integrating women into the Court: the inclusion of female judges; the creation of an office specialized in gender issues with experts in the field; the participation of female witnesses in the trial; the relationship between the Tribunal and non-governmental organizations and local women's groups.

have not been examined by the Tribunal if a woman had not been elected among the highest judges. At the beginning, the prosecutor's proceedings against Dragan Nikolić, the commander of the Sušica detention camp in Vlasenica, did not contain any indictments for gender crimes⁹⁶. But, when evidence of numerous sexual assaults, including rape, committed against women in the camp emerged, Judge Elizabeth Odio-Benito publicly called, in the judgments and during proceedings, for indictments to be amended include gender crimes⁹⁷. In the proceedings for re-confirmation of the Nikolić indictment, the judges declared:

From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Sušica camp. Dragan Nikolic and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances. [. . .] The Trial Chamber feels that the prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolic with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes. [. . .] Without prejudice to any subsequent decision by the judges at trial, and having regard to the special provisions on the subject contained in the Rules, the Chamber considers that rape and other forms of sexual assaults inflicted on women in

⁹⁶ Prosecutor v Nikolić (Oct. 20, 1995). International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-2-R61. For an overview about the facts and final sentence visit: https://www.icty.org/en/case/dragan_nikolic

⁹⁷ R. J. GOLDSTONE and E. A. DEHON, *Engendering Accountability: Gender Crimes Under International Criminal Law*. New England Journal of Public Policy, 2003, p. 124.

circumstances such as those described by the witnesses may fall within the definition of torture submitted by the Prosecutor⁹⁸.

Nikolić was held responsible for different charges, including conspiracy for rape, a crime against humanity⁹⁹. Not only is this statement crucial for the prosecution of gender crimes but it is also remarkable in its suggestions that the judges would be open to the consideration of indictment of rape and sexual abuse beyond the enumerated ground of crimes against humanity. Indeed, the implication that the Tribunal would develop its jurisprudence around war crimes and grave violations of the Geneva Convention was really groundbreaking, especially coming as it did in one of the ICTY's earliest judicial statements¹⁰⁰.

Not only would the inclusion of women on international courts improve the judgment of typical female experiences of discrimination and violence, but also would favor a progress in the field of human rights. In particular, the cases above-mentioned are examples of judicial precedents essential for the development of international criminal law from a gender perspective thanks to the contribution of women in the sentences of crimes against women. Indeed, women judges have played a significant role in eradicating gender-based violence through programs and initiatives and by playing

⁹⁸Prosecutor v Nikolić (Oct. 20, 1995). International Criminal Tribunal for the former Yugoslavia, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61, 33. Online at https://www.icty.org/x/cases/dragan_nikolic/tord/en/951020.pdf

⁹⁹ Prosecutor v Nikolić (Sentencing judgement) 18 December 2003, International Criminal Tribunal for the former Yugoslavia, IT-94-2-S, par. 5. Online at https://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf

¹⁰⁰ Supranote 80.

critical roles in shaping international law relating to gender-based violence through their participation on international tribunals¹⁰¹.

Therefore, it is clear that female magistrates had made strong difference in advancing the level of jurisprudence of the court especially in relation to violence against women, thus supporting the theory of Grossman, according to which since men and women approach the act of judging differently based on gender, both are necessary for an unbiased adjudication¹⁰².

In this way, the female presence on the bench is fundamental for the normative legitimacy of the international judicial body.

2.2 Sociological legitimacy

As we previously anticipated, the underrepresentation of women in international courts would also affect sociological legitimacy, as long as sex representation matters to perceptions of impartiality and fairness. Even if we want to reject that women bring a different perspective within the courts, so that sex representation is irrelevant for normative legitimacy, the balance of the sexes would affect the legitimacy of the judicial body as many believe that gender influences and inspires the way in which judges evaluate the facts and apply the law¹⁰³.

This is affirmed by the fact that a significant number of non-governmental and state subjects involved in the establishment of international courts have based the claim for a

¹⁰¹ Global Justice Centre, Written Submission on the General Recommendation on Access to Justice, February 1st, 2013, par. 3, 4

¹⁰² N. GROSSMAN, *Sex on the bench: do women judges matter to the legitimacy of international courts*. Chi. J. Int'l L., 2011, Vol. 12, p. 656.

¹⁰³ N. GROSSMAN, *Legitimacy and International Adjudicative Bodies*. Geo. Wash. Int'l L. Rev. 41 2009, p. 649-650.

greater female participation precisely on the assumption of the uniqueness of the female contribution. In other words, since gender is relevant for the collective perception of impartiality and fairness of international courts, a significant disproportion of the sexes in the courts would undermine the credibility of the body and, therefore, weaken its legitimacy¹⁰⁴.

Indeed, the history of the establishment of the post-World War II international Tribunals suggests NGOs and states to mobilize for the inclusion of female judges because they believed that women would make a difference in decision-making and for final outcomes and would produce unique contributions for their capacity to do justice. Representation appeared to be particularly important in shaping perceptions of fairness and impartiality when a group has been subjected to discrimination or unfair treatment. For instance, especially during the creation of ICTY and the ICC, several NGOs strongly demanded for the involvement of female judges among lot of other initiatives that aimed at punishing perpetrators of rape. In fact, many women's groups feared that the rape of thousands of especially Muslim women would be ignored, after Nuremberg prosecutors chose not to introduce evidence about these crimes committed during World War II. As Grossman insists on, feminists thought that the presence of women in international benches might make a difference in the prosecution of serious violations against women. Women's Caucus for Gender Justice, a non-governmental organization for women's human rights based in New York at the time of the Rome Statute's negotiations, pushed for a fair composition of the ICC to be guaranteed and argued that "[f]or the International Criminal Court to effectively dispense and promote universal justice ... it must necessarily incorporate gender perspectives in all aspects of its jurisdiction, structure and

¹⁰⁴ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 82.

operations”¹⁰⁵. Moreover, representatives of states such as Senegal and the United States mobilized to ensure a proportionate presence of women among the judges of the Tribunal in order to better respond to women's issues¹⁰⁶. The National Alliance of Women's Organization, a British umbrella organization concerned with gender equality and women's rights, perceived the inclusion of female judges in the ICTY as an opportunity to ensure full justice for women in the former Yugoslavia who have been and continue to be sexually abused, as well as an opportunity "to correct the historic trivialization of the abuse women in war”¹⁰⁷.

According to Judge Patricia M. Wald:

The need for women was especially urgent on a court dealing with the laws of war and international human rights. For centuries women and children had

¹⁰⁵ N. GROSSMAN, *Sex on the bench: do women judges matter to the legitimacy of international courts*. Chi. J. Int'l L., 2011, Vol. 12, p. 663.; Further, the Women's Caucus wrote that to promote and dispense universal justice, "the Court must have the capacity to ensure that crimes against women are not ignored or treated as trivial or secondary. It must take account of the disproportionate or distinct impact of the core crimes on women. The Court should be equipped and enabled to eliminate common assumptions about and prejudices against women and their experiences." See NGO Coalition for an International Criminal Court (June 1998). Core Principles of the Women's Caucus, 8 Intl Crim Ct Monitor 13, p. 13.

The Caucus is a network of individuals and groups committed to strengthening advocacy on women's human rights and helping to develop greater capacity among women in the use of International Criminal Court and other mechanisms that provide women avenues of and access to different systems of justice. For more details see <http://www.iccwomen.org/wigjdraft1/Archives/oldWCG/aboutcaucus.html>

¹⁰⁶ Ibid, p. 663. The United States supported the appointment of "qualified women as well as men" because "[o]n the basis of its experience [with the ICTY and the ICTR] . . . [it] believed that that issue needed to be covered explicitly in the Statute if the Court was to be responsive to the concerns of women caught up in international and internal conflicts."⁸⁷ The representative from Senegal, too, called for gender balance: "The [ICTR and ICTY] . . . had been hampered by the lack of judges with experience in regard to violence against women, rape or discrimination against women. A woman who [had] been raped would naturally find it easier to talk about her experience to another woman."

¹⁰⁷ National Alliance of Women's Organisations, Letter to the Secretary General of the United Nations, the United Nations Commission of experts, the members of the Security Council, and the United Nations Office of legal counsel, (31 March 1993), IN V MORRIS AND P. M. SCHARF, *An insider's guide to the International Criminal Tribunal for the former Yugoslavia: a documentary history and analysis in "Transnational"*. New York, 1995, pp. 399-403. [Quoted in N. GROSSMAN, *Sex representation on the bench and the legitimacy of International Criminal Courts*. *International Criminal Law Review*, 2011, Vol. 11, p.650].

been the predominant victims of war crimes. But they played no significant role in the peace negotiations or punishment of war criminals¹⁰⁸.

Therefore, pressure from both states and NGOs have brought to the incorporation in the Rome Statute of the requirement that states have to consider the need for both individuals with expertise in sexual violence and "a fair representation of female and male judges" on the ICC bench, so that it inherently suggests that an international criminal court with no female judges would be unacceptable to states.

This demonstrates how discussions about gender balance and expertise on sexual violence in the Rome Statute are relevant to show that ignoring these issues might weaken States' perception and attitudes towards the court, as well as court's reliability.

Not by chance, after the Rome Statute was ratified, also the Statutes of the ICTR and ICTY were amended to insert a sex representativeness requirement for ad litem judges¹⁰⁹, even if neither statute was modified to require sex in the appointment of permanent judges.

Therefore, representation appears important for impartiality and legitimacy, especially when a group has experienced discrimination in the adjudicative system, despite the subject matter jurisdiction of any court. Indeed, all-male international benches may undermine trust in the competence of the judiciary to do justice, just as the judicial system at the dawn of post- Apartheid South Africa did, as reported by Grossman (2011).

The plan of the South African Department of Justice, called Justice Vision 2000, demanded for greater inclusion on the bench of black and women, recognizing that the court could not consist of 97% white male judges and expect legitimacy, since both female and black

¹⁰⁸ P. M. WALD, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*. U. Tol. L. Rev., 2004, Vol. 36, p. 991.

¹⁰⁹ Security Council Resolution 1431 (U.N. Doc. S/RES/1431), Art. 12 quater (ICTR); Security Council Resolution 1329 (U.N. Doc. S/RES/1329), Art. 13 quater (ICTY).

judges were necessary to represent the experiences of all south Africans. In fact, "diversity... is a quality without which the Court is unlikely to be able to do justice to all the citizens of the country [...]"¹¹⁰.

Furthermore, the mere presence of minorities can overcome both actual bias and perceptions of bias. For many feminist scholars, indeed, the exclusion of women from international law-making processes creates biases in all kinds of international law, a presumption that requires sex representation to be rebutted¹¹¹.

In a globalized world, where a broader range of actors uphold a more inclusive conception of global rule of law, international benches should seek legitimation not only within state parties but also considering the emergence of a new international community. So far, it is clear how hard, especially, NGOs and women's groups have been trying to give voice and visibility to more vulnerable groups that are underrepresented in mainstream democratic processes, helping to overcome systemic patterns of discrimination and bias. In this way, not only is international law reshaped reflecting diversity, but also international judiciary can offer a space for contestation and emancipation¹¹².

This analysis demonstrates the consideration presented at the beginning of this section, according to which even if one rejects the idea that men and women think in different ways, both states and NGOs that shape international criminal adjudication believe the

¹¹⁰ C. RICKARD, *The South African Judicial Service Commission. Judicial Reform: Function, Appointment and Structure*. Centre for Public Law, University of Cambridge, October 4th, 2003, available at http://wwwwww.law.cam.ac.uk/view_doc_info.php?class=12&order=doc_title=asc&doc=879&page=1&start=0. In his words: "all the appointments were decided on behind closed doors; there was no prior scrutiny by the public or the profession and the result was a bench that was largely a mirror of the political establishment: virtually all male, all middle-class and largely Afrikaans-speaking"

¹¹¹ H. CHARLESWORTH, C. M. CHINKIN, and A. EHRLICH, *The boundaries of international law: A feminist analysis*. Manchester University Press, 2000, p.308; H. CHARLESWORTH, C. CHINKIN, and S. WRIGHT, *Feminist approaches to international law*. American Journal of International Law, 1991, Vol. 85, p. 625.

¹¹² N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. Journal of Social Philosophy, 2021, Vol. 52, p. 9, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>

presence of women would influence the direction of the law or the developments of facts. Moreover, when a group has been victim of discrimination and exclusion, it is extremely hard to go beyond a presumption of bias, without including the group on the bench, regardless of the subject matter jurisdiction of a court. In other words, gender representation on the bench affects sociological legitimacy.

2.3 Democratic legitimacy

As Grossman pointed out in his recent work, the representation of women in international judicial bodies does not only affect the normative and sociological legitimacy, but also the democratic legitimacy of the court¹¹³. Geographical requirements for the composition of international benches are very present in the Statute of the most influential international judicial bodies¹¹⁴. This section suggests that just as judges' geographical diversity matters to international courts' legitimacy, sex representation improves legitimacy of international courts by reflecting the population subjected to their authority, a fundamental democratic principle. Nevertheless, while representativeness as a democratic value may strengthen normative legitimacy, it may weaken perceptions of justified authority, therefore sociological legitimacy, for some constituencies¹¹⁵. For

¹¹³ N. GROSSMAN, *Sex representation on the bench and the legitimacy of International Criminal Courts*. *International Criminal Law Review*, 2011, Vol. 11, p. 668-675

¹¹⁴ For example, ICJ Statute, Art 9 ("Electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."); Statute of the International Tribunal of the Law of the Sea, Art 2, 1833 UN Treaty Ser 561, 561 (1994) ("In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured."); Treaty on the functioning of the European Union, 27 ("The Court of Justice shall consist of one judge from each Member State."); Statute of the Inter-American Court on Human Rights, OAS Res 448 (IX-0/79) (IACHR Statute) ("No two judges may be nationals of the same State."); Convention for the Protection of Human Rights and Fundamental Freedoms, Art 20, 213 UN Treaty Ser 221, § 4, Art 38 (1950) ("The European Court of Human Rights shall consist of a number of judges equal to that of the High Contracting Parties.")

¹¹⁵ N. GROSSMAN, *Sex on the bench: do women judges matter to the legitimacy of international courts*. *Chi. J. Int'l L.*, 2011, Vol. 12, p. 669.

instance, despite many districts have been pushed hard for female judges on the ICC bench, there was not any protest since its establishment over the entirely male ITLOS bench. This is strongly connected with the subject matter of the judiciary, in which women may not have expertise on the law of the Sea, because it does not reflect their experience, as human rights do. Indeed, recently scholars have started to discuss about the fact that “democratic principles can serve as an additional source of legitimacy”¹¹⁶ for international courts.

The concept of democratic legitimacy of international courts, in terms of a composition of the judging panel that reflects the gender of the social components, indicates that:

women’s participation in the judiciary is important to establishing a judiciary that is reflective of the society of whose laws it interprets. People are more likely to put their trust and confidence in courts that represent all of the individuals that constitute society¹¹⁷.

In other words, democratic legitimacy justifies that the presence of a balanced gender representation in the international judicial bodies is necessary for the representation of the whole society and not because female judges have a different perspective. Therefore, the composition of the bench should be sexually proportionate not to ensure the emergence of this “different voice”¹¹⁸, but because women too, as part of the international

¹¹⁶ N. GROSSMAN, *The Effect of the Participation of Women Judges on the Legitimacy of International Courts and Tribunals*. Proceedings of the 105th Annual Meeting, Cambridge University Press, 2011, Vol. 105, p. 455.

¹¹⁷ S.D O'CONNOR and K. K. AZZARELLI, *Sustainable development, rule of law, and the impact of women judges*. Cornell Int'l LJ, 2011, Vol. 44, p. 5.

¹¹⁸ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 84. The uniqueness of the female point of view has been questioned by several critical approaches developed within feminist theories. In particular, the Third World Feminisms criticize the application of Western feminist theories to societies and communities different from the liberal model and call for a study of the interaction between different systems of

community, have the right to be represented in all decision-making bodies. Women have the right to be involved in the judicial system as women and not as having a different point a view.

New requirements for the nomination of international judges from groups that go beyond states' boundaries indicates that the presence of diverse members of the society on the bench, not only women, affects the legitimacy of international courts. These requirements are framed in terms of "representation", a principal democratic value¹¹⁹. For example, the African Court of Human and Peoples' Rights states that electors of judges should not only ensure that "there is representation of the main regions of Africa and of their principal legal traditions," but also "that there is adequate gender representation"¹²⁰. As the section 2.1.2 underlined, the Rome Statute of the ICC requires both individuals with legal expertise in violence against women and children and "a fair representation of female and male judges" on the ICC bench¹²¹. Therefore, it can be deduced from the development of these new prerequisites, that general geographic diversity is not enough. Indeed, what matters is whether the regions that include states, which most use the Court, are adequately represented on the bench. In a similar way, for instance, the WTO's Dispute Settlement Understanding allows developing states that are parties to a dispute to ask for a panel member from a developing state¹²². Here too, the focus is not on geographic

oppression: sex, race, class, colonialism and global capitalism. See also C. T. MOHANTY, A. RUSSO and L. TORRES, *Third world women and the politics of feminism*. Indiana University Press, 1991, p. 314-327.; For a more recent study, R. WEST and C. G. BOWMAN, *Research handbook on feminist jurisprudence*. Edward Elgar Publishing, 2019, p. 477- 484.

¹¹⁹ N. GROSSMAN, *Sex on the bench: do women judges matter to the legitimacy of international courts*. Chi. J. Int'l L., 2011, Vol. 12, p. 669.

¹²⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Burkina Faso, 1998, Art 14(2), (3).

¹²¹ The Rome Statute of the International Criminal Court, Rome, 1998, Art 36(8) (a - b), 37

¹²² World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh, 1994, Art 8(10)

diversity per se, but rather, on the inclusion of a judge from a developing state for a question of democratic participation.

Not by chance, the current strongest argument for demanding for equal gender representation, and therefore the inclusion of more female judges on the international bench, is that women make up almost half of the world's population. As above-mentioned, democratic legitimacy related to normative legitimacy refers to a greater presence of women in international courts according to a more sensitivity of women in legally responding to problems connected to women's experiences.

However, this logic incorporates some risks, as Marconi identified in her analysis. First of all, thinking of women merely in terms of different contribution to the judgment, the resulting logical deformation according to which the election of female judges should be motivated by the nature of the crimes relegates women to certain areas of international law¹²³. For instance, as argued before, there is not the same interest to have female judges in the International Tribunal of the Law of the Sea. Moreover, there is a clear risk of attributing to any woman a presumed sensitivity towards gender issues, due to a supposed coincidence between the female subject and her desire to translate female interests in the judgment of the courts¹²⁴. Judge Cecilia Medina Quiroga, previously cited, claims that female judges are more sensitive towards feminine experiences, but also that the inclusion of women in the international judicial bodies should be supported as democratic value and principle of equality:

¹²³ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 85.

¹²⁴ F. N. AOLÁIN, *More Women–But Which Women? A Reply to Stéphanie Hennette Vauchez*. European Journal of International Law, 2015, Vol. 26, p. 229-236. In her analysis, the author argues that a greater number of women in international courts is not, in itself, a guarantee of advancing feminist values and methods in the courts. On the contrary, only the presence of feminist female judges would be able to bring radical transformations to the set of internal practices that continue to hinder full gender equality in the courts.

Well, if you ask me if it is important to have women, just women, I would say, “Yes”, because it shows that equality is respected. Why on earth not have women if we are half of the world? So it is important from a symbolic point of view for women to see other women on the court. And it is important for democracy, because it shows that women are not discriminated against¹²⁵.

