ARTICLE

Shattering the Glass Ceiling in International Adjudication

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The Article shows that women are found in dramatically low numbers on the benches of the majority of the world's most important international courts, analyzes the causes of this phenomenon, and proposes and evaluates solutions. It establishes that the number of women in the pool of potential judges does not appear to dictate how many women become international judges. It shows, too, that when selection procedures are closed and opaque, and there is no quota or aspirational target for a sex-balanced bench, women obtain international judgeships in disproportionately low numbers. On the other hand, when a quota or aspirational target exists, benches are more balanced. Finally, the Article suggests and evaluates concrete reforms to selection procedures on international courts to remedy this problem, including greater transparency and openness in selection procedures, aspirational targets for the participation of women on the bench, and quotas. It is the first article to explore the relationship between selection procedures and sex representativeness outcomes on international courts.

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INTRODUCTION

Twenty-five years ago, Hillary Charlesworth, Christine Chinkin, and Shelley Wright wrote a path-breaking feminist critique of international law and institutions in the American Journal of International Law.[1] While applying feminist methodologies to international law and institutions is no longer a novel endeavor, serious questions remain about the extent to which the structures and content of international law continue to "privilege men" today. How much international law has made a difference to women and girls' rights is questionable, particularly when in many parts of the globe they continue to suffer from physical abuse at the hands of both state and non-state actors, are prevented from going to school, married off or trafficked as children, and are used as child soldiers. Progress in integrating women into international legal institutions is uneven at best.

1. Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

For example, the influential thirty-four member International Law Commission and eleven-member Inter-American Juridical Committee contained only two female members each in June 2015.[2] The UN human rights treaty bodies show ghettoization of women on the Committee on the Elimination of Discrimination Against Women, where women made up twenty-two of twenty-three members, and on the Committee on the Rights of the Child, where they accounted for eleven of eighteen members.[3] Yet women made up only 10% of the UN Committee on Enforced Disappearances,[4] 22% of the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination.[5] Only the Committee on the Rights of Persons with Disabilities was relatively balanced; seven out of eighteen of its members were women.[6] At a 2014 International Council for Commercial Arbitration conference, self-reports by participants established that 82.4% of those serving as arbitrators were men, while only 17.6% were women.[7] Only four female lawyers appeared before the International Court of Justice more than once between 1999 and 2012, while fifty-nine men appeared more than once during the same period.[8] The four female lawyers accounted for only 2.9% of the speaking time during the fourteen-year period studied.[9]

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2. *Membership*, INT'L LAW COMM'N, http://legal.un.org/ilc/ilcmembe.shtml (last updated July 20, 2015); *Members*, ORG. OF AM. STATES, INTER-AM. JURIDICIAL COMM., http://www.oas.org/en/sla/iajc/members.asp (last visited Apr. 22, 2016).

3. *Membership*, COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Membership.aspx (last visited Apr. 22, 2016); *Membership*, COMM. ON THE RIGHTS OF THE CHILD, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx (last visited Apr. 22, 2016).

4. *Members of the Committee on Enforced Disappearances*, COMM. ON ENFORCED DISAPPEARANCES, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CED/Pages/Me-mbership.aspx (last visited Apr. 22, 2016).

5. *Membership*, HUMAN RIGHTS COMM., UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx (last visited Apr. 22, 2016); *Membership*, COMM. ON ECON., SOCIAL AND CULTURAL RIGHTS, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Membership.aspx (last visited Apr. 22, 2016); *Membership*, COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CERD/Pages/Membership.aspx (last visited Apr. 22, 2016). Three out of 14 of the members of the Committee on Migrant Workers were women. *Membership*, COMM. ON MIGRANT WORKERS, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CMW/Pages/Membership.aspx (last visited Apr. 22, 2016). Women made up 30% of the UN Committee Against Torture. *Membership*, COMM. AGAINST TORTURE, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/CAT/Pages/Membership.aspx (last visited Apr. 22, 2016).

6. *Membership*, COMM. ON THE RIGHTS OF PERSONS WITH DISABILITIES, UNITED NATIONS http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx (last visited Apr. 22, 2016).

7. Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 452 (2015).

8. Shashank P. Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice, 1999–2012*, 25 EUR. J. INT'L L. 893, 904 (2014).

9. *Id.*

On most international courts and tribunals, the focus of this article, men continue greatly to outnumber women on the bench.[10] International courts decide the scope of our human rights, what individuals should be held accountable for atrocity crimes, what natural resources belong to which states, when environmental concerns should trump trade rules, and when the use of force is allowed. They find facts, discern relevant rules of international law, and apply them, filling gaps when necessary. Most international court judges studied law at the top universities in their countries, while many also studied international law, and a large majority have graduate or doctoral degrees from top elite universities such as Harvard University, Columbia University, the University of Cambridge, the University of London, Oxford University, the University of Paris, and the University of Moscow.[11] Judges frequently have decades of experience and generally hale from three career paths: the national judiciary, academia, or civil service in international organizations or for their own states as diplomats.[12] International judges come from all over the world,[13] but they may not reflect vast swathes of its people. For example, the percentage of international court judges from indigenous or poor backgrounds, minority groups within their own countries, or having disability status appears virtually unquestioned and unknown. We can say with certainty, however, that a great majority of international courts are not representative when it comes to sex.[14]

This Article surveyed a dozen international courts representing a cross-section of regions, subject-matter jurisdictions, and number of state parties and found that a great majority of them were not sex representative; their benches did not generally approximate the ratio of the sexes in the world's population. Of the eight international courts surveyed with no representativeness requirements built into their selection procedures, only 15% of judges were women in mid-2015.[15] On courts with either aspirational representativeness language or mandatory targets, however, 33% were women.[16] Since 1998, an average of 13% of judges on

10. *See* Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 654 (2012) [hereinafter Grossman I]; *see also infra* Part I.

11. *See infra* Part I, at 230-31.

12. *Id.* at 20. The study found that 40% came from academia, 33% were professional national judges, and about 28% were either national or international civil servants. *Id.*; *see also* Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387, 390 (2009).

13. A 2006 study found that of 215 international court judges, 63% came from civil law countries, 14% from common law countries, and 23% came from mixed common law/civil law, Islamic or local customary law blended with civil or common law traditions. DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 17 (2007).

14. Grossman I, *supra* note 10, at 654; *see infra* Part I.

15. *See infra* Part I.

16. These courts include the European Court of Human Rights, the African Court on Human

international courts without representativeness requirements have been women, while, on average, 31% of judges on courts with such mandates or aspirations were women.[17] Courts without representativeness requirements include the Inter-American Court of Human Rights (one woman on a seven-member bench), the International Tribunal for the Law of the Sea (one woman on a twenty-one member bench), and the World Trade Organization's Appellate Body (one woman on a seven-member bench).

These statistics establish that Charlesworth, Chinkin, and Wright's concerns about integrating women into the structures of international law remain relevant for most international courts. While some may take for granted that sex representativeness on the bench is a worthy aspiration for a number of reasons, others appear skeptical about its importance. A prominent commentary on the Rome Statute of the International Criminal Court described the requirement for "fair representation" on the bench as a "gesture in the direction of political correctness."[18] There are ongoing debates on whether a representativeness requirement should be applied to investment panels in the Transatlantic Trade and Investment Partnership,[19] and whether commissioner and judicial diversity matters for the Inter-American Commission and Court of Human Rights.[20] Judges and individuals involved in judicial selection on the International Court of Justice and the International Criminal Court have expressed mixed views about the importance of sex representation requirements.[21] While the requirements for legal, linguistic, and geographical diversity are widely accepted, "attitudes towards gender balance are generally much more ambivalent."[22]

The paucity of women judges on most international court benches is worrisome for a number of reasons. First, it affects both the normative and

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and Peoples' Rights, the International Criminal Court, and only *ad litem* judges for the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

17. These percentages were obtained by adding up the total number of slots in which women judges served every year since 1998 or the year of establishment, whichever came later, and dividing it by the total number of slots in which both male and female judges served every year since establishment. The yearly average was then taken.

18. John R.W.D. Jones, *Composition of the Court*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 255 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

19. Postings of various OGEMID members to ogemid@ogeltdm.com (July 1–2, 2014) (on file with author). OGEMID is an on-line discussion platform for individuals involved in international arbitration, especially investment disputes. *See,* https://www.transnational-dispute-management.com/ogemid/.

20. Center for Justice and International Law (CEJIL), Position Paper No 10-2014, The Selection Process of the Inter-American Commission and Court on Human Rights: Reflections on necessary reforms (2014).

21. RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 1 (2010) [hereinafter SELECTING INTERNATIONAL JUDGES].

22. *Id.* at 48–49.

sociological legitimacy of international courts. [23] Scholars of normative legitimacy ask what characteristics ought to be present for a court's authority to be justified, while students of sociological legitimacy focus on what drives perceptions of justified authority.[24] Both normative and sociological legitimacy rest in part on the impartiality of a court.[25] If men and women approach judging differently, whether based on nature or nurture, a homogeneous bench is inherently biased. Few studies of the gender effect of judging on international courts exist, due in part to the paucity of women on the bench.[26] But one study showed that women judges are much more likely than men to reject challenges to jurisdiction in International Centre for Settlement of Investment Disputes cases.[27] Another established that International Criminal Tribunal for the Former Yugoslavia panels with female judges imposed more severe sanctions on defendants who assaulted females, while all male panels imposed more severe sanctions on defendants who assaulted men.[28] Judge Navanethem Pillay, the only woman on a panel hearing Jean Paul Akayesu's case before the International Criminal Tribunal for Rwanda, is credited with vigorously questioning witnesses about sexual violence, ultimately resulting in the first conviction of an individual for the crime against humanity of rape and of genocide founded on rape.[29] And several renowned female international court judges have made the point that women bring a different set of life experiences to the bench than men.[30]

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23. *See* Grossman I, *supra* note 10, at 652.

24. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 (1999); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 116 (2009) [hereinafter Grossman II].

25. *See* BRIAN BARRY, JUSTICE AS IMPARTIALITY 17–18 (1995); *see also* LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 4 (Tom R. Tyler ed., 2007); Grossman II, *supra* note 24, at 129; David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 569, 576 (Samantha Besson & John Tasioulas eds., 2010).

26. *See* Kimi L. King & Megan Greening, *Gender Justice of Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 SOC. SCI. Q. 1049, 1050 n.2 (2007) (examining the relationship between sentence length and sex of the judge and victim, but not including the ICTR because "there are too few [women judges] to conduct empirical analysis and virtually all the guilty defendants received life sentences").

27. Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* 35 (July 5, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2101186.

28. King & Greening, *supra* note 26, at 1049–50, 1065–66.

29. Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 277–78, 282 (2002); *see also Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶¶ 696, 731 (Sept. 2, 1988); José E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. INT'L & COMP. L. 359, 362–63 (1999); Navanethem Pillay, *Equal Justice for Women: A Personal Journey*, 50 ARIZ. L. REV. 657, 665–66 (2008).

30. *See, e.g.*, Patricia Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOLEDO L. REV. 979, 989 (2005) [hereinafter Wald, *Six Not-So-Easy Pieces*]; Patricia Wald, *What Do Women Want from International Criminal Justice? To Help Shape the Law*, INTLAWGRRLS (Oct. 5, 2009, 6:05 AM), http://intlawgrrls.blogspot.com2009/10/what-do-women-want-from-international-law.html [hereinafter Wald, *What Do Women Want?*]; TERRIS ET AL., *supra* note 13, at 48, 186–87 (containing comments by former ICC Judge Navanethem Pillay and former Inter-American Court of Human Rights Judge Cecilia Medina Quiroga).

Even if men and women do not think differently, if they can overcome their differences, or if there is no essence unique to women as a group or men as a group, sex unrepresentativeness can still harm perceptions of legitimacy. For example, non-governmental organizations and some states argued for including women on the benches of post-WWII international criminal tribunals because they believed women might make a difference in the prosecution of international crimes against women.[31] Constituencies, especially those traditionally excluded from power, may continue to believe unrepresentative courts are biased against them. For example, South Africa could not have countenanced an all-white all-male judiciary, even if all the judges were "cured" of racism and sexism the day after Apartheid ended. In light of Third World critiques of international law and institutions, it is not surprising that the drafters of the World Trade Organization's Dispute Settlement Understanding chose to give developing states the right to demand an adjudicator from a developing country on dispute settlement panels hearing cases involving both a developing and developed state.[32] The exclusion of women from international law-making institutions historically has raised similar concerns among feminist scholars.[33]

Democratic legitimacy provides another compelling reason for sex representation on international courts: those affected should be represented among decision-makers. International courts exercise public authority by interpreting and shaping international law. "The de facto lawmaking role played by international judges cannot be denied."[34] This authority requires justification, and democratic values such as representation provide a meaningful justification.[35] Both women and men are affected by the work of international courts and should be involved in judicial decision-making for these institutions to possess justified authority.

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31. *See* Grossman I, *supra* note 10, at 661–64.

32. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 8(10), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Dispute Settlement Understanding] ("When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.").

33. *See, e.g.*, HILARY CHARLESWORTH & CHRISTINE CHINKIN, BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 308 (2000).

34. TERRIS ET AL., *supra* note 13, at 115–17 (discussing a number of different examples, ranging from the European and Inter-American human rights courts' contribution to the development of human rights law "far beyond what the original drafters [of the respective conventions] might have conceived," to the role of the European Court of Justice in European integration, to the WTO Appellate Body's inclusion of other areas of international law within its jurisdiction); *see also* Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GER. L. J. 979, 979 (2011) (stating that international judicial decisions influence "general legal structures"); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 68–76 (2013) [hereinafter Grossman III] (explaining how international courts influence the development of law and politics).

35. Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GER. L. J. 1341, 1343 (2011); *see also* Gráinne De Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221, 226–27 (2008).

There are, of course, other justifications beyond legitimacy for seeking sex representation on the bench. The presence of members of previously excluded groups in positions of influence may create mentorship opportunities and role models for others; it may give previously excluded groups the sense that they too can succeed. One study found that more female members of parliament correlates with more discussion of politics by both adolescent and adult women, increased participation in politics by adult women, and a greater intention to participate in politics among adolescent girls.[36] The same phenomenon may exist in other environments. And having diverse judges can have ripple effects on homogenous counsel as well. For example, appearing with an all-male team of lawyers before a Court with several women judges, some of whom have called for greater diversity in the bar, may be ill-advised.

Further, states are under an international legal obligation to grant men and women equal access to employment on international court benches. The United Nations Charter specifies that 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."[37] Courts affiliated with the United Nations include the International Court of Justice (primary judicial organ), the tribunals for the former Yugoslavia and Rwanda (created by Security Council Resolutions), and the International Criminal Court (through referral and deferral by the Security Council). In addition, the International Covenant on Civil and Political Rights indicates that States Parties "undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant," including the right and opportunity to take part in the conduct of public affairs and to have access "on general terms of equality" to public service.[38]

The Convention on the Elimination of Discrimination against Women requires states to take steps to ensure the right to participation of women at all levels of governance. States Parties are obligated to "take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right . . . [t]o participate in the formulation of

36. Christina Wolbrecht & David E. Campbell, *Leading by Example: Female Members of Parliament as Political Role Models*, 51 AM. J. POL. SCI. 921, 921 (2007); *see also, e.g.*, Kijana Crawford & Danielle T. Smith, *The We and the Us: Mentoring African American Women*, 36 J. BLACK STUD. 52 (2005) (discussing the importance of mentoring to the career development of African American female administrators in higher education).

37. U.N. Charter art. 8. The Preamble "reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." *Id.* pmbl.

38. International Covenant on Civil and Political Rights arts. 3, 25, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government. . . ."[39] International courts fall within the scope of the obligation to ensure women's right to participate.[40]

The absence or paucity of a significant proportion of the world's population from most international court benches suggests that something is awry. Why are women found in such meager numbers on most international court benches? Is a smaller pool of qualified women than men the reason? Who is selected for these positions, who is not, and why not? What does the paucity of women tell us about what values are driving the process of judicial selection on most international courts, and whether and how it may be flawed? Is outright discrimination against women the cause? Does a glass ceiling remain to be shattered in the international judiciary? A quarter-century after Chinkin, Charlesworth, and Wright wrote their seminal article, these questions deserve renewed attention and debate.

This is the first full-length journal article to attempt to tackle these questions.[41] It examines the relationship between selection procedures and sex representation on various international court benches. In so doing, it takes into account both quantitative and qualitative data on twelve different international courts, and it adopts a comparative approach to studying international courts. Although each of these courts operates within its own specific institutional and legal contexts, comparing their procedures and outcomes can result in insights into best and worst practices and what steps can be taken to strengthen these increasingly important institutions. The article exposes troubling qualities of selection procedures, which, if remedied, may provide greater opportunities to others traditionally excluded from international court judgeships, as well as enhance the legitimacy of these institutions. At the same time, it shows that trade-offs may exist between inclusion of women and other less traditional candidates, and

39. Convention on the Elimination of All Forms of Discrimination Against Women art. 7, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

40. The CEDAW Committee subsequently clarified that obligations extend "to all areas of public and political life" and are not limited to those spelled out in Article 7. "It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels." U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 23: Political and Public Life, 16th Sess. 1997, at http://www.un.org/womenwatch/daw/cedaw/recommenda-tions/recomm.htm#recom22. CEDAW's article 8 states that "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 organizations." CEDAW, *supra* note 39, art. 8.

41. *But see* Jan Linehan, *Women and Public International Litigation*, PROJECT ON INT'L COURTS AND TRIBUNALS (Sept. 2002), *available at* http://www.pict-pcti.org/publications/PICT_articles/Women1.pdf (last visited Apr. 22, 2016) (background paper providing a brief introduction to the topic).

states' desires to exert a high degree of control over international judicial selection procedures.

Part I provides statistics on sex representativeness on twelve global and regional international courts and establishes that women continue to serve on the vast majority of these institutions in paltry numbers. Part II seeks to explain whether and why glass ceilings continue to exist on most international courts. First, it argues that, although women may make up a smaller percentage of elite lawyers, high-level legal academics, and diplomats than men, a smaller pool is an unsatisfying explanation for a number of reasons. Second, national nominations tend to be opaque and known only to a small group of insiders, making it difficult for potential candidates to be aware of and apply for positions at the national level. Third, where courts employ institutionalized screening mechanisms that interview, evaluate, or rank candidates at the international level, women appear in greater numbers. Fourth, women tend to be present in higher numbers when constitutive instruments require or aspire to the inclusion of both male and female judges, as compared to when no such language is present.

Achieving sex representativeness requires the consideration and eventual implementation of reforms to judicial selection procedures. Part III proposes a number of possibilities for opening nomination procedures at the national level, including requiring states to publicize their procedures at the national level and the use of nominating commissions at the national or international levels. Ultimately, it argues that if measures aimed at opening and making more transparent selection procedures fail to make the bench more representative or if states reject them, states should consider aspirational language for the inclusion of both male and female judges, as well as temporary mandatory quotas to enhance sex representation on the bench.

I. HOW BALANCED ARE INTERNATIONAL COURT BENCHES?

Table 1 shows the percentage of women judges serving on twelve different international courts in mid-2015. These courts are a cross-section of the many international courts operating today, and they represent a wide array of subject matters, from human rights to the Law of the Sea to international economic law to international criminal law, as well as many of the regions of the world. While some have global membership, others are regional, and they vary by size as well. They include the African Court on Human and Peoples' Rights (Af. Ct. HPR), the Andean Tribunal of Justice (ATJ), the European Court of Human Rights (ECHR), the European Court of Justice (ECJ), the Court for the Economic Community of West African States (ECOWAS), the Inter-American Court of Human Rights (IACHR), the International Criminal Court (ICC), the International Court of Justice

(ICJ), the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY), the International Tribunal for the Law of the Sea (ITLOS), and the World Trade Organization's Appellate Body (WTO-AB).[42] The data are drawn from court websites or other relevant publications in mid-2015.[43]

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42. Ad hoc investment or trade arbitral panels, such as those arising under the International Center for the Settlement of Investment Disputes or the World Trade Organization are not included. In 2009, only 9% of ICSID arbitrators were women and 17% of WTO panel members were women. *See* Grossman I, *supra* note 10, at 680. In 2007, Susan Franck found that only 3.5% of investment treaty arbitrators were women. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 81 (2007).

