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FEMINIST CRITIQUES OF INTERNATIONAL COURTS SYMPOSIUM

## It's not about "women issues".

An interview with Nienke Grossman about parity on international court benches

DANA SCHMALZ — NIENKE GROSSMAN — 17 April, 2017



There is no way to get around Nienke Grossman's work when reflecting about diversity on the benches of international courts. Her scholarship offers statistics about the numbers of women judges, their development over the last years and the respective distribution along nationalities; it examines causes for the exclusion of women, and discusses reasons for claiming a more equal composition of benches. While directly concerned with the representation of women in international courts, her work also provides a basis for addressing questions of diversity in courts more generally. We are very grateful that Nienke Grossman agreed to give an interview to the Völkerrechtsblog, which kicks off the symposium "Feminist Critiques of International Courts".

1. *You have done encompassing empirical research about the presence of women on international courts. What was the most surprising finding during this research?*

I have been studying this topic for several years now, so I have to remind myself what I knew and did not know when I first started studying this topic. I became interested in diversity on the bench while working for a law firm that represented states in international courts. At the hearings, I noticed how few women were on the bench, and I began to acquire a consciousness about diversity, or the lack of diversity, in these courts. I began to wonder whether my perceptions were correct and decided to do some empirical research to find out.

Once I began doing the research, I was surprised by several findings. One is that for two-thirds of the courts, a lower percentage of women judges sat on the bench in mid-2015 than in previous years. This was unexpected because I assumed that over time, as more women became professors, lawyers, judges at the domestic level, and diplomats, they would become better represented at the international court level. Another surprising fact was that states with a higher percentage of women lawyers do not necessarily have more women judges representing them. For example, although France has almost 50% women lawyers, no French woman has ever served as a permanent international judge on any of the courts I surveyed. Also, it appears that there may be more women from less developed states serving on international courts than women from the more developed ones. For example, the women on the [International Tribunal for the Law of the Sea \(ITLOS\)](#) and the [WTO Appellate Body](#) are from Argentina and China, respectively. Many of the women on the International Criminal Court and the International Court of Justice

come from less developed parts of the world.

2. In your paper *Shattering the Glass Ceiling in International Adjudication* you point to criticisms regarding the "ghettoization" of women in international courts concerned with "women's issues". Advocating for more women in international courts, we encounter a similar dilemma: Claims for better representation of women have been raised when matters "concerning women" were at stake, such as questions of sexualized violence before the ICC. We see from the figures in your *paper* that the percentage of women in the ICC is also comparatively high (33 %). The same is the case for the European Court of Human Rights (ECHR). But making this argument seems to suggest that representation of women is needed less in a court like, say, the ITLOS.

First of all, the International Criminal Court and the European Court of Human Rights (ECHR) both have requirements for sex representation built into their procedures for selecting judges, which helps to explain why we find more sex representative benches on those courts. The question becomes: why did states believe that it was important to put in representation requirements for those courts, but not for other courts?

In the case of the ICC, which came into being after the Rwandan and the Yugoslav Tribunals, NGOs and states pushed for the inclusion of women judges based in part on experiences in the Yugoslav Tribunal. In the case of the ECHR, the Parliamentary Assembly of the Council of Europe started raising the issue that few women were serving as judges on the ECHR, and it began making changes to selection procedures.

When it comes to subject matter jurisdiction and gender, some people make the argument that women are necessary when the subject matter includes "women issues." The corollary to that argument is that they are unnecessary, or less necessary, when it does not. For example, I had a conversation with a judge who said, "On my court this is not important, because we don't address women's concerns directly." But any area of international law concerns both men and women equally, regardless of its subject matter jurisdiction. In other words, men do not have a monopoly over the Law of the Sea. It affects both men and women equally, and both groups should be represented on courts that are interpreting the Law of the Sea.