The symbolic aspect mentioned by Medina consists in the educational effect that generates the mere presence of women in a high-level position such as that of international judge. In fact, thinking of women filling certain roles helps to dissolve the stereotype, according to which some prominent legal professions, particularly the profession of judge, are reserved exclusively for men.

Women, who have so far held the position of international judge have often contributed significantly to the advancement of women's rights thanks to the greater sensitivity shown especially in the case of sexual crimes and gender crimes. Nonetheless, supporting a greater female presence in international courts only because of a supposed difference between the two sexes appears misleading due to the risk of relegating the figure of the female judge to specific matters and cases concerning female issues.

On the contrary, as far as democratic legitimacy is concerned, the participation of female judges based on the principle of equality is the right to represent part of the population; it is not a question of having a different receptiveness to dealing with gender crimes.

¹²⁵ D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007, p. 186.

3. The improvement of women's rights

Representativeness, besides being an important democratic value, is also a fundamental social right. Women's effective representation is, indeed, essential to empower them as valid interlocutors with genuine rights to shape the public space. This section examines how the participation of women in decision-making process is a fundamental human right well-established in the international system, and how the contribution of female judges manages to improve the advancement of women's rights, increasing public trust and, therefore, promoting access to justice.

First of all, gender parity in international Courts and monitoring bodies is formally ground in the international commitment for the application of gender equality for human rights guaranteeing. In this sense, the lack of women participation in international systems undermines the international adherence to equality and non-discrimination. The right of access to decision-making, to equal opportunity in employment and right of access to justice support the participation of women in international bodies and reflect how states commitment to gender equality.

3.1 The impact of women underrepresentation on the rights to equality and non – discrimination

Underrepresentation in international bodies and mechanisms, including the judicial system, significantly affect their human rights to equality and to non-discrimination.

The principle of equality is widely recognized by the international community, starting from article 1 of the Universal Declaration of Human Rights affirms that all human beings

are born free and equal in dignity and rights¹²⁶. The Preamble and article 55 (c) of the Charter of the United Nations¹²⁷, article 2 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights¹²⁸, and article 2 of the International Covenant on Economic, Social and Cultural Rights¹²⁹ all recognize that individuals have the right to the exercise of human rights without distinction or discrimination, including based on sex. Furthermore, article 7 of the Universal Declaration of Human Rights and article 26 of the International Covenant on Civil and Political Rights set forth the rights to equality before the law and to equal protection of the law. More specialized, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹³⁰ specifically includes reference to the right of women to equal protection of the law (art. 2 (c)), equality of opportunity and treatment (art. 4), and the duty to ensure, through law and other appropriate means, the practical realization of the principle of equality of men and women (art. 2 (a)). According to article 1, “any distinction, exclusion or restriction made on the basis of sex, may constitute discrimination against women if it has the effect or purpose of nullifying women’s rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. The Committee on the Elimination of Discrimination against Women¹³¹ has explained that the purpose of eliminating all forms of discrimination against women is to

¹²⁶ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

¹²⁷ <https://legal.un.org/repertory/art55.shtml>

¹²⁸ <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

¹²⁹ <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

¹³⁰ On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981, in accordance with article 27(1). <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

¹³¹ Body of 23 independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women. See <https://www.ohchr.org/en/treaty-bodies/cedaw>

achieve gender equality¹³². Substantive equality in the enjoyment of all rights requires that the effects and impacts of the laws and policies on women's lives must be taken into account. According to this, states may also need to take affirmative measures to ensure equality in fact, and not just in law, as provided for in article 4 of the CEDAW, if such steps are necessary to overcome underrepresentation.

3.2 The impact of women underrepresentation on the right to equal participation in international decision-making

The right to equality and to non-discrimination is essential to assure the right of women to equal participation in all spheres of life, including international decision-making¹³³. Indeed, women should have the possibility to fully participate in the same way as men in these processes that affect everyday life. Some academics have highlighted that gender-balanced participation in international affairs can ensure that “the greatest possible plurality and diversity of views are brought into the deliberative process in international bodies to prevent gender-biased outcomes¹³⁴”. According to this, women should be enabled to influence the process of developing, applying and administering international law and policy. All international bodies have integrated in their agenda gender perspective as a fundamental objective; therefore, the nomination of women as

¹³² Committee on the Elimination of Discriminations Against Women, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, para. 4

¹³³ United Nations General Assembly Human Rights Council, *Report on the current levels of representation of women in human rights organs and mechanisms: ensuring gender balance*, July 9th, 2021, p. 7, para. 24, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/111/46/PDF/G2111146.pdf?OpenElement>,

¹³⁴ M. A. FREEMAN, C. CHINKIN and B. RUDOLF, *The UN convention on the elimination of all forms of discrimination against women: A commentary*. OUP Oxford, 2012, p. 222.

international judge is a prerequisite to influence, formulate and implement international strategies¹³⁵.

International agreements and treaties clearly show that access to decision-making includes the right to participate in political and public life, including at the international level. For instance, under article 25 of the International Covenant on Civil and Political Rights the right to equal participation in public life, including public service, of all citizens is pointed out. Moreover, article 7 (b) of the CEDAW specifically set out that women have the right “to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government”. This clause is interwoven with article 8 of the same treaty, which requires states parties “to take all appropriate measures to ensure to women, on equal terms with men and without discrimination, the opportunity to represent their governments at the international level and to participate in the work of international organizations¹³⁶”. Therefore, the provision protects the equal participation of women at the international level, whether as government representatives or as members of international organizations. The Advisory Committee report¹³⁷ reaffirms the WG on discrimination’s definition of parity as the measure to assess whether States have complied with their obligation to ensure equal participation of women in international decision-making. Gender parity for purposes of underrepresentation means “no less than 50 per cent of a given body consisting of one gender.” Thus, when Article 8 of CEDAW refers to “equal

¹³⁵ Committee on the Elimination of Discriminations Against Women, General Recommendation No. 23: Political and Public Life, 1997, para. 39–40 and para. 5

¹³⁶ See also C. MARTIN, *Symposium on Gender Representation: Article 8 of CEDAW – Significance and Role of the CEDAW Committee to Tackle Women Underrepresentation in International Bodies*. OpinioJuris, 2021, available at <https://opiniojuris.org/2021/10/05/symposium-on-gender-representation-article-8-of-cedaw-significance-and-role-of-the-cedaw-committee-to-tackle-women-underrepresentation-in-international-bodies/>

¹³⁷ United Nations General Assembly Human Rights Council, *Report on the current levels of representation of women in human rights organs and mechanisms: ensuring gender balance*, July 9th, 2021, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/111/46/PDF/G2111146.pdf?OpenElement>

representation and/or participation” this language must be interpreted as requiring at least 50 per cent of women in the composition of international courts and bodies¹³⁸.

For the implementation of this article, the reference to the term “international organizations” has been broadly interpreted. The International Law Commission, whose purpose is to encourage the progressive development of international law and its codification, defines the term as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities¹³⁹”. Thus, universal and regional organizations, as well as courts, supervisory treaty bodies, human rights organs, funds and programs, and specialized agencies are all encompassed in that definition¹⁴⁰. As a matter of fact, as the Committee on the Elimination of Discrimination against Women affirmed, States parties have a responsibility, where it is within their control, to appoint women to senior decision-making roles¹⁴¹. It underlines that under article 8, states have to elaborate objective criteria and processes for the appointment and promotion of women to relevant positions¹⁴², as well as adopt temporary special measures aimed at accelerating substantive equality for women¹⁴³, as provided for in article 4 of the Convention on the Elimination of All Forms of Discrimination against Women.

Similarly, according to with the Beijing Platform for Action, Governments have to take action aimed at guaranteeing gender balance in the composition of delegations to the

¹³⁸ Supranote 119.

¹³⁹ Draft articles on responsibility of international organizations (A/66/10), para. 87, art. 2.

¹⁴⁰ M. A. FREEMAN, C. CHINKIN and B. RUDOLF, *The UN convention on the elimination of all forms of discrimination against women: A commentary*. OUP Oxford, 2012, p. 224.

¹⁴¹ Committee on the Elimination of Discriminations Against Women, General Recommendation No. 23: Political and Public Life, 1997, para. 26.

¹⁴² *ibid*, paras. 38 e 50 (b).

¹⁴³ *Ibid*, para. 43.

United Nations and other international organizations, as well as “in the lists of national candidates nominated for election or appointment to United Nations bodies, specialized agencies and other autonomous organizations of the United Nations system, particularly at the senior level¹⁴⁴”. In particular, the Beijing Declaration not only underscores women’s rights as a human right, but it particularly recognizes the significance of women’s empowerment and their full participation based on equality in all spheres of society, including participation in the decision-making process and access to power, as pillars for the achievement of equality, development, and peace around the world¹⁴⁵.

3.3 The impact of women underrepresentation on the right of access to equal opportunity in employment

The absence of women in the international judicial bodies has also an impact on the right of access to equal opportunity in employment, which is recognized under international law. Indeed, article 7 of the International Covenant on Economic, Social and Cultural Rights provide member states to ensure “equal opportunity for everyone to be promoted in his (or her) employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; those protections are expanded to women seeking to be promoted to, or to serve, on international bodies¹⁴⁶. In addition, the United Nations has recognized the importance of equal opportunity in employment within the United Nations system, for example through article 8 of the Charter: “The United Nations

¹⁴⁴GQUAL, The GQUAL Action Plan, 2017, p. 3, available at <http://www.gqualcampaign.org/wp-content/uploads/2017/11/FINAL-2017-11-22-Action-Plan.pdf>

¹⁴⁵ M. CASTILLEJOS-ARAGÓN, *A need for change: Why do women in the judiciary matter?*. Konrad Adenauer Stiftung, 2021, p. 3

¹⁴⁶ Committee on Economic, Social and Cultural Rights, *Achieving gender parity*, General comment No. 18, 2005, p. 36, para. 6.

shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs¹⁴⁷". According to this, the United Nations has accepted that giving effect to article 8 requires addressing the selection, retention and promotion procedures that hinder women's fulfilment of their right to equal employment opportunity¹⁴⁸.

3.4 The impact of women underrepresentation on the advancement in women's rights

Women's involvement in the judicial system serves as a driving force for the development of independent, strong, accessible and gender-sensitive judicial institutions and, in a general sense, the realization of gender justice within the society. Female judges have, indeed, made groundbreaking decisions that have modified the criminal justice systems, especially in cases involving rape, sexual violence and forced marriage. Therefore, not only does the presence of female judges permit a better judgment of feminine experience of discrimination and violence, but also an advancement in the field of women's rights.

For instance, as it is above-mentioned, they gave a great push to raise awareness in the ICTY and ICTR of sexual violence as a tactic of warfare and not merely as marginal abuse, recognizing the use of sexual violence as a threat to international peace and security in international law. And this is thanks to the proactive action and pressure of high-impact women, who have been fought for including gender crimes. Commissioned with the task of bringing justice and deterring further crimes, the ICTY and the ICTR both base their case laws on their respective Statutes as well as on customary international law. This

¹⁴⁷ <https://www.un.org/en/about-us/un-charter/chapter-3>

¹⁴⁸ M. A. FREEMAN, C. CHINKIN and B. RUDOLF, *The UN convention on the elimination of all forms of discrimination against women: A commentary*. OUP Oxford, 2012, p. 229.

feature produces a greater level of influence on the development of criminalization of sexual violence in warfare, since customary international law inevitably affects all states¹⁴⁹. Rape ceased to be perceived as the unrestrained sexual behavior of individuals and was recognized as a powerful tool of war, used to intimidate, persecute and terrorize the enemy. Among different cases, the Čelebići case¹⁵⁰ represents a milestone in international justice by recognizing rape as a form of torture, and as such both a grave breach of the Geneva Conventions and a violation of the laws and customs of war, thanks to the pressure made by former judges ruling in that case, such as Elisabeth Odio Benito, Gabrielle Kirk McDonald and Patricia M. Wald¹⁵¹. Moreover, the case Akayesu¹⁵², in which was recognized the essential role of Judge Navanethem Pillay in directing the ICTY trial panel towards a sentence in which it was declared for the first time that rape and sexual violence can represent constitutive acts of genocide. Another famous litigation is the case Nikolić¹⁵³, in which Judge Elizabeth Odio-Benito publicly urged the ICTY prosecutor's office to change the charge with the aim to include gender crimes. Nikolić was later found guilty of a series of charges, including complicity in rape, a crime against humanity. Besides, more recently in its judgement against Dominic Ongwen¹⁵⁴, the ICC has characterized forced marriage as an autonomous crime against humanity. For the first

¹⁴⁹ F. HAMPSON, *Working paper on the criminalization, investigation and prosecution of acts of serious sexual violence: working paper*. 2004. UN Doc. E/CN.4/Sub.2/2004/12, p. 4, available at: <http://documentsddsny.un.org/doc/UNDOC/GEN/G04/154/40/pdf/G0415440.pdf?OpenElement>

¹⁵⁰ The Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić. (IT- 96-21). See https://www.icty.org/x/cases/mucic/cis/en/cis_mucic_al_en.pdf

¹⁵¹ List of former permanent judges <https://www.icty.org/en/about/chambers/former-judges>

¹⁵² Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998) See <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MS15217R0000619817.PDF>

¹⁵³ Prosecutor v Nikolić (Oct. 20, 1995). Case No. IT-94-2-R61. For an overview about the facts and final sentence visit: https://www.icty.org/en/case/dragan_nikolic

¹⁵⁴ Prosecutor v. Dominic Ongwen (04 February 2021). Case No. ICC-02/04-01/15-1762-Red. See https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF

time, a person has been judged guilty of forced pregnancy and marriage, figure that so far was not included in the Rome Statute.

Women's participation in the judiciary has also become an essential objective to make the decision-making process more responsive, inclusive, and participatory at all levels worldwide. Women judges contribute to improve access to justice for women, by supporting women's specific justice needs across a range of issues. Female judicial appointments, particularly at senior levels, can help shift gender stereotypes and provides a welcoming space for women's motivation to enforce their rights¹⁵⁵. Since the presence female judges increases judicial legitimacy, indeed, public trust is strengthened, thus making especially women victims of abuse, violence or discrimination more encouraged to go in front of the Court, asking for their rights to be respected. Thanks to the inclusion of women, they can have their voice heard.

However, analyzing the essentialist premise according to which women bring a different perspective in international, it is important to highlight that there is very little empirical data on the issue of the impact of women's presence on judicial benches on case law, since data relies on small studies. As there is insufficient empirical evidence according to which it can be developed a theory of the effects of female presence in international courts, the thesis of the uniqueness of female contribution to judgment can be demonstrated for now only by individual experiences of female judges.

Therefore, we should rather focus on the distinctiveness of female experiences rather than on gender itself to support an increased proportion of women on judicial benches. To the extent that judges' individual life experiences matter for judicial outcomes, we might want particular sets of life experiences to be represented both with the aim of

¹⁵⁵OECD, *Women in the Judiciary. Government at a Glance*, 2017, OECD Publishing

representing the greatest possible diversity and allowing for outcomes more favourable to women and women's rights advancements¹⁵⁶. Famously, Judge Bertha Wilson, one of the major figures of recent history of female judges wrote about abortion in 1980, underlying the uniqueness and the importance of female experience:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma¹⁵⁷.

And likewise, she wrote about domestic violence:

If it strains credibility to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'¹⁵⁸

¹⁵⁶ S. HENNETTE-VAUCHEZ, *Gender Balance in International Adjudicatory Bodies*. Max Planck Encyclopedia of International Procedural Law, 2019, p. 9.

¹⁵⁷ R v Morgentaler and ors, Supreme Court of Canada, 28 January 1988, [1988] 1 SCR 30.

¹⁵⁸ R v Lavallee, Supreme Court of Canada, 3 May 1990, [1990] 1 SCR 852.

To conclude, as Edroma notes, gender parity in the judiciary ensures a “balanced approach to enforcing the law and implementing equality, which in turn builds public trust and confidence in the state.¹⁵⁹”

4. Effectiveness of the rule of law

All the positive developments that have been analyzed in the context of a greater presence of female judges in international courts, are the basis for an effective rule of law. First of all, gender equality is fundamental for the legitimacy of international judicial bodies’ policies and decisions, which stem from the principle of equality¹⁶⁰. Female judges are indeed key actors within international governance related to transparency, integrity and the effectiveness of the rule of law. They have made groundbreaking judgments that have improved the criminal justice system, especially in the cases concerning rape, sexual violence and forced marriage. Their involvement has also contributed to progress for access to justice for women, creating a more participatory, inclusive judicial decision-making processes worldwide¹⁶¹. Second, a more balanced approach, ensured by diverse judges, to enforce the law and implement equality, builds public trust and confidence in the state¹⁶². In fact, as Torbisco-Casals suggests, diversity on the bench is understood, not only as the mere symbolic representation of the pluralism inherent in international society, but also a diversity of cultural backgrounds, experiences, perspectives, competencies, which are essential to improving outcomes of international adjudication

¹⁵⁹ E. EDROMA, *Retrieved from Promoting Gender equality in the judiciary*. United Nations Development Programme, 2019, available at <https://www.undp.org/blog/promoting-gender-equality-judiciary>

¹⁶⁰ Viviana Krsticevic, “Gender equality in international tribunals and bodies: an achievable step with global impact”, GQUAL Concept Paper (2016) p. 7.

¹⁶¹ M. CASTILLEJOS-ARAGÓN, *A need for change: Why do women in the judiciary matter?*. Konrad Adenauer Stiftung, 2021

¹⁶² Edroma, E. Retrieved from Promoting Gender equality in the judiciary: <https://www.undp.org/blog/promoting-gender-equality-judiciary>. UNPD

as a global public service¹⁶³. Trust is necessary for legitimacy and enhancing diversity also helps improving the level of social trust in international institutions. Thus, guaranteeing the representation of identities and groups that are marginalized in building international institutions may be crucial for increasing the level of trust and improving democratic legitimacy. Just think that when government institutions reflect who we are, they receive more public attention. Indeed, international courts gain legitimacy only if those potentially affected by the norms of those bodies are adequately represented throughout relevant decision-making processes¹⁶⁴. And even if a judgement can be substantively fair, it should be decided by decision makers who represent the people who will be affected by it. On the contrary, the lack of diversity negatively affects the process and quality of judging, and therefore the effectiveness of the rule of law. Moreover, the constant underrepresentation of female international judges, when not due to lack of available candidates, may suggest bias in selection processes. In fact, homogeneous composition of the courts intensifies the reproduction of social prejudices and bias in judicial decisions. And it is clear that potential threats appear not only from conscious interest or public prejudice or partiality of the adjudicator, but also from unconscious bias¹⁶⁵, which makes judges less aware when assessing claims of members in vulnerable groups. Indeed, gender structural inequalities within the judicial system tend to be unclear when international courts privilege civil and political rights over social, cultural and economic rights, since this choice has no neutral effect and advantage male dominant social values and situations. For instance, male judges do not properly consider

¹⁶³ N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. Journal of Social Philosophy, 2021, Vol. 52, p. 11, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>

¹⁶⁴ N. GROSSMAN, The normative legitimacy of international courts. Temp. L. Rev., 2013, Vol. 86, p.104.