43. *Current Judges*, European Court of Justice, *available at* http://curia.europa.eu/jcms/jcms/Jo2_7026/ (last visited June 1, 2015); *Former Judges*, European Court of Justice, *available at* http://curia.europa.eu/jcms/jcms/Jo2_9606/#CJE (last visited June 1, 2015); *Judges of the Court*, African Court on Human and Peoples' Rights, *available at* http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/judges (last visited June 1, 2015); Email from Ana Rita Ramirez of the Inter-American Court of Human Rights to author, concerning current and former judges (16 February 2015) (on file with author); *Zaffaroni elected to inter-American rights court*, Buenos Aires Herald.com, June 17, 2015, *available at* http://www.buenosairesherald.com/article/191791/zaffaroni-elected-to-interamerican-rights-court (last visited June 26, 2015); *ECOWAS Court Holds Valedictory Court Session for Six Retiring Judges*, ECOWAS Press Release (June 20, 2014), *available at* http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=223:valedictorycourtsessionforsixretiringjudges&catid=14:pressrelease&Itemid=36 (last visited June 26, 2015); *The Past Members of the Court*, ECOWAS (last visited June 26, 2015), *available at* http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=29&Itemid=32 (last visited June 26, 2015); *The Judges of the Community Court of Justice*, ECOWAS, *available at* http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=260&Itemid=31http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=260&Itemid=31 (last visited June 26, 2015); *Current Judges – Biographical Notes*, International Criminal Court, *available at* http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges.aspx (last visited June 25, 2015); *Former Judges*, International Criminal Court, *available at* http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/chambers/the%20judges/pages/former%20judges.aspx (last visited June 25, 2015); *Judges Continuing in Office to Complete Proceedings*, International Criminal Court, *available at* http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges%20continuing%20in%20office%20to%20complete%20proceedings.aspx (last visited June 25, 2015); *Judges of the Court since 1959*, European Court of Human Rights, *available at* http://www.echr.coe.int/Documents/List_judges_since_1959_ENG.pdf (last visited April 30, 2015); *Appellate Body Members*, World Trade Organization, *available at* https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited June 25, 2015); *All Members*, International Court of Justice, *available at http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2* (last visited June 25, 2015); Libro Testimonio Comunitario, Tribunal Andino de Justicia (2004), *available at* http://www.tribunalandino.org.ec/sitetjca/index.php?option=com_filecabinet&view=files&id=7&Itemid=35 (last visited June 26, 2015); Emails from Angie Sasaki of Andean Tribunal of Justice to author (Dec. 5, 2014, April 16, 2015, May 5, 2015) (on file with author); *Members*, International Tribunal of the Law of the Sea, available at https://www.itlos.org/the-tribunal/members/ (last visited June 25, 2015); *Members of the Tribunal since 1996*, International Tribunal of the Law of the Sea, *available at* https://www.itlos.org/en/the-tribunal/members-of-the-tribunal-since-1996/ (last visited June 28, 2015); Annual Reports of the International Criminal Tribunal for Rwanda to the General Assembly and Security Council, 1996-2014; *Chambers*, United Nations International Criminal Tribunal for Rwanda, *available at* http://www.unictr.org/en/tribunal/chambers (last visited June 1, 2015); *The Judges*, ICTY, *available at* http://www.icty.org/sid/151 (last visited June 1, 2015); *Former Judges*, ICTY, *available at* http://www.icty.org/sid/10572 (last visited June 1, 2015). When one judge completed his or her

Table 1 demonstrates that the smallest court in the group, the ATJ, was also the court with the highest percentage of women judges in mid-2015. Two of the four judges were women. The next highest percentage of women served on the ICC, with 39% percent women judges, or seven females out of eighteen total judges, and then the ECHR, where women made up 33% of the forty-five judges on the court. On the nine remaining courts, men made up 80% or more of the total number of judges on the bench.

Table 1. Percent Female Judges on Courts in Mid-2015

Court	% Female	Nationality
Af. Ct. HPR	2/11 (18%)	Nigeria, Uganda
ATJ	2/4 (50%)	Bolivia, Colombia
ECHR	15/45 (33%)	Austria, Croatia, Estonia, Finland, Georgia, Germany, Ireland, Monaco, Romania, San Marino, Sweden, Switzerland, FYR Macedonia, Turkey, Ukraine
ECJ	5/28 (18%)	Spain, Romania, Austria, Netherlands, Estonia
ECOWAS	1/7 (14%)	Guinea Bissau
IACHR	1/7 (14%)	Costa Rica
ICC	7/18 (39%)	Japan, Kenya, Botswana, Dominican Republic, Belgium, Argentina, Brazil
ICJ	3/15 (20%)	China, Uganda, United States
ICTR	Permanent: 2/9 (22%) Ad Litem: 0/1 (0%) Total: 2/10 (20%)	Madagascar, Pakistan
ICTY	Permanent: 2/19 (11%) Ad Litem: 1/3 (33%) Total: 3/22 (14%)	Italy, Madagascar, Pakistan
ITLOS	1/21 (5%)	Argentina
WTO-AB	1/7 (14%)	China

tenure during the same year as another was elected, only the judge elected that year was counted for that year.

Table 1 also lists the countries of origin of women judges. Interestingly, the vast majority of the women on the global, rather than regional, courts came from outside of Western Europe and the United States. The women on the ICC were from Japan, Kenya, Botswana, Dominican Republic, Belgium, Argentina, and Brazil. Only one of seven women on the ICC came from Western Europe. The women on the ICTY and the ICTR's Appellate Chamber were from Pakistan and Madagascar, although one ad litem judge on the ICTY was Italian. The lone women on the WTO-AB and on ITLOS were Chinese and Argentinian, respectively. One of the three women on the ICJ, Joan Donoghue, haled from the United States, while the other two female judges were Chinese and Ugandan. While not all states are parties to all of the global courts,[44] which could potentially explain why some states appear over or under-represented in the percentage of women on the bench, a significant number of Western European and North American states are parties to or participate in most of them. Figures 1 through 12 show the percentage of women judges serving on these same twelve courts from their establishment through mid-2015.

Figures 1–12 show that while on some courts, a discernable upwards trend exists in the percentage of women judges, on others the number of women appears to have stayed constant or relatively constant, fluctuated dramatically or decreased. The data suggest that the percentage of women judges has generally increased over time on the ATJ, the ECHR, and the ICJ. On the other hand, the number of women has remained constant on the Af. Ct. HPR, at two out of eleven every year since its establishment, and relatively constant on ITLOS. Elsa Kelly is the only woman ever to have served on the twenty-one member ITLOS bench in the two decades since its establishment.

44. The ICTY and the ICTR were created by Security Council resolutions, and therefore no state is formally a "party." S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; S.C. Res, 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

Figure 1. African Court on Human and Peoples' Rights

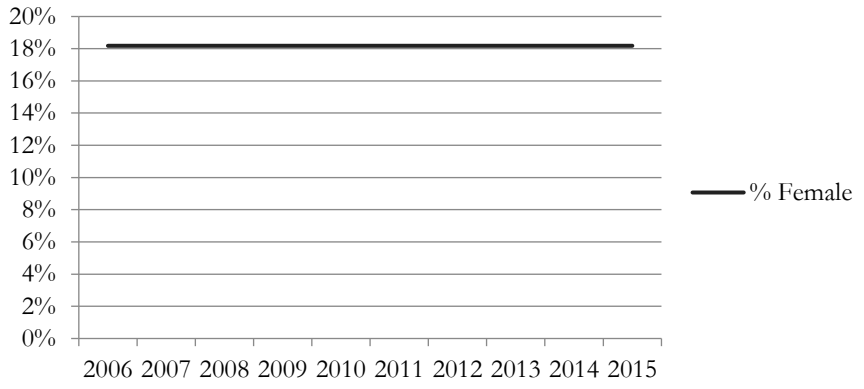


Figure 2. Andean Tribunal of Justice

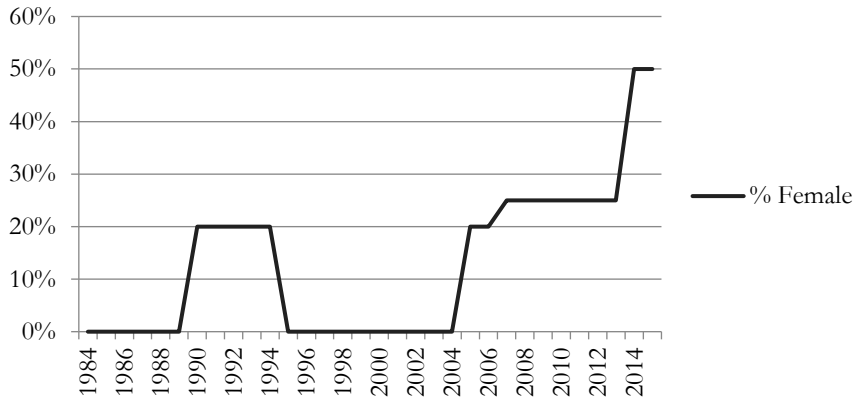


Figure 3. European Court of Human Rights

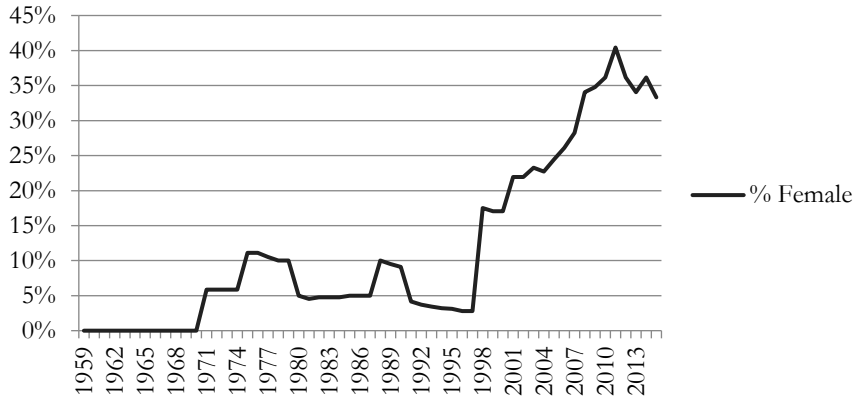


Figure 4. European Court of Justice

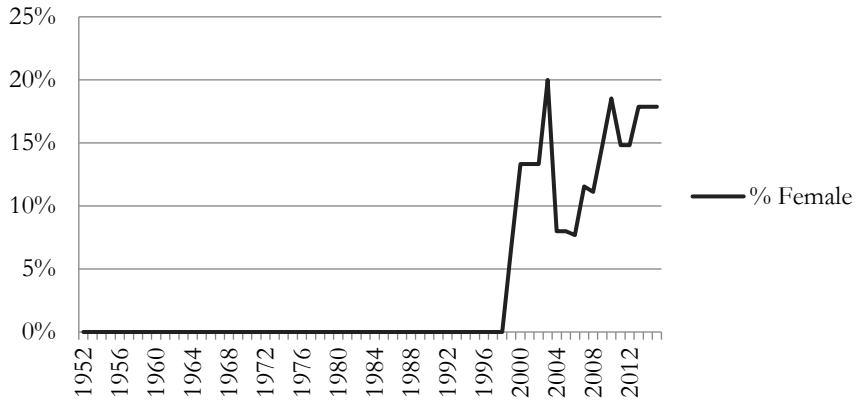


Figure 5. ECOWAS Community Court of Justice

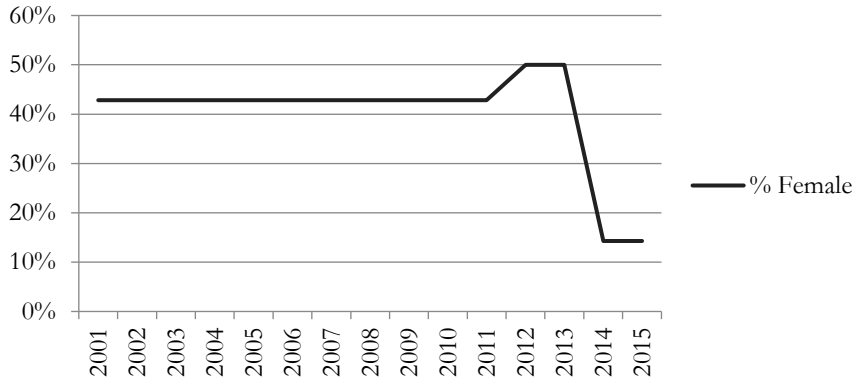


Figure 6. Inter-American Court of Human Rights

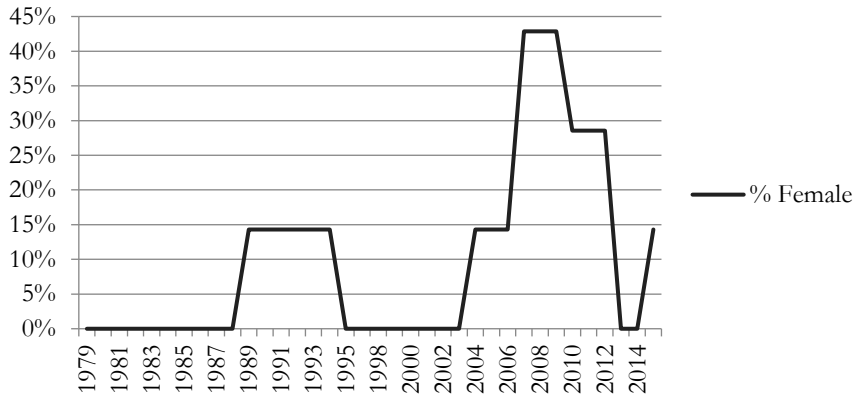


Figure 7. International Criminal Court

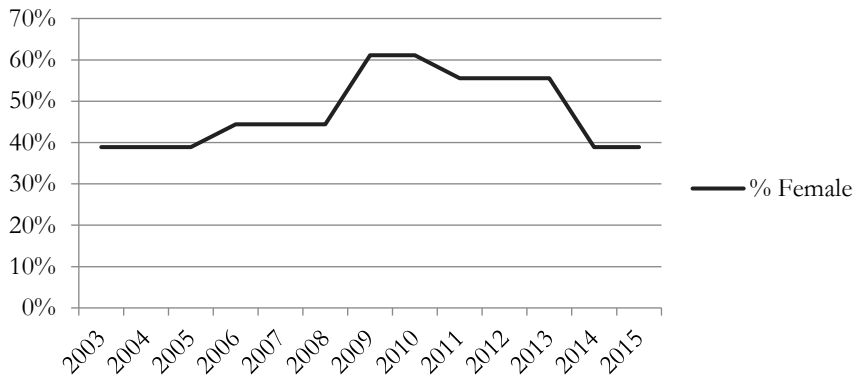


Figure 8. International Court of Justice

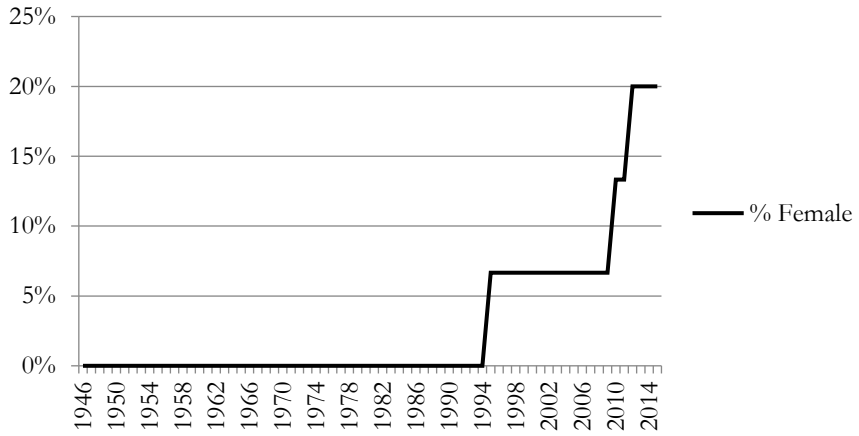


Figure 9. International Criminal Tribunal for Rwanda

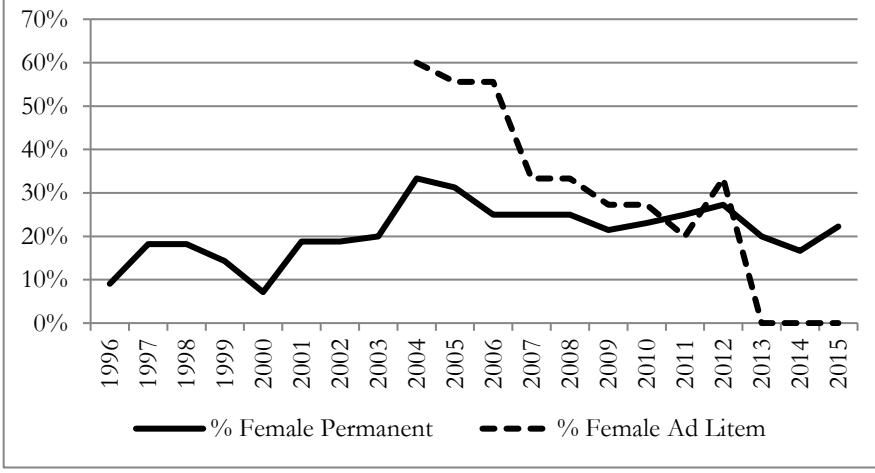


Figure 10. International Criminal Tribunal for the Former Yugoslavia

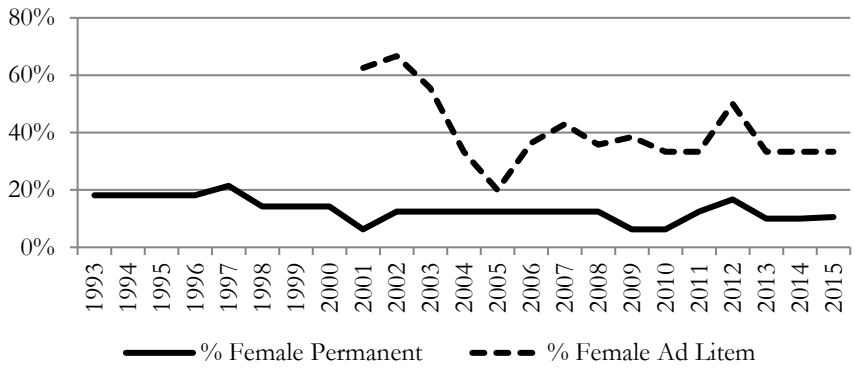


Figure 11. International Tribunal for the Law of the Sea

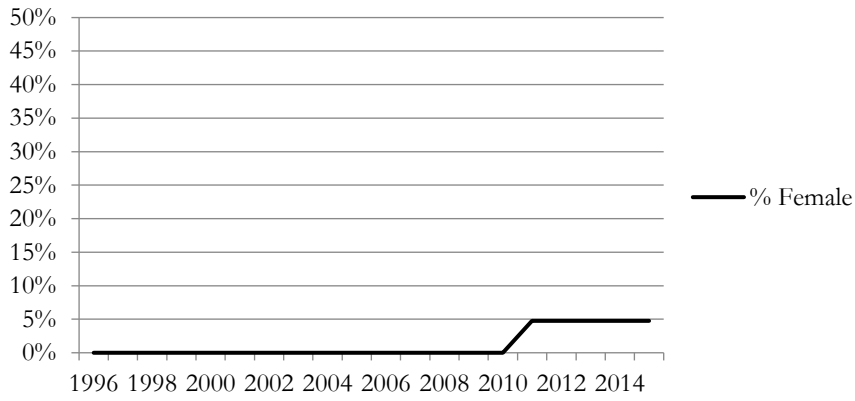
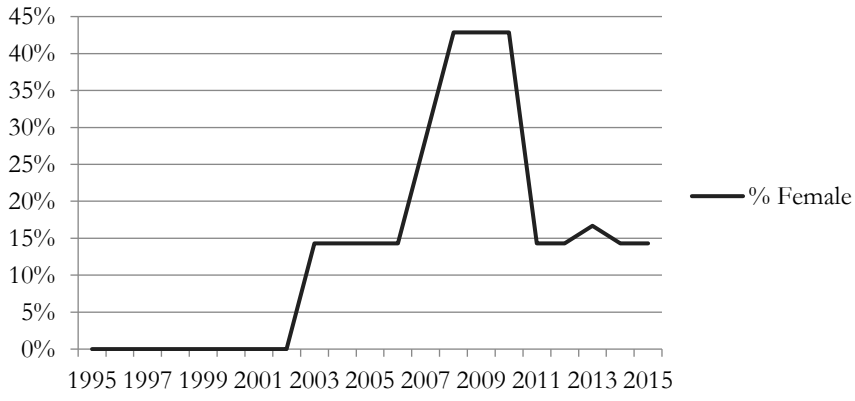


Figure 12. World Trade Organization Appellate Body



On many of the courts, the numbers have fluctuated dramatically, such as on the IACHR, ECOWAS, the ICTR, and ICTY, especially for *ad litem* judges, and the WTO-AB. For example, the seven-member IACHR bench dropped from three to zero female members within the span of six years. One woman was recently elected to join the previously all-male bench. The number of women on ECOWAS dropped from three to one in 2014, and on the WTO-AB from three to one in 2011. Women made up two-thirds of the ICTY's *ad litem* judiciary in 2002, dropping to 20% in 2005. In mid-2015, one of the ICTY's three remaining *ad litem* judges was female. In 2004, 60% of the ICTR's *ad litem* judges were women, but men occupied 80% of the bench by 2011. The percentage of woman serving on the bench in mid-2015 was lower than in previous years on eight of the twelve courts surveyed: the IACHR, ECOWAS, the ICTY, and ICTR for both permanent and *ad litem* judges, the ICC, the WTO-AB, the ECHR, and the ECJ.