3. There are different approaches to why we should be concerned by the low number of women in international courts: Is it about the decision-making, the outcomes, the experiences that women contribute as judges, about the legitimacy of courts more generally, the acceptance and the corresponding authority? The 1991 classic *Feminist Approaches to International Law* (by Hilary Charlesworth, Christine Chinkin and Shelley Wright) discusses these arguments regarding a "woman's different voice". They seem highly relevant for the question of parity on international courts: Do we have to believe that "women judge differently"?

When it comes to arguing for parity, I sometimes find the argument that women bring different perspectives to the bench than men unhelpful. In other words, it has a downside, and that downside is that the argument makes it seem like women must justify their existence on the bench based on their difference. In other words, the default is an all-male court, and you only need women when they decide differently from men. If the Court has nothing to do with "women's issues," then women become unnecessary. Second, it is essentialist because it assumes that men and women have views on legal issues that differ by sex, and that all women think the same way and all men think the same way.

Of course, people bring their own perspectives to judging. Judges do not leave their

identities at the courthouse door. But perhaps it is worth questioning the extent to which we want to make the argument that women should be represented *because* of their unique perspectives. Women should be on the bench because they are qualified to be on the bench and because they make up half of the world's population.

On the other hand, in [Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?](#), an article published in the Chicago Journal of International Law several years ago, I focused on the impacts of paucity of women on the bench on normative and sociological legitimacy of international courts. In that article, I proposed that if women and men do differ, both male and female judges are needed for fair adjudication. Furthermore, even if they do not differ, but are perceived to nonetheless, the presence of both is important to perceptions of the justified authority of international courts. In more recent pieces, I have begun querying whether the argument that states bear a legal obligation to nominate and elect in parity is a more powerful tool for achieving parity.

4. *Among the factors you identify as influencing the number of women present on international court benches are the existence of quotas or aspirational targets, but also simply the degree of transparency in the selection process.*

Yes, and it is very difficult to argue against transparency. The idea that states should have standards by which they judge candidates, and which are accessible to the public, does not appear particularly controversial. The Parliamentary Assembly of the Council of Europe has done a great deal to make selection procedures for the ECHR more transparent; they encourage states to publicize vacancies, to have an open process. Ultimately, the factors that lead to a better representation of women on the ECHR are difficult to disentangle because the Parliamentary Assembly has taken many different steps with respect to the selection process. For example, states are required to have open selection procedures, but they are also required to nominate at least one member of the underrepresented sex.

At the same time, we can ask if the quota requirement in the ECHR works as both a floor and as a ceiling, as Stephanie Hénette-Vauchez has done in her article in the EJIL. She raises questions about whether states continue to nominate women once they are no longer required to.

5. *What is the relationship between the concern for better representation of women and representation along other criteria? Factors like transparency will generally benefit a more diverse bench. But can there also be a conflict between claims for more women judges and better inclusion of other "less traditional candidates"?*

The question assumes a false opposition between women and "other underrepresented groups," because women are themselves part of all underrepresented groups. There are women of every race, religion, and disability-status, as well as indigenous women. Our question should be: what can we do to make these institutions more representative? And one of the things we can do is look at gender. But there are many other kinds of representativeness that we should be looking at. For example, it appears that there has never been an indigenous person to serve as a judge on the [Inter-American Court of Human Rights](#) (IACHR). This is a court that deeply affects indigenous people in the Americas, yet no indigenous people have served as judges on that body.

One goal of my scholarship is to focus on the issue of women, wherever they may be from, and think about the legitimacy of these institutions, and the relationship between legitimacy and parity. But another goal is to recognize that many other groups should

also be represented: people who belong to minorities in their countries, people who are disabled, people from a wide range of religious and racial backgrounds, for example. I hope that this scholarship encourages people to think about who else is missing.

In terms of avenues for further research, one underexplored topic concerns the experience of women serving on international courts today. What is it like to be a judge on these bodies? What is the nature of interactions with fellow judges, litigants, and registrars? I am currently writing a chapter in a book on African women judges about [Judge Julia Sebutinde](#), the ICJ's first African woman judge. One of the points that she makes is that women often have to justify their presence on these courts in a way that men do not have to. That seems an interesting point to think about, and a perspective that perhaps we have not yet explored enough in the literature.

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