¹⁶⁵ P. M. JR COLLINS, M. PAUL, M. K. L. MANNING and R. A. CARP, *Gender, critical mass, and judicial decision making*. Law & Policy, 2010, Vol. 32, p. 260-281. P. KASTELLEK, Racial diversity and judicial influence on appellate courts. American Journal of Political Science, 2013, Vol. 57, p.167-183.

relevant facts or interpret rules in ways that affirm dominant values¹⁶⁶. As a result, their decision may reflect stereotypes or biases which only contributed to strengthen them. An example of this cultural misconception can be found in ECtHR jurisprudence concerning freedom of religious expression and the right to wear a Muslim headscarf¹⁶⁷. The European Court has indeed, ruled in favor of state-imposed restrictions on the individual right to manifest religion recognized in article 9 of the ECHR in different cases, where it also did not consider other interpretations. For example, it rejected the interpretation of judge Tulkens, in the famous Sahin case, where she insisted on the danger of unconscious biases in interpretations of rights and perceptions that try to speak for minority groups without hearing nor dialoguing with them. In her own words: “[w]hat is lacking in [the Court's] debate is the opinion of women, both those who wear the headscarf and those who choose not to¹⁶⁸”. To decrease a certain abuse of power and corruption within the judicial bodies, the presence of women is essential to enhance transparency in the system. As a matter of fact, more transparency improves judicial integrity and reduces forms of corruption connected to gender, for which women have been turned in direct victims through the extortion.

As judge Ruiz strongly affirms, women judges in the judiciary play a crucial role in ensuring fairness, transparency, integrity, and the effectiveness of the rule of law. Their

¹⁶⁶ N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. Journal of Social Philosophy, 2021, Vol. 52, p. 14, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>

¹⁶⁷ The ECtHR has considered questions regarding restrictions on the right to manifest religion by wearing religious attire under article 9(2) of the European Convention of Human Rights (ECHR) in a varied range of cases. The reference here is on a few crucial decisions that have consolidated the Court's general line of reasoning concerning the compatibility of headscarf bans with the right to freedom of religion and other rights recognized in the ECHR: (Dahlab v. Switzerland, 2001; Dogru v. France, 2008; Leyla Sahin v. Turkey, 2005; Kervanci v. France, 2008).

¹⁶⁸ Leyla Sahin v. Turkey (2005). Dissenting Opinion of Judge Tulkens, 44. She specifically stresses the underlying paternalism of the majority's opinion, stressing that '[t]he applicant, a young university student, said—and there is nothing to suggest that she was not telling the truth—that she wore the headscarf of her own free will'.

presence helps to improve legitimacy and, therefore, to build public trust¹⁶⁹. Furthermore, female judges are less vulnerable to corruption and political pressure, contributing to the strengthening of the independence and integrity of the judicial systems as well as the quality of judgements, thus ensuring an effective rule of law.

5. Critical examination of counterarguments

One of the main arguments that justifies the underrepresentation of women on the international benches is the lack of available female candidates to nominate first at national level. However, the weak pool of qualified female candidates is proven to be an unsatisfactory explanation of the overrepresentation of male judges. If the pool were the cause of the paucity of women judges, it might be expected that the number of women on the bench would grow as women enter law schools and the legal profession in greater numbers¹⁷⁰. But this is not the case for many international courts, as we have previously analyzed the numbers on the benches. The United Nations Statistics Division, according to the Indicator IV.5, measured the share of Female Professional Judges or Magistrates at the national level, proving that the limited- pool argument is illogic, since high-qualified female judges are worldwide present. What can be clearly seen in Figure 3, which gives a general overview of the quota of female judges around the globe, is that the highest rates of women concentrate especially in Europe and in the area of Latin America and the Caribbean. If the pool argument was correct, it might be thought that states with a higher percentage of female lawyers would have an higher numbers of female judges on the

¹⁶⁹ V. RUIZ, *The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity*. United Nations Office on Drugs and Crime, 2019, available at <https://www.unodc.org/dohadeclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html>

¹⁷⁰ N. GROSSMAN, *Achieving sex-representative international court benches*. American Journal of International Law, 2016, Vol. 110, p. 85.

bench. However, again, this does not appear the case in many countries where there are most qualified women. For example, in France, 50% of lawyers are estimated to be women. Nevertheless, no French women has served as permanent judge on the ICJ, ECHR, ICC, ICTR, ICTY, or ITLOS¹⁷¹. Equally, only one British woman has ruled on the ICJ, ECHR, ICC, ICTR, ICTY, or ITLOS respect to 24 British men, even though half of United Kingdom lawyers are women¹⁷². The same for Russia, where no women have served on international benches where men have, although half of Russia's lawyers are women¹⁷³. This demonstrates that nomination at national level does not have the aim to select candidates on the basis of merit. On the contrary, the process is surrounded by corruption and abuse of power since states use the role of international judge to reward political loyalty or advance political agendas. In conclusion, these data show that not only is the limited pool inconsistent, but great part of the problem might be that judicial selection procedures lack of transparency and are not clearly set up on merit¹⁷⁴.

¹⁷¹ Mi E. MICHELSON, *Women in the legal profession, 1970-2010: A study of the global supply of lawyers*. Indiana Journal of Global Legal Studies, 2013 Vol. 20, p. 1071-1137

¹⁷² *ibid*

¹⁷³ Three men have served on the ECHR. On the ICJ, five men served on behalf of the Union of Soviet Socialist Republics and four on behalf of the Russian Federation. Two men were judges for ITLOS, and three for the ICTY and ICTR combined. N. GROSSMAN, *Achieving sex-representative international court benches*. American Journal of International Law, 2016, Vol. 110, p. 86.

¹⁷⁴ N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. Journal of Social Philosophy, 2021, Vol. 52, p. 18, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>

Figure 3



Source: United Nations, Minimum set of Gender Indicators, Share of female judges (2019)

The other argument that is usually promoted concerning the underrepresentation of female international judges is that the latter tend to have a different judgment and to criminalize cases involving gender issues. However, there is an inconsistency with this argument. Indeed, as it is underlined many times in the thesis, diversity is not a negative factor when dealing with international judgements. On the contrary, it enhances legitimacy, both normative and sociological one, contributing to improve the effectiveness of the rule of law. Increasing the number of female judges, as well as of judges who belong to cultural minorities, can raise the standards of deliberation by adding perspectives and reasons that are typically missing in discussion among judges who belong to privileged social and cultural group and who may not attach enough significance to the point of view of members of structurally subordinated realities¹⁷⁵. In

¹⁷⁵ N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. Journal of Social Philosophy, 2021, Vol. 52, p. 15, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>

other words, diversity has a huge impact on the quality of court's final decision, increasing at the same time the level of public trust and democracy. According to judge Nancy Hernández, who spoke about the situation in Costa Rica, gender diversity profoundly improves the credibility of courts and in her own words:

in cases related to sexual harassment, gender violence, obstetrics violence, women judges' role has been crucial in evaluating the evidence. Women can relate to experiences that only women know. The more diverse the courts, the better quality of justice will be delivered because women judges offer different perspectives¹⁷⁶.

Diversity is, indeed, a point of strength for the functioning of the international judiciary and for the application of international law, not a weak point, according to which the inclusion of women on the bench is believed not to be essential. It must be pointed out that female judges, when dealing with cases concerning discrimination against women, have made strong difference in advancing the level of jurisprudence of the court thanks to their experiences as women; experiences that tend toward a more comprehensive and empathetic perspective one that encompasses not only the legal basis for judicial action, but also awareness of consequences on the people affected¹⁷⁷. And this does not mean that they are likely to criminalize trial related to women, making impartial decisions. Conversely, bringing a different understanding to problems and solutions, they

¹⁷⁶ M. CASTILLEJOS-ARAGÓN, A need for change: Why do women in the judiciary matter?. Konrad Adenauer Stiftung, 2021, p. 14.

¹⁷⁷ V. RUIZ, The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity. United Nations Office on Drugs and Crime, 2019, available at <https://www.unodc.org/dohadecclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html>

significantly contribute to the quality of justice and adjudication as they advance to the fore considerations that would not have been taken into account in their absence.

Today, most of the law students and judges are women. Nevertheless, women are still a minority in supreme courts. There is a need to overcome these justifications that are not based on empirical evidences, and merely grounded on national interests.

6. Do existing resolutions impose states to assure gender equality in the composition of international courts?

Since the mid-nineteen women have fought for equality¹⁷⁸. Women strongly strived, protested, worked and went on strikes for many decades before having their rights recognized.

Internationally, since the year of its establishment in 1945, the United Nations has committed to the universal protection of women's rights, thus perceiving gender inequality as a social problem worthy of attention from the organization itself with the signature of the UN Charter. Article 8 declared "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in-its principal and subsidiary organs"¹⁷⁹. Based on this document, many others have later been developed. Referring to political rights of women, the United Nations General Assembly introduced the Convention on the Political Rights of Women¹⁸⁰ during the 409th plenary meeting of 1952, aiming at instituting an international standard for women's political rights. In particular, the Preamble recalls the Article 21 of the

¹⁷⁸ M. A. PALUDI and B.E. COATES, *Women as Transformational Leaders*. ABC-CLIO, 2011, p. 2

¹⁷⁹ Charter of the United Nations, San Francisco, 1945, available at <https://www.un.org/en/charter-united-nations/>

¹⁸⁰ United Nations General Assembly, Convention on the Political Rights of Women, 20 December 1952, New York. The Convention was then adopted in 1953 and entered into force in 1954.

Universal Declaration of Human Rights on the “right to take part in the government of his country, directly or through freely chosen representatives”¹⁸¹.

The importance of female condition and especially the increasing awareness of gender discrimination and violence, has driven the international belief to separate the protection of human rights related to gender issue. Indeed, a real branch of international law has introduced as a defense of “women’s human rights”. The most important legally binding instrument on women’s rights is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 and entered into force in 1981. The Convention promotes the protection of women’s rights against all forms of discriminations, which inhibit the realization of women. It includes an action plan to stop extensive discrimination against women and safeguard their rights addressed to state parties of the Convention.

Article 1 claims:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field¹⁸².

¹⁸¹ United Nations General Assembly, Convention on the Political Rights of Women, New York, March 31st, 1953, available at https://treaties.un.org/doc/treaties/1954/07/19540707%2000-40%20am/ch_xvi_1p.pdf

¹⁸² United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, New York. Article 1. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

The recognition of women's subordinate status in several aspects and field throughout the international arena, became more and more a matter of protection. Since 1975, six World Conferences of Women take place with the objective to improve female's condition in all sectors, from the social field to the political and economic sphere¹⁸³. They represent an essential instrument for international advancement in women's rights and are at the core of the world agenda for gender equality. However, the most important and evolutionary one was that of Beijing in 1995, which underlines the importance of gender identity, focusing on man-woman relations within the society. In fact, it introduces new concepts, such as empowerment and mainstreaming, maintaining the principle of equal opportunities between gender as the universal value. Empowerment refers to the acquisition of major responsibilities and powers in decision-making positions, while mainstreaming refers to the women integration in all sectors under a gender perspective. Moreover, during the Conference, the Beijing Platform for Action was adopted, considering several critical areas as obstacles for women's realization and the improvement of their condition: women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanism for the advancement of women; human rights of women; women and the media; women and the environment; the girl child¹⁸⁴.

Deeply used as springboard for the introduction of gender equality as central for many contemporary discourses, especially for debate about the representation of women in the

¹⁸³ World Conferences on Women, Mexico City 1975, Copenhagen 1980, Nairobi 1985, Beijing 1995, New York 2005, Milan 2015.

¹⁸⁴ World Conference on Women, Beijing 1995.

international judicial system, the Resolution 1325¹⁸⁵, for the first time, explicitly mentioned the impact of war on women and their contribution in the resolution of conflicts for a durable peace. It, indeed, recognizes the essential role of women in prevention and resolution of conflicts, promotes greater participation in peace-keeping and national security processes, and “urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict”¹⁸⁶.

All things considered, gender equality is a long-established legal right, and related prohibition of discrimination based on gender is an international rule with customary status¹⁸⁷. Indeed, it is a non derogable right in many international treaties which prohibit member states and the UN from discrimination based on sex¹⁸⁸.

But if gender parity is a deeply rooted fundamental value in the international legal system, why are we still debating for the promotion of women’s empowerment, and therefore for an unbalanced proportion of women and men in high-level positions, including the role of international judge?

¹⁸⁵ United Nations Security Council Resolution, S/RES/1325 (2000), October 13th, 2000

¹⁸⁶ Ibid, para 1.

¹⁸⁷ Committee on the Elimination of Discriminations Against Women, General Recommendation No. 23: Political and Public Life, 1997, para. 13

¹⁸⁸ Charter of the United Nations, art.8, 9; CEDAW, art.1; CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/24, (10 August 2017); CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), UN Doc. E/C.12/2005/4, (11 August 2005); UN Human Rights Committee (UNHRC), CCPR General Comment No. 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.9, (10 November 1989); Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 47th sess, UN Doc. CEDAW/C/GC/28, (16 December 2010); CEDAW Committee, Report of the Committee on the Elimination of Discrimination against Women: Thirtieth Session; Thirty-First Session, UN GAOR, 59th sess, Supp No 38, UN Doc. A/59/38, (2004); Committee on the Elimination of Discriminations Against Women, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004

This section analyses whether existing norms and resolutions impose member states to assure gender parity over the composition of international courts.

Article 8 of the CEDAW is the starting point to highlight that states have duties to ensure gender equality in participation in international tribunals and bodies that play key role in international law. Using a due diligence formula which urges all States to use their best efforts and appropriate measures to improve the opportunities for women, it states:

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations¹⁸⁹.

With 189 States Party, the Convention represents a universal requirement. Women have the right to represent their own government and they should be part of the diplomatic bodies in parity. The report of the Advisory Committee of the Human Rights Council on “Current levels of representation of women in human rights organs and mechanisms: ensuring gender balance” (“Advisory Committee report”)¹⁹⁰, indeed, recommends that the Committee on the Elimination of All Forms of Discrimination against Women (‘CEDAW Committee’) engages in monitoring the implementation of the obligations arising out of Article 8 as a measure to ensure equal participation of women at the international level. Furthermore, it provides that the right to equal participation in

¹⁸⁹ United Nations. *Convention on the Elimination of All Forms of Discrimination against Women*. New York, 18 December 1979, art. 8

¹⁹⁰ United Nations General Assembly Human Rights Council, *Report on the current levels of representation of women in human rights organs and mechanisms: ensuring gender balance*, July 9th, 2021, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/111/46/PDF/G2111146.pdf?OpenElement>

international decision-making under Article 8 of CEDAW requires States to create objective criteria and processes for the appointment and promotion of women to relevant positions and the adoption of temporary special measures aimed at accelerating substantive equality for women¹⁹¹, as provided for in article 4 of the Convention on the Elimination of All Forms of Discrimination against Women. For instance, some of the measures that States should adopt include proactive measures in recruitment to international posts to address women candidates specifically and, where appropriate, to give women preference over male candidates, the establishment of goals and standards for the selection, recruitment and promotion of women and they should vote in a way consistent with the international treaty obligations of States¹⁹². Therefore, states must prevent both direct and indirect discrimination to ensure greater gender diversity on the bench and ‘take all appropriate measures’ to ensure gender-equal representation at the international level, including at courts¹⁹³.

Gender parity is a more recent interpretation of the right to gender equality¹⁹⁴, but essential to realize the latter, constituting principles of customary law. Therefore, states have a positive obligation of protecting equality under international law. Parity in the international judicial system means the inclusion of historically marginalized groups and requires a structural change to achieve this integration in order to promote political and social participation. As cited several times, existing Statutes of the international courts

¹⁹¹ Committee on the Elimination of Discriminations Against Women, General Recommendation No. 23: Political and Public Life, 1997, para. 43.

¹⁹² United Nations General Assembly Human Rights Council, *Report on the current levels of representation of women in human rights organs and mechanisms: ensuring gender balance*, July 9th, 2021, para. 28, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/111/46/PDF/G2111146.pdf?OpenElement>

¹⁹³ 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*. *Leiden Journal of International Law*, 2021, Vol. 34, p. 984

¹⁹⁴ Human Rights Council (HRC), Rep. of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, UN Doc. A/HRC/23/50, (19 April 2013)

consider geographical representations and occasionally are openly related to gender with the exception of the Rome Statute of the ICC¹⁹⁵. However, many resolutions at UN level, and also regional stage demand a greater representation of female international judges. For instance, in 2000 the United Nation Security Council (UNSC) presented parity as a right and stated that gender parity is a fundamental step towards equality calling for urgent need to achieve gender parity in UN staffing¹⁹⁶. The UN's gender parity commitment is included in numerous legal instruments, including the Beijing Platform¹⁹⁷, various UNSC Resolutions calling for women's equal participation in decision-making¹⁹⁸, and United Nations General Assembly (UNGA) Resolutions such as 33/143 calling upon member states to 'assist the United Nations' in increasing the proportion of women judges 'by nominating more women candidates' to positions¹⁹⁹. Among several resolutions, a recent one of the UNGA (2020), emphasizes that an independent and impartial judiciary, which foster a balanced representation of men and women and the establishment of gender-sensitive procedures, is essential for the effective protection of women's rights, including protection from violence and revictimization through court systems, to ensuring that the administration of justice is free from gender-based discrimination and stereotypes, and to a recognition that both men and women benefit when women are treated equally by the justice sector. In addition, it encourages states to promote diversity in the composition of the members of the judiciary, including considering a gender perspective and actively promoting the balanced representation of

¹⁹⁵ Article 36(8)(1)(iii) of the Rome Statute of the ICC that requires states to "[i]n the selection of judges, take into account the need, within the membership of the Court, for: [...] a fair representation of female and male judges";

¹⁹⁶ United Nations Strategy, System-Wide Strategy on Gender Parity, September 13th, 2017 available at www.un.int/sites/www.un.int/files/Permanent%20Missions/delegate/17-00102b_gender_strategy_report_13_sept_2017.pdf

¹⁹⁷ Statute of the International Court of Justice, San Francisco 1945, para 142 (b), available at <https://www.icj-cij.org/en/statute>

¹⁹⁸ SC Res. 1325, (20 October 2000); SC Res. 56/127 (30 January 2002); SC. Res. 1889, (5 October 2009).

¹⁹⁹ GA Res. 33/143, (10 December 1978).

women and men from various segments of society at all levels, and of persons belonging to minorities and other disadvantaged groups, and to ensure that the requirements for joining the judiciary and the selection process are non-discriminatory, public and transparent, and based on objective criteria, and guarantee the appointment of individuals of integrity and ability with appropriate training and qualifications in law, based on individual merit and under equal working conditions²⁰⁰.

Furthermore, The UN's System-Wide Strategy on Gender Parity, claims that the position of ICJ Judges might be classed as a senior level of leadership within the UN. Article 8 of the UN Charter implicates staffing at the ICJ particularly, as equal participation should occur 'in principal and subsidiary organs'²⁰¹. Decades of UN practice show the existence of a belief in gender parity in staffing as a legal requirement; as a result, it may be clear how the law of established practice transforms these repeated actions into binding rules of both conduct and result for both UN organs and UN member states²⁰².

Established practice falls within the rules of an international organization (IO). Indeed, the 2011 Draft Articles on the Responsibility of International Organizations²⁰³ reflects an understanding of IO established practice as a reference of binding rules for the IO and potentially its member states. Established practice is a binding, almost customary law of an International Organization, and may also serve as third source of IO law, changing the IO's constituent instruments²⁰⁴. As a consequence, the UN parity policy may bind states

²⁰⁰ GA Res. 44/9, (23 July 2020).