Figure 13. Percent Female Judges - All Surveyed Courts

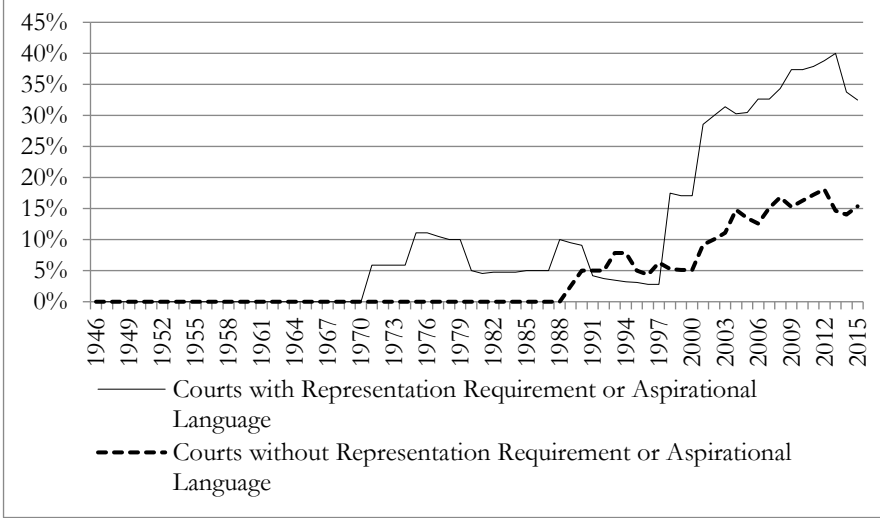
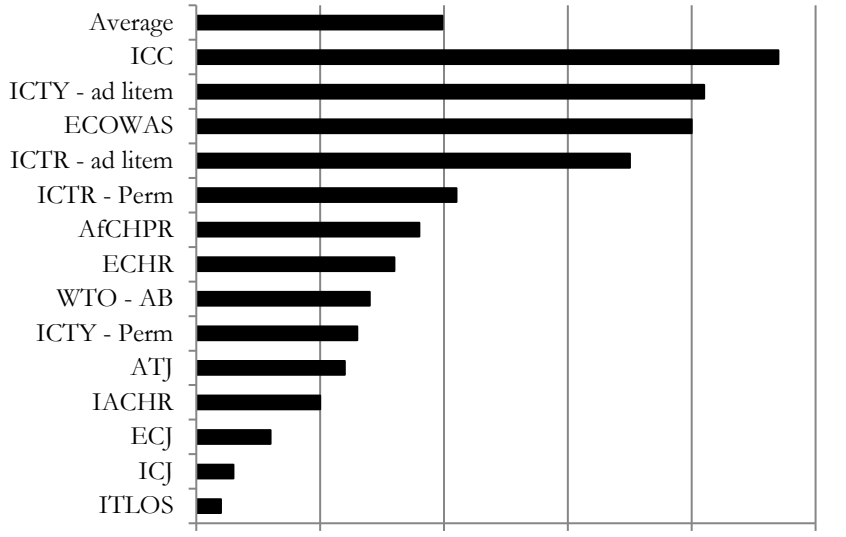


Figure 13 compares the percentage of women judges each year on all courts with representation requirements, either in the form of mandatory or virtually mandatory quotas — the ICC and the ECHR since 2004 — or aspirational language favoring balanced representation of the sexes — the ECHR from the late 1990s until 2003, the ICTY and ICTR with respect to *ad litem* judges only, and the Af. Ct. HPR. The ECHR is included in the group of courts with representation requirements since establishment, even though its emphasis on balanced representation began only in the late 1990s. While the percentage of women judges has increased over time for both categories of courts, the overall percentage of women judges on courts with

no representativeness requirement has never broken 20%. It has reached 40% for courts with representativeness aspirations or requirements.

Figure 14 contains the percentage of slots occupied by women on each of the twelve courts since their establishment until mid-2015. The percentage was calculated by dividing the total number of women judges each year by the total number of male and female judges per year. The ICC is the Court that has had the most slots occupied by women since its establishment (47%), followed by *ad litem* judges on the ICTY (41%), and then ECOWAS (40%). Women served in the lowest percentages on ITLOS (2%), the ICJ (3%), the ECJ (6%), and the IACHR (10%).

Figure 14. Percent Slots Occupied by Women Since Court's Establishment Until Mid-2015



II. WHY SO FEW WOMEN?

Why are women under-represented and men over-represented on most international courts in comparison to their numbers in the world's population?[45] While a smaller pool of candidates appears to help explain the statistics to some extent, the argument lacks persuasive force when analyzed in light of the data on women's participation on international courts. A

45. A UN Study estimated that in 2010, there were 101.7 males per 100 females in the world. *2015 Revision of World Population Prospects*, POPULATION DIV., DEP'T OF ECON. & SOC. AFFAIRS, UN SECRETARIAT, http://esa.un.org/unpd/wpp/Excel-Data/population.htm (last visited Apr. 22, 2016).

comparison of national nomination procedures and selection procedures at the international level suggests that courts with more open nomination procedures and institutional screening mechanisms may put more women on the bench. In addition, courts with mandatory or near mandatory sex representation requirements are more likely to have higher percentages of women on the bench. Finally, a lack of political will may account to some degree for the paucity of women on most international court benches, presenting a substantial hurdle to diversification of the international judiciary.

A. The Limited Pool

One possible explanation for the paucity of women judges on international courts is that they make up a much smaller percentage of the available pool of candidates than men do. Judges are usually selected from legal academia, the judiciary, and the diplomatic corps in each country.[46] Women are typically found in lower numbers than men in the legal profession generally, and in the highest echelons of the profession in most if not all countries. In many states, women make up a smaller proportion of lawyers. An anomalous example is Saudi Arabia, which only recently allowed women to become lawyers.[47] According to a recent study by Ethan Michelson, 36% of all countries have fewer than 30% female lawyers, and 36% of the world's lawyers are women.[48]

While the number of women lawyers is high in some states, numbers alone do not paint an accurate picture of women's status in the legal profession globally or in each state. Women are frequently underrepresented at the highest levels of the profession. For example, while Michelson's study estimated that 48% of lawyers in the UK are female, women accounted for only 35% of practicing barristers and 11% of Queen's Counsel in 2010.[49] A similar dynamic exists in the South African courts.[50] In 2003, nearly 60% of law schools in the UK had never had a female professor and 83% of all law professors were men.[51] A 2003 book examining women in the legal

46. TERRIS ET AL., *supra* note 13, at 20.

47. Neil MacFarquhar, *Saudi Monarch Grants Women Right to Vote*, N.Y. TIMES, Sept. 25, 2011, at http://www.nytimes.com/2011/09/26/world/middleeast/women-to-vote-in-saudi-arabia-king-says.html.

48. Ethan Michelson, *Women in the Legal Profession, 1970–2010: A Study of the Global Supply of Lawyers*, 20 IND. J. GLOBAL LEGAL STUD. 1071, 1095, 1101 (2013). A sampling of estimates of the percentage of female lawyers is drawn from the study: 32% (USA), 5% (India), 66% (Brazil), 35% (Mexico), 21% (China), 48% (UK), 45% (Russia), 27% (Indonesia), 26% (Egypt), 50% (France), 16% (Japan). *Id.*

49. *Id.* at 1115 tbl.A6; About the Bar: Statistics, The Bar Council, http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/statistics/#AllBarStats (last visited Apr. 22, 2016).

50. Ruth B. Cowan, *Women's Representation on the Courts in the Republic of South Africa*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 291, 312–13 (2006).

51. Celia Wells, *The Remains of the Day: The Women Law Professors Project*, *in* WOMEN IN THE

profession from a comparative perspective found that women were underrepresented in the most lucrative sectors and highest echelons of the legal profession in most countries surveyed, including Canada, Australia, New Zealand, UK, Israel, Germany, Holland, Poland, France, and Japan.[52] Several studies reach the same conclusions in the United States.[53]

Although lower levels of the judiciary in many countries are increasingly feminized, men continue to be overrepresented in most countries, especially at intermediate and highest court levels.[54] In 2010, women made up 0%, 8%, 18%, 25%, 33%, and 35% of the higher courts of Paraguay, Guatemala, Brazil, Chile, El Salvador, and Costa Rica, respectively.[55] Similarly, while women are present in high numbers at the lowest levels of the judiciary in the Netherlands, France, Spain, and Italy, it takes them longer to be promoted and they are present in low numbers at the highest levels of the judicial hierarchy.[56] According to the Organisation for Economic Co-operation and Development (OECD), in 2012, 49.2% of professional judges in OECD countries were women, but only 29.4% of court presidents and 26% of Supreme Court justices were women.[57] In April 2011, according to the UN Progress of the World's Women 2011–2012 Report, women made up 67% of the judges on the highest courts of Serbia and 50% in Rwanda, but no women judges were present on the highest courts of Andorra, Cameroon, Cape Verde, Hungary, Malaysia, Pakistan, and Peru.[58] Overall, for sixty-five of seventy-eight states surveyed for the UN report, women made up 33% or less of the bench.[59]

WORLD'S LEGAL PROFESSIONS 225, 227 (Ulrike Schultz & Gisela Shaw eds., 2003).

52. *See generally* WOMEN IN THE WORLD'S LEGAL PROFESSIONS (Ulrike Schultz & Gisela Shaw eds., 2003).

53. *See, e.g.*, Steven A. Boutcher & Carole Silver, *Gender and Global Lawyering: Where are the Women?*, 20 IND. J. GLOBAL LEGAL STUD. 1139, 1146–47 (2013); Jennifer Smith, "Female Lawyers Still Battle Gender Bias: Despite Advances Women Still Lag Behind Men in Billing, Management Roles," WALL ST. J. (May 4, 2014), http://www.wsj.com/articles/SB10001424052702303948104579537814028747376; SALLY KENNEY, GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 25 (2013).

54. *See, e.g.*, MARITZA FORMISANO & VALENTINE M. MOGHADAM, UNESCO, WOMEN IN THE JUDICIARY IN LATIN AMERICA: AN OVERVIEW OF PROGRESS AND GAPS 4, 20 (2005) (discussing Latin America).

55. Sital Kalantry, *Women in Robes*, AMERICA'S Q., Summer 2012, at 83, Table I, *available at* http://www.lwv.org/files/Women%20in%20Robes-Sital%20Kalantry.pdf (last visited Apr. 22, 2016) (citing Economic Commission for Latin America statistics from 1998–2010).

56. Justice Susan Glazebrook, Talk delivered to Chapman-Tripp Women and Law Event, Looking Through the Glass: Gender Inequality at the Senior Levels of New Zealand's Legal Profession 2–3 (2010).

57. *Gender Equality: Women in Government*, OECD GENDER INITIATIVE, http://www.oecd.org/gender/data/womeningovernment.htm (last visited Apr. 22, 2016).

58. UN Women, *Progress of the World's Women: In Pursuit of Justice* 61 Fig.2.6 (2011), *available at* http://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice.

59. *Id.*

Studies have identified numerous causes for the lower percentage of female lawyers at the highest levels of the legal profession at the domestic level, including the inflexible structure of specific work environments such as large private law firms, discrimination, and women shouldering a disproportionate burden of domestic responsibilities, opting out to care for family due to family-unfriendly policies, and preferring increased flexibility.[60] To the extent that glass ceilings or discrimination keep women at lower levels of the judiciary in the domestic context, the available pool of potential international judicial candidates will appear smaller than it is.

The extent to which women are present (or absent) at the bars of international courts may also have an impact on the diversity of the bench. For example, women are present in meager numbers as oral advocates at the ICJ. In the thirty-three contentious cases argued in the ICJ between 1999 and 2012, women made up only 11% of lawyers arguing before the Court, and their arguments made up only 7.44% of the total speaking time.[61] Only four female lawyers appeared before the ICJ more than once in the entire thirteen year period, while fifty-nine men appeared more than once during the same period, and these four female lawyers accounted for only 2.9% of the speaking time.[62] There are calls for increased diversity among counsel before the ICC as well.[63] Even if the career path of an international judge does not necessarily include serving as a litigator before it, the lack of diversity on the bench and at the bar may contribute to a culture of complacency. It is normal to see few women in these contexts. The lack or paucity of women may make the problem itself invisible or appear inevitable.[64]

It is difficult to quantify the pool of women available from the diplomatic corps due to a lack of systematic comparative data. Nonetheless, in many OECD countries, women tend to be found in higher numbers in the public sector than in the private sector; they made up 57% of public sector employees in OECD countries in 2010.[65] Women held 40% of middle management positions and 29% of top management positions in government in 2010.[66] According to United Nations statistics, women made

60. *See generally* Leah V. Durant, *Gender Bias and the Legal Profession: A Discussion of Why There Are Still So Few Women on the Bench*, 4 MD. L.J. RACE, RELIGION, GENDER & CLASS 181 (2004); Boutcher & Silver, *supra* note 53, at 1148–49.

61. Kumar & Rose, *supra* note 8, at 904.

62. *Id.*

63. *See* ICC-ASP/12/Res.8, § 33, 27 Nov. 2013, *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res8-ENG.pdf.

64. *See* Cowan, *supra* note 50, at Part VI.D (explaining that women judges in South Africa stress the need for greater visibility of women on the South African bench, "so that women in judicial robes can become part of the cultural consciousness . . . .").

65. *Gender Equality: Women in Government*, *supra* note 56.

66. *Id.*

up an average of 29% of legislators, senior officials, and managers in the world.[67] Yet, in 2012, only 11 out of 115 European Union Ambassadors were women.[68]

The limited pool argument lacks persuasive force for a number of reasons: First, in a world where women serve as presidents, ambassadors, judges, and professors, it is difficult to believe that only one woman in North-, South-, or Central America or the Caribbean is qualified to sit on the IACHR; only one woman in the Economic Community of West Africa can meet the requirements of its court; and that only one woman in a world of over seven billion people is qualified to sit on the Law of the Sea Tribunal or the WTO's Appellate Body. In other words, a very small pool is still sufficient to fill a handful of open seats on international courts. Second, the limited pool argument is unconvincing where women judges are present in higher numbers for a period and then drop off substantially. The ECOWAS Court, the WTO-AB, and the IACHR had three women on their seven-member benches just a few years ago, but they only had one each by mid-2015. The percentage of women judges has also dropped dramatically over time on both the ICTY and the ICTR. It is reasonable to assume that the female pool of qualified candidates would grow over time, not shrink.

In addition, the limited pool argument fails to explain why some global courts with very similar qualifications requirements and subject-matter jurisdictions exhibit stark differences in the percentages of female judges. In mid-2015, women made up 39% of judges on the ICC, but only 11% and 22% of permanent judges on the ICTY and the ICTR. Presumably, ICC judges should have similar qualifications to those on the ICTY or ICTR, since all of them address international criminal law matters. In the same vein, a limited pool cannot explain why so many more women have served as *ad litem* judges on the ICTY than permanent judges, or why the number of women *ad litem* judges on the ICTR dropped from a high of 60% in 2004 to a low of 20% in 2011.[69]

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67. *See Statistics and Indicators on Women and Men, Women's Share of Legislators, Senior Officials and Managers*, UNITED NATIONS STATISTICS DIVISION, http://unstats.un.org/unsd/demographic/products/indwm/default.htm (last visited Apr. 22, 2016).

68. *See* Talyn Rahman-Figueroa, *Celebrating the Rise of Women in Diplomacy*, DIPLOMATIC COURIER: A GLOBAL AFFAIRS MAGAZINE (Mar. 8, 2012), *available at* http://www.diplomaticourier.com/news/topics/diplomacy/1374-celebrating-the-rise-of-women-in-diplomacy (noting that only 11 female ambassadors served as Permanent Representatives of their states to the United Nations in 2002 and discussing the challenges to women in the United Kingdom's diplomatic corps); *see also* Ann Wright, *For the Record: Breaking through Diplomacy's Glass Ceiling*, FOREIGN SERV. J. 54–55 (October 2005), *available at* http://afsa.org/sites/default/files/flipping_book/1005/files/assets/downloads/publication.pdf (noting that rapid progress was made starting with the Carter Administration in promoting women to chief-of-mission positions and other high level appointments, and that in 2003 only 25% of senior foreign service officers were women).

69. *See supra* Figures 9–10. *Ad litem* judges were first elected to the ICTR in 2004. There were ten *ad litem* judges on the bench in 2011. After 2011, the number of *ad litem* judges was reduced to three and then to one, as the tribunal sought to complete its work.

Furthermore, the limited pool is unconvincing because it assumes that selection procedures aim to promote the most meritorious candidates. This is far from obvious. For example, in preparation for 2015 elections to the IACHR, the Open Society Justice Initiative established a panel of experts to evaluate candidates nominated by states. The panel expressed concerns about whether one of the five candidates, Patricio Pazmiño Freire, would "be in a position to avoid conflicts of interest or to maintain the necessary independence and impartiality with regard to the Ecuadorian executive branch."[70] The panel noted that he was appointed to Ecuador's Constitutional Court after the entire body was dissolved, which a 2013 Inter-American Court decision determined violated due process norms by arbitrary termination and impeachment proceedings against the previous judges.[71] He was elected to the bench nonetheless. On the other hand, another judge, with a "long and deep commitment to human rights," lost his re-election bid.[72] While this could arguably constitute an exceptional case, as discussed in more detail with reference to national nomination and international elections procedures, several scholars of international courts have argued that selection processes for international courts often have more to do with "[p]olitical factors, rather than the individual selection criteria. . . ."[73] In the same vein, Philippe Sands and Cherie Booth wrote: "in many states, nominations are handed out to reward political loyalty rather than legal excellence."[74] If so, the limited pool argument loses much of its purported explanatory force.

The limited pool argument is also problematic because it appears that the percentage of women on the bench does not necessarily correspond with the percentage of women lawyers a state may have. In other words, growing the pool does not necessarily translate to more women on the bench. Although Michelson estimates that 50% of France's lawyers are women,[75] no French woman has ever served as a permanent judge on the ECJ, the ECHR, the ICC, the ICJ, ITLOS, the ICTR, or the ICTY, although 25 French men have served on them.[76] In the same vein, although women

70. Final Report of the Independent Panel for the Election of Inter-American Commissioners and Judges, INTER-AM. COMM'N (June 2, 2015), 25–27, *available at* http://www.opensocietyfoundations.org/sites/default/files/iachr-panel-report-eng-20150603.pdf (last visited Apr. 22, 2016) [hereinafter Independent Panel Report].