²⁰¹ Statute of the International Court of Justice, art.8

²⁰² 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*. Leiden Journal of International Law, 2021, Vol. 34, p. 988

²⁰³ International Law Commission, Draft Articles on the Responsibility of International Organizations, 2011, art. 2(b), available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf

²⁰⁴ C. PETERS, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin*. Goettingen J. Int'l L., 2011, Vol 3, p. 641, available at https://web.archive.org/web/20180410001824id_/http://www.gojil.eu/issues/32/32_article_peters.pdf

and UN organs, since the UN's established practice demonstrate that, within the UN, gender equality now requires gender parity. As Corsi (2021) suggests, an evolutive interpretation of article 9 of the ICJ Statute can represent a legal justification for gender equality on the bench of the ICJ. The text of article 9 is broad, and gives space to evolutive interpretation, as does its drafting history²⁰⁵. It states:

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured²⁰⁶.

For the understanding of Article 9's meaning is necessary a reference to the Charter. The accentuation on gender equality in the Charter is expressed in both the instrument's preamble and substantive terms, thus indicating that the UN as a whole represents them. Reinforced by article 8 of the Charter²⁰⁷, the United Nations "shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs"²⁰⁸. Here, the key clause is 'the representation of the main forms of civilization.. of the world'. The question is: who may provide such representation? According to Zimmermann et al. (2012), the reference to the 'main forms of civilization' was originally a means of allaying Great Power fears of their possible future exclusion from the bench. However, it cannot be a representation of

²⁰⁵ B. FASSBENDER, *The Representation of the "Main Forms of Civilization" and of "the Principal Legal Systems of the World" in the International Court of Justice*. *Unité et diversité du droit international/Unity and Diversity of International Law*. Brill Nijhoff, 2014, p. 584

²⁰⁶ Statute of the international court of justice, art. 9, available at <https://www.icj-cij.org/en/statute>

²⁰⁷ Charter of the United Nations, art. 8.

²⁰⁸ N. GROSSMAN, *Achieving sex-representative international court benches*. *American Journal of International Law*, 2016, Vol. 110, p. 87.

the main forms of civilization if half of the society is absent from the bench. Thus, the existence of a substantial gender imbalance on the ICJ's bench suggests that the requirement of representation is not being met²⁰⁹. At the UN level, the UNGA and the UNSC decide the final election of judges. Therefore, they have the possibility to create more gender parity on the bench, if female candidates are presented by member states. They may amend their rules of procedure according to article 21 of the Charter, that gives UNGA the capacity to adopt its own rules of procedure²¹⁰, as well as article 30 for UNSC²¹¹. For modifying the rule of procedure is needed an affirmative vote of at least nine UNSC members, according to article 27 of the Charter²¹². The establishment of the regional groups through a series of UNGA resolutions between 1957 and 1978 prove its power to amend voting procedures at the UN for the purpose of an equal representation²¹³. But as was for ECHR in 2004, member states might oppose to gender parity requirements. However, as this analysis points out, they are bound by fundamental human right of gender equality and are specifically required to create equal access to international decision-making. Therefore, when member states vote for appointments to international bodies, they cannot vote in a way that violates their international treaty obligations. Indeed, organ practice can both establish rules that bind member states and are indicative of state practice in favor of such rules²¹⁴. Each organ must, 'in the first place at

²⁰⁹ B. FASSBENDER, *The Representation of the "Main Forms of Civilization" and of "the Principal Legal Systems of the World" in the International Court of Justice*. *Unité et diversité du droit international/Unity and Diversity of International Law*. Brill Nijhoff, 2014. p. 593.

²¹⁰ Charter of the United Nations, art. 21; United Nations, Rules of Procedure of the General Assembly, XI-XVIII, UN Doc. A/520/Rev 15, (1985); United Nations Amendments to the Annex of the Rules of Procedure of the General Assembly, UN Doc. a/520/Rev15/Amend.1 and 2 (1991), August 21st, 1991; GA Res. 48/264 Annex II, July 29, 1994

²¹¹ Charter of the United Nations, art. 30.

²¹² Charter of the United Nations, art. 27; B. SIMMA, C. TOMUSCHAT, H. MOSLER AND A. RANDELZHOFFER, *Charter of the United Nations: A Commentary Supplement*, Oxford University Press, 2002, p. 426 D. B. GOLDBERG, *Equal Representation of Women through the Lens of Leadership and Organizational Culture Expert Group Meeting*. UN Women, EGM/2015/Report, 2015

²¹³ GA Resolution 1192 (1957); GA Resolution 1900 (1963); GA Resolution 33/138 (1978)

²¹⁴ K. DAUGIRDAS, *International organizations and the creation of customary international law*. *European Journal of International Law*, 2020, Vol. 31, p. 201-233.

least determine its own jurisdiction'²¹⁵. At first place, if the UNSC or UNGA were to modify their internal rules to assure gender parity on the bench, they would be supposed to have the competency to do this, and as above examined, they could have it, according to states practice. Nevertheless, if at national level no women are nominated, this advancement cannot find outcome to create more space for the election of female judges. As it is analyzed in section 2.4, there is no evidence of the lack of qualified female judges, which many times states have been used as justification for the presentation of merely male list of candidates. For instance, the analysis made by Hannel Vauchez of the CVs of women candidates put forth by states for appointment to the ECHR demonstrates both the presence of high qualified women and that states may overlook capable women candidates in judicial selection at national level²¹⁶. All in all, the main problem is how to persuade states to welcome structural changes and a greater representation of women on the bench. In this sense, efforts, such as those managed by GQUAL²¹⁷, the campaign for gender parity in international representation, or the one conducted by the International Association of Women Judges (IAWJ)²¹⁸, might play a crucial role in encouraging national governments to support gender parity on the bench.

Finally, the 2030 Agenda for Sustainable Development recognizes that gender equality is not only a fundamental human right, but also a necessary foundation for sustainable peace and development. In particular, goal 5.5 aims to “ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in

²¹⁵ International Court of Justice, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Certain Expenses)*, Advisory Opinion, 1962, p. 160, available at <https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf>.

²¹⁶ S. H. VAUCHEZ, *More women–But which women? The rule and the politics of gender balance at the European Court of human rights*. *European Journal of International Law*, 2015, Vol. 26, p. 214-220.

²¹⁷ About GQUAL, available at www.gqualcampaign.org/about-gqual/

²¹⁸ About IAWJ, available at <https://www.iawj.org>

political, economic and public life²¹⁹”, and Goal 16 addresses the global responsibility we have to gender equality and women’s representation in public institutions such as the judiciary, striving to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”²²⁰.

In conclusion, according to CEDAW Committee, states have obligations at international level to ensure gender equality in all aspects of public life, including the judiciary. They should remove barriers to women’s participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers in justice related services. Take steps, including temporary special measures, to ensure that women are equally represented in the judiciary and other law implementation mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal officials and expert practitioners, as well as in other professional capacities²²¹.

²¹⁹ UN Sustainable Development Goals, Goal 5.5. Available at <https://sdgs.un.org/goals/goal5>

²²⁰ UN Sustainable Development Goals, Goal 16. Available at <https://sdgs.un.org/goals/goal16>

²²¹ Committee on the Elimination of Discriminations Against Women, General Recommendation No. 33 on women’s access to justice, August 3rd, 2015, para. 15(f)

CHAPTER 3: THE CHALLENGING PATH FOR AFGHAN FEMALE JUDGES

1. Premise

The international commitment in Afghanistan after 2001, created an opportunity to improve human rights, in particular those of women and girls, after years of Taliban autocratic politics and ideology. Significant advancement in legal protections have been made through the adoption of new and revised laws, and the training of female lawyers, prosecutors and judges. The 2004 Afghan Constitution and reforms, such as the 2009 Elimination of Violence against Women (EVAW) law, which mandates punishments for 22 acts of violence against women, including rape and requires the government to take specific actions to prevent violence and assist victims²²², represent an important development in the recognition of women's rights, among them the right to education, employment and participation and access to justice. This constitutes a salient phase, where the figure of judge (qazi) has been relevant for structural changes in the field of state justice. In the framework of post 2001 Afghanistan legal reconstruction, the most significant increase of female judges occurred. As of 2020 there were between 250 and 300 female judges in the country, most of them in Kabul, comprising approximately 10 percent of the judiciary as a whole²²³. However, despite these improvements, the majority of them have been appointed for specialized courts, such as the juvenile courts and family courts, and very few work for other specialized courts, such as the primary commercial courts and counter-narcotics divisions²²⁴. It is really rare to find women working in high

²²² T. WIMPELMANN, *The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan*. University of California Press, 2017, p. 51-82

²²³ A. DE LAURI, *Women Judges in Afghanistan: An Interview with Anisa Rasooli*. CMI Insight, 2020, available at <https://www.cmi.no/publications/7268-women-judges-in-afghanistan-an-interview-with-anisa-rasooli>

²²⁴ *ibid*

positions in the Courts, or in the Supreme Court. Working as a female judge in Afghanistan is very challenging, especially due to cultural and religious ideology that see women as subjected to male dominance and the high rate of corruption, which makes the process of appointing women nontransparent. If the path of female Afghan judges is difficult within the country, it is impossible for them to have a judicial career at international level, since Afghanistan would never nominate a woman as candidate for international judges' vacancies. Unless they are committed to international treaties, they do not entirely apply and implement international norms, as well as fundamental rights and values recognized by the international community. Anyway, the improvements have been made in last 20 years, have vanished when US troops withdrew from the country and the Taliban took the power in September 2021. Female conditions dramatically worsened: now women are in danger, threatened and locked into their house. Deprived of their rights, they cannot get out of their home, neither for shopping or for school, since Taliban deny education to women and girls. Female judges have lost their job and as well as activists, they live in a state of perpetual fear that they or their loved ones could be tracked down and killed, because they defended abused women or pursued cases against men accused of beating, kidnapping or raping women and girls²²⁵.

This chapter explores the current situation of female judges in Afghanistan, forced to leave after the Taliban invasion in August 2021, starting from an historical background, since the post war 2001 reconstruction. The section aims at analyzing how female judges are essential for improvement of women's rights and at the same time, how the cultural background and history have made the appointment of female judges both at national

²²⁵ D. ZUCCHINO, *Afghan Women Who Once Presided Over Abuse Cases Now Fear for Their Lives*, The New York Times, October, 2021, available at: <https://www.nytimes.com/2021/10/21/world/asia/afghan-judges-women-taliban.html>

and international level so challenging, with the worsening future perspective under Taliban rules.

2. Historical background

2.1 Post-war 2001 legal reconstruction in Afghanistan

After 2001, the international reconstruction in Afghanistan created the space for the advancement of human rights, especially the recognition of women's rights. The process of democratization of the country led to the draft of a new Afghan Constitution in 2003, the first since 1964. The new Constitution entered into force in 2004 and served as the legal basis of the Islamic Republic of Afghanistan until 2021²²⁶. The document represents a fundamental development for the establishment of democratic principles within the country, for which the government recognizes essential human rights.

Article 6 states:

The state shall be obligated to create a prosperous and progressive society based on social justice, preservation of human dignity, protection of human rights, realization of democracy, attainment of national unity as well as equality between all peoples and tribes and balance development of all areas of the country²²⁷.

²²⁶ B. SHAH, *The constitution process in Afghanistan. Strategic Studies*, 2004, Vol. 24, p. 91-109, available at <http://www.jstor.org/stable/45242497>

²²⁷ Enforced Constitution of Afghanistan 2004, article 6. Available at: <https://moj.gov.af/en/enforced-constitution-afghanistan>

The constitution entails equal rights and non-discrimination, according to article 22, endorsing the prohibition of distinction and discrimination between citizens and recognizing the equality of women and men before the law. Article 44 requires the state to “devise and implement effective programs to create and foster balanced education for women, improve education of nomads as well as eliminate illiteracy in the country”²²⁸, so that the government acknowledges education rights and engages to create a balanced education system for women. A key foundation for the advancement of women’s employment rights, is primarily the recognition of work as a right of every Afghan²²⁹, and article 50 related to the right of participation, which obliges the state to recruit Afghan citizens “on the basis of ability, without any discrimination, according to the provisions of the law”²³⁰. Indeed, for what it concerns the judiciary, according to article 117, the Supreme Court, the highest judicial body heading the judiciary in the state, is composed by nine members, who have to be appointed by the President and with the endorsement of the House of People and with the observation of article 50 as well as article 118 of the Constitution, which contains the qualifications for the judge. Furthermore, in accordance with article 116²³¹ and 123²³² of the Constitution, for the purpose of managing the affairs related to the organization of the judiciary, duties and powers of the Supreme Court, a law on organization and jurisdiction of courts of the Islamic republic of Afghanistan was

²²⁸ Enforced Constitution of Afghanistan 2004, article 44. Available at: <https://moj.gov.af/en/enforced-constitution-afghanistan>

²²⁹ Enforced Constitution of Afghanistan 2004, article 48. Available at: <https://moj.gov.af/en/enforced-constitution-afghanistan>

²³⁰ Enforced Constitution of Afghanistan 2004, article 50. Available at: <https://moj.gov.af/en/enforced-constitution-afghanistan>

²³¹ “The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan. The judiciary shall be comprised of one Supreme Court, Courts of Appeal as well as Primary Courts whose organization and authority shall be regulated by law. The Supreme Court shall be the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan”. Enforced Constitution of Afghanistan 2004, article 116. Available at: <https://moj.gov.af/en/enforced-constitution-afghanistan>.

²³² “With respect to the provisions of this Constitution, statutes related to the formation, authority, as well as proceedings of courts and matters related to judges, shall be regulated by law”. Enforced Constitution of Afghanistan 2004, article 123. Available at: <https://moj.gov.af/en/enforced-constitution-afghanistan>.

implemented. In the section about the requirement for the Court's composition, under article 60, the appointment transfer, upgrading, retirement, extension of the appointments' duration, offering approval, and accepting the resignation of judges from Grade 1 and above have to be made upon the recommendation of the Supreme Court with the approval of the President²³³. In this way the Afghan government committed itself to elect judges for their abilities and experiences, without considering the gender of applicants. Unfortunately, despite positive developments that see an increase in the number of women Afghan judges from zero in 2001 up to 250 in 2021, making up 10% of the country's judiciary, the situation is still sad due to the high level of corruption, for which the Court itself barely propose female candidates. And this is even more evident at international level, although Afghanistan is a member of the United Nations and as such, it should fulfill all UN resolutions and implement them. As stated in article 7 of the Afghan Constitution about the status of international law, the state is required to "observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights"²³⁴. Among the international treaties Afghanistan have ratified, it is important to mention the UN International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights ratified in 1983 and the CEDAW in 2003²³⁵. Since it still has to sign the Optional Protocols of most of the Conventions, individual complaint cannot be filled, and this is a limitation because the agreements only establish the procedure and not the complaint; however, the Afghan government shall fulfil his duties

²³³ CHECCHI, *Law on organization and jurisdiction of courts of the Islamic republic of Afghanistan*, May 21st, 2005, article 60, chapter 5, p. 15. Official Gazette No. 851 Published 31 Sawar 1384.

²³⁴ Enforced Constitution of Afghanistan 2004, article 7. Available at: <https://moj.gov.af/en/enforced-constitution-afghanistan>.

²³⁵ UN Treaty Body Database. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx

within the international community and respect the fundamental rights that are universally accepted. What's more, the world has recognized the exclusion of women from the political, social, economic life of each country as a threat to international peace and security when the U.N. Security Council passed Resolution 1325 on Women, Peace and Security in October 2000²³⁶, which should result in more women participation in decision-making, including in the role of the international judge. However, empowered by this agenda, women around the world, in partnership with the international community, have achieved remarkable progress in some of the most conflict-ridden corners of the world, such as Afghanistan. The implementation of the agenda has been difficult for cultural and environmental conditions; the cultural stripping is always difficult to overcome, especially when one is in the midst of a conflict, but in these last years Afghan leaders have started to be aware of the importance of women in the country's development. With the fall of Afghan government and the horrible setbacks due to the Taliban takeover and the power in their hands, this agenda is now at a crossroads²³⁷.

For 20 years, significant improvements in legal protection have been the result of the structural change within the judiciary since 2001 through the adoption of new laws and the establishment of reforms, such as the EVAW law, ordered by then-President Hamid Karzai in 2009 and reconfirmed by President Ashraf Ghani in 2018²³⁸. This law considers 22 acts of abuse toward women as criminal offenses, including battery, rape, forced marriage, preventing women from acquiring property, and criminalizes women's civil

²³⁶ United Nations Security Council Resolution, S/RES/1325 (2000), October 13th, 2000

²³⁷ The International Association of Women Judges (IAWJ), Women Judges, and Women at Risk, Remain in Afghanistan, March 10th, 2022, available at: https://www.iawj.org/content.aspx?page_id=5&club_id=882224&item_id=74039

²³⁸ Human Rights Watch, I Thought Our Life Might Get Better: Implementing Afghanistan's Elimination of Violence against Women Law, 2021, available at <https://www.hrw.org/report/2021/08/05/i-thought-our-life-might-get-better/implementing-afghanistans-elimination>

rights, interim prohibiting a woman or girl from going to school or work and also it requires the government to take specific actions to prevent violence and assist victims²³⁹. Basing on the EAW framework, according to article 7, the victim of violence or her relative in her behalf, can bring a complaint to the Ministry of Women's Affairs, civil law departments, the police, or the EAW unit in the local prosecutor's office²⁴⁰. According to the report of Human Rights Watch (2021), the Ministry of Women's Affairs has registered the majority of cases filed, representing an important advancement in women's right access to justice. Despite these gains, the system still remains corrupted, since police officers discourage women from filing a case and pressure her to go home and reconcile with her partner. In most of the cases women cannot have a lawyer, since the EAW law provides that prosecution of most crimes must be based on a complaint that the victim, her family, or her attorney files, and the case cannot proceed and is dropped if a complaint is withdrawn²⁴¹. Policemen and prosecutors in many areas of Afghanistan still do not know the law or ignore it on purpose. The main problem for the correct implementation of the EAW law is that Afghanistan's legal system is manifold, and the legal framework includes the old 1976²⁴² and new 2018²⁴³ penal code, the 2004 Constitution and the Sharia law²⁴⁴, being often contradictory. This is linked with the high rate of corruption at

²³⁹ T. WIMPELMANN, *The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan*. University of California Press, 2017, p. 51-82

²⁴⁰ Islamic republic of Afghanistan Ministry of Justice, Law on Elimination of Violence against Women (EAW), August 1st, 2009, art. 7, available at <https://www.refworld.org/pdfid/5486d1a34.pdf>

²⁴¹ Islamic republic of Afghanistan Ministry of Justice, Law on Elimination of Violence against Women (EAW), August 1st, 2009, art. 39, available at <https://www.refworld.org/pdfid/5486d1a34.pdf>

²⁴² International Committee of the Red Cross, Afghanistan Penal Code, September 22th, 1976, available at [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/cca31567c689b4aec12571140033a15e/\\$FILE/Penal%20Code%201976.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/cca31567c689b4aec12571140033a15e/$FILE/Penal%20Code%201976.pdf)

²⁴³ It was adopted in 2017 and entered into force in 2018. Official Gazette Nr 1260, (15th May 2017). See <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=598034855221CE85C12582480054D831&action=op>

²⁴⁴ Known as the "Islamic law", it is not a written text, but it is a series of wide-ranging ethical and moral principles, which for the faithful Muslim are fundamental and immutable. Sharia is Islam's legal system and derived from the Quran, Islam's holy book, as well as the Sunnah and Hadith - the deeds and sayings of the Prophet Muhammad. For more information see <https://www.bbc.com/news/world-27307249>

national level and with social and cultural norms in the country, which consider violence against women as a private family issue or something that should not come out, and given that, women do not often report sexual assaults and other forms of violence. However, despite its limitations and flawed implementation, the EVAW law represents a significant legislative tool for fighting discrimination and violence against women and girls in Afghanistan. Indeed, the Afghan government established specialized police divisions called “Family Response Units,” prosecution offices, and special courts with female judges to support the law’s application²⁴⁵. Since the law was adopted and mechanisms for process complaint were implemented, the registration of cases of violence has raised²⁴⁶. The Afghanistan Independent Human Rights Commission reported an 8.4 percent growth in registered cases of violence against women from 2018 to 2019²⁴⁷. Prosecutors and judges are now better trained, so that they increasingly accept hearings from victims of abuses. As a result, women access to justice has improved, since women feel to have the chance to have their rights recognized and their voice heard.

Obviously, now, with the Taliban authorities leading the country, all the gains of last 20 years have been jeopardized, and all the improvements in the legal system are going to be nullified, especially laws and resolutions regarding women’s rights.

²⁴⁵ J. FOTI, J. HICKLE and M. JWEIED, *Access to Justice*, Open Government Partnership, 2019, available at <https://www.opengovpartnership.org/wp-content/uploads/2019/09/Justice-Policy-Series-Access-to-Justice.pdf>

²⁴⁶ Afghanistan Independent Human Rights Commission, Report Summary: Violence against Women in Afghanistan, November 23, 2019, available at https://www.aihrc.org.af/home/research_report/8670.

²⁴⁷ Of the 4,693 EVAW cases registered at the AIHRC in 2019, 1,435 (30.6%) were physical violence, 194 (4.1%) were sexual violence, 1,783 (38.0%) were verbal and psychological violence, 844 (18.0%) were economic violence, and 437 (9.3%) were other incidents of violence against women such as denial of the right to marriage, forced marriage, and the denial of the right to education and health services. Afghanistan Independent Human Rights Commission, “Report Summary: Violence against Women in Afghanistan,” March 23, 2020, available at https://www.aihrc.org.af/home/research_report/8803

2.2 The underrepresentation of female Afghan judges: which are the causes?

When in power for the first time, the Taliban enforced their extreme fundamentalist ideologies by removing women from all public life. Indeed, women serving as judges over men was unthinkable. However, the post-war reconstruction guided by the US, the EU, the UN, Japan, and several international humanitarian organizations had a huge push towards the improvement of women's rights and empowerment.

Indeed, as anticipated, the figure of the Judge in Afghanistan has assumed a relevant role in the post-2001 reconstruction of the legal system towards a democratization of the country. In fact, a structural change in the sphere of state justice, through rebuilding tribunals, codifying laws, such as the new Constitution and the new Criminal Procedural Code in 2004, and training judges has strengthened the influence of female judges.

According to article 116 of the 2004 Constitution, the judiciary is an independent organ of the state of the Islamic Republic of Afghanistan, comprised of one Supreme Court, Courts of Appeal as well as Primary Courts. The Supreme Court is the highest judicial organ, heading the judicial power of Afghanistan, and is constituted by nine members, appointed by the Afghan president, and approved by the House of People²⁴⁸. In last 20 years the country has experienced the major increase of women working in the judicial system, even if they are specifically working in specialized courts, juvenile and family courts, and very few in the commercial or anti-drug departments, as well as in highest courts of the country²⁴⁹. As it is well-established, Afghanistan is a male-dominated

²⁴⁸ Enforced constitution of Afghanistan, 2004. Article 116, <https://moj.gov.af/en/enforced-constitution-afghanistan>.

²⁴⁹ A. DE LAURI, *Women Judges in Afghanistan: An Interview with Anisa Rasooli*. CMI Insight, 2020, available at <https://www.cmi.no/publications/7268-women-judges-in-afghanistan-an-interview-with-anisa-rasooli>

society, traditionally against women's empowerment, and therefore becoming a judge for a woman is really challenging, but with the developments occurred in the country until the Taliban takeover, judges faced fewer problems than in the past. Of course, being a female judge is still very demanding, especially outside Kabul, in provinces where it is dangerous to work as a female judge. However, the presence of female judges in those insecure provinces is crucial, since it is especially in those contexts that women have less access to justice and the presence of female judges can encourage women to approach and trust the courts. In most of these insecure provinces, customary norms are the only legal rule, so people do not go to court. Current and previous female Afghan judges brought some reforms to many courts, particularly in urban areas, delivering justice to a growing number of women and girls mistreated and abused by husbands or male relatives²⁵⁰. They confronted a legal system which benefits husbands, giving Afghan wives, who before would have been forced to stay in abusive marriages, the possibility to divorce. Therefore, they defended oppressed women or pursue cases against men, accusing of beating, raping, and kidnapping women and girls. This has incredibly enhanced the number of women presenting their cases in front of a court, since they could have their voice heard, and they are not discouraged from a male overrepresentation of the bench, that would not properly listen to her demands. To sum up, female representation in the judicial system is essential to make independent judicial institutions more responsive, inclusive, and participatory at all levels. In this way judicial legitimacy can be improved and the public trust strengthened, making women victims of abuse, violence or discrimination more incentivized to go in front of the court, asking for their rights to be respected.

²⁵⁰ D. ZUCCHINO, *Afghan Women Who Once Presided Over Abuse Cases Now Fear for Their Lives*, The New York Times, October, 2021, available at: <https://www.nytimes.com/2021/10/21/world/asia/afghan-judges-women-taliban.html>

Anyway, despite the positive developments towards women's emancipation and an increase in the representation of female judges, the level of corruption that characterizes the country is very high and this prevents the appointment of female judges in the highest national courts, but especially abroad. This is even more difficult as Afghan culture prohibits women from leaving the country, if not even the province of residence itself. Thus, the nomination process is not clear and transparent, and although the number of qualified women for the position of international judge has considerably increased, they are not taken into account when proposing the national candidate list.

Judge Anisa Rasooli, the first woman ever in Afghanistan to be appointed as a candidate to the Supreme Court, explained that the Afghan government signed different international conventions concerning women's rights and as a UN member, it must be expected to respect the UN resolutions related to the improvement of women's condition, but if these treaties will not effectively be implemented, the situation would never change²⁵¹.

Moreover, women are discouraged to follow the judicial career path due to corruption, for which people have developed mistrust about the judiciary in Afghanistan, and because of fear for their personal security. Being a female judge is really dangerous, they received death threats daily, especially from men who have been sentenced and judged guilty of rape or mistreatment. In Anisa Rasooli words:

In my case, my position makes it even more difficult since, as the head of the Court of Appeal for Serious Crimes of Corruption, I have to deal with major criminals and corrupt individuals. So the main challenge for me now is my

²⁵¹ Supranote 230.

personal security. Consider, for instance, that I currently investigate crimes in which there are huge amounts of money and land at stake, so we are basically investigating crimes that are committed by dangerous major criminals, and this in itself demands a certain dose of courage and commitment²⁵².

One of the main challenges for female judge is, therefore, to find the courage to undertake the judicial career, being aware of the security threat. Indeed, even before the Taliban took the control of the country, female judges and lawyers were many times threatened or attacked. In January 2021, two female judges on the Afghan Supreme Court were shot and killed on their way to fulfil their official judicial responsibility in Kabul²⁵³. It is clear how threats against women continue, challenging the rule of law and the participation of women in the judiciary. These attacks on women are a way to confine the role of women within the society, notwithstanding the Afghan government has recognized women's rights to work and participation both at national and international level. One of the problems is that male judges and policemen often do not accept reforms to the justice system. According to a Human Rights Watch Report, the Elimination of Violence against Women law have been repeatedly sabotaged by male officials²⁵⁴. As a result, this resistance discourages women to enter in the judicial system, but also victims of violence to go in front of the court and bring their case.

In conclusion, the corruptive system that is still present in the country, together with the cultural tradition that see women as subjected to male dominance and constrained to stay

²⁵² *ibid*

²⁵³ V. RUIZ AND P. WHALEN, *Afghanistan Resolution*. IAWJ, 2021, available at <https://www.iawj2021auckland.com/assets/Afghanistan%20resolution.pdf>

²⁵⁴ D. ZUCCHINO, *Afghan Women Who Once Presided Over Abuse Cases Now Fear for Their Lives*, *The New York Times*, October, 2021, available at: <https://www.nytimes.com/2021/10/21/world/asia/afghan-judges-women-taliban.html>

at home without actively participating in country's social and political life, hamper women's application for the position of judge, limiting their representation in the judiciary. To face this situation, lots of civil and international organizations, such as the International Association of Women Judges (IAWJ) urgently call on Afghan authorities and the international community to assure the security of women in the Afghan judicial system to permit women to feel free to start a career as a judge. The female judges of Afghanistan are committed to carry out their judicial responsibilities. They are essential to the protection of human rights and advancement of access to justice for women and girls in Afghanistan. There is a risk that the world will become paralyzed or ignore women judges, and their current condition under Taliban's rule is even worse and alarming.

2.3 The Taliban's threat

Initially, the Taliban arrived in Afghanistan in 1994, declaring that their aim was to purify the society and defeat the corrupt Mujahidin groups that have created chaos and civil war in the country, with the establishment of the "Islamic Emirate of Afghanistan- IEoA"²⁵⁵. This radical regime, that brutally discriminated women and persecuted non-Muslim groups, had no precedence in the history of Afghanistan. After the terrorist attack of 11 September 2001, the US overthrown the Taliban in October²⁵⁶ and in December a new democratic government was agreed by Taliban's opponents. The exclusion of Taliban from the establishment of this new system led to their rebirth around 2003 and after more than fifteen years of rebellions, they entered into peace negotiations with the US in

²⁵⁵ F. KUEHN, *Taliban history of war and peace in Afghanistan. International Review of Peace Initiatives*, 2018, p. 35-40; Nojumi, N. (2009). *The Rise and Fall of Taliban*. In R. D. CREWS and A. TARZI, *The Taliban and the crisis of Afghanistan*. Harvard University Press, 2009, p. 90-117.

²⁵⁶ I. G. KHAN, *Afghanistan: Human cost of armed conflict since the Soviet invasion*. *Journal of International Affairs*, 2012, Vol. 17, p. 209-224

late 2018, whose outcome was the peace process agreement signed on February 2020²⁵⁷. In August 2021 they invaded Afghanistan and took the power, creating an autocracy that deprive especially women of fundamental rights, demolishing all the advancements that have been made in last 20 years of Afghan government. After they took the control, The Taliban have demolished the political and legal order, ruled by the 2004 Afghan Constitution. But Afghanistan's de facto new rulers still have to create an alternative for the constitutional order they have rejected. The legal basis of Taliban's authority, remains, indeed, unknown. In fact, the Taliban have just increased the uncertainty which characterized their constitutional view making incoherent declarations about the legal order they want to implement in Afghanistan. They are particularly vague and ambivalent when it comes to the future of 2004 Constitution or to drafting a new fundamental charter²⁵⁸. For instance, in September 2021 they have publicly declared that they would have adopted the Constitution of 1964 temporary, however the 2004 Constitution is still available on the website of the Ministry of Justice, labeled as Afghanistan's "enforced constitution". Moreover, the Taliban have pushed in many places to refuse the values and rules written in both 1964 and 2004 Constitution. They have never hidden their hatred towards 2004 Constitution, denouncing the document as a foreign imposition. Therefore, it has been asking what the Taliban constitutional plan is since the real Taliban constitution is not yet codified in any official text. It can be found explicitly or implicitly

²⁵⁷ The US State Department, Agreement for Bringing Peace to Afghanistan, February 29th, 2020, available at <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>; E. GRAHAM-HARRISON, Afghan peace talks with Taliban begin in Doha with rocky path ahead. The Guardian, September 12th, 2020 available at: <https://www.theguardian.com/world/2020/sep/12/afghan-peace-talks-with-taliban-begin-in-doha-with-rocky-path-ahead>

²⁵⁸ S. PASARLAY, *Dead or Alive? The Taliban and the Conundrum of Afghanistan's 2004 Constitution*. Int'l J. Const. L. Blog, March 23, 2022, available at: <http://www.iconnectblog.com/2022/03/dead-or-alive-the-taliban-and-the-conundrum-of-afghanistans-2004-constitution/>

in other documents, including 1998 dastur (Charter)²⁵⁹, which were emitted when the Taliban ruled for the first time in the mid 90s. It can be spoken about an autocratic “unwritten constitution”, which can be extrapolated from a series of laws that specify the great discretionary power of the Taliban’s head of the state. First, the Taliban have restabilized the “Islamic Emirate”, which according to 1998 Charter, is centralized and autocratic, and have adopted laws of the mid 90s, which establish the structure of the executive power and the Ministers’ draft law.

Hanafi Fiqh²⁶⁰ is the supreme law of the land, according to which each state law must be based on. While the previous Afghan state rules do not require that the laws were coherent with the decisions of Hanafi Fiqh but that respected the “basics of Islam”, the Taliban government have reanimated the supremacy of Hanafi and established a new Committee, composed only by Hanafi jurists, to examine all the laws of the Republic of Afghanistan provided that they are coherent with the norms of shari’a (God’s commands)²⁶¹, but also with the injunctions of the Hanafi Fiqh. As long as the procedure is not concluded, the Hanafi law remains in force²⁶².

²⁵⁹ Dastur Emarat Islami Afghanistan. It was a draft constitution created by the Council of Ulema of Afghanistan at the decree of Mullah Omar in 1998. However, the constitution was never ratified. For more information <https://responsiblestatecraft.org/2021/07/09/can-the-afghan-government-draft-a-new-constitution-with-the-taliban/>

²⁶⁰ Hanafi fiqh is the Islamic law as defined over centuries by the scholars associated with the Hanafi school of law. C. S. WARREN, *The Hanafi School*. Oxford University Press, 2013

²⁶¹ It is the sacred law of Islam, based mainly on the Koran and on custom, which collects rules of different character, among which those concerning cult and ritual obligations are separated from those of legal and political nature; the provisions governing the conduct of the holy war belong to the latter group. Treccani, <https://www.treccani.it/vocabolario/sharia/>. As God’s direct revelation, it remains absolute and indisputable by humans. the Fiqh, the islamic law, represents the concrete effort exerted to identify the Law of God.

²⁶² For more information about the “unwritten constitution” see S. PASARLAY, *Afghanistan’s Unwritten Constitution under the Taliban*, Int’l J. Const. L. Blog, March 17, 2022, available at: <http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/>

2.3.1 The Taliban's attitude towards women

According to their dominant patriarchal mentality and understanding of Sharia, the Taliban's attitude towards women have been strictly horrible. Apart from the prohibition of women's presence in public, they impeded women to go to school and work²⁶³ and if caught teaching or leaving home for educational purpose, they were beaten with lashes²⁶⁴. After 2001, when they reemerged in 2003, they took an even more violent stance against women's education. They developed codes of conducts, named Layha and campaigned against girls' education by posting warning letters on people's house or mosque doors at night, threatening parents to stop sending their daughters to schools. Those who ignored these letters were physically attacked with acid, murdered, injured. But in 2006 Layha, for the first time, instructed to stop brutal attacks, marking a turning point for the Taliban's public relations and communications because they began a softer position towards women's rights. Despite of this, the number of attacks against girl schools remain high.

Practically Layha, whose key provisions continue to guide Taliban's attitude on women's rights to education, says:

1. Women at schools and universities should always be covered with an Islamic Hijab and can only be taught by female teachers.
2. Any subjects that are against Jihad and "women's role in society" as defined by the Taliban, will be curtailed.

²⁶³ With the exception of medical staff in some rare cases with strict conditions. M. KEATING, Women's rights and wrongs. *The World Today*, 1997, Vol. 53.1, p. 11-12

²⁶⁴ F. YOUSUFI, *The Prospect of Women's Rights in the Post-Taliban-Government Peace Agreement*, *Journal of International Women's Studies*, 2021, Vol. 22, p. 1-18, available at <https://vc.bridgew.edu/jiws/vol22/iss9/1>

3. The focus of classes must be Islamic subjects such as the Holy Quran, Fiqh, Aqaid, Hadiths, and the Arabic language.
4. Girls who are attending co-education will be killed after two warnings.
5. Teachers who talk about the equal rights of men and women will be killed after two warnings²⁶⁵.

Like education, the prohibition of women's access to work was among the first actions taken by Taliban in 1996²⁶⁶. Hence, many women, in particular those who had lost their male family members, were forced to become street beggars or prostitutes to feed their families²⁶⁷. According to Layha provisions:

2. Women are not allowed to work within the Afghan government or military institutions.
3. If women talk to and shake hands with non-Mahram males in the workplace, their hands will be cut off.
4. Women can only seek treatment from female doctors.
5. A woman who disobeys these rules will be beaten by her husband, father, or brother in front of the Taliban²⁶⁸.

This extreme attitude towards women continued to be imposed. For instance, a female teacher was sent a letter in October 2009 affirming: "we warn you to leave your job as a

²⁶⁵ Afghanistan Public Policy Research Organisation (2015). Women's rights, Taliban and reconciliation: An overview. <http://appro.org.af/wp-content/uploads/2017/03/292589038-2015-11-11-Women-s-Rights-Taliban-And-Reconciliation-An-Overview.pdf>. Accessed 21 May 2022.

²⁶⁶ M. KEATING, *Women's rights and wrongs. The World Today*, 1997, Vol. 53.1, p. 12

²⁶⁷ ICG-International Crisis Group. Women and Conflict in Afghanistan. Asia Report N°252, 2013, available at <https://www.refworld.org/pdfid/525e78184.pdf>

²⁶⁸ Supranote 215.

teacher...otherwise we will cut the heads of your children and we shall set fire to your house"²⁶⁹. When these kinds of threats were ignored by women, they were often killed.

When Taliban entered in the city of Kabul on 15 August 2011, it was clear from that moment that life for women and girls in Afghanistan would change. Since they took the power, a cabinet has been appointed with no women. Deputy Ministers were appointed and, again, no women were included. The Ministry for Women's Affairs has been abolished. In some provinces, women were forced to quit their job and not to leave home without a male relative. Protection centers for women have been attacked, and people working there have been assaulted. Property have been confiscated and they make reprisal against female leaders, who are not able to operate inside anymore. This was even more dramatic for female judges, who were threatened and forced to leave the country, since their life is in danger. Before the Taliban takeover, more than 270 female judges have worked in the Afghanistan's corrupt, male-dominated justice system. Specialized Courts with female judges, together with special police units have been created in many places to handle cases of violence against women²⁷⁰. Afghan women have been at the forefront of fighting for their rights for centuries, and now they are having their rights, once again, negated.

The attitude of the Taliban towards women, characterized by a totalitarian and exclusionary regime, negate all the progress and gains of the last 20 years, including gender equality, rights of the minority, and a democratic regime²⁷¹.

²⁶⁹ Human Rights Watch, The "Ten-Dollar Talib" and Women's Rights: Afghan Women and Risk of Reintegration and Reconciliation, 2010, available at <https://www.hrw.org/report/2010/07/13/ten-dollar-talib-and-womens-rights/afghan-women-and-risks-reintegration-and>

²⁷⁰ A. DAVIDIAN, *Expert's take: Gender equality is critical for Afghanistan's future, long-term development, and sustained peace*. UN Women, 2021, available at <https://www.unwomen.org/en/news/stories/2021/10/experts-take-gender-equality-is-critical-for-the-afghanistans-future>

²⁷¹ Tolonews, Habiba Sarabi Discusses Doha Talks. Tolonews, October 1st, 2020, available at https://www.youtube.com/watch?v=r_iSqwGusj8. Accessed 3 March 2022

Despite an apparent softening of their strict ideology, the Taliban do not seem willing to compromise, to allow women to have an education under current conditions in government-controlled territories. Their strategy is indeed to invalidate many national and international legal frameworks supporting women's rights such as the Convention on the Elimination of all Form of Discrimination Against Women. Similarly, it is likely that the provisions made by the Afghan constitution granting equal rights to men and women and other minority groups (including Elimination of Violence Against Women Law which criminalizes 22 acts of violence against women) will be amended or nullified to satisfy the Taliban's view²⁷².