71. *Id.* at 26.

72. *Id.* at 29.

73. *See, e.g.*, SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 95.

74. Cherie Booth & Philippe Sands, *Keep Politics out of the Global Courts*, THE GUARDIAN (July 13, 2001), *available at* http://www.theguardian.com/politics/2001/jul/13/warcrimes.world.

75. Michelson, *supra* note 48, at 1115 tbl.A6.

76. Seven French men have served on the ECJ, including one for two separate terms. *See Current Judges*, *supra* note 43. *Former Judges, supra* note 43. Five French men have served on the European Court of Human Rights. *See Judges of the Court since 1959*, *supra* note 43. One French man has served on ITLOS. *See Members*, *supra* note 43; *Members of the Tribunal since 1996*, *supra* note 43. Five French men have served

account for about 48% of the United Kingdom's lawyers according to Michelson,[77] no British woman has ever served on the ECJ, the ICC, the ECHR, or the ICTY, although British men have. Dame Rosalynn Higgins, the first woman ever to serve as a permanent judge on the ICJ, however, is British. In sum, twenty-four British men and one British woman have served as permanent judges on all five of these international courts.[78] On the other hand, China, which is estimated to have about 21% female lawyers,[79] has appointed one woman each to the ICJ and the WTO-AB. Four Chinese men have served on the ICJ, and three have served on the ICTY and the ICTR combined. [80] Russia has appointed no women to the ECHR, the ICJ, ITLOS, the ICTR, or ICTY, although seventeen Russian men have served there.[81] Michelson estimates that 45% of Russia's lawyers are women.[82] Only 16% of lawyers are women in Japan,[83] yet Japanese women have served on the ICC and on the ICTY as *ad litem* judges.[84] No Japanese women have served on the WTO-AB, the ICJ, or ITLOS, although eight Japanese men have.[85]

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on the International Court of Justice as permanent judges. *See All Members*, *supra* note 43. Three French men have served as permanent judges on the ICTY, and one served on the joint Appellate Body for both courts. *See Former Judges*, ICTY, *supra* note 43 (listing two French former permanent judges and one former President); *Chambers*, ICTY, http://www.icty.org/en-/about/chambers (specifying that Presidents of the ICTY preside over the Appeals chamber) (last visited April 23, 2016). Three French men have served on the International Criminal Court. *See Current Judges—Biographical Notes*, *supra* note 43; *Former Judges*, ICC, *supra* note 43; *Judges Continuing in Office to Complete Proceedings*, *supra* note 43. Michele Picard, a French woman, served as an *ad litem* judge on the ICTY. Suzanne Bastide served as an *ad hoc* judge on the ICJ, but she was appointed by Tunisia.

77. Michelson, *supra* note 48, at 1115 tbl.A6.

78. Six men have served on the European Court of Justice, while two served on the ICC. *See Current Judges*, *supra* note 43; *Current Judges—Biographical Notes*, *supra* note 43; *Former Judges*, *supra* note 43; *Judges Continuing in Office to Complete Proceedings*, *supra* note 43. Seven served on the ECHR, and three served on the ICTY as permanent judges. *See Judges of the Court since* 1959, *supra* note 43; *The Judges*, *supra* note 43. Six British men and one British woman have served as judges on the ICJ bench. *See All Members*, *supra* note 43.

79. Michelson, *supra* note 48, at 1115 tbl.A6.

80. Yuejiao Zhang is the first Chinese national to serve on the WTO Appellate Body. *Appellate Body Members*, *supra* note 43. Xue Hanquin is the fifth Chinese national to serve on the ICJ. *See All Members*, *supra* note 43.

81. Three Russian men served on the ECHR, five on behalf of the USSR on the ICJ, while four on behalf of the Russian Federation, two for ITLOS, and three for the ICTY and the ICTR combined. *See Judges of the Court since 1959*, *supra* note 43; *All Members*, *supra* note 43; *Members*, *supra* note 43; *Members of the Tribunal since 1996*, *supra* note 43; *The Judges*, *supra* note 43; *Chambers*, *supra* note 43.

82. Michelson, *supra* note 48, at 1115 tbl.A6.

83. *Id.*

84. No Japanese men have served on the ICC. *See Current Judges*, *supra* note 43; *Current Judges—Biographical Notes*, *supra* note 43; *Former Judges*, *supra* note 43; *Judges Continuing in Office to Complete Proceedings*, *supra* note 43.

85. Three Japanese men have served on the WTO Appellate Body. *See Appellate Body Members*, *supra* note 43. Three Japanese men and no women have served on the ICJ. *See All Members*, *supra* note 43. Two Japanese men served on ITLOS. *Members of the Tribunal since 1996*, *supra* note 43.

B. The Opacity of National Nomination Procedures

The number of women serving as international court judges in proportion to their availability in the pool of qualified candidates raises serious questions about the definition of the pool itself and the procedures utilized to identify and select new judges. For many international courts, judicial candidates are identified and nominated by individual states at the domestic level in a closed and opaque procedure, and then elected by an assembly of states parties to the court at the international level with little statutory guidance or institutionalized screening of the candidates. The remainder of this Part evaluates the impact of these procedures, as well as of quotas or aspirational statements to achieve sex representativeness on the bench.

National nominations practices can be grouped into three categories: (1) little to no guidance or transparency, (2) a high level of guidance or transparency, and (3) no nominations procedure at the national level. Most of the twelve courts surveyed fall into the first group, while the ECHR and the ECJ fall into the second, and ECOWAS into the third. A comparison of these three groups' selection procedures and statistics on women's participation does not appear to yield concrete conclusions about the relationship between the amount of guidance provided or the degree of transparency in national nominations procedures, and the percentage of women judges on the bench in mid-2015 or historically. What is clear, however, is that national nomination procedures are frequently opaque and known only to well-connected insiders. Such procedures not only make it more difficult for outsiders to make it to the international election stage, but also, they raise questions about whether selection procedures aim to seat the most meritorious candidates in the first place.

1. Group 1: Little Guidance or Transparency

The ICJ, ICC, Af. Ct. HPR, ICTY, ICTR, WTO-AB, ATJ, ITLOS, and IACHR contain the least guidance on national selection procedures. The ICJ Statute provides that a national group composed of up to four individuals named by states parties to the Permanent Court of Arbitration are charged with nominating candidates for the ICJ, and that the national group "is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law."[86] Interviews of individuals involved in selection, however, showed that few actually engage

86. Statute of the International Court of Justice arts. 4–10, June 26, 1945, 59 Stat. 1055 (1945), TS No. 993 [hereinafter ICJ Statute].

in the recommended consultation.[87] National groups may nominate no more than four candidates, and not more than two of them may be of the nationality of the national group.[88] The number of candidates nominated by a group cannot be greater than double the number of seats to be filled.[89] There are no separate guidelines or best practices available to states concerning domestic nominations procedures. In mid-2015, women made up 20% of the fifteen-member bench, but women account for only 3% of the court's slots since establishment. Dame Rosalynn Higgins (United Kingdom) became the first woman to serve as a judge on the ICJ in 1995. Xue Hanquin (China) and Joan Donoghue (United States) joined the bench in 2010, followed by Julia Sebutinde (Uganda) in 2012.

The Rome Statute of the ICC specifies that any state party may nominate a candidate for election, and the procedure for nomination should be the same as for the highest judicial offices of that State or by the same procedure utilized for the ICJ.[90] Nominations must include a statement describing the candidate's competence in criminal law and procedure or relevant international law areas, and their language capabilities.[91] Once the Secretariat receives the nominations, it must place them and any accompanying information on the ICC website as soon as possible.[92] While the drafters of the Rome Statute and the Assembly of States Parties developed detailed rules concerning international elections procedures, discussed in the section below,[93] the same does not appear to apply to national nominations. The Assembly of State Parties has encouraged states "to conduct thorough and transparent processes to identify the best candidates," but it has not issued guidelines as to what procedures would be appropriate.[94]

During its 10th Session (2011–2012), the Assembly of State Parties agreed on the creation of an Advisory Committee on Nominations.[95] Despite its name, however, the Advisory Committee on Nominations plays no role whatsoever in the nomination process. Rather, it evaluates whether

87. SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 142–43.

88. ICJ Statute, *supra* note 86, art. 5(2).

89. *Id.*

90. Rome Statute of the International Criminal Court art. 36(4), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

91. *Id.*

92. ICC, *Procedure for the Nomination and Election of Judges of the International Criminal Court*, at para. 8, ICC-ASP/3/Res.6, (Sept. 10, 2004) [hereinafter *Procedure for Nomination to ICC*].

93. *See id.*; *infra* Part II(C)(1).

94. ICC, *Strengthening the International Criminal Court and the Assembly of States Parties*, at para. 27, ICC-ASP/12/Res.8 (Nov. 27, 2013) [hereinafter *Strengthening the ICC*].

95. ICC, *Strengthening the International Criminal Court and the Assembly of State Parties*, at paras. 19–20, Res. ICC-ASP/10/Res.5 (Dec. 21, 2011) (noting in the same resolution, the Assembly of the State Parties encouraged States Parties "to conduct thorough and transparent processes to identify the best candidates" for judgeships) [hereinafter *Strengthening the ICC and the ASP*]; *see infra* Part II(C)(1).

nominees already proposed by states meet the requirements of the Rome Statute and is discussed further below.[96] Scholars of the ICC and the Assembly of State Parties have expressed concerns that individual state nomination processes lack transparency and may not be driven by merit.[97] Thirty-nine percent of the judges on the ICC bench in mid-2015 were women. Women have accounted for 47% of judicial slots since its establishment.

States parties to the constitutive instrument of the Af. Ct. HPR may nominate up to three candidates each for that court, two of whom must be nationals of that state and none of whom may share the nationality of any sitting member of the court.[98] The Protocol establishing the Court provides that "[d]ue consideration shall be given to adequate gender representation in the nomination process," but provides no further guidance on national nominations.[99] Interestingly, the African Union Commission, in correspondence to states in advance of elections taking place in June 2014, asserted that it was "mandatory" that states propose at least one female candidate each, given the low numbers of women on the bench.[100] Also, the Commission suggested that in their nominations procedures, states should consider taking into account:

> additional factors submitted to the AU Commission by Civil Society organizations: a) The procedure for nomination of candidates should be at the minimum that for appointment to the highest judicial office in the State Party; b) States Parties should encourage the participation of civil society, including Judicial and other State bodies, bar associations, academic and human rights organizations and women's groups, in the process of selection of nominees; c) State Parties should employ a transparent and impartial national selection procedure in order to create public trust in the integrity of the nomination process.[101]

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96. *See* ICC, *Report of the Bureau on the Establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court*, ICC-ASP/10/36 (Dec. 21, 2011) [hereinafter *Report on Establishment of Committee*]; *infra* Part II(C)(1).

97. *Strengthening the ICC*, *supra* note 94, para. 27 ("*Emphasizes* the importance of nominating and electing the most highly qualified judges in accordance with article 36 of the Rome Statute, and for this purpose *encourages* States Parties to conduct thorough and transparent processes to identify the best candidates. . . ."); SELECTING INTERNATIONAL JUDGES, *supra* note 21.

98. Protocol to African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights arts. 11(2) & 12, June 10, 1998, Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter Protocol to African Charter].

99. *Id.* art. 12.

100. *See* Letter to Ministries of Foreign Affairs/External Relations of all Member States from the African Union Commission, Reference: BC/OLC/66.5/2954.14, *available at* http://legal.au.int/-en/sites/default/files/2954.14_Bc-olc-66.5_Eng_0.pdf.

101. *Id.*

In July 2014, one man was re-elected, and two men and one woman were elected to replace two men and one woman.[102] In mid-2015, women made up 18% of the bench, a number that has remained constant since the Court's establishment.[103]

The Resolutions establishing the ICTY and ICTR provide almost no guidance on national nominations procedures. United Nations member states and non-member states maintaining permanent observer missions at the United Nations may nominate up to two candidates for permanent and four candidates for *ad litem* judges to the International Criminal Tribunals for the Former Yugoslavia and Rwanda.[104] The nominees must meet qualifications requirements and cannot be of the same nationality as each other or as a sitting member of the other tribunal or the appeals chamber.[105] While for the nomination of *ad litem* judges, states are encouraged to take "into account the importance of a fair representation of female and male candidates,"[106] no such requirement exists for permanent judges. No other guidance is provided for national nominations. In mid-2015, women made up 11% of the permanent judges on the ICTY and 22% of the permanent judges on the ICTR. The sole *ad litem* judge remaining on the ICTR was a man, while one of three *ad litem* judges on the ICTY was a woman. Women have served in 21% and 13% of the permanent judge slots on the ICTR and the ICTY, respectively, and 35% and 41% of the *ad litem* slots, respectively.

The constitutive instruments and rules of procedure of ITLOS, IACHR, and ATJ say nothing about suggested or required procedures for national nominations, beyond specifying qualifications for judges and nationality requirements.[107] For example, the Statute of the Inter-American Court provides that judges must be "elected in an individual capacity from among

102. Press Release, Afr. Court on Human & Peoples' Rights, New Judges Appointed to the Court (July 8, 2014), *available at* http://www.african-court.org/en/index.php/news/latest-news/545-new-judges-appointed-to-the-court.

103. *See supra* Figure 1.

104. S.C. Res. 1329, Annex I art. 13, 13*bis*, U.N. Doc S/RES/1329 (Nov. 30, 2000); S.C. Res. 1431, Annex I art. 12, 12*bis*, U.N. Doc S/RES/1431 (Aug. 14, 2002) ("[J]udges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.").

105. *Id.*

106. S.C. Res. 1329, *supra* note 104, Annex I art. 13.

107. *See* United Nations Convention on the Law of the Sea Annex VI, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter ITLOS Statute]; Rules of the Tribunal, International Tribunal for the Law of the Sea, Mar. 17, 2009, Doc. ITLOS/8; Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-O/79), O.A.S. Off. Rec. OEA/Ser.P./IX.0.2/80, Vol. 1, at 88 [hereinafter IACHR Statute]; Rules of Procedure of the Inter-American Court of Human Rights (2000), *available at* http://www.corteidh.or.cr/sitios/reglamento/2000_eng.pdf; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143.; Andean Subregional Integration Agreement, May 26, 1969, 8 I.L.M. 910 (1969); Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, 18 I.L.M. 1203 (1979) [hereinafter ATJ Treaty].

jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates."[108] States may nominate up to two appropriately qualified candidates to the Law of the Sea Tribunal,[109] three to the Inter-American court,[110] and three to the Andean Tribunal.[111] When states nominate three candidates to the Inter-American Court, at least one nominee must be a national of a state other than the nominating state.[112] In mid-2015, women made up 5%, 14%, and 50% of the judges on ITLOS, IACHR, and ATJ, respectively. Elsa Kelly of Argentina is the only woman to have served on ITLOS's 21-member bench since its establishment in 1996. For 20 of the 36 years since the IACHR's founding, women were absent from the bench; most recently, no women served on the bench in 2013 and 2014. 2014 was the first year that two women served on the ATJ simultaneously since its establishment in 1984.

States are not required to nominate members of the WTO-AB, but they may forward suggestions to the Director-General.[113] The WTO Dispute Settlement Understanding offers no guidance on what procedures delegations should use in coming up with nominees.[114] The United States generally nominates at least two people when proposing individuals to fill its unofficial spot.[115] A Selection Committee composed of the Director-General, the Chairman of the Dispute Settlement Body, and the Chairmen of the Goods, Services, TRIPS, and General Councils then makes proposals for new members "after appropriate consultations. "[116] Critiques have been raised concerning the increasing politicization of the WTO Appellate Body nominating process, as well as the need to ensure geographic diversity on the bench.[117] One of seven members of the Appellate Body was a woman

108. IACHR Statute, *supra* note 107, art. 4.

109. ITLOS Statute, *supra* note 107, art. 4.

110. IACHR Statute, *supra* note 107, art. 7.

111. ATJ Treaty, *supra* note 107, art. 8.

112. IACHR Statute, *supra* note 107, art. 7 ("When a slate of three is proposed, at least one of the candidates must be a national of a state other than the nominating state.").

113. Recommendations by the Preparatory Committee for the WTO, *Establishment of the Appellate Body*, ¶ 13, WT/DSB/1 (June 19, 1995) [hereinafter WTO Prep. Comm. Recs.].

114. Ruth Mackenzie, *The Selection of International Judges*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 737, 745 (Cesare P.R. Romano et al., eds. 2014); Joost Pauwelyn, *La sélection des juges a l'OMC, et peut-être celle d'un Chinois, mérite plus d'attention*, LE TEMPS (16 Nov. 2007), http://www.letemps.ch/economie/2007/11/16/invite-selection-juges-omc-celle-un-chinois-merite-plus-attention.

115. Pauwelyn, *supra* note 113.

116. WTO Prep. Comm. Recs., *supra* note 112, para. 13.

117. Pauwelyn, *supra* note 113; *see also* Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391 (2014); Daniel Pruzin, *WTO Selection Panel to Recommence Search For Appellate Body Judge Following Deadlock*, BLOOMBERG BNA INT'L TRADE DAILY (Jan. 21, 2014), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=40114245&vname=itdbulallissues&

in mid-2015. Women were absent from the bench for the first eight years after it was established. Between one and three women have served on the seven-member bench each year since then.

2. Group 2: Greater Amount of Guidance and Transparency

States appointing candidates to the ECJ have received some guidance in the national nomination procedure since 2009.[118] The Treaty of Lisbon, which entered into force that year, added a new element to the judicial selection procedure consisting of an advisory panel. Article 255 established the panel to "give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General" before the governments make their selections.[119] The panel, which is appointed by the Council of the European Union, is composed of seven members, including former members of the Court of Justice and the General Court, members of national supreme courts, and lawyers of recognized competence, one of whom must be proposed by the European Parliament.[120] The President of the Court of Justice proposes six of the candidates for the panel, and the European Parliament proposes the seventh candidate.[121] Panel members serve four-year terms that are renewable once.[122] State members propose judicial candidates to the panel, and the panel may request additional information, holds a private hearing with the candidate, and then prepares an opinion on the candidate's suitability, including a statement of reasons.[123] The panel then forwards its opinion to member state governments.[124] No guidance is provided to states regarding generating names for the panel's review in the first instance. There is no election process; rather individual states then appoint their nominees to the bench.

In mid-2015 the ECJ was composed of five women and twenty-three men (18% women). From 1952 until 1999, no woman had ever served on the ECJ's bench. From 1999 until 2008, between one and three women served on the bench each year. It is interesting to note that the court's membership increased from fifteen, in 2003, to twenty-seven, in 2008. The percentage of women judges on the bench fell from 20% in 2003 to 11% in 2008. Since 2009, the number of women on the bench has fluctuated between four and five, ranging from 15% to 18% of the total bench.

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wsn=515970000&searchid=27046792&doctypeid=1&type=date&mode=doc&split=0&scm='TDLNWB&pg=1.

118. Treaty Establishing the European Community art. 221, Nov. 10, 1997, 1997 O.J. (C 340).

119. Treaty on the Functioning of the European Union art. 255, May 9, 2008, 2008 O.J. (C 115).

120. *Id.*

121. *Id.*; Laurence Burgorgue-Larsen, *Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members*, 5 NOTRE DAME J. INT'L & COMP. L. 29, 47 (2015).

122. Council Decision 2010/124, Annex para. 3, 2010 O.J. (L 50) 18.

123. *Id.* at paras. 6–8.

124. *Id.* at para. 8.

The ECHR has among the most complex selection procedures of the world's international courts, and the history of the evolution in the procedures is important to understanding its current iteration. From 1959 until 1998, the process was relatively simple. According to the text of the original European Convention on Human Rights, the Consultative Assembly, now known as the Parliamentary Assembly, was to elect judges to the Court from a list of three candidates provided by Members of the Council of Europe.[125] Candidates were to "possess high moral character and . . . either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."[126] The Court was to be composed of one judge from each state member of the Council of Europe, and no two judges could be nationals of the same state.[127] States included no other guidance for national nominations or qualifications requirements in the original convention. The percentage of women judges on the bench during this period fluctuated between 0% and 11%; it was 3% in 1998.