3. What women are now fearing

Over ten months women's fundamental rights have been drastically rote back. What we are hearing and seeing from Afghan women and girls is fear. Women remember how life under Taliban rule was in the mid 90s and that fear has been intensified by the fact that the Taliban do not have clear stances about their positions on women's rights. The Taliban fired women from most government duties. They developed new guidelines very hard and almost impossible for many universities on how women could attend a university, requiring strict gender segregation. They also forbidden women to play sports and they destroyed the legal system that protected women from violence, replacing the Ministry of Women's Affairs with a harsh Ministry of Vice and Virtue, and moreover, they made it harder for women to have access to health care²⁷³. Activists, human rights

²⁷² F. YOUSUFI, *The Prospect of Women's Rights in the Post-Taliban-Government Peace Agreement*, *Journal of International Women's Studies*, 2021, Vol. 22, p. 1-18, available at <https://vc.bridgew.edu/jiws/vol22/iss9/1>

²⁷³ H. BARR, *No stability and Peace without protecting women and girls*. Human Rights Watch. Friedrich Naumann Foundation, 2021, available at <https://www.hrw.org/news/2021/10/12/no-stability-and-peace-without-protecting-women-and-girls>

defenders, journalists, female judges have been arrested or disappeared. Now, women's condition in Afghanistan is really worrying. They are stuck in their house; they cannot go to school, and they can only step out of their house if accompanied by male representative. They are terrified and abused out of their home. At policy and institutional level there is no women representation, since women who have played a central role in the transformation of the society are now hiding because of security threat. Women's rights activists, as well as female judges, have made important progress around the world in the 20 years since the Taliban were previously in power, from 1996 to 2001. These advances make the Taliban's violations of the rights of women and girls even more cruel and intolerable than they were in 2001, since Afghanistan is committed to protect human rights.

3.1 The impact on female judges and the judiciary

According to Najla Ayoubi, chief of global programs at Every Woman Treaty and a former Afghan judge²⁷⁴, the main drawback with Taliban's leadership of the country is the lack of a legal system and institutions; as anticipated above, there are no mechanisms for ensuring the rule of law and its implementation, so, no one knows which legal framework are following the Taliban²⁷⁵.

Female Afghan judges, who were the strong defenders of the law, seeking justice for their country's most marginalized. They have worked a lot to uphold the country's former laws which aim to support women and advocated for the idea that violence against women is a punishable criminal offence. But now they left the courts under Taliban pressure,

²⁷⁴ Every Women Treaty. Available at: <https://everywoman.org/who-we-are/najla-ayoubi/>

²⁷⁵ UN. Conference: Upholding Women's Rights in Afghanistan: An Urgent Moment for UNAMA Renewal, March 15th, 2022, available at <https://media.un.org/en/asset/k1v/k1v2y6tktt>

suddenly cancelling one of the most important achievements since 2001. More than 250 female judges are hiding or escaping, fearing to be punished under Taliban rule²⁷⁶. These women judged hundreds of men for violence against women, including rape, murder and torture, but also, they ruled in cases concerning custody and divorce; they are indeed public figures. Therefore, when the Taliban took the power and thousands of criminals were released from prison, dead threats increased shortly, through text messages and phone calls by unknown numbers.

Women judges have been harassed in different ways, through intimidation, being repeatedly bushed at home, and having their bank accounts frozen; they have all been reduced to live off hand-outs from their relatives. Women have been eliminated from the justice system and at the same time they have been denied of educational rights, so that they cannot go to university and do not have the possibility for a career in the law sector. Female Afghan judges have not only lost their jobs, but also live in a state of continuing fear that their or their loved ones could be found and killed. Some of them were able to leave the country, seeking refuge in Greece and Poland. But, according to the International Association of Women Judges, more than 200 female judges remain in Afghanistan under threat and hiding from criminals they have prosecuted, since they are not able to evacuate because they do not have ID cards or passports. More than half of Afghan women lack national ID cards compared with 6 percent of men, as the World Bank published²⁷⁷. And for many women who do have documents, their efforts to escape are complicated by their

²⁷⁶ C. PRESS, *Female Afghan judges hunted by the murderers they convicted*. BBC World Service, September 28th, 2021, available at <https://www.bbc.com/news/world-asia-58709353>

²⁷⁷ T. LIVANI and S. HADDOCK, *Women's access to identification cards can accelerate development in Afghanistan*. The World Bank Group, 2020, available at: <https://blogs.worldbank.org/endpovertyinsouthasia/womens-access-identification-cards-can-accelerate-development-afghanistan>

husband or children who do not²⁷⁸. Their feeling of perpetual fear is worrying and clearly shows the strong position of Taliban toward women's rights, even though they presented themselves with a less strict ideology about women, just to ingratiate the international community. As we know from testimonies, since they seized power, hundreds of prisoners were set free, representing a threat for female judges. For instance, Nabila, judge of Afghanistan's Supreme Court, explained she feared reprisals, not only from fundamentalists, but also the men she once jailed. She has granted divorce to women whose husbands were sometimes jailed for assaulting them. When they were released, she started to receive death threat calls from former prisoners. She moved out of her house in Kabul and went into hiding as she sought ways to leave Afghanistan with her husband and three young daughters²⁷⁹. In her words:²⁸⁰

I lost my job and now I can't even go outside or do anything freely because I fear these freed prisoners. Now we do not feel safe; the same criminals are going after my own life, the lives of my family. A dark future is awaiting everyone in Afghanistan, especially female judges.²⁸¹

Friba, a female judge in the court of appeal, managed to escape and fled to Greece. She has convicted numerous men for domestic violence and also presided over the trial of two

²⁷⁸ D. ZUCCHINO, *Afghan Women Who Once Presided Over Abuse Cases Now Fear for Their Lives*, The New York Times, October, 2021, available at: <https://www.nytimes.com/2021/10/21/world/asia/afghan-judges-women-taliban.html>

²⁷⁹ *ibid*

²⁸⁰ *ibid*

²⁸¹ R. WRIGHT, A. COREN and A. B. BINA, *Afghanistan's women judges are in hiding, fearing reprisal attacks from men they jailed*. CNN, September 20th, 2021, available at: <https://edition.cnn.com/2021/09/19/asia/afghanistan-women-judges-hnk-dst-intl/index.html>

Taliban members found guilty for the November 2016 suicide bomb attack on the German consulate. She was getting threats for the past five years.

This is a worrying situation, for which the international community must come together to take meaningful action upholding the universal principles and women's rights in Afghanistan, avoiding that all the two decades of hard-fought progress in Afghanistan will be nullified.

4. Some recommendations

How can we react and change this situation? The international community as a whole should act and take this serious issue as a priority in its agenda. One solution could be the integration of special political mission, for which the Security Council promotes participatory government, women peace and security agenda. There should be a universal agenda to uphold women's rights and support women's long fight for them, shared by the UN, international organizations, member states and civil societies. This is a crucial moment to renew the commitment of UNAMA, a UN Special Political Mission established to assist the state and the people of Afghanistan in laying the foundations for sustainable peace and development²⁸². Therefore, one of the steps that can be encouraged is fully empower UNAMA to support people of Afghanistan, taking an inclusive human rights approach, reporting and documenting violations of all actors as well as working with women leaders and other minorities as partners who can help shape UN policies, implementing finally a mechanism for monitoring the distribution of humanitarian aid.

²⁸² UNAMA was established on 28 March 2002 by United Nations Security Council Resolution 1401, Reviewed annually, this mandate has been altered over time to reflect the needs of the country and was extended for six months, on 17 September 2021, by UN Security Council Resolution 2596 (2021). See <https://unama.unmissions.org/about>

Its renewal in September by UNSC Resolution 2596 was a fundamental decision because it provides a mechanism for controlling human rights from within the country and engaging in regular discussions with the Taliban on meeting Afghanistan's obligations under international human rights law. These obligations contain the duty to ensure full gender equality, as provided under the Convention on the Elimination of All Forms of Discrimination against Women, which Afghanistan ratified in 2003²⁸³. Human rights are at the forefront, especially those of women and girls, right to education, participation, empowerment, freedom of expression, all of them enshrined in the UN Declaration of Human Rights, which Afghanistan is a state party.

As judge Analisa Rasooli pointed out in her interview, female Afghan judges need to be supported in terms of capacity building²⁸⁴. They should be granted higher education and scholarships to attend master's and doctorate studies. Moreover, the system has to improve to assure security to them. However, before these structural changes, communication with the Taleban can play a fundamental role, so that the International Community must be an active partner of the Security council towards accountability to address political, human rights and humanitarian needs. The main areas that have to be addressed to face this alarming challenge are the protection of women and girls from killings, disappearing and suppression of their voices, girl's education, reopening schools as soon as possible, and participation, ensuring Afghan women who have played a vital and active role in the development of Afghanistan as politicians, legislators, lawyers, journalists, artists, businesswomen to participate fully in public life and contribute to the

²⁸³ UN Treaty Body Database. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx

²⁸⁴ A. DE LAURI, *Women Judges in Afghanistan: An Interview with Anisa Rasooli*. CMI Insight, 2020, available at <https://www.cmi.no/publications/7268-women-judges-in-afghanistan-an-interview-with-anisa-rasooli>

development of their society and country²⁸⁵. Recognizing the importance of Afghan women and keeping spotlight on them not only as victims, but instead as players and fighters for their lives, would be central to adopt an agenda which aims to insist on an inclusive negotiated political settlement with the full equal participation of women that responds to the desire of Afghans to sustain and build on Afghanistan's gains over the last twenty years in line with Security Council Resolution 2593²⁸⁶.

To sum up, what is needed mostly is, therefore, international action from the United Nations, regional organizations, such as the European Union, the African Union or the Organization of American States, as well as civil associations and NGOs dealing with human rights. The first step to take is searching for a solution through peaceful dialogue in order to ensure the rule of law and the protection of human rights in Afghanistan. All countries should increase and accelerate refugee protection measures especially for Afghan women who are escaping from violence and prosecution. Evacuation flights for human rights defenders, women activists, and female judges should be organized since they are under threat and in need for relocation in a safe place for them and their families. Neighbouring states and the international community have some obligations under international treaties, such as the International Covenant on Civil and Political Rights (ICCPR)²⁸⁷ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)²⁸⁸. The Afghan's human rights defenders have developed a petition that calls for concrete actions from an international system that, under the Charter of the United

²⁸⁵ UN. Conference: Upholding Women's Rights in Afghanistan: An Urgent Moment for UNAMA Renewal. (15 March 2022)

²⁸⁶ United Nations Security Council Resolution, S/ RES/2593 (2021), August 30th, 2021, para. 4

²⁸⁷ General Assembly resolution 2200A (XXI), (16 December 1966) Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

²⁸⁸ General Assembly resolution 2200A (XXI), (16 December 1966) Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

Nations, is supposed to maintain international peace and security, as well as to simultaneously achieve “international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion²⁸⁹”.

In conclusion, Afghan women deserve to live in a secure and safe place, they must have their right protected and the possibility to live their life in dignity. Our community should preserve the achievements made in the last two decades: women’s full participation and leadership in public and political life is critical for Afghanistan’s future and long-term development, for having a sustainable peace and creating a solid economy that can bounce back from any crisis. Taliban are lying to the world, there is still no access to education for girls even if they promised to reopen schools. Women’s voice has been silenced systematically. The international community must keep on political pressure and promote women’s rights. All rights are equal and interconnected, they must be able to go to university and have access to economic resources, they have the right to work and fully participate in every aspect of society. Activists are now fighting besides their wall in social media since they cannot leave their households²⁹⁰. Half of the population has been denied of their rights. Afghan women have fought for more than 20 years for their rights and the world cannot let them alone now, instead it must protect their rights, calling for respect and involvement of all women and girls for participation in public life.

²⁸⁹ D. DESIERTO and T. SOBAT, *The Endless War Against Human Rights in Afghanistan: Human Rights Defenders’ Joint Statement of Solidarity with the People of Afghanistan*. Blog of the European Journal of International Law, 2021, available at <https://www.ejiltalk.org/the-endless-war-against-human-rights-in-afghanistan/>

²⁹⁰ UN. Conference: Upholding Women’s Rights in Afghanistan: An Urgent Moment for UNAMA Renewal. (15 March 2022)

CHAPTER 4: CONCLUSIONS

Throughout the above dissertation, an attempt was made to explain the lack of women as international judge and the reason why female underrepresentation is strongly more accentuated in this field than in any other professional sectors. To this purpose, after a brief overview on the relationship established between the judiciary and the female gender over the years, a series of statistical data concerning the representation of women in the international and regional judicial bodies have been taken into consideration. The survey was conducted using certified sources responsible for monitoring gender inequality at different levels: both from a cultural and social point of view, specifically among the judicial system.

The selection procedure of international judges is regulated by norms that leave wide discretion both interpretative, regarding the requirements for the selection of candidates, and operational, referred to methods and practices to follow for the election of the judge. The generality and vagueness of the rules that define the selection process of international judges show subtle unwritten mechanisms and practices, which, by supporting and reproducing certain logic of power, marginalize subjects historically distant from decision-making places: women²⁹¹.

In general, women are underrepresented across almost all international judicial bodies²⁹². The causes of such unbalanced representation are identified in the unequal access to high-level education and the high cost of it for women, the patriarchal structure of some societies that impede women to enter in a high office in the international judicial system, and especially the high level of corruption at national level that favor male

²⁹¹ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 86.

²⁹² Section 1.2

practitioners due to networks and political connections, following the logic of “the old boys’ club”, according to which female judges would be more suitable for lower-grade or family courts. Moreover, it is important to mention the lack of flexibility between work and private life, for which many women are forced not to apply for the position of international judge, since the system does not offer adequate childcare to meet the needs of mothers. However, thanks to the commitment of numerous organizations and social groups that promote and guarantee equality as a fundamental value for humanity, it is recognized that this trend in recent times is being abandoned in favor of a balanced diversity of gender, including gender as an essential principle in many international treaties and legislations. But while on the one hand the legislation has had a positive impact on the representation of women in boards of directors and in places of political power, on the other it seems that there are no great improvements in the positions that women hold within the international judiciary. In fact, their actual presence in international benches, as we have seen, is still rare.

The feminist literature²⁹³ has helped to support women and their abilities in every working environment. Scholars have recognized the added value of the judicial practice carried out by women. To mention some positive aspects²⁹⁴, women participation is important first for the principle of equality itself, for the legitimacy of the court and its final outcome, but also because women, thanks to their experiences, bring a different perspective that helps develop international law, and they improve women and girls access to justice, increasing the ruling of cases concerning violence and developing public trust. Therefore, women bring better justice overall, their lack within international tribunals and monitoring bodies failed to tap on the different background and

²⁹³ Supranote 11

²⁹⁴ Section 2

experiences that women can bring to the table, the legitimacy, and the impact of these entities. Women judges shape international law so that women's rights are part of human rights.

Despite the positive demonstrations of having a more feminine leadership, the underrepresentation of women remains a fact for many European and non-European realities. As we anticipated, an explanation for this phenomenon can be found in the continuous obstacles and barriers that women are forced to face every day. The judicial career is a very demanding profession, it requires a certain flexibility in terms of time as the hours spent for this type of activity is very high, and it is difficult to reconcile a woman's life with it. If the woman is also a wife and a mother, the time available for private life and working life is drastically reduced. Indeed, our way of thinking should change, introducing corner stones in policies such as childcare. Moreover, being a woman and above all a career woman is complicated, not for lack of skills and will, but for the way in which the world has been accustomed to think about women and female position within the society. When it comes to gender issue there is always historic, cultural and religious reasons why people has traditional attitudes. Society has contributed to create certain expectations about the roles that men and women should hold; expectations that in the long run has influenced the daily interactions between men and women and the reactions of the environment towards women. Secondly, women are often forced to suffer direct or indirect discriminatory behaviors in the workplace. And finally, the prejudice that is perhaps the main reason for their exclusion.

Some counterarguments that often emerge are that female judges are relevant only when "women's concerns" are a meaningful component of the subject-matter jurisdiction of a court, when women and men judge differently, or only when those women elected

“represent” women in their decision making²⁹⁵. But these arguments are proven to be weak. The decision of international tribunals on subject matter of economic law, sea legislation and the use of force affect both women and men. States have committed themselves to giving men and women equal opportunities to participate in governance at all levels, through the Convention on the Elimination of Discrimination Against Women, the International Covenant on Civil and Political Rights, the UN Charter, and other international treaties and soft law instruments. Therefore, exceptions to these obligations cannot be made on the basis of evidence that women and men decide in different ways.

What is clear, is that despite recent positive developments, it is not a linear incremental progress towards gender parity. The decisions that international courts have made affect society, commerce, international boards, migration, human right, and so they should be involved in them since they are so important for current affairs and the future of humanity.

1. The development of international law and the international law commission

The perspectives that female judges can have in the international judicial decisions represent an essential basis for the progress of international law. The international Law Commission, established in 1947 by the General Assembly²⁹⁶, has the function of promoting the progressive development of international law and its codification, closing

²⁹⁵ N. GROSSMAN, *Achieving sex-representative international court benches*. American Journal of International Law, 2016, Vol. 110, p.94

²⁹⁶ General Assembly Resolution 174 (II), (21 November 1947). Available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/81/PDF/NR003881.pdf?OpenElement>

treaties that leave room for interpretation, and the international judges determine the interpretation of international law. The international Law Commission (ILC), given its historical huge underrepresentation of women, needs to be representative, and this includes greater presence of women. This is crucially important as the ILC is tasked with the codification and progressive development of international law concerning all issues of great significance, which deserve to be addressed in the most comprehensive manner possible.

Just to mention some numbers, out of its 229 members, the commission have only had seven women members so far. However, in December 2021, in its seventy-third session, for the first time a record number of women, eight in total, have been nominated in the elections²⁹⁷. From no women nominated in 1947 to the first woman nominee in 1966, followed by a nearly thirty-year gap before two subsequent nominations of women in 1991, and with no women elected at all until 2001, when the first two women, Paula Escarameia of Portugal and Xue Hanqin of China²⁹⁸, have been elected. The record number of nomination last year represent significant progress: as two women just got re-elected, the ILC, a male body for over half a century, will soon have a total of five female members, which is more than twice as many as 20 years ago²⁹⁹.

²⁹⁷ The women nominees for these ILC elections are: Phoebe Okowa (Kenya, and United Kingdom of Great Britain and Northern Ireland); Vilawan Mangklatanakul (Thailand); Réka Varga (Hungary); Evelyn Aswad (United States of America); Concepción Escobar Hernández (Spain); Patrícia Galvão Teles (Portugal); Nilüfer Oral (Turkey); Penelope Ridings (New Zealand, and Australia, Canada, Sierra Leone).

P. PILLAY, *Symposium on Gender Representation: Representation of Women at the International Law Commission*. *OpinioJuris*, 2021, available at <https://opiniojuris.org/2021/10/07/symposium-on-gender-representation-representation-of-women-at-the-international-law-commission/>

²⁹⁸ United Nations. (15 November 2001). HISTORY MADE AS TWO WOMEN ELECTED TO INTERNATIONAL LAW COMMISSION. Press Release, L/2988-WOM/1302.

²⁹⁹ L. GRADONI, *Still Losing: A Short History of Women in Elections (and By-Elections) for the UN International Law Commission*. Blog of the European Journal of International Law, 2021, available at <https://www.ejiltalk.org/still-losing-a-short-history-of-women-in-elections-and-by-elections-for-the-un-international-law-commission/>

With regard to its mandate and scope, the Commission owes its existence to article 13 (1) (a) of the Charter of the United Nations, which specifies that the General Assembly shall “initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification³⁰⁰”. According to this, Article 1(1) of the Statute of the ILC specifies that: “The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.³⁰¹” Regarding membership the Statute provides some criteria: : as per Article 11 of the ILC Statute, ‘[i]n the case of a vacancy, the Commission itself shall fill the vacancy’ having regard to the usual requirements of ‘recognized competence in international law’ and ‘representation of the main forms of civilization and of the principal legal systems of the world’, written respectively in article 2 and 8 of the Statute³⁰². Article 2a, amended in 1981, specifies that “the Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.³⁰³”

Article 8 states in its entirety:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of

³⁰⁰ United Nations Charter, art. 13 (1), chapter IV. Available at: <https://www.un.org/en/about-us/un-charter/chapter-4>

³⁰¹ Statute of the International Law Commission, art. 1(1). Available at: <https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>

³⁰² Statute of the International Law Commission, art. 11. Available at: <https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>

³⁰³ Statute of the International Law Commission, art. 2a(1). Available at: <https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>

civilization and of the principal legal systems of the world should be assured³⁰⁴.

From the article, it is clear that similarities exist between the ILC and the International Court of Justice (ICJ) requirements, for which neither statute provides for gender parity as a criterion for the composition of the body.

In sum, progress has been once again too slow, but this time it could bring with it the seeds of quicker change. There is a need for better representation of women at the ILC, and for states to take their legal obligations of representation more seriously. This starts with better nomination practices of qualified women as well as with a great effort to ensure that these nominees are elected, including gender representation as a requirement for ILC's composition.

In 2003, women will form, for the first time, a contingent covering three groups of states and should be numerically and politically strong enough not to determine the outcome of a by-election but to try to change at least some of the rules of the game. Indeed, they could ask the ILC to formally invite states to nominate women or at least one woman for every two candidates. As Gradoni (2021) suggests, there is no need to wait for the next regular elections to engage in a struggle for gender balance from within the International Law Commission³⁰⁵.

This section aims to raise awareness about how much women are underrepresented at international level, even in the ILC whose purpose is to promote the progress of

³⁰⁴ Statute of the International Law Commission, art. 8. Available at: <https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>

³⁰⁵ L. GRADONI, *Still Losing: A Short History of Women in Elections (and By-Elections) for the UN International Law Commission*. Blog of the European Journal of International Law, 2021, available at <https://www.ejiltalk.org/still-losing-a-short-history-of-women-in-elections-and-by-elections-for-the-un-international-law-commission/>

international law. But how can international law be developed if women perspective is not taken into consideration? Indeed, the only solution is to include more female judges, who help advance the progressive development of the law.

2. Some suggestions to overcome the under-representation of women in international tribunals and monitoring bodies

To conclude this thesis, this section provides some recommendation for states, international organizations, NGOs, academia and scholars and civil societies, asking for a joint of forces to follow the same aim: more female representation in international courts. One of the more significant findings to emerge from this study is that women are underrepresented in all international bodies responsible for monitoring and developing international law, human rights, and international relations. As it is emerged in previous sections, it is well-established that international justice is served best and is more legitimate and effective when the judicial bodies reflect the diversity of humanity and merge equally the perspectives of qualified, diverse and independent people.

Therefore, in accordance with the principle of equality and the responsibility to ensure equal access to public participation enshrined in international and regional human rights treaties and instruments and guided by the 2030 Agenda for Sustainable Development's recognition that gender equality is not only a fundamental human right, but also a necessary foundation for sustainable peace and development, the international community should take measures to improve the presence of women in the composition of international judicial bodies. The Beijing Declaration requires States and other institutions to ensure equal participation of women and men in in all national, regional and international bodies and policy-making processes and the Beijing Platform for Action

encourages states to support gender balance in the composition of delegations to the United Nations and other international organizations, as well as “in the list of candidates nominated for election or appointment to United Nations bodies, particularly for posts at the senior level³⁰⁶”. Achieving gender equality in international bodies obliges states, United Nations agencies and representatives of other international and regional organizations, international and regional tribunals, civil society organizations, academic institutions to take concrete steps and actions.

States should make progress towards achieving gender parity in the composition of international tribunals and bodies by changing the system at national nomination stage to institutionalize the nomination of an equal number of women and men, considering international human rights principles enshrined in international and regional human rights treaties and other instruments. Furthermore, they should enhance transparent participatory mechanisms and practices that include diversity and gender as necessary requirements for the nomination and selection of candidates, and endorse procedures, standards and guidelines set forth by the United Nations and other international organizations which embody gender balance as condition for the composition of ICs.

As well as states, international organizations and experts should promote transparency in selection mechanisms and processes, by informing about the historic and current gender compositions of each body, vacancies for international judges, national and international nomination and criteria and procedures for voting. They should publicize in detail the call for applications on governments websites and wherever else may be relevant³⁰⁷. Indeed, the call for application should be made publicly and widely available

³⁰⁶ GQUAL, The GQUAL Action Plan, 2017, p. 3, available at <http://www.gqualcampaign.org/wp-content/uploads/2017/11/FINAL-2017-11-22-Action-Plan.pdf>

³⁰⁷ N. GROSSMAN, *Achieving sex-representative international court benches*. American Journal of International Law, 2016, Vol. 110, p. 91

to come to the attention of suitable candidates. At the same time, international organizations should encourage states to nominate and vote for women especially when elections affect position where no or few women have been elected before, so that to raise gender awareness and guarantee gender equality. What's more, together with monitoring bodies, they should check progress and best practices in nominating, voting and selecting procedures and practices and publish observations, comments and recommendations that analyze substantive and procedural features relevant to achieve equal gender representation.

The international judge him/herself can help to support gender equality in court's composition by sharing personal experiences and information especially with state representative on selection processes and gender balance on international benches.

Civil societies and academics should promote adequate gender representation at nomination and appointment stages and encourage the creation of a network of women interested in positions in international tribunals and bodies that includes the participation of current or former members of international tribunals and bodies. Furthermore, they should develop a process of gathering data to support further advocacy to support equal presence of women and men in courts and raise awareness through communication tools, networks and social media³⁰⁸.

In sum, all actors within the international community should commit themselves to promote gender equality agenda at senior and high positions, creating opportunities to show female leadership at international and regional levels to close the existing gender gap. In particular, states have a fundamental role in assuring a gender-balanced participation in international courts because the first step to become an international

³⁰⁸ GQUAL, The GQUAL Action Plan, 2017, p. 7, available at <http://www.gqualcampaign.org/wp-content/uploads/2017/11/FINAL-2017-11-22-Action-Plan.pdf>

judge is national nominee presented by the government. On this regard, a timid move seems to have been undertaken by the Italian state with the recent work of the study group on the "Rebalancing of gender representation in nomination procedures"³⁰⁹. The document underlines that the regulatory intervention in relation to nominations decided by political bodies should not only protect gender equality, but also respect the principles of transparency of procedures and good performance of public administration. Essentially, it is recognized that the opacity of current internal mechanisms for high position's appointments affects not only the implementation of the principle of equal gender representation, but also the general principles of transparency and good performance of the public administration. The commitment to achieve this goal is an essential premise for a greater presence of women in international courts. In fact, the promotion of greater transparency in national procedures for appointments at top positions would limit the system of the old boys' club, so as to allow women to have more opportunities to obtain positions functional to the career of the international judge. Only an integrated approach, consisting of both normative and cultural national interventions on the issues of education, of the reconciliation of family life with work and of the deconstruction of gender stereotypes, may lead to an effective rebalancing of gender representation first at national and international level afterwards³¹⁰.

The rule of law is fundamentally about equality. Equal participation is essential to democracy and to promote a better developed environment within the society.

³⁰⁹ The Study Group, made up of nine university professors of constitutional law, institutions of public law and comparative law, was set up by the Minister of the Family and Equal Opportunities, Elena Bonetti, in April 2021 at the department for Equal Opportunities of the Presidency of the Council. Its final document was presented on 1 December 2021 at the headquarters of the State Attorney General.

Study Group on the Rebalancing of Gender Representation in Nomination Procedures, Working Document, p. 3. Available at: <http://www.pariopportunita.gov.it/wp-content/uploads/2021/11/Tavolo-riequilibrio-di-genere.pdf>

³¹⁰ R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. Rivista Deportate, esuli, profughi DEP n. 48, 2022, p. 88.

As it is many times highlighted in the text, women increase participation in the justice sector, for instance, the case of Afghanistan shows how important is the presence of female judges both for the effectiveness of the rule of law and for the improvement of access to education and justice. Therefore, it is important to ensure democracy and equal opportunity in the workplace, better access to justice and fair outcomes for women. Indeed, gendering justice will enhance justice for all. Nevertheless, if the system at domestic level is not going to be improved, then the situation would not change, since states are the ones that present candidates' list for international judge's vacancies. Half of all judges appointed must be women to ensure gender balance. If we leave half of population behind, not contributing to the economy, that's a huge problem for the development of international relations and what concerns the international community. Throughout the above thesis, it has been identified the positive reasons why female representation in international court matters. These findings contribute in several ways to our understanding of the relation between the work of female judges and the development of international law. It has been mentioned cases in which the presence of female judges has led to a more sensitive attitude towards gender issues from the court. However, these are individual cases that cannot lead to the axiom according to which a judge, as a woman, is "naturally" led to greater attention to women's issues. In this regard, further research could be conducted to analyze the close link between female representation in international courts and the outcome of judgements, which improves women's rights, as well as it produces effective judicial decisions and one may wonder if it is the task of the international courts, very diversified from each other especially in terms of subject-matter, to promote an advancement of gender issues and, if so, in what terms.

Thirty years ago, “Feminist Approaches to International Law” challenged us to rethink and revise the structures and substance of international law through a feminist lens. While progress has undoubtedly been made in the last century, much still remains to realize. Achieving equal gender international court benches will bring states into compliance with their international legal obligations, improve the legitimacy of international courts, and advance the objective of equality of the sexes in international institutions³¹¹.

In conclusion, an equal participation of women is therefore essential for building a fairer global justice system.

³¹¹ N. GROSSMAN, *Achieving sex-representative international court benches*. American Journal of International Law, 2016, Vol. 110, p. 95

BIBLIOGRAPHY

BOOKS

- A. VON BOGDANDY and I. VENZKE, *In whose name?: a public law theory of international adjudication*. Oxford University Press, 2014
- A. ZIMMERMANN and C. J. TAMS, *The Statute of the International Court of Justice: A Commentary*. Oxford University Press, 2019
- B. FASSBENDER, *The Representation of the "Main Forms of Civilization" and of "the Principal Legal Systems of the World" in the International Court of Justice*. Unité et diversité du droit international/Unity and Diversity of International Law. Brill Nijhoff, 2014
- C. GILLIGAN, *In a different voice: Psychological theory and women's development*. Harvard University Press, 1993
- D. TERRIS, C. PR. ROMANO, and L. SWIGART, *The international judge: An introduction to the men and women who decide the world's cases*. UPNE, 2007
- E. C. DUBOIS, *Suffrage: women's long battle for the vote*. Simon and Schuster, 2020
- F. BAETENS, *Identity and Diversity on the International Bench: Who is the Judge?*. Oxford University Press, 2020
- H. CHARLESWORTH, C. M. CHINKIN, and A. EHRLICH, *The boundaries of international law: A feminist analysis*. Manchester University Press, 2000
- J. W. SCOTT, *Gender and the Politics of History*. In: *Gender and the Politics of History*. Columbia University Press, 1988
- M. A. FREEMAN, C. CHINKIN and B. RUDOLF, *The UN convention on the elimination of all forms of discrimination against women: A commentary*. OUP Oxford, 2012
- M. A. PALUDI and B.E. COATES, *Women as Transformational Leaders*. ABC-CLIO, 2011
- A. OAKLEY, *Sex, gender and society*. Routledge, 2016
- R. R. REITER, *Toward an Anthropology of Women*. Monthly Review Press, 1975
- R. D. CREWS and A. TARZI, *The Taliban and the crisis of Afghanistan*. Harvard University Press, 2009.

- R. MACKENZIE, C. P. ROMANO, Y. SHANY AND P. SANDS, *Manual on international courts and tribunals*. International Courts and Tribu, 2010
- R. O. KEOHANE and J. S. NYE JR, *The club model of multilateral cooperation and problems of democratic legitimacy*. Power and governance in a partially globalized world. Routledge, 2002
- R. WEST and C. G. BOWMAN, *Research handbook on feminist jurisprudence*. Edward Elgar Publishing, 2019
- Y. NAKANISHI, (eds), *Contemporary Issues in Human Rights Law*. Springer, Singapore, 2017
- S. WARREN, *The Hanafi School*. Oxford University Press, 2013
- T. INGADOTTIR, *The International Criminal Court: Recommendations on Policy and Practice Nomination and Election of Judges*. Brill Nijhoff, 2003
- T. M. TYLER, *Legitimacy and criminal justice: An International perspective*. Russell Sage Foundation, 2007
- T. WIMPELMANN, *The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan*. University of California Press, 2017

ARTICLES

- A. BUCHANAN and R.O. KEOHANE, *The legitimacy of global governance institutions*. *Ethics & international affairs*, 2006, Vol. 20, p. 405-437
- A. DAVIDIAN, *Expert's take: Gender equality is critical for Afghanistan's future, long-term development, and sustained peace*. UN Women, 2021, available at <https://www.unwomen.org/en/news/stories/2021/10/experts-take-gender-equality-is-critical-for-the-afghanistans-future>
- A. DE LAURI, *Women Judges in Afghanistan: An Interview with Anisa Rasooli*. CMI Insight, 2020, available at <https://www.cmi.no/publications/7268-women-judges-in-afghanistan-an-interview-with-anisa-rasooli>
- A. FØLLESDAL, *How many women judges are enough on international courts?*. *Journal of Social Philosophy*, 2021, p. 1-15
- A. MALIK, *The Importance of Women in the Judiciary to Integrate the Gender Perspective and Bring Equal Visibility*. UNODC, available at <https://www.unodc.org/dohadeclaration/en/news/2021/152/the-importance-of-women-in-the-judiciary-to-integrate-the-gender-perspective-and-bring-equal-visibility.html>

- B. BIANCHI, *Introduzione Ecofemminismo: il pensiero, i dibattiti, le prospettive*. Rivista Deportate, esuli, profughi DEP n.20/2012, p. XV-XVI-XVII
- B. SHAH, *The constitution process in Afghanistan*. Strategic Studies, 2004, Vol. 24, p. 91-109, available at <http://www.jstor.org/stable/45242497>
- B. SIMMA, C. TOMUSCHAT, H. MOSLER AND A. RANDELZHOFFER, *Charter of the United Nations: A Commentary Supplement*, Oxford University Press, 2002
- C. HOLST and S. A. LANGVATN, *Descriptive representation of women in international courts*. Journal of Social Philosophy, 2021, p. 1-18
- C. MARTIN, *Symposium on Gender Representation: Article 8 of CEDAW – Significance and Role of the CEDAW Committee to Tackle Women Underrepresentation in International Bodies*. OpinioJuris, 2021, available at <https://opiniojuris.org/2021/10/05/symposium-on-gender-representation-article-8-of-cedaw-significance-and-role-of-the-cedaw-committee-to-tackle-women-underrepresentation-in-international-bodies/>
- C. MENKEL-MEADOW, *Portia in a different voice: Speculations on a women's lawyering process*. Berkeley Women's LJ, 1985, Vol. 1
- C. PETERS, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin*. Goettingen Journal of International Law, 2011, Vol 3, p. 617-642, available at https://web.archive.org/web/20180410001824id_/http://www.gojil.eu/issues/32/32_article_peters.pdf
- C. PRESS, *Female Afghan judges hunted by the murderers they convicted*. BBC World Service, September 28th, 2021, available at <https://www.bbc.com/news/world-asia-58709353>
- C. RICKARD, *The South African Judicial Service Commission. Judicial Reform: Function, Appointment and Structure*. Centre for Public Law, University of Cambridge, October 4th, 2003, available at http://www.law.cam.ac.uk/view_doc_info.php?class=12&order=doc_title=asc&doc=879&page=1&start=0
- D. BODANSKY, *The legitimacy of international governance: a coming challenge for international environmental law?*. American Journal of International Law, 1999, Vol. 93, p. 596-624
- D. DESIERTO and T. SOBAT, *The Endless War Against Human Rights in Afghanistan: Human Rights Defenders' Joint Statement of Solidarity with the People of Afghanistan*. Blog of the European Journal of International Law, 2021, available at <https://www.ejiltalk.org/the-endless-war-against-human-rights-in-afghanistan/>

- D. OTTO, *The exile of inclusion: reflections on gender issues in international law over the last decade*. Melbourne Journal of International Law, 2009, Vol. 10, p. 11-26
- D. TERRIS, C. PR. ROMANO, and L. SWIGART, *Toward a Community of International Judges*. Loyola of Los Angeles International and Comparative Law Review, 2008, Vol. 30, p. 419- 471, available at <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1638&context=ilr>
- D. ZUCCHINO, *Afghan Women Who Once Presided Over Abuse Cases Now Fear for Their Lives*, The New York Times, October, 2021, available at: <https://www.nytimes.com/2021/10/21/world/asia/afghan-judges-women-taliban.html>
- E. DONOGHUE, *Reflections on the 75th Anniversary of the International Court of Justice*. ICJ-CIJ/Frank van Beek. Courtesy of ICJ, 2021, available at <https://www.un.org/en/un-chronicle/reflections-75th-anniversary-international-court-justice>
- E. EDROMA, *Retrieved from Promoting Gender equality in the judiciary. United Nations Development Programme*, 2019, available at <https://www.undp.org/blog/promoting-gender-equality-judiciary>
- E. GRAHAM-HARRISON, *Afghan peace talks with Taliban begin in Doha with rocky path ahead*. The Guardian, September 12th, 2020 available at: <https://www.theguardian.com/world/2020/sep/12/afghan-peace-talks-with-taliban-begin-in-doha-with-rocky-path-ahead>
- E. MICHELSON, *Women in the legal profession, 1970-2010: A study of the global supply of lawyers*. Indiana Journal of Global Legal Studies, 2013 Vol. 20, p. 1071-1137
- F. KUEHN, *Taliban history of war and peace in Afghanistan*. International Review of Peace Initiatives, 2018, p. 35-40
- F. TULKENS, *Parity on the Bench. Why? Why not?*. European Human Rights Law Review, 2014, Vol. 19, p. 587-598
- F. YOUSUFI, *The Prospect of Women's Rights in the Post-Taliban-Government Peace Agreement*, Journal of International Women's Studies, 2021, Vol. 22, p. 1-18, available at <https://vc.bridgew.edu/jiws/vol22/iss9/1>
- G. KHAN, *Afghanistan: Human cost of armed conflict since the Soviet invasion*. Journal of International Affairs, 2012, Vol. 17, p. 209-224
- H. CHARLESWORTH, C. CHINKIN, and S. WRIGHT, *Feminist approaches to international law*. American Journal of International Law, 1991, Vol. 85, p. 613-645