In preparation for the entry into force of Protocol 11, the Parliamentary Assembly adopted resolutions, recommendations, and orders with regard to selection procedures. The Parliamentary Assembly still elects judges from lists of three candidates submitted by each state party,[128] but a much greater focus exists on making national selection procedures transparent and ensuring the election of qualified candidates. In 1996, the Parliamentary Assembly committed itself to improving its procedures for the selection of candidates. It adopted a model curriculum vitae to systematize the information provided by candidates to the Parliamentary Assembly, and it undertook to require personal interviews of candidates by one of its committees once candidates were nominated.[129] It also ordered the Committee on Legal Affairs and Human Rights to "examine the question of the qualifications and manner of appointment of judges to the European Court of Human Rights, with a view to achieving a balanced representation of the sexes."[130] Between 1997 and 1998 the percentage of women on the bench jumped from 3% to 18%, and it has not fallen below 17% since.

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125. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 39, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR].

126. *Id.* art. 39.

127. *Id.* art. 38.

128. Protocol 11 to the ECHR art. 22, *opened for signature* May 11, 1994, 2061 U.N.T.S. 7 (entered into force Nov. 1, 1998).

129. Procedure For Examining Candidatures For The Election Of Judges To The European Court Of Human Rights, Eur. Parl. Ass. Res. 1082 (1996); Procedure For Examining Candidatures For The Election Of Judges To The European Court Of Human Rights, Eur. Parl. Ass. Recommendation 1295 (1996).

130. Procedure for Examining Candidatures for the Election of Judges to the European Court Of Human Rights, Eur. Parl. Ass. Order 519 (1996); *see e.g.*, Election of Judges to the European Court

In 1999, the Parliamentary Assembly criticized national selection procedures and proposed criteria for their improvement.[131] It recommended that the Committee of Ministers invite states to apply the following set of criteria in the preparation of candidate lists:

i. issue a call for candidatures through the specialised press, so as to obtain candidates who are indeed eminent jurists satisfying the criteria laid down in Article 21, paragraph 1, of the Convention;
ii. ensure that the candidates have experience in the field of human rights, either as practitioners or as activists in non-governmental organisations working in this area;
iii. select candidates of both sexes in every case;
iv. ensure that the candidates are in fact fluent in either French or English and are capable of working in one of these two languages;
v. put the names of the candidates in alphabetical order.[132]

In addition, the Assembly asked the Committee of Ministers to invite member states to consult their national parliaments in preparing candidate lists to create a more transparent national selection procedure.[133] Shortly thereafter, it instructed the Sub-Committee on the Election of Judges of the Committee of Legal Affairs and Human Rights to ensure that states members apply these criteria, "and in particular the presence of candidates of both sexes."[134] In the same vein, in 2004, the Parliamentary Assembly emphasized the importance of an independent judiciary for the protection of human rights and fundamental freedoms, insisted that the appointments process "reflect the principles of democratic procedure, the rule of law, non-discrimination, accountability, and transparency," and it urged states to publish their procedures.[135]

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of Human Rights, Eur. Parl. Ass. Res. 1200 (1999).

131. National Procedures for Nominating Candidates for Election to the European Court of Human Rights, Eur. Parl. Ass. Recommendation 1429 (1999).

132. *Id.*

133. *Id.*

134. National Procedures for Nominating Candidates for Election to the European Court Of Human Rights, Eur. Parl. Ass. Order No. 558 (1999).

135. Candidates for the European Court of Human Rights, Eur. Parl. Ass. Recommendation 1649 (2004). The Assembly's Recommendation stated: " . . . it is not satisfactory merely to assert that the gender balance of the Court reflects the under-representation of women in the judiciary of the member states. It is in the interest of impartiality and of the Court's effectiveness for the Committee of Ministers, the Assembly, and the high contracting parties to address the issue of the gender imbalance of the Court by considering — and where necessary, improving — the procedures for the appointment of judges." *Id.* The Parliamentary Assembly then called on the Committee of Ministers to invite member states to meet specific criteria before submitting their candidate lists, including an open call for candidates, candidates with experience in human rights, lists with both sexes, candidates with

In Resolution 1366 (2004), the Parliamentary Assembly decided it would no longer consider lists of candidates where the areas of competence of candidates appear "unduly restricted," the list does not contain candidates of both sexes, the candidates do not have sufficient knowledge of an official language of the Court, or do not possess "the stature" to meet the qualifications requirements enumerated in article 21 of the European Convention.[136] The Assembly emphasized its belief in the importance of the transparency of procedures, and it decided to investigate obstacles to nominating women at the national and European levels.[137] After Malta submitted an all-male list to the Parliamentary Assembly, it sought an Advisory Opinion from the ECHR on the requirement for at least one member of the under-represented sex.[138] In response to the Court's opinion, the Assembly modified its list requirement such that it would only consider single-sex lists where a contracting party has "taken all necessary and appropriate steps" to obtain a list with a candidate of the under-represented sex.[139] Also, it required various bodies of the Assembly to certify the existence of "exceptional circumstances" permitting a list with no members of the under-represented sex.[140] Since the Advisory Opinion was issued, states have provided unisex lists on at least two occasions.[141] In 2009, the Parliamentary Assembly reiterated that national nominations procedures

knowledge of one of the official languages of the Court, and that names of candidates be placed in alphabetical order on candidate lists. It also encouraged the Committee to consider revising the Convention to state that the three-candidate lists include at least one candidate of each sex. *Id.* paras. 19, 21.

136. Candidates for the European Court of Human Rights, Eur. Parl. Ass. Res. 1366 (2004).

137. *Id.* The Parliamentary Assembly then decided to reintroduce and modify the rule for candidate lists such that it would no longer consider candidates where "the list does not include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong." Candidates for the European Court of Human Rights, Eur. Parl. Ass. Res. 1426 (2005).

138. Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights, Advisory Opinion 12.02.2008, Eur. Ct. H.R., *available at* http://hudoc.echr.coe.int/eng?i=003-2268009-2419060.

139. Candidates for the European Court of Human Rights, Eur. Parl. Ass. Res. 1627 (2008).

140.*Id.* In the wake of the Court's Advisory Opinion, the Assembly modified the list requirement: "Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule." COUNCIL OF EUR. COMMITTEE OF MINISTERS, 4.4 GUIDELINES OF THE COMMITTEE OF MINISTERS ON THE SELECTION OF CANDIDATES FOR THE POST OF JUDGE AT THE EUROPEAN COURT OF HUMAN RIGHTS, CM(2012)40 ADDENDUM FINAL (2012) [hereinafter 2012 COUNCIL GUIDELINES].

141. *See, e.g.*, EUR. PARL. ASS., *List and curricula vitae of candidates submitted by the Governments of Bosnia and Herzogovina, Croatia, the Republic of Moldova and the Russian Federation*, DOC. NO. 13027 (2012) [hereinafter *Candidate List—Moldova*], *available at* http://assembly.coe.int/Documents/WorkingDocs/2012/COE.PACE.WD.COM.13027.2012.EN.pdf (containing Moldova's proposal of three male candidates); EUR. PARL. ASS., *List and curricula vitae of candidates submitted by the Government of Belgium*, DOC. NO. 12789 (2011) [hereinafter *Candidate List—Belgium*], *available at* http://assembly.coe.int-/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12986&lang=en (relaying Belgium's proposal of three male candidates).

must reflect principles of "democratic procedure, transparency, and non-discrimination," it required the Assembly to reject lists that fail to present a "real choice" among the candidates submitted, and allowed the Assembly to reject lists not generated through "fair, transparent, and consistent" national selection procedures.[142]

In 2010, the Committee of Ministers of the Council of Europe established an Advisory Panel of Experts on Candidates for Election as Judge to the ECHR to assist states in evaluating candidates before they are transmitted to the Parliamentary Assembly for consideration.[143] The Committee of Ministers in consultation with the President of the Court chooses the Advisory Panel. It is composed of seven members chosen from states' highest national courts, former judges of international courts, and lawyers of recognized competence, and it is supposed to be "geographically and gender balanced."[144] States must forward to the Advisory Panel the names and curricula vitarum of intended candidates before submitting them to the Parliamentary Assembly.[145] If, following consultations with the nominating state, the Panel finds that a nominee is not suitable, it will provide that view and its reasoning confidentially to the state.[146] When three candidates are finally presented by a state to the Parliamentary Assembly, the Panel will confidentially provide to that body, in writing, its opinion on whether the candidates meet the Convention's criteria.[147] In 2010, the first Advisory Panel consisted of two women and five men.[148] In June 2014, the

142. Nomination of candidates and election of judges to the European Court of Human Rights, Eur. Parl. Ass. Res. 1646 (2009). The Assembly again listed best practices for selection procedures, such as open calls for candidates and listing candidates in alphabetical order, and "strongly urge[d]" states to establish national selection procedures "to ensure that the authority and credibility of the Court are not put at risk by ad hoc and politicised processes" and such that those advising on selection are "themselves as gender-balanced as possible." *Id.* In 2011, the Parliamentary Assembly specified that when a list lacks a member of the under-represented sex, two-thirds of the Sub-Committee on the Election of Judges to the European Court of Human Rights must determine that the state proposing the list took all "necessary and appropriate steps to ensure" that the list contained candidates of both sexes meeting the qualifications requirements in the European Convention, and the Parliamentary Assembly must also endorse this position. The Amendment Of Various Provisions Of The Rules Of Procedure Of The Parliamentary Assembly—Implementation Of Resolution 1822 (2011) On The Reform Of The Parliamentary Assembly, Eur. Parl. Ass. Res. 1841 (2011).

143. COUNCIL OF EUR. COMMITTEE OF MINISTERS, *Resolution on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights*, CM/Res(2010)26 (2010).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. COUNCIL OF EUR. COMMITTEE OF MINISTERS, *Establishment of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights—Implementation*, 1101ST MEET., ITEM 1.7, *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2010)1101/1.7&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

Committee appointed an Advisory Panel consisting of one woman and six men.[149]

In addition, in 2012, the Committee of Ministers issued detailed guidance on the selection of candidates for ECHR judgeships covering the establishment of procedures, identification of criteria for candidates, composition and procedures of selection bodies, and the role of the final decision-maker to whom selection bodies report.[150] The Guidelines provide specific examples of best practices for national selection procedures, including what qualifications requirements different states utilize and how they publicize calls for candidates.[151] As for the procedure for drawing up recommended lists of candidates, the Committee noted that the composition of selection bodies is an "essential consideration" and it should be free from "undue influence since the composition of the final list of candidates must not be, and must not appear to be a result of political patronage or preference. . . ."[152] The committee that evaluates candidates after states submit them to the Parliamentary Assembly also considers whether the state complied with the criteria established by the Assembly, including the presence of the under-represented sex in the list of candidates.[153]

Between 1999 and 2015, the percentage of women on the bench has fluctuated between 17% in 1999 and 2000, and 40% in 2011, increasing every year from 2000 until 2011. Since 2011, the percentages have ranged from 33% to 36%. Women have taken up 29% of the judicial slots since 1999.

3. Group 3: No National Nomination Procedure

ECOWAS has no national selection procedure at all. The Protocol to the Community Court of Justice states that member states may nominate up to two candidates each, and then Heads of State of member states vote on the nominees.[154] In 2006, States reformed the judicial selection procedure to give national judges a greater voice in the selection of judges to ECOWAS through a Community Judicial Council, composed of chief justices of states

149. COUNCIL OF EUR. COMMITTEE OF MINISTERS, *Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights—Appointment of members*, 1202ND MEET., ITEM 1.7, *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2014)1202/1.7&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

150. 2012 COUNCIL GUIDELINES, *supra* note 140, at paras. 2, 15, 16.

151. 2012 COUNCIL GUIDELINES, *supra* note 140, at paras. 40–41, 59.

152. 2012 COUNCIL GUIDELINES, *supra* note 140, at para. 48.

153. Evaluation of the Implementation of the Reform of the Parliamentary Assembly, Eur. Parl. Ass. Res. 2002, paras. 9–10 (2014).

154. ECONOMIC COMMUNITY OF WEST AFRICAN STATES, PROTOCOL A/P.1/7/91 ON THE COMMUNITY COURT OF JUSTICE art. 3 (July 6, 1991).

without representation on the Court.[155] The reform was also instituted to "ensure that the Court is endowed with the best qualified and competent persons to contribute, by virtue of their quality and experience" to the development of Community law.[156] When it is a state's turn to have a judge sit on the Court, the Council initiates a competitive selection process by advertising the vacancies and required qualifications in the Official Gazette of the Community and widely circulated national gazettes and newspapers.[157] The Council collects the applications, narrows down the applications to three per state, interviews the three candidates per state, and then recommends one to the Authority.[158] Although the home state of the candidate is no longer formally involved in the nomination process for its candidates to the Court, candidates without a state's support are unlikely to survive the Authority's vote.[159] After the Court lost one of its seven judges, women made up 50% of the bench in 2012 and 2013. By mid-2015, only one woman was serving on the seven-member bench.

4. Conclusions on National Nominations

When courts are grouped by the amount of guidance provided to states on national nominations procedures, no clear pattern in the data on sex representativeness emerges. ECOWAS dropped from 50% to 14%, even though its national nomination procedure appears quite comprehensive, open, and focused on merit. The ICJ's percentage of female judges has increased from 0% to 20%, but there was no apparent corresponding change to national selection procedures. The ICC has a relatively high number of female judges, but little in the way of guidance for national selection procedures. The ECJ has had an advisory committee on nominations since 2009, but the percentage of female judges is still quite low. On the other hand, the court with the greatest amount of guidance on national nomination procedures, the ECHR, shows a strong upward trend in female participation. Since the Parliamentary Assembly began emphasizing open and merit-based selection procedures, the percentage of female judges has increased dramatically.

A number of factors make conclusions difficult to draw about the relationship between national nomination procedures and sex

155. Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737, 760 (2013).

156. *Id.* (citing *ECOWAS NEWSLETTER,* no. 1, Oct. 2006).

157. Mojeed Olujinmi Abefe Alabi, Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa 147 (2013) (unpublished PhD thesis, University of Leicester) (on file with author). An advertisement for a judicial position was even posted on an internet job site. National Judicial Council, *Job Posting for Judge of ECOWAS Community Court of Justice*, NGCAREERS, http://m.ngcareers.com/job/2013-10/judge-at-national-judicial-council#sthash.GlX3Q2vd.sVzCr-Gir.dpbs (last visited Apr. 22, 2016).

158. Alabi, *supra* note 157, at 148.

159. *Id.* at 148–49.

representativeness. First, the sample size of twelve courts is relatively small. Second, to some extent, the comparison is one of apples and oranges. Procedures differ across courts, and sometimes suggested or even required guidelines or procedures are not rigorously complied with. Also, looking only at national nominations leaves out what happens at the international elections stage, when such a stage exists. Finally, it excludes sex representativeness requirements or aspirations found in a few courts' statutes described below. What does emerge from the comparison, however, is that, with a few notable exceptions, the vast majority of the courts surveyed have little concrete instruction to states at the national nomination stage. Nor are their procedures transparent.

The lack of a transparent procedure for selecting judges on most courts makes it easier for selectors to define the pool of acceptable candidates narrowly and in a way that may benefit them personally. Individuals may select a particular nominee because it will help them gain a professional advantage in the future, or the nominee's pedigree may correspond with the selector's own understanding of merit, based on the selector's own professional choices. It benefits an Oxford graduate to name other Oxford graduates to positions of power because it enhances her own credentials. It may benefit a lawyer to push his client to name a particular individual as *ad hoc* judge to the ICJ in the hopes that the newly named judge will become a friendly professional acquaintance and reciprocate in some way in the future. Bryant Garth and Yves Dezalay made a similar point in the context of international commercial arbitration: arbitrators and would be arbitrators "not only promote the forms of symbolic capital that give maximum value to their personal characteristics, but also they try to build symbolic capital that will allow them to prosper and succeed in the changing environment."[160] Access to the kinds of experiences that build symbolic capital or prestige may itself be conditioned upon the same incentives to exclude newcomers or individuals with non-traditional backgrounds, as well as flawed selection procedures. For example, four of the last five judges elected to the ICJ were previously members of the International Law Commission,[161] but very few women have ever served on that body; only two of thirty-four members elected in 2011 were women.[162]

Further, opaque nomination procedures are likely to make it more difficult for less well connected potential candidates to be aware of

160. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 10, 29 (1996).

161. Dapo Akande, *Patrick Robinson of Jamaica Elected to the ICJ*, EJIL: TALK! (Nov. 18, 2014), http://www.ejiltalk.org/patrick-robinson-of-jamaica-elected-to-the-icj/.

162. *See Membership: 2011 Election of the International Law Commission*, INT'L LAW COMM'N (last updated Dec. 2, 2015), http://legal.un.org/ilc/2011election.shtml.

openings. In a recent book, Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands conducted a series of interviews about selection procedures for the ICJ and the ICC; they determined that "few well-informed insiders appear to be familiar with the details," and "significant variations in practice from one judicial nomination to another frequently occur."[163] Processes varied substantially from state to state, although most states used "informal" nomination processes, sometimes consisting of discussions among a few individuals, followed by decisions by powerful insiders.[164] Individuals known to the decision-makers and who lobby for the position are most likely to succeed.[165] A few states appeared to have more structured and transparent procedures, but these were relatively rare.[166] Overall, processes were "marked by their lack of transparency and accountability and a stronger likelihood of being informed by extraneous political considerations. The resulting selection pool was small, there was limited outside input into the selection process, and political factors, rather than the individual selection criteria, could determine nominations."[167] In the same vein, in describing the selection of nominees for international courts more generally, Daniel Terris, Cesare P.R. Romano and Leigh Swigart wrote:

> In general, one cannot apply to become an international judge. Most of the time one is called. It is not only a matter of having the right skills and experience, but most of all a matter of being on the radar screen of, and appreciated by, one's own government, particularly by some key civil servants.[168]

Similarly, in their interviews of international commercial arbitrators, Dezalay and Garth were told that "[i]t's a mafia because people appoint one another. You always appoint your friends — people you know," and "[i]t is a club. They nominate one another. And sometimes you're counsel, and sometimes you're arbitrator."[169] It is difficult for outsiders to break into the club if they lack information about opportunities or if there are no apparent application procedures. And the lack of transparency at the national nomination level precludes accountability or oversight at the domestic level by constituencies who might push for greater diversity or more structured procedures.

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163. SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 64.

164. *Id.* at 64.

165. *Id.* at 65.

166. *Id.*

167. *Id.* at 95.

168. TERRIS ET AL., *supra* note 13, at 23. One individual described the process of nominating judges to the ICJ and the ICC as "very direct and personal and not very institutional-like, [more] a friendship thing." SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 86.

169. DEZALAY & GARTH, *supra* note 160, at 10.

In summary, the opacity of national nominations procedures may play a role in reducing potential sex representativeness on the bench. Without information about available positions and opaque procedures, individuals or groups with fewer connections to nominators may simply not be aware of openings or choose to refrain from applying if they believe decisions have already been made. Insiders doing the selection have incentives to validate their own qualifications as they nominate new candidates, and the lack of transparency precludes public accountability.

C. Elections — May the Best Candidate Win?

Once a candidate is nominated for an international judgeship, she usually must survive election by states in an international body, although not in every case. For example, individual states appoint their judges to the ECJ. Just as with national nominations, the drafters of the constitutive instruments of international courts have provided varying degrees of direction to states on voting at the international level, in the form of statutory mandates or aspirations, or institutionalized screening mechanisms to evaluate candidates' qualifications or rank candidates. It appears that courts with a high degree of direction, either in the form of express instructions about how to vote or institutionalized screening mechanisms tend to have higher percentages of women judges on the bench. The courts that provide the greatest amount of direction to states at the international selection phase, as well as screening mechanisms, are the ICC and the ECHR. These are followed by a second group, which includes ECOWAS and the WTO-AB; both courts have screening committees, but little statutory guidance on selecting among candidates. The third group has no institutionalized screening and some statutory guidance, and it includes the Af. Ct. HPR, the ICTY, and the ICTR. The remainder of the courts — the IACHR, ICJ, ITLOS, and ATJ — provide the least amount of statutory direction and no institutionalized screening mechanism at the international level. The group with the least amount of statutory direction and no institutionalized screening mechanisms had among the lowest number of women judges historically, and the group with the highest amount of screening and direction had a greater proportion of women on the bench.

1. Group 1: Quotas and Screening

States are provided the most guidance as to how to select among nominees for the ICC. First, the Statute requires that "[n]o two judges be nationals of the same state,"[170] and that state parties must consider the need for "representation of the principal legal systems of the world; equitable geographical representation; and a fair representation of female and male

170. Rome Statute, *supra* note 90, art. 36(7).

judges."[171] They must also consider the need to include judges with legal expertise on specific issues such as violence against women or children.[172] The President of the Assembly of States Parties may extend the nomination period up to six weeks if regional or gender minimum voting requirements are not matched with at least twice the number of candidates fulfilling the requirement.[173]

Judges are elected at a meeting of the Assembly of State Parties by secret ballot.[174] The persons elected are the candidates who obtain the highest number of votes and a two-thirds majority of the States present and voting.[175] Two lists of candidates are generated in advance of the vote. List A contains candidates with criminal law and procedure expertise while List B contains candidates with relevant international law knowledge.[176] States are instructed to vote such that at least nine and no more than thirteen candidates from list A and at least five and no more than nine candidates from list B are seated on the Court at all times.[177] Further, each state party is required to vote for a minimum number of candidates from each regional group and of each gender, and the required number of votes decreases depending on the number of candidates available and the number of judges meeting those requirements remaining on the bench.[178] Only ballots complying with the voting requirements are valid, and elections continue until all spots are filled.[179]

The Assembly of State Parties created an Advisory Committee on Nominations to assist states in vetting nominees for judgeships in 2011.[180] The Advisory Committee evaluates whether nominees proposed by states meet the requirements of the Rome Statute.[181] Despite a mandate for geographically and gender diverse membership, the Assembly of State Parties ultimately elected a geographically diverse group of eight men and one woman to serve on the Committee in October 2012.[182] The Committee has conducted interviews with nominees and reached conclusions about their proficiencies in the working languages of the Court and the extent of

171. *Id.* art. 36(8)(a).
172. *Id.* art. 36(8).
173. *Procedure for Nomination to ICC*, *supra* note 92, para. 11.
174. Rome Statute, *supra* note 90, art. 36(6)(a).
175. *Id.*
176. *Id.*, art. 36(5).
177. *Procedure for Nomination to ICC*, *supra* note 92, para. 20.
178. *Id.*
179. *Id.* para. 22.
180. *Strengthening the ICC and the ASP*, *supra* note 95.
181. *See Report on Establishment of Committee*, *supra* note 96.
182. *See Election of the Advisory Committee on Nominations—2012 Nomination*, INT'L CRIM. CT. (Nov. 27, 2012), https://www.icc-cpi.int/en_menus/asp/elections/advisorycommitteenominations-/ACN2012/Pages/election%20acn-%202012.aspx.

their relevant knowledge and experience.[183] A candidate whose qualifications were questioned by the Advisory Committee was not elected to the bench in 2013.[184] Of all the courts surveyed, the ICC has had the highest percentage of women judges of surveyed courts, reaching 61% in 2009, and at or exceeding 39% for its entire existence.

Like the ICC, the ECHR too has an institutional mechanism for reviewing candidates before they are voted on by the Parliamentary Assembly, in addition to the Advisory Panel of Experts on Candidates for Election as Judge to the ECHR created by the Council of Ministers, to advise states before naming nominees. In 1996, the Assembly requested that states utilize a standardized curriculum vitae to facilitate the comparison of candidates, and it expressed its expectation that the Sub-Committee on Human Rights or an ad hoc sub-committee of the Committee on Legal Affairs and Human Rights would interview all candidates on behalf the Parliamentary Assembly.[185] The sub-committee's conclusions are forwarded to the Assembly before the vote.[186] As of January 2015, the Subcommittee will be replaced by a Committee on the Election of Judges to the ECHR.[187] The new committee, composed of twenty people, is charged with studying the standardized curricula vitae of all candidates, interviewing candidates, preparing a report to the Assembly with a recommendation and a ranking of candidates with reasons for its recommendations and rankings, and seeking to ensure that the nominating state complied with the Assembly's criteria for the establishment of lists, "and in particular the presence of candidates of both sexes."[188] The committee may also report to the Assembly on any questions related to the national selection procedure.[189] Any decision to reject a list of candidates or to consider a single-sex list of candidates requires a two-thirds majority of votes cast.[190] When the committee chooses to recommend rejection of a list, it must provide its

183. Int'l Crim. Ct. Assembly of States Parties, Rep. of the Advisory Comm. on Nomination of Judges on the Work of Its Second Meeting, Twelfth Session, ¶ 10, Doc. ICC/ASP/12/47 (Oct. 29, 2013), http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf; *Id.* Annex 1 (Evaluation of the candidates).

184. *See id.*; *2013—Election of a Judge—Result*, INT'L CRIM. CT. (NOV. 26, 2013) (listing Judge Geoffrey A. Henderson as a sitting judge of the ICC), https://www.icc-cpi.int/en_menus/asp/elections/judges/2013/Pages/2013-alphabetical%20listing.aspx.

185. On The Procedure For Examining Candidatures For The Election Of Judges To The European Court Of Human Rights, Eur. Parl. Ass. Res. 1082 (1996).

186. Election of Judges to the European Court of Human Rights, Eur. Parl. Ass. Res. 1200 (1999), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16760&lang=en.

187. Evaluation of the Implementation of the Reform of the Parliamentary Assembly, Eur. Parl. Ass. Res. 2002 (2014), http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21049&lang=en.

188. *Id.* at App. para. 2(iv).

189. *Id.* at App. para. 3.

190. *Id.* at App. para. 4(i).

reasons to the Assembly.[191] Committee members are expected to have "appropriate knowledge or practical experience in the legal field."[192] Women have accounted for between 33% and 40% of the bench for the period of 2008 to 2015, among the highest percentages for all the courts surveyed.

2. Group 2: Screening and Ranking, But Little Statutory Guidance

ECOWAS and the WTO-AB have screening and ranking committees, but little statutory guidance to states about how to select among candidates. At ECOWAS, the Community Judicial Council composed of chief justices of states without representation on the Court is charged with "[ensuring] that the Court is endowed with the best qualified and competent persons to contribute, by virtue of their quality and experience" to the development of Community law.[193] The Council not only collects applications, but also, it narrows down the applications to three per state, interviews the three candidates per state, and then recommends specific candidates to states for a vote.[194]

The WTO appears to have a relatively rigorous vetting procedure before states vote on members of the Appellate Body. Once states propose candidates, a Selection Committee composed of the Director-General, and the Chairs of the Dispute Settlement Body, Goods Council, Services Council, TRIPS Council and General Council makes proposals for new members.[195] The Selection Committee requires candidates to take a written exam and to participate in an interview process.[196] Then, member states vote on the proposed slate of candidates.[197] Most, if not all of the time, candidates proposed by the Selection Committee are elected.[198] Despite the apparently in-depth interview process in the Committee, some have criticized the late announcement of candidates by the Committee to the public and a corresponding lack of public debate about potential candidates.[199] In early 2014, elections were delayed after the Committee deadlocked over whom to propose, in response to pressure from African countries for an African member of the Body and US opposition to the proposed candidates.[200]

191. *Id.*

192. *Id.* at App. Para. 5.

193. Alter et al., *supra* note 154, at 760 (quoting ECOWAS NEWSLETTER, *supra* note 157, at 4).

194. Alabi, *supra* note 157, at 148.

195. WTO Prep. Comm. Recs., *supra* note 113, para. 13.

196. Pauwelyn, *supra* note 114.

197. Dispute Settlement Understanding, *supra* note 32, art. 17; *Appellate Body Members*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Apr. 22, 2016); *see also, e.g.*, *DSB Launches Selection Process for Appellate Body Vacancy*, WTO (Jan. 25, 2016), https://www.wto.org/english/news_e/news16_e/dsb_25jan16_e.htm.

198. Pauwelyn, *supra* note 114.

199. *Id.*

200. Pruzin, *supra* note 117.

In mid-2015, 14% of sitting ECOWAS and WTO Appellate Body judges were women. One out of seven judges on each bench was a woman. Women have occupied 14% of Appellate Body member slots since its establishment, while women accounted for 40% of ECOWAS judgeships since establishment.

3. Group 3: Some Statutory Guidance, But No Screening

For the next group of courts, states receive some statutory guidance on the election of candidates, but no institutionalized screening mechanism exists. Once state nominees to the Af. Ct. HPR arrive at the Assembly of Heads of State and Government of the African Union, states elect judges by secret ballot.[201] The Assembly must ensure that "there is representation of the main regions of Africa and of their principal legal traditions," as well as "adequate gender representation."[202] There is no formal nominating commission or advisory panel required in the nomination of judges at the national level or for vetting candidates once nominated.

The Secretary-General of the United Nations forwards nominees for permanent judgeships to the ICTY and the ICTR to the Security Council, which then establishes a list of candidates, "taking due account of the adequate representation of the principal legal systems of the world."[203] No additional guidance is provided on how the Security Council should create the list of candidates from the names forwarded to it. The General Assembly then votes on the candidates provided by the Security Council; if two candidates of the same nationality receive more than an absolute majority of votes, the one with the greater number of votes will win.[204] The constitutive instruments also state that "[i]n the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."[205] For *ad litem* judges, once states have nominated candidates "taking into account the importance of a fair representation of female and male candidates," the Secretary-General forwards the nominees to the Security Council, which establishes a list of candidates "taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution."[206] Then, whichever candidates receive an absolute majority of votes of the General Assembly are elected.[207]

201. Protocol to African Charter, *supra* note 98, art. 14.
202. *Id.* art. 14(2), (3).
203. ICTY Statute, *supra* note 43, art. 13 *bis*; ICTR Statute, *supra* note 43, art. 12.
204. ICTY Statute, *supra* note 43, art. 13; ICTR Statute, *supra* note 43, art. 12.
205. ICTY Statute, *supra* note 43, art. 13; ICTR Statute, *supra* note 43, art. 12.
206. ICTY Statute, *supra* note 43, art. 13 *ter*.
207. *Id.*

The Af. Ct. HPR was composed of 18% women judges in mid-2015. Women have occupied two of the eleven positions on that court every year since its establishment. In mid-2015, the ICTY and the ICTR had 11% and 22% female permanent judges, respectively, and 0% (zero out of one) and 33% (one out of three), *ad litem* judges, respectively. On the ICTY, women occupied 41% of *ad litem* slots since establishment, and 13% of the permanent slots.[208] On the ICTR, women occupied 35% of *ad litem* slots, and 21% of permanent slots.

4. Group 4: No Screening and Little Statutory Guidance

No institutional mechanisms for evaluating or ranking nominees exist at the IACHR, ITLOS, the ATJ, or the ICJ, although some requirements for voting exist, related to geographic distribution of judges. After states nominate candidates to the IACHR, parties to the American Convention on Human Rights vote by secret ballot on the candidates.[209] "No two judges can be nationals of the same state."[210] In 2015, the Open Society Justice Initiative, supported by over 70 non-governmental organizations, convened a panel of independent experts to review and comment on candidates for the Inter-American Court and Commission of Human Rights.[211] The panel surveyed the application materials, asked candidates to complete a questionnaire, looked at publicly available information on each candidate, and opined on the suitability of the various candidates.[212] For ITLOS, after states nominate candidates, states parties vote by secret ballot as well.[213] To be elected, nominees must obtain the largest number of votes and a two-thirds majority of states present and voting, so long as the majority includes a majority of the States Parties.[214] No two members of the tribunal can share nationality, and there must be at least three members from each geographical group established by the United Nations General Assembly.[215] The ITLOS Statute also provides that "[i]n the Tribunal as a whole the representation of

208. These statistics were obtained by adding up the total number of slots in which women judges served since the courts were established and dividing it by the total number of slots in which both male and female judges served since establishment. *See The Judges*, ICTY, http://www.icty.org/en/about/chambers/judges (last visited Feb. 24, 2016) (no permanent female judge, one female *ad litem* judge); *Former Judges*, ICTY, http://www.icty.org/en/sid/10572 (last visited Feb. 24, 2016) (nine permanent female judges, thirteen female *ad litem* judges).

209. IACHR Statute, *supra* note 107, arts. 6–9; American Convention on Human Rights art. 53, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]. States choose their own ad hoc judges when appropriate, and there is no vote required by states parties to the Inter-American Court. IACHR Statute, *supra* note 107, art. 10.

210. IACHR Statute, *supra* note 107, art. 4.

211. *New Independent Panel Will Monitor Election of Inter-American Human Rights Commissioners and Judges*, OPEN SOC'Y FOUNDATIONS, (Apr. 29, 2015), http://www.opensocietyfoundations.org/pr-ess-releases/new-independent-panel-will-monitor-election-inter-american-human-rights-commission-ers.

212. *See* Independent Panel Report, *supra* note 70.

213. ITLOS Statute, *supra* note 107, art. 4.

214. *Id.* art. 4.

215. *Id.* art. 3.

the principal legal systems of the world and equitable geographical distribution shall be assured."[216]

Once states nominate candidates to the ICJ, the General Assembly and the Security Council independently vote on the candidates.[217] Candidates who receive an absolute majority of votes in both chambers are elected.[218] Traditionally, candidates proposed by the permanent members of the Security Council win their elections.[219] States may not elect two nationals of the same state.[220] The ICJ Statute provides that "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."[221] For the ATJ, each state nominates three candidates, and then each judge must be unanimously selected by all four contracting parties.[222] No commission is involved in vetting candidates or providing guidelines to states in voting at the international level.

Historically, these courts have among the lowest numbers of women on the bench. Women have occupied the following percentage of slots on these courts: IACHR—10%, ITLOS—2%, the ICJ—3%, the ATJ—12%, and the Af. Ct. HPR—18%.

5. Conclusions on Elections

Just as reading constitutive instruments alone does not provide a complete picture of national nominations procedures, neither does a survey of formal elections procedures at the international level. Despite the high-minded qualifications language found in many courts' founding documents, states' decisions about whom to vote for appear to be rooted in political horse-trading, rather than merit.[223] In a study of judges on the ICTY and ICTR, Michael Bohlander determined that eight out of twenty-five judges at the ICTY and the appeals chamber shared with the ICTR had no prior criminal judicial experience, many of them had no experience in

216. *Id.* art. 2; *see also* ITLOS Statute, *supra* note 107, art. 17 (There is no vote required for ad hoc judges appointed by states.).

217. *See Members of the Court*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/court/index.php?p1=1&p2=2 (last visited March 26, 2016).

218. *Id.*

219. RUTH MACKENZIE ET AL., MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 7 (2010).

220. ICJ Statute, *supra* note 86, art. 3. Ad hoc judges are appointed by states without a vote, but "[s]uch person shall be chosen preferably from among those persons who have been nominated as candidates" to permanent judge positions. *See id.* art. 9.

221. *See id.* art. 9.

222. ATJ Treaty, *supra* note 107, art. 8.

223. TERRIS ET AL., *supra* note 13, at 34; SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 77 ("Success depends to a large extent on vote trading and campaigning . . . "); *id.* at 102.

international criminal law, and many did not have even fifteen years of relevant professional experience.[224] In the same vein, the International Bar Association expressed concerns that, for many courts, "there is no prior consideration of whether candidates for appointment to international judicial office conform to the requirements for appointment according to any stated criteria."[225] And seats on international benches are often seen as "bargaining chips in the diplomatic process," where individuals receive votes because of the lobbying efforts and power of their states, not because of their individual achievements.[226] Scholars have noted states' difficulty in verifying independently the qualifications of proposed candidates.[227] Political factors appear to play "the important, if not central, role" in elections, at least where the ICJ and the ICC are concerned.[228] The International Bar Association summarized the state of play with respect to international court and tribunal elections succinctly: "Geopolitical considerations — rather than objective merits, experience, qualifications, and personal qualities of the candidates — predominate in the final process."[229]

To what extent does this lack of emphasis on qualifications and merit at the international level potentially affect diversity on the bench? By the time states are voting, the candidates have already been nominated. Yet a comparison of procedures to elect judges at the international level suggests that courts with institutionalized screening procedures may have greater numbers of women on the bench. Three of the four courts that utilize committees to screen candidates had relatively high numbers of female judges in mid-2015, or high percentages of slots occupied by women since 1999, or since establishment, whichever came later. These include the ICC (39% in mid-2015, 47% historically), ECHR (33% in mid-2015, 29% historically), and ECOWAS (14% in mid-2015, 40% historically).[230] The

224. Michael Bohlander, *The International Criminal Judiciary—Problems of Judicial Selection, Independence and Ethics*, *in* INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 354 (Michael Bohlander ed., 2007).

225. INT'L BAR ASSOCIATION'S HUMAN RIGHTS INST., Background Paper to the Institute's Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals ¶ 6 (Oct. 31, 2011) [hereinafter IBA's Background Paper], *available at* http://www.ibanet.org/Article/Detai-l.aspx?ArticleUid=CA79763C-39CC-4B54-8174-DD247A894150.

226. TERRIS ET AL., *supra* note 13, at 34.

227. *Id.* at 34–35.

228. SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 101.

229. IBA's Background Paper, *supra* note 225, ¶ 29.

230. 1999 was chosen because that is when the Parliamentary Assembly of the Council of Europe began paying more attention to the issue of sex representativeness, the first of any of the international courts to do so. Also, ECOWAS began operating as a court in 2001, while the ICC and the WTO Appellate Body started in 2003 and 1995, respectively. Finally, going back all the way to the establishment of the ECHR in 1959 seems unfair because women's role in the legal profession was significantly more limited at the time.

WTO-AB, however, had only 14% women judges in mid-2015, and 17% of judicial slots went to women. The courts with the lowest percentages of slots allocated to women since establishment included those with the least amount of institutional screening, such as the IACHR (10%), ITLOS (2%), ICJ (3%), and ATJ (12%). Since its establishment, women have served in only six percent of available slots on the ECJ, which has no international voting procedure at all. Although it is difficult to disentangle national nominations procedures, screening mechanisms, and emphasis on equal representation on the bench in constitutive instruments, the data suggest a correlation may exist between institutionalized screening and guidance at the international voting stage and a more sex representative bench.

The extent to which non-governmental organizations (NGOs) and other stakeholders are involved in the screening of candidates and the degree of candidate information accessible to the public may also affect the sex composition of the bench. A systematic study of NGOs' role in international judicial selection procedures is necessary to better understand their effect. Nonetheless, NGOs appear to be involved in screening candidates when information is available to them. For example, the Coalition for the International Criminal Court has provided its own questionnaire to ICC candidates, interviewed candidates, and held public events with candidates and experts and public debates among the candidates "to expand on their respective qualifications and expertise, as well as to promote fully-informed decision-making by States Parties delegates."[231] Other NGOs have pushed for greater transparency and procedures at the national nomination and international levels. For example, Human Rights Watch complained about the selection procedures utilized by Russia in generating its list of candidates for the ECHR in 2012.[232] Civil society organizations urged states to use more rigorous, open, transparent, and participatory procedures in national nominations to the Af. Ct. HPR.[233] The Open Society Justice Initiative and over 70 NGOs have pushed for greater transparency and screening of IACHR candidates.[234] Others have complained that the late listing of WTO-AB member candidates precludes substantive public debate about their merits.[235]

231. *Delivering on the Promise Of A Fair, Effective and Independent Court—Election of ICC and ASP Officials—Judges*, Coal. for the Int'l Crim. Ct., http://www.iccnow.org/?mod=electionjudges (last visited Apr. 22, 2016).

232. Letter to the European Court of Human Rights Regarding the Selection Procedure for Candidates from the Russian Federation from Hugh Williamson, Executive Director, Europe and Central Asia Division, Human Rights Watch (April 11, 2012), *available at* http://www.hrw.org/-news/2012/04/11/letter-european-court-human-rights-regarding-selection-procedure-candidates-russian-.

233. *See* discussion *infra* Part II(B)(1).

234. Independent Panel Report, *supra* note 70.

235. Pauwelyn, *supra* note 114.

D. Sex Representation Requirements or Aspirational Language

What about sex representation aspirations or requirements at the national nomination or international election levels? Aspirational statements encouraging states to nominate both men and women may not be as successful as mandates to do so. For example, states parties to the Af. Ct. HPR are supposed to give "[d]ue consideration" to "adequate gender representation in the nomination process."[236] But no binding statutory guidance explains to states how they should implement this mandate, and it is doubtful whether states are taking to heart the African Union Commission's suggestions to include civil society and enhance transparency, or even to nominate women in the first place.[237] The percentage of women judges on the court has been stuck at 18% since its establishment through 2015.

On the other hand, 41% of *ad litem* judicial slots on the ICTY have gone to women, while women have occupied only 13% of permanent judge spots. The numbers are 35% and 21%, respectively, for the ICTR. States are required to take into account the need for a fair representation of both sexes only with respect to *ad litem* judges, suggesting that the representativeness requirement at the national nomination stage may make a difference. Like the African Court, however, no guidance exists as to how this mandate should be implemented. The historical data on these courts, found at Figures 9 and 10, appears compelling, nonetheless. It shows that since *ad litem* judges were added to the ICTY in 2001, women have always served in a significantly higher percentage of *ad litem* positions than permanent ones. Similarly, women accounted for a greater percentage of *ad litem* than permanent judges on the ICTR, almost every year since *ad litem* judges were added in 2004, and until the number of *ad litem* judges was reduced to only one in 2013.

Mandatory or virtually mandatory requirements to include both sexes at the bench appear to correlate with a dramatically higher percentage of women on the bench. Women have made up at least 39% of the ICC's judges every year since its establishment, and the ICC has what amounts to a quota requirement at the international election stage. As for the ECHR, almost immediately after the Parliamentary Assembly began drawing states' attention to the issue of sex representation on the bench in 1996, the number of women elected rose dramatically. The percentage of women judges jumped from 3% to 18% between 1997 and 1998. Then, shortly after the Parliamentary Assembly invited the Committee of Ministers to encourage states to apply a set of criteria to national nominations in 1999, including open calls for candidates, experience in human rights, and

236. Protocol to African Charter, *supra* note 98, art. 12.

237. *See supra* notes 97–102 and accompanying text.

candidates of both sexes,[238] the percentage of women judges again increased, this time, from 17% in 1999 and 2000, to 22% in 2001. This jump coincided with a Parliamentary Assembly instruction to the relevant Parliamentary Assembly subcommittee on elections to ensure that member states apply the stated criteria.[239] In 2004, the Parliamentary Assembly decided it would no longer consider unisex lists of candidates;[240] the percentage of women judges rose from 23% in 2004 to 40% seven years later. Although Malta challenged the list requirement and states have submitted unisex male lists on at least two occasions,[241] the percentage of women judges has not dropped below 33% since 2008, four years after the requirement was imposed.

Figure 15 shows the percentage of slots filled by women judges from 1999 to 2015, or since establishment until 2015, if the Court was founded after 1999. Interestingly, of the five courts with the highest percentages of slots allocated to women, four had either quotas or aspirational language to include women on the bench: the ICC, the ICTY for *ad litem* judges, the ICTR for *ad litem* judges, and the ECHR. Of the seven courts with the lowest percentages of slots going to women, none had quotas or aspirational language seeking a fair representation of women on the bench.

238. Eur. Parl. Ass. Recommendation 1429, *supra* note 131.
239. Eur. Parl. Ass. Order No. 558, *supra* note 134.
240. Eur. Parl. Ass. Res. 1366, *supra* note 136.
241. *See, e.g.*, *Candidate List—Moldova*, *supra* note 141; *Candidate List—Belgium*, *supra* note 141.

Figure 15. Percentage Slots Occupied by Women from 1999 to 2015 (or establishment to 2015, if established after 1999)

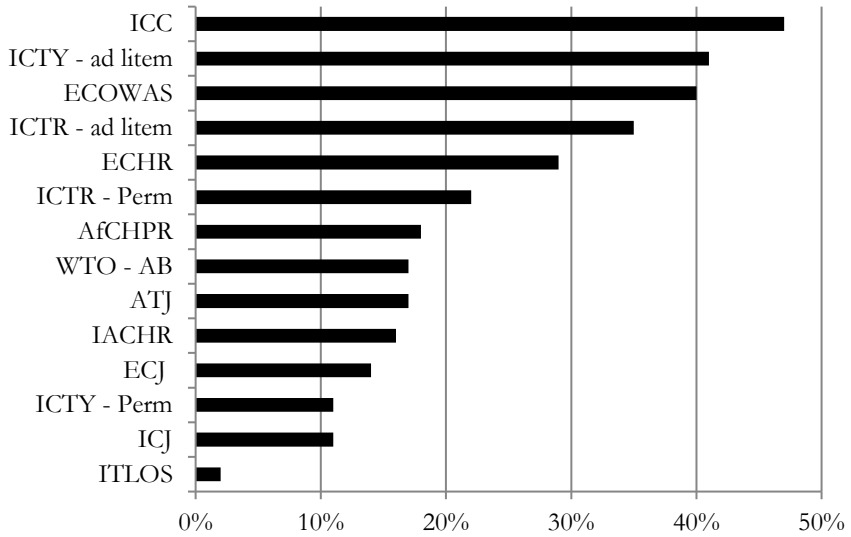

Table 2 shows the percentage of women judges on international courts without sex representation requirements or aspirational language in mid-2015. Table 3 shows courts with such requirements. While women accounted for 15% of judges on courts without sex representation requirements, they made up 32% of judges on courts with such requirements or aspirational language.

Although, due to the small number of courts involved, these comparisons are not statistically significant, they provide compelling circumstantial evidence that quotas and aspirational language may make a difference in getting women on the bench. At the same time, two of the five courts with sex representation requirements, the ICC and the ECHR, also happen to have among the most guidance and screening at the international election level, and the ECHR provides meaningful instruction to states at the national nomination stage. Also, ECOWAS and the WTO-AB appear to have screening and ranking before elections take place, yet the percentage of women judges was relatively low on both courts' benches in mid-2015. Nonetheless, 40% of slots have gone to women on ECOWAS since it was established. 17% have gone to women on the WTO-AB since establishment.

Table 2. Percent Female Judges on Courts without Sex Representation Requirements or Aspirations (mid-2015)

Court	% Female
ICJ	3/15 (20%)
ITLOS	1/21 (5%)
IACHR	1/7 (14%)
ECJ	5/28 (18%)
ATJ	2/4 (50%)
ECOWAS	1/7 (14%)
WTO- AB	1/7 (14%)
ICTR *permanent*	2/9 (22%)
ICTY *permanent*	2/19 (11%)
Total	**18/117 (15%)**

Table 3. Percent Female Judges on Courts with Representation Requirements or Aspirations (mid-2015)

Court	% Female
ICC	7/18 (39%)
ICTY *ad litem*	1/3 (25%)
ICTR *ad litem*	0/1 (0%)
ECHR	15/45 (33%)
Af. Ct. HPR	2/11 (18%)
Total	**25/78 (32%)**

E. Summarizing the Reasons for the Paucity of Women on the Bench

The limited pool argument does not adequately explain the paucity of women judges on international courts. It assumes that selection procedures are implemented to select the most meritorious candidates, yet ample evidence exists that political horse-trading, political patronage, and other considerations may trump. Also, given the low number of international judgeships available, only a small pool of women is necessary to achieve parity on the bench. Finally, states that appear to have greater pools do not necessarily nominate more women than states with smaller pools, suggesting that something other than the pool is playing a significant role in judicial nominations. Opaque nominations procedures at the national level likely create obstacles for less well-connected or "outsider" candidates to make it through to the next stage of the elections process. Despite the political nature of elections at the international level, courts with institutional screening mechanisms may draw greater numbers of women to the bench.

Finally, courts with explicit requirements for sex representativeness have been more successful at achieving it than courts without such provisions.

Other factors aside from or instead of national nomination procedures, institutional screening mechanisms, and representativeness mandates may also be at play, particularly with regard to historical statistics. These may include when the court was established, changes in attitudes toward women, and greater participation in the workforce over time. Since fewer women were qualified to serve as judges in the 1950s than today, older courts would appear more likely to have fewer women as a percentage of the bench since establishment. Also, all the courts with representativeness mandates or aspirations began functioning after 1990, excluding the ECHR, where a sex representation requirement was instituted in 2004. Nonetheless, ITLOS is among the younger courts, and it has among the lowest percentages of women on the bench historically.

Interestingly, all courts with representativeness requirements are human rights or international criminal courts, raising the question whether subject matter jurisdiction might make some sort of difference, rather than statutory language. Just as states are happy to appoint a plethora of women to the CEDAW monitoring body, perhaps states are more willing to nominate and vote for women candidates on courts deciding international human rights and criminal law issues, which may be perceived to implicate what may be deemed "women's concerns." Perhaps the willingness exists in theory alone: the Inter-American Court has only one woman on the bench, and the African Court appears to be stuck at a maximum of two.

A lack of state and domestic constituencies' commitment to diversity on international court benches may, too, contribute to keeping benches homogeneous. While such a disposition may have helped to diversify the United States federal judiciary,[242] it is not readily discernable at the international level for many international courts. In their interviews of judges and individuals involved in judicial selection for the ICJ and the ICC, Ruth Mackenzie and her colleagues found that interviewees expressed mixed views about the importance of sex representation on the bench.[243] One questioned the need for emphasizing gender given the increased enrollment of women on law faculties in the West, while others expressed concerns that appointing female candidates would result in a drop in quality of judges. [244] Still others challenged the use of the gender quotas on the ICC, suggesting that it was unfair that seven seats went to women in the first ICC

242. *See, e.g.*, KENNEY *supra*, note 52, (arguing that Carter's advancement of women on the federal judicial bench was driven primarily by mobilization by strategically placed insiders collaborating with outside groups).

243. SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 48–49.

244. *Id.*

election.[245] While the requirements for legal, linguistic, and geographical diversity were widely accepted, "attitudes towards gender balance are generally much more ambivalent."[246]

Minimal direct advocacy on the issue of sex representation on most international courts historically may be to blame for ambivalence about the paucity of women on the bench. In discussing President Carter's historic advancement of women on the federal judicial bench in the US, Sally Kenney proposed that change occurs when people mobilize, especially strategically placed insiders collaborating with outside groups.[247] The same may apply to the inclusion of women judges on the ICC. The reason the Rome Statute has a gender representativeness requirement is because groups advocated vigorously for it.[248] Interest groups argued that the ICTY, founded in the wake of over ten thousand rapes in the former Yugoslavia, should have had more women on the bench.[249] They suggested that the presence of people like Navanethem Pillay on the ICTR made a difference in the development of international criminal law, and that it was essential that the ICC have women's voices on it, not just experts on violence against women and children.[250] Arguably, the ICC has had such high representation of women judges because NGOs and sympathetic states pushed for the "fair representation" requirement in the statute, and NGOs "made extensive efforts to bring forward the names of women who met the election requirements, particularly from those countries that had little diplomatic leverage to get one of their nationals elected. Once some of these women were nominated, NGOs vigorously lobbied states to elect them."[251]

Domestic constituencies may pay little attention to the percentage of women judges on international courts due to a lack of knowledge of and interest in their activities. Simply, people are more likely to know and care about courts in their own communities than in far-flung places across the world, with little perceived significance for their daily lives. Consequently, individuals vetting, nominating, and electing judges on behalf of states face little domestic political pressure to propose or vote for a diverse slate of candidates. The lack of transparency around nominations and elections also serves to shield officials from the public view on this issue. While domestic constituencies may push for the inclusion of women on domestic benches, they may be unaware that selection is even taking place for international ones.

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245. *Id.*

246. *Id.*

247. KENNEY, *supra* note 52, at 65.

248. Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT'L CRIM. L. REV. 643, 650 (2011) [hereinafter Grossman IV].

249. *Id.*

250. *Id.*

251. TERRIS ET AL., *supra* note 13, at 19.

Perhaps calls for more representative benches are beginning to grow louder. More people are studying and questioning extreme sex unrepresentativeness on international commercial and investment treaty arbitral panels.[252] Non-governmental organizations such as the Center for Justice and International Law, are organizing events around the selection and nomination processes at the Inter-American Court, and a new campaign called "Gqual" was recently launched at the United Nations to promote parity on international law bodies.[253] Other groups, such as the International Association of Women Judges, foster networks of women judges from around the world and share information about vacancies when they are announced.[254] At the same time, it is rare to hear people decrying the paucity of women judges on ITLOS or the WTO-AB.

III. PROPOSALS FOR REFORM

Opaque and closed selection procedures at the national nomination and international elections levels, political horse-trading, and a lack of advocacy around and sunlight on the issue of representativeness on the bench are likely facilitating sex unrepresentativeness on most international court benches. In light of these conclusions, what reforms to judicial selection procedures would increase sex representativeness on international benches? This Part proposes methods for enhancing openness and transparency at the national nomination and international voting levels. It also analyzes why states may, in many instances, be opposed to what appear to be reasonable and legitimacy-enhancing reforms. Mandatory quotas or aspirational targets may be advisable should enhanced procedures fail, or as an alternative to them. The feasibility or desirability of potential reforms may vary by the court involved.

A. Enhance Candidate Selection Procedures

To improve the probability of the nomination of women as well as other non-status quo candidates for international judgeships, national selection procedures must be made more open and accessible for courts where they are currently closed and opaque. Rather than simply giving national groups or state officials unfettered and unguided discretion in selecting nominees,

252. Franck et al., *supra* note 7; Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 401, 404–05 (2014).

253. Press Release, GQUAL, New Global Campaign Highlights Dearth of Women Across International Tribunals & Other Monitoring Bodies; Seeks To Achieve Gender Parity Within Them (Sept. 18, 2015), http://www.gqualcampaign.org/new-global-campaign-highlights-dearth-of-women-across-international-tribunals-seeks-to-achieve-gender-parity-within-them/.

254. *See, e.g.*, INTERNATIONAL ASSOCIATION OF WOMEN JUDGES, http://www.iawj.org/ (last visited March 26, 2016).

qualifications requirements, and procedures to be employed at the national level should be spelled out in greater detail by the states that utilize these courts. For example, states parties could pass resolutions, like the Assembly of the State Parties to the ICC, clarifying what kinds of qualities and experiences they expect judges will have. Like the procedures for nominating judges to the ECHR, relevant political bodies can provide examples of different procedures or "best practices" that can be utilized in the nomination and selection of candidates at the national level. These practices might include public advertisement for potential candidates, a more detailed description of the candidate evaluation process and necessary qualifications, participants in the nomination and evaluation processes, and deadlines.

Alternatively, or in addition, all states could be required to detail what standards and procedures they intend to use in their domestic nomination processes, what procedure took place, and how many nominees were considered, along with their list of nominees. This information could then be filed with the Registrar of the relevant court. The idea is that if states must draft explicit standards and procedures for international judge nominees, they are more likely to employ them. Such requirements will help to identify a broader pool of candidates and show the public, including interested NGOs, what procedures are followed, leading to enhanced accountability. If nomination procedures are brought to the attention of interested members of the public, officials charged with selecting candidates are less likely simply to go with who they know and more likely to conduct a search with a more diverse and meritorious pool of candidates.

Another way to make the process more transparent is to allow non-state actors to take part in vetting potential candidates or to require states to create national nominating commissions that represent constituencies in a particular state. If commissions are used, they should reflect the diverse makeup of the society.[255] States could also create commissions composed of stakeholders at the international level to vet candidates proposed by states, as the ICC, ECHR, ECOWAS, and ECJ are currently doing to

255. Some have criticized U.S. domestic selection commissions for taking the appointments process out of the public view and for the lack of diversity among commissioners, particularly when no statutory requirement for diversity on the commissions exists. *See* Becky Kruse, *Luck and Politics: Judicial Selection Methods and Their Effect on Women on the Bench*, 16 WIS. WOMEN'S L.J. 67, 82–83, App. A (2001). The American Judicature Society recommended in 2008 that commissioners be appointed or elected taking into account geographic representation and bipartisan membership, and appointing authorities are to "make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity)." AM. JUDICATURE SOC'Y, MODEL JUDICIAL SELECTION PROVISIONS 1 (rev. 2008), *available at* http://www.judicialselection.us/uploads/documents/MJSP_ptr_3962CC5301809.pdf. In the same vein, Ruth Cowan, a scholar of the South African judiciary questioned whether those involved in the judicial nomination process, although charged with diversifying the judiciary, might in fact be blocking the appointment of women. Cowan, *supra* note 50, at 213–15.

different extents. Commissions could be composed of individuals with some knowledge of the subject matter jurisdiction of the relevant court and guidance about necessary qualifications for competent judges. As suggested by the International Bar Association, such commissions could draw on the model of the United Nations Internal Justice Council as well.[256] The United Nations General Assembly created the Council, composed of reputable lawyers and a small secretariat to be appointed by the United Nations Secretary General, to propose lists of qualified candidates to states for the UN tribunals charged with hearing internal staff complaints.[257]

Shining light on, requiring systematization of, and involving more stakeholders in selection procedures is more likely to result in the consideration of a broader and more competent array of candidates because of greater public participation and accountability. Closed, opaque procedures, on the other hand, create few incentives for those choosing nominees to move beyond their own personal contact lists and to forego the benefits that may accrue to them personally by choosing people within their own networks.

Yet states may have principled reasons to reject enhanced procedures. States may prefer the opportunity to control tightly the nomination and election process for international judges rather than opening it to the light of day. Creating commissions and transparency may run counter to their understanding of the proper relationship between states and international courts more generally. Erik Voeten has identified a number of motivations which may affect how a state approaches international judicial appointments, including signaling credible commitments to a particular cause such as human rights, influencing the court's decision-making in a way that protects a state's sovereign interests or promotes an activist agenda, advancing liberal internationalist norms, and political patronage.[258] Keeping the selection process primarily in the hands of individual states may allow states to more effectively pursue some of these goals. For example, at the national level, opacity and lack of procedure simplifies the nomination process and gives state officials the opportunity to grant political favors. Public calls for nominations and national selection commissions would limit a state official's ability to reward loyalists.

In addition, unfettered discretion makes it possible for states to promote candidates who will vote in line with a state's perceived interests and broader foreign policy agenda. Provided closed and opaque selection procedures, national governments may select or vote on candidates because they believe individuals will vote in a particular way should issues of importance to that

256. *See* IBA's Background Paper, *supra* note 225, ¶ 5.

257. *Id.*

258. *See generally* Voeten, *supra* note 12; Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669, 670–71 (2007).

state arise. For example, a large state with a powerful military may choose an ICC candidate who would interpret broadly key terms in international criminal and humanitarian law such as "necessity" and "proportionality," so that the law develops in a manner that gives the state greater flexibility in its war-waging techniques. A smaller, less powerful state might choose a candidate with a narrower understanding as a protective measure against its larger and aggressive neighbors. Hypotheticals are unnecessary to make the point. As Voeten has demonstrated, governments in favor of European integration chose more activist judges for the ECHR.[259] In the same vein, the United States and other states have taken an active role in interviewing and vetting candidates for membership on the WTO-AB to ensure their consistency with their interests.[260] They have *de facto* vetoed candidates who disagree or are perceived to disagree with them on important policy matters.[261] The less power states have to nominate and elect the candidates of their choice, the less likely they are able to shape the future decisions of international courts.

Eric Posner and John Yoo might add that enhanced selection procedures promote the "independent" nature of many international courts, which may undermine their effectiveness. Posner and Yoo define "independence" as "a measure of the tribunal member's vulnerability to the state that appoints him. Tribunals composed of dependent members have a strong incentive to serve the joint interests of the disputing states."[262] Independent members, on the other hand, are less motivated to serve disputing states' interests, and morals, ideology, and the interests of other states may influence their decision-making.[263] Because independent judges' rulings are less likely to appease the litigating parties than dependent judges, compliance will decline, and so will the effectiveness of the Court.[264] Transparent selection procedures with screening at the international level are more likely to produce independent judges. Members of selection commissions at the international level are likely to screen out or rank lower candidates they perceive as biased toward a particular state or set of interests, so long as the commission itself is composed of individuals representing states with diverse interests.

But if a state's goals are to promote the rule of law or signal a commitment to a particular normative regime, it may prefer to appoint judges through transparent and merit-based process. Alternatively, whether

259. Voeten, *supra* note 257, at 670–71.

260. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 264 (2004); Elsig & Pollack, *supra* note 117, at 3–4.

261. Steinberg, *supra* note 260, at 264.

262. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals,* 93 CALIF. L. REV. 1, 26–27 (2005).

263. *Id.* at 27.

264. *Id.* at 28.

states perceive adjudicators as Trustees of a particular legal regime, rather than Agents who merely reflect their policy preferences, may affect their disposition to more open and merit-based selection procedures. In distinguishing between Trustees and Agents in the international courts context, Karen Alter wrote:

> Principals choose to delegate to Trustees, as opposed to Agents, when the point of delegation is to harness the authority of the Trustee so as to enhance the legitimacy of political decision-making. Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary.[265]

Agents, on the other hand, are expected to be loyal to and implement the decisions of the Principal.[266] Screening commissions at the international level may serve to filter out Agents in favor of Trustees. They may choose judges who will interpret the law with reference to the prevailing legal discourse, professional norms, and moral ideals rather than in accord with the political sensibilities of the Principal.

Open procedures at the national level and international screening or ranking of candidates for international judicial office decrease states' ability to affect substantive legal decision-making in international courts. They cannot simply choose the candidate whom they expect will vote their way on a given matter. At the same time, these enhanced procedures are more likely to result in decision-making that is independent from state influence and focused on cultivating the rule of law, qualities which strengthen the legitimacy of these institutions. And it appears that such enhanced procedures coincide with greater opportunity for women, and perhaps others, to serve on international court benches.

B. Aspirational Targets or Temporary Mandatory Quotas

Enhanced procedures may not be acceptable to states, or they may not change the sex unrepresentative status quo. What about aspirational targets or quotas? A comparison of courts with representativeness requirements against courts without them suggests that representativeness requirements are correlated with greater numbers of women judges on the bench over time. Between 1998 and 2015, women occupied on average 31% of slots on courts with representation requirements or aspirational language, but only 13% of slots on courts without them. While the percentage of women judges

265. Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT'L REL. 33, 35 (2008).

266. *Id.* at 39–40.

has increased over time for both categories of courts, the overall percentage of women judges on courts with no representativeness requirement has never broken 20%. It has reached 40% for courts with representativeness requirements. Consequently, the adoption of aspirational language or of mandatory targets may result in better sex representativeness on the bench. Mandatory targets could be adopted at the nomination stage, as the ECHR does, or quotas could be instituted at the voting phase, as the ICC does. This section considers the pros and cons of such measures, and ultimately concludes that, should enhanced selection procedures fail to achieve more sex representative bodies, or should states disfavor them, temporary mandatory measures are worth considering.

Concrete steps to open up international courts benches to women are not only permitted by international law, but also required by it. CEDAW's Article 8 provides that "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 organizations."[267] States have agreed that the use of special measures of a temporary duration may be appropriate to foster equality.[268] As of May 2016, 189 states considered themselves to be parties to CEDAW.[269]

The 1995 Beijing Declaration, subsequently adopted by the United Nations General Assembly, emphasized the importance of full participation in decision-making and access to power.[270] In the Beijing Platform, states agreed to:

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267. *Id.*; CEDAW, *supra* note 39, art. 8. Article 11 adds, ""States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . . [t]he right to the same employment opportunities, including the application of the same criteria for selection in matters of employment. . . ." *Id. See also* Claudia Martin*, Article 8 of the Convention to Eliminate all Forms of Discrimination Against Women: A Stepping Stone in Ensuring Gender Parity in International Organs and Tribunals*, GQUAL: CAMPAIGN FOR GENDER PARITY IN INTERNATIONAL REPRESENTATION http://www.gqualcampaign.org/wp-content/uploads/2015/09/Advocacy-Piece-1.pdf.

268. The treaty also provides: "Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." *Id.* art. 4(1).

269. *See Status of Treaties——Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Apr. 22, 2016). A number of states have made reservations to CEDAW which likely conflict with its object and purpose, and therefore, would presumably render them non-parties, but they nonetheless consider themselves parties. *See* Vienna Convention on the Law of Treaties art. 19, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

270. Fourth World Conference on Women, Beijing Declaration and Platform for Action, para. 13 (1995), *available at* http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf ("Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace.").

> Commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, inter alia, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions.[271]

With respect to United Nations bodies, states agreed to "[a]im at gender balance 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 for posts at the senior level."[272] Other global and regional treaties authorize and promote the use of temporary measures to ensure equality of opportunity and non-discrimination, including the International Labor Organization's Convention No. 111[273] and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.[274]

Interestingly, aspirational and mandatory targets have become more broadly accepted in the domestic political context in recent years, and they exist in over one hundred countries in various forms.[275] For example, France requires all political parties to list equal numbers of men and women in most elections.[276] Rwanda's Constitution specifies that at least 30% of each decision-making body must be composed of women.[277] Argentina mandates that women must be placed in electable positions on party lists.[278] The Iraqi Constitution aims for at least one-quarter of the Council of Representatives

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271. *Id.* para. 190(a).

272. *Id.* para. 190(j).

273. ILO Convention No. 111 specifies that state parties must "declare and pursue a national policy designed to promote . . . equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof," and it authorizes "special measures of protection or assistance" to this end. Convention Concerning Discrimination in Respect of Employment and Occupation, ILO Convention No. 111 art. 2, June 25, 1958, 362 U.N.T.S. 31. 172 states have ratified the treaty. *Ratifications of C111*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256 (last visited Apr. 22, 2016).

274. States "shall . . . take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist." Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 1, adopted July 11, 2003, http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%C20the%C20Rights%C20of%20Women.pdf.

275. Susan Franceschet et al., *Conceptualizing the Impact of Gender Quotas*, *in* THE IMPACT OF GENDER QUOTAS 3 (Susan Franceschet et al. eds., 2012).

276. Rainbow Murray, *Parity and Legislative Competence in France*, *in* THE IMPACT OF GENDER QUOTAS 27, 27 (Susan Franceschet et al. eds., 2012).

277. THE CONSTITUTION OF THE REPUBLIC OF RWANDA, May 26, 2003, art. 9(4), *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/64236/90478/F238686952/RWA64236.pdf (last visited March 26, 2016).

278. Franceschet et al., *supra* note 274, at 44–45.

to consist of women.[279] At least a few states have adopted quotas for the judiciary as well. The Transitional Constitution of South Sudan states that "[t]here shall be a substantial representation of women in the Judiciary having regard to competence, integrity, credibility, and impartiality."[280] Belgium recently adopted a quota for women on its constitutional court.[281]

In response to low participation of women on European corporate boards and low growth rates over time, some legislatures have instituted mandatory parity requirements.[282] Norway instituted a 40% of either sex requirement on boards of all privately-owned public limited companies, and non-compliance can result in penalties and even dissolution of the company.[283] Since the institution of the quota, participation on corporate boards rose from 25% in 2004 to 42% in 2009.[284] In March 2007, Spain passed a law requiring public companies and other large firms with more than 250 employees to develop plans to promote equal participation on boards and to try to achieve at least 40% participation of each sex within eight years.[285] In late 2010, France adopted a law requiring listed companies and companies with 500 or more employees and revenues over 50 million euros to appoint 40% women on boards within six years.[286] The Netherlands, Italy, and Belgium also adopted quota laws for corporate boards.[287] Austria, Denmark, Finland, France, Germany, the Netherlands, Poland, Spain, Sweden, and the United Kingdom make reference to gender in corporate governance codes.[288] A study by the European Commission's Network to Promote Women in Decision-making in Politics and the Economy asserted that "[a] wave of quota debates is sweeping over Europe, creating more awareness with the public and putting pressure on companies

279. Article 49, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005, *available at* http://iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

280. TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN, art. 123 (6), *available at* http://www.sudantribune.com/IMG/pdf/The_Draft_Transitional_Constitution_of_the_ROSS2-2.pdf (last visited March 26, 2016).

281 Loi spéciale portant modification de la loi du 6 janvier 1989 sur la Cour constitutionnelle (1), art. 12 (April 15, 2014)("La Cour se compose de juges de sexe différent, tant en ce qui concerne les juges visés au § 1er, 1o, que ceux visés au § 1er, 2o. Elle compte au moins un tiers de juges de chaque sexe. ").

282. Dir. Gen. for Emp't, Soc. Affairs & Equal Opportunities, European Comm'n, *More Women in Senior Positions: Key to Economic Stability and Growth 44* (Jan. 2010), *available at* http://ec.europa.eu/danmark/documents/alle_emner/beskaeftigelse/more_women_in_senior_positions.pdf. The percentage of women on Europe's corporate boards grew less than 3% points, to a total of 10.9%, from 2003–2009. *Id.*

283. *Id.* at 45.

284. *Id.*

285. European Comm'ns Network to Promote Women in Decision-Making in Politics and the Econ., *The Quota-Instrument: Different Approaches Across Europe* 12 (Working Paper, June 2011), *available at* http://ec.europa.eu/justice/gender-equality/files/quota-working_paper_en.pdf.

286. *Id.*

287. *Id.*

288. *Id.* at 13.

and governments to make fast and fundamental changes in the representation of women in decision-making."[289] In November 2013, the EU Parliament voted to require European companies to hire 40% women for corporate board positions by 2020.[290] The issue of gender diversity on corporate boards and possible remedies including quotas has been discussed in non-European countries as well, including South Africa and Australia.[291]

Despite the now widespread use of quotas at the political level, on corporate boards, and to a lesser extent, in judiciaries, counter-arguments to the use of mandatory quotas exist. It is more difficult to find arguments against aspirational targets. Aspirational targets simply point out to nominators that sex representation is a worthwhile goal. They express the community of relevant states' values about who should be represented on the bench as a whole, but they impose no requirement to reject or accept a candidate based on sex. From a political standpoint, aspirational language demonstrates a political commitment to sex representation. (One could imagine a more widespread use of such language to encompass other groups as well, such as indigenous people or people of minority status within their own states.)

Aspiring to a fair representation of the sexes led to a dramatic difference on the ICTY and the ICTR between the percent of women serving as *ad litem* (aspirational sex representativeness language) as compared to permanent judges (no such language). Women served in much higher percentages on the *ad litem* bench, as compared to the permanent one.[292] On the other hand, women have made up only 18% of the Af. Ct. HPR bench. There were many other courts with even lower percentages of women judges in mid-2015, however, including ITLOS, IACHR, ECOWAS, the WTO-AB, and the ICTY's permanent bench.

Some might argue that targets of any kind are not worthwhile if they do not result in "substantive representation," or the promotion of women's concerns.[293] The jury is still out on whether sex representativeness affects international court decision-making, although there is some evidence that it may make a difference in at least some cases. A 2007 study on the role of gender in sexual assault decisions of international criminal tribunals excluded the ICTR in part because there were "too few [women judges] to

289. *Id.* at 15.

290. Press Release, European Parliament News, 40% Of Seats On Company Boards For Women (Nov. 20, 2013), *available at* http://www.europarl.europa.eu/news/en/news-room/content-/20131118IPR25532/html/40-of-seats-on-company-boards-for-women (last visited Apr. 22, 2016).

291. *See* Jean J. du Plessis et al., *Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa*, 17 DEAKIN L. REV. 207 (2012) (discussing debates and initiatives on corporate board diversity).

292. *See supra* Figures 9–10.

293. Franceschet et al., *supra* note 275, at 8.

conduct empirical analysis. . . ."[294] The same study found that ICTY panels with female judges imposed more severe sanctions on defendants who assaulted women, while male judges imposed more severe sanctions on defendants who assaulted men.[295] Another study showed that women judges were much more likely than men to rule in favor of jurisdiction in cases under the auspices of the International Centre for the Settlement of Investment Disputes.[296]

A number of studies have sought to understand the relationship between gender and judging in the United States, scholarship that may help to illuminate the gender effect of judging in international courts in the absence of additional international data. Although many studies show a limited or non-existent effect of gender on judging, cases involving family law and discrimination appear to be an exception.[297] One study found that a sex discrimination plaintiff was 10 percentage points less likely to prevail if the judge was male, and when a woman was present on a panel deciding such a case, men were more likely to rule in favor of the plaintiff.[298] Another study showed that asylum applicants randomly assigned to women judges were 44% more likely to prevail than those facing male judges.[299]

Anecdotal evidence at the international level may also be instructive in understanding whether a gender diverse bench makes a difference. A number of female judges have made statements implying that their experiences as women gave them a particular sensitivity in certain cases. These include former D.C. Court of Appeals and ICTY Judge Patricia Wald, former ICC Judge Navenathem Pillay, and former IACHR Judge Cecilia Medina.[300] For example, Judge Wald wrote:

> [B]eing a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions. . . . A judge is the sum of her experiences and if she has suffered disadvantages of discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.[301]

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294. King & Greening, *supra* note 26.

295. *Id.*

296. Waibel & Wu, *supra* note 27, at 34–35.

297. *See* Sally J. Kenney, *Thinking about Gender and Judging*, 15 INT'L J. LEGAL PROF. 87, 96–101 (2008); Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 FEMINIST LEGAL STUD. 1, 7 (2003).

298. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390–406 (2010).

299. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 342 (2007).

300. Grossman IV, *supra* note 248, at 647–48.

301. Wald, *Six Not-So-Easy Pieces*, *supra* note 30, at 989.

She has also pointed to five different major gender-crime precedents issued when at least one woman sat on the bench.[302] Judge Pillay suggested that although women do not "decide in a different way," they have a "particular sensitivity and understanding about what happens to people who are raped."[303] Former Inter-American Court Judge Cecilia Medina Quiroga posited that her perspective as a woman changed the reparations outcome in a case involving a massacre and rape in Guatemala.[304]

National judges and lawyers from all over the world have made similar points. For example, United States Justice Ruth Bader Ginsburg, while expressing doubts about the accuracy of studies on gender and judging, suggested that "the presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII."[305] Madame Justice Bertha Wilson, the first woman on Canada's court of last resort asserted that for entire areas of the law, "there is no uniquely feminine perspective," but in others, "a distinctly male perspective is clearly discernible . . . "[306] In the same vein, Lady Baroness Hale, the sole woman ever to have served on the United Kingdom's highest court, posited that women bring "different perceptions to the task of fact-finding — which is what most judges do much of the time."[307] A European Commission survey of male and female judges and other legal professionals found that, in cases involving violence against women or children, family issues, and sometimes sex discrimination, "it is recognized (mainly by the women interviewed) that gender does have an influence."[308] Although she thought gender made little difference most of the time, an Israeli judge pointed out a number of instances where she thought it did make a difference, including commercial cases and cases involving sexual assault.[309]

Some may argue that the presence of both men and women may matter for some but not all courts. For example, sex representativeness may be important on international criminal and human rights courts because male and female judges may perceive gender-biased violence in different ways, and victims may feel less comfortable relating such stories to a unisex

302. Wald, *What do Women Want?*, *supra* note 30.

303. TERRIS ET AL., *supra* note 13, at 48.

304. *Id.* at 186–87.

305.Emily Bazelon, *The Place of Women on the Court*, N.Y. Times, MM22 July 12, 2009 (interviewing Justice Ruth Bader Ginsburg).

306. Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 515 (1990).

307. Brenda Hale & Rosemary Hunter, *A Conversation with Baroness Hale*, 16 FEMINIST LEGAL STUD. 237, 245 (2008).

308. Miriam Anasagasti & Nathalie Wuiame, *Women and Decision-Making in the Judiciary in the European Union*, EUR. COMM'N, Directorate-General for Employment, Industrial Relations and Social Affairs Unit V/D.5, 8, 23–24 (1999).

309. Hana Evenor, *Women on the Bench*, *in* WOMEN IN LAW 93–95 (Shimon Shetreet ed., 1998).

court.[310] Further, for human rights courts in particular, some constituencies will question the values and impartiality of a *human* rights court where half of humanity is missing from the bench. If women judges relate to rape or crimes of violence against women in a different way than men, then both are necessary on the bench for impartiality. On the other hand, a mixed bench may be unnecessary or irrelevant for a court that interprets the Law of the Sea or trade agreements. If there is no difference in substantive outcome, why is important to have a female or male judge on the Law of the Sea Tribunal or on the WTO's Appellate Body?

The presence of both sexes on the bench is important, regardless of subject matter or whether a unique feminine or male perspective exists on a particular factual or legal issue. International courts exercise public authority by interpreting and shaping international law.[311] Democratic values such as representation provide meaningful justification for the exercise of such authority.[312] In essence, those affected by decision-making should play some role in the making of those decisions. As half of the world, women are equally impacted by the decisions of international courts. Even if men and women were identical in their identification and interpretation of relevant facts and application of law, it would still be problematic to have all female benches or all male benches. Furthermore, if these groups are identical in their reasoning and approach to legal analysis, how can we justify the systematic exclusion of one of them? Finally, international law requires states to provide women and men with equal opportunities to serve on these bodies, regardless of their subject matter jurisdiction.[313]

Opponents of electoral quotas have argued that they "facilitate access for 'unqualified' women with little interest in promoting women's concerns" and "reinforce stereotypes about women's inferiority as political actors."[314] Similar arguments could be made concerning mandatory judicial quotas. If women are less qualified and replace more qualified male candidates, their presence may detract from the authority of international courts, and therefore, be ill-advised. Less incentive exists to respect and comply with the decisions of international courts if the judges are not of high caliber. Because of the small number of international judge positions in the world —

310. Grossman IV, *supra* note 248, at 647–48.

311. TERRIS ET AL., *supra* note 13, at 115–17 (discussing a number of different examples, ranging from the European and Inter-American human rights courts' contribution to the development of human rights law "far beyond what the original drafters [of the respective conventions] might have conceived," to the role of the European Court of Justice in European integration, to the WTO Appellate Body's inclusion of other areas of international law within its jurisdiction); *see also* von Bogdandy & Venzke, *supra* note 34 (stating that international judicial decisions influence "general legal structures"); Grossman III, *supra* note 34 (explaining how international courts influence the development of law and politics).

312. Von Bogdandy & Venzke, *supra* note 35; *see also* De Búrca, *supra* note 35.

313. *See supra*, notes 273-74.

314. Franceschet et al., *supra* note 275, at 3.

a few hundred at most — arguments about qualifications are more difficult to make in this context than in domestic political elections. Surely there are three women qualified to sit on the Inter-American Court, WTO-AB, and ECOWAS. And there must be more than only one woman in the entire world qualified to serve on ITLOS. Further, it is not at all clear that merit is what motivates many judicial appointments in the first place.[315] In other words, the argument that women are "unqualified" has little purchase when judicial nominees are often selected to reward political loyalty or because of their relationships with nominators.

Another counter-argument to mandatory targets is that beneficiaries may be perceived as somehow inferior or less capable than their male peers, even if they are equally or even more qualified. Alternatively stated, women would not be in the courtroom but for the quota. A quota and the corresponding perceived drop in the qualifications of judges is dangerous for the authority of the court. The problem is that current selection procedures appear to be keeping *qualified* women off the bench, not that a quota would put unqualified women on it. Put otherwise, it is simply inconceivable that no French or Russian woman is qualified to serve as a permanent international judge. As for a failure to promote "women's concerns," should men's presence on the bench be justified on the basis of their ability to promote "men's concerns"? Is this a litmus test to be applied to all judges, or just female ones? Furthermore, the presence of diversity in leadership is important for other reasons as well, such as non-discrimination in employment opportunity, opening doors to other previously excluded groups, and democratic legitimacy.

If states decide they want women on the bench in greater numbers but do not want to give up tight control over who ultimately gets nominated and selected, they may prefer quotas or aspirational targets over more sweeping reforms to national nomination and international election procedures. More sex representative benches may be more impartial if and when men and women judge differently, or be perceived to be more impartial even if men and women do not differ in their decision-making. Also more balanced benches would confer greater democratic legitimacy on these courts, simply because