- J. BARR, *No stability and Peace without protecting women and girls*. Human Rights Watch. Friedrich Naumann Foundation, 2021, available at <https://www.hrw.org/news/2021/10/12/no-stability-and-peace-without-protecting-women-and-girls>
- J. MERTUS, *When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia*. Seton Hall L. Rev., 2008
- J. P. KASTELLEK, *Racial diversity and judicial influence on appellate courts*. American Journal of Political Science, 2013, Vol. 57, p.167-183
- 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*. Leiden Journal of International Law, 2021, Vol. 34, p. 977-1000
- J. GOLDSTONE and E. A. DEHON, *Engendering Accountability: Gender Crimes Under International Criminal Law*. New England Journal of Public Policy, 2003
- J. LINEHAN, *Women and Public International Litigation. Background paper for the Project on International Courts and Tribunals*, London Meeting, 2001
- K. DAUGIRDAS, *International organizations and the creation of customary international law*. European Journal of International Law, 2020, Vol. 31, p. 201-233
- L. BOYD, L. EPSTEIN and A.D. MARTIN, *Untangling the causal effects of sex on judging*. American journal of political science, 2010, Vol. 54, p. 389-411
- L. GRADONI, *Still Losing: A Short History of Women in Elections (and By-Elections) for the UN International Law Commission*. Blog of the European Journal of International Law, 2021, available at <https://www.ejiltalk.org/still-losing-a-short-history-of-women-in-elections-and-by-elections-for-the-un-international-law-commission/>
- M. ANASAGASTI and N. WUIAME, *Women and Decision-making in the Judiciary in the European Union*. Office for Official Publications of the European Communities, 1999
- M. CASTILLEJOS-ARAGÓN, *A need for change: Why do women in the judiciary matter?*. Konrad Adenauer Stiftung, 2021
- M. KEATING, *Women's rights and wrongs*. The World Today, 1997, Vol. 53.1, p. 11-12
- M. JR COLLINS, M. PAUL, M. K. L. MANNING and R. A. CARP, *Gender, critical mass, and judicial decision making*. Law & Policy, 2010, Vol. 32, p. 260-281
- M. THANE, *What difference did the vote make? Women in public and private life in Britain since 1918*. Historical Research, 2003, Vol. 76, p. 268-285, available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2281.00175>

- N. AOLÁIN, *More Women–But Which Women? A Reply to Stéphanie Hennette Vauchez*. *European Journal of International Law*, 2015, Vol. 26, p. 229-236
- N. GROSSMAN, *Achieving sex-representative international court benches*. *American Journal of International Law*, 2016, Vol. 110, p. 82-95
- N. GROSSMAN, *Legitimacy and International Adjudicative Bodies*. *George Washington International Law Review* 41, 2009, p. 107
- N. GROSSMAN, *Sex on the bench: do women judges matter to the legitimacy of international courts*. *Chicago Journal of International Law*, 2011, Vol. 12, p. 647-685
- N. GROSSMAN, *Sex representation on the bench and the legitimacy of International Criminal Courts*. *International Criminal Law Review*, 2011, Vol. 11, p. 643-653
- N. GROSSMAN, *The Effect of the Participation of Women Judges on the Legitimacy of International Courts and Tribunals*. *Proceedings of the 105th Annual Meeting*, Cambridge University Press, 2011, Vol. 105, p. 452-455
- N. GROSSMAN, *The normative legitimacy of international courts*. *Temp. L. Rev.*, 2013, Vol. 86, p. 61
- N. TORBISCO-CASALS, *The legitimacy of international courts: The challenge of diversity*. *Journal of Social Philosophy*, 2021, Vol. 52, p. 491-515, available at <https://onlinelibrary.wiley.com/doi/full/10.1111/josp.12452>
- P. ALSTON, *Vacancies at the ICJ: Yes, there is a special practice, and it has to cease*. *Blog of the European Journal of Law*, October 25th, 2021, available at <https://www.ejiltalk.org/vacancies-at-the-icj-yes-there-is-a-special-practice-and-it-has-to-cess/>
- P. M. WALD, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*. *The University of Toledo Law Review*, 2004, Vol. 36, p. 979 – 992
- P. PILLAY, *Symposium on Gender Representation: Representation of Women at the International Law Commission*. *OpinioJuris*, 2021, available at <https://opiniojuris.org/2021/10/07/symposium-on-gender-representation-representation-of-women-at-the-international-law-commission/>
- R. MARCONI, *La sotto rappresentanza femminile negli organi giurisdizionali internazionali*. *Rivista Deportate, esuli, profughi DEP* n. 48, 2022, p. 58-88
- R. HAROUN, *Can the Afghan government draft a new constitution with the Taliban?* *Quincy Institute for Responsible Statecraft*, July 9th, 2021, available at

<https://responsiblestatecraft.org/2021/07/09/can-the-afghan-government-draft-a-new-constitution-with-the-taliban/>

- R. WRIGHT, A. COREN and A. B. BINA, *Afghanistan's women judges are in hiding, fearing reprisal attacks from men they jailed*. CNN, September 20th, 2021, available at: <https://edition.cnn.com/2021/09/19/asia/afghanistan-women-judges-hnk-dst-intl/index.html>
- S. BARRIGA, *Election Rules for ICC Judges: A Balanced Bench Through Quasi-Quotas*. EJIL:Talk!, December 4th, 2017, available at www.ejiltalk.org/election-rules-for-icc-judges-a-balanced-bench-through-quasi-quotas/
- S. CUSACK, *Eliminating Judicial Stereotyping. Equal Access to Justice for Women in Gender-Based Violence Cases Final Paper*. Office of the High Commissioner for Human Rights, 2014
- S.D O'CONNOR and K. K. AZZARELLI, *Sustainable development, rule of law, and the impact of women judges*. Cornell Int'l LJ, 2011, Vol. 44, p. 3-9
- S. H. VAUCHEZ, *More women–But which women? The rule and the politics of gender balance at the European Court of human rights*. European Journal of International Law, 2015, Vol. 26, p. 195-221
- S. HENNETTE-VAUCHEZ, *Gender Balance in International Adjudicatory Bodies*. Max Planck Encyclopedia of International Procedural Law, 2019
- S. J. KENNEY, *Breaking the silence: gender mainstreaming and the composition of the European Court of Justice*. Feminist Legal Studies, 2002, Vol. 10, p. 257-270
- S. PASARLAY, *Dead or Alive? The Taliban and the Conundrum of Afghanistan's 2004 Constitution*. Blog of the International Journal of Constitutional Law, March 23, 2022, available at: <http://www.iconnectblog.com/2022/03/dead-or-alive-the-taliban-and-the-conundrum-of-afghanistans-2004-constitution/>
- S. PASARLAY, *Afghanistan's Unwritten Constitution under the Taliban*, Blog of the International Journal of Constitutional Law, March 17, 2022, available at: <http://www.iconnectblog.com/2022/05/afghanistans-unwritten-constitution-under-the-taliban/>
- T. DUMBROVSKÝ, B. PETKOVA and M. VAN DER SLUIS, *Judicial appointments: The article 255 TFEU Advisory Panel and selection Procedures in the member states*. Common market law review, 2014, Vol. 51, p. 455-482, available at <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/51.2/COLA2014034>

- T. LIVANI and S. HADDOCK, *Women's access to identification cards can accelerate development in Afghanistan*. The World Bank Group, 2020, available at <https://blogs.worldbank.org/endpovertyinsouthasia/womens-access-identification-cards-can-accelerate-development-afghanistan>
- T. MOHANTY, A. RUSSO and L. TORRES, *Third world women and the politics of feminism*. Indiana University Press, 1991, p. 314-327
- V. RUIZ, *The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity*. United Nations Office on Drugs and Crime, 2019, available at <https://www.unodc.org/dohadeclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html>
- X. FELLMETH. *Feminism and international law: Theory, methodology, and substantive reform*. Human Rights Quarterly, 2000, Vol. 22, p. 658-731
- Y. SHANY, *Assessing the effectiveness of international courts: a goal-based approach*. American Journal of International Law, Cambridge University Press, January 20th, 2017, Vol. 106, p. 225-270

WEBSITES

- International Court of Justice Website: <https://www.icj-cij.org/en>
- International Criminal Court Website: <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/current-judges.aspx>
- International of the Law of the Sea Website: <https://www.itlos.org/en/main/the-tribunal/members/>
- The International Residual Mechanism for Criminal Tribunals Website: <https://www.irmct.org/en/about/judges>
- International Criminal Tribunal for the former Yugoslavia Website: <https://www.icty.org/en/about/chambers/judges>
- The Inter-American Court of Human Rights Website: <https://www.corteidh.or.cr/composicion.cfm>
- The European Court of Human Rights Website: https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n1368718271710_po
inter

- The African Court on human and people's rights Website: <https://www.african-court.org/wpafc/current-judges/>
- The court of Justice of the European Union Website: https://curia.europa.eu/jcms/jcms/Jo2_7026/it/
- The Court of Justice of the European Union Website: <https://eftacourt.int/the-court/judges-and-staff/>
- The Court of Justice of the Andean community Website: <https://www.tribunalandino.org.ec/index.php/nosotros/magistrados/>
- The inter-American Court of Justice Website: <http://portal.ccj.org.ni/ccj/magistrado/>
- The Caribbean Court of Justice Website: <http://www.caribbeancourtofjustice.org/about-the-ccj/judges/>
- The ECOWAS Court of Justice Website: http://www.courtecowas.org/site2012/?option=com_content&view=article&id=260&Item
- The Comité Website: <https://comite255.europa.eu/en/home>
- United Nations Human Rights Office of Discrimination against Women Website: <https://www.ohchr.org/en/treaty-bodies/cedaw>
- Treccani: <https://www.treccani.it/vocabolario/sharia/>
- Every Woman Treaty Website: <https://everywoman.org/who-we-are/najla-ayoubi/>
- United Nations, UNAMA: <https://unama.unmissions.org/about>
- World Bank Database, Population, Female (% of total population) – World, 2020 <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=1W>
- ISTAT. Stereotipi, rinunce e discriminazioni di genere, 2013: <https://www.istat.it/it/archivio/106599>
- OHCHR and women's human rights and gender equality. Gender stereotyping: <https://www.ohchr.org/en/women/gender-stereotyping>
- UN Treaty Body Database: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx

- Youtube, Tolo News. Habiba Sarabi Discusses Doha Talks:
https://www.youtube.com/watch?v=r_iSqwGusj8
- United Nations Web Tv, Upholding Women's Rights in Afghanistan: An Urgent Moment for UNAMA Renewal, March 15th, 2022:
<https://media.un.org/en/asset/k1v/k1v2y6tktt>

CASES

Prosecutor v Nikolić (Oct. 20, 1995). International Criminal Tribunal for the former Yugoslavia (ICTY). Case No. IT-94-2-R61. https://www.icty.org/en/case/dragan_nikolic

Prosecutor v Nikolić (Oct. 20, 1995). International Criminal Tribunal for the former Yugoslavia (ICTY). Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61, 33. Online at https://www.icty.org/x/cases/dragan_nikolic/tord/en/951020.pdf

Prosecutor v Nikolić (Sentencing judgement) 18 December 2003 International Criminal Tribunal for the former Yugoslavia (ICTY), IT-94-2-S, par. 5. Online at https://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf

INTERNATIONAL CONVENTIONS, TREATIES and RESOLUTIONS

- Statute of the International Court of Justice, San Francisco 1945, available at <https://www.icj-cij.org/en/statute>
- United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), New York, 1979, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>
- United Nations, The 2030 Agenda for sustainable development, New York, 2015, available at <https://sdgs.un.org/2030agenda>
- United Nations, Charter of the United Nations, San Francisco, 1945, available at <https://www.un.org/en/charter-united-nations/>
- Statute of the International Tribunal of the Law of the Sea, Montego Bay, 1982 , available at https://www.un.org/ruleoflaw/files/statute_en.pdf
- Treaty on the functioning of the European Union, Lisbon, 2009, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

- Statute of the Inter-American Court on Human Rights, Bolivia, 1979, available at https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf
- United Nations Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1953, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf>
- World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh, 1994 (Art 8(10)),
- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Burkina Faso, 1998, available at https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf (Art 14(2), (3),)
- The Rome Statute of the International Criminal Court, Rome, 1998, available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (Art 36(8) (a – b))
- United Nations Universal Declaration of Human Rights, Paris, 1948, available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- United Nations General Assembly, International Covenant on Civil and Political Rights, 1966, available at [https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights\(article 2, 26\)](https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights(article%202,%2026))
- United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 1966, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>
- International Law Commission, Draft Articles on the Responsibility of International Organizations, 2011, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (art. 2(b))
- United Nations General Assembly, Convention on the Political Rights of Women, New York, March 31st, 1953, available at https://treaties.un.org/doc/treaties/1954/07/19540707%2000-40%20am/ch_xvi_1p.pdf

- Enforced Constitution of Afghanistan 2004, available at <https://moj.gov.af/en/enforced-constitution-afghanistan>
- Islamic republic of Afghanistan Ministry of Justice, Law on Elimination of Violence against Women (EVAW), August 1st, 2009, available at <https://www.refworld.org/pdfid/5486d1a34.pdf>
- The Supreme Court of the Islamic Republic of Afghanistan, Law on organization and jurisdiction of courts of the Islamic republic of Afghanistan, Official Gazette No. 851, May 21st, 2005, available at https://www.wto.org/english/thewto_e/acc_e/afg_e/wtaccafg33_leg_1.pdf
- International Committee of the Red Cross, Afghanistan Penal Code, September 22th, 1976, available at [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/cca31567c689b4aec12571140033a15e/\\$FILE/Penal%20Code%201976.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/cca31567c689b4aec12571140033a15e/$FILE/Penal%20Code%201976.pdf)
- United Nations Security Council Resolution, S/RES/1325 (2000), October 13th, 2000
- United Nations Security Council Resolution, S/ RES/2593 (2021), August 30th, 2021
- United Nations Security Council Resolution, A/RES/56/127 (2002), January 30th, 2002
- UN Doc. A/HRC/RES/44/9 (2020), July 16th, 2020
- UN Security Council Resolution, S/RES/1820 (2008), June 19th, 2008
- United Nations General Assembly Resolution, 48/264 (1994), July 29th, 1994
- United Nations General Assembly Resolution, A/RES/1192(XII) (1957), December 12th, 1957
- United Nations General Assembly Resolution, A/RES/1900(XVIII) (1963), November 13rd, 1963
- United Nations General Assembly Resolution, A/RES/33/138 (1978), December 19th, 1978
- United Nations General Assembly Resolution, A/RES/70/01 (2015), September 25th, 2015
- United Nations General Assembly Resolution, A/RES/75/274 (2021), April 29th, 2021
- United Nations General Assembly Resolution, A/RES/21/2200A (XXI) (1966), December 16th, 1996

- Parliamentary Assembly of the Council of Europe Resolution 1426 (2005), March 18th, 2005
- Parliamentary Assembly of the Council of Europe Resolution 1366 (2004), January 30th, 2004

INTERNATIONAL SOFT LAW

- Committee on the Elimination of Discriminations Against Women, General Recommendation No. 33 on women's access to justice, August 3rd, 2015,
- Global Justice Centre, Written Submission on the General Recommendation on Access to Justice, February 1st, 2013
- Committee on the Elimination of Discriminations Against Women, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004
- Committee on the Elimination of Discriminations Against Women, General Recommendation No. 23: Political and Public Life, 1997
- United Nations Amendments to the Annex of the Rules of Procedure of the General Assembly, UN Doc. a/520/Rev15/Amend.1 and 2 (1991), August 21st, 1991
- United Nations Rules of Procedure of the General Assembly, A/520/Rev.17, 2008
- The US State Department, Agreement for Bringing Peace to Afghanistan, February 29th, 2020, available at <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>
- Parliamentary Assembly of the Council of Europe Resolution 1429 (1999), National procedures for nominating candidates for election to the European Court of Human Rights, September 24th, 1999, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16755&lang=en>.

REPORTS, STATEMENTS and COMMENTS

- Committee on Economic, Social and Cultural Rights, Achieving gender parity, General comment No. 18, 2005

- United Nations Strategy, System-Wide Strategy on Gender Parity, September 13th, 2017 available at www.un.int/sites/www.un.int/files/Permanent%20Missions/delegate/17-00102b_gender_strategy_report_13_sept_2017.pdf
- International Court of Justice, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Certain Expenses), Advisory Opinion, 1962, available at <https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf>.
- International Law Commission, Report on the Work of its forty-sixth session, May 22nd - July 22nd, 1994, available at https://legal.un.org/ilc/documentation/english/reports/a_49_10.pdf
- United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee, March-April and August, 1996, available at <https://www.legal-tools.org/doc/e75432/pdf/>
- United Nations General Assembly Human Rights Council, Report on the current levels of representation of women in human rights organs and mechanisms: ensuring gender balance, July 9th, 2021, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/111/46/PDF/G2111146.pdf?OpenElement>
- J. LIMBACH, P.C. VILLALÓN, R. ERRERA, T. MORSCHTSCHAKOWA and A. ZOLL, Judicial independence: law and practice of appointments to the European Court of Human Rights, International Centre for the Legal Protection of Human Rights, May, 2003, available at <https://www.corteidh.or.cr/tablas/32795.pdf>
- GQUAL, The GQUAL Action Plan, 2017, available at <http://www.gqualcampaign.org/wp-content/uploads/2017/11/FINAL-2017-11-22-Action-Plan.pdf>
- Afghanistan Independent Human Rights Commission, Report Summary: Violence against Women in Afghanistan, November 23, 2019, available at https://www.aihrc.org.af/home/research_report/8670.
- D. B. GOLDBERG, Equal Representation of Women through the Lens of Leadership and Organizational Culture Expert Group Meeting. UN Women, EGM/2015/Report, 2015
- F. HAMPSON, Working paper on the criminalization, investigation and prosecution of acts of serious sexual violence: working paper. 2004. UN Doc. E/CN.4/Sub.2/2004/12, p. 4, available at: <http://documents-ddsny.un.org/docs/UNDOC/GEN/G04/154/40/pdf/G0415440.pdf?OpenElement>
- Human Rights Watch, I Thought Our Life Might Get Better: Implementing Afghanistan's Elimination of Violence against Women Law, 2021, available at

<https://www.hrw.org/report/2021/08/05/i-thought-our-life-might-get-better/implementing-afghanistans-elimination>

- Human Rights Watch, The “Ten-Dollar Talib” and Women’s Rights: Afghan Women and Risk of Reintegration and Reconciliation, 2010, available at <https://www.hrw.org/report/2010/07/13/ten-dollar-talib-and-womens-rights/afghan-women-and-risks-reintegration-and>
- ICG-International Crisis Group. Women and Conflict in Afghanistan. Asia Report N°252, 2013, available at <https://www.refworld.org/pdfid/525e78184.pdf>
- J. FOTI, J. HICKLE and M. JWEIED, Access to Justice, Open Government Partnership, 2019, available at <https://www.opengovpartnership.org/wp-content/uploads/2019/09/Justice-Policy-Series-Access-to-Justice.pdf>
- J. LIMBACH, P. C. VILLALÓN, R. ERRERA, A. LESTER, T. MORSHCHAKOVA, S. SEDLEY AND A. ZOLL, Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights. International Centre for the Legal Protection of Human Rights, 2003, p. 26.
- V. RUIZ AND P. WHALEN, Afghanistan Resolution. IAWJ, 2021, available at <https://www.iawj2021auckland.com/assets/Afghanistan%20resolution.pdf>
- The International Association of Women Judges (IAWJ), Women Judges, and Women at Risk, Remain in Afghanistan, March 10th, 2022, available at https://www.iawj.org/content.aspx?page_id=5&club_id=882224&item_id=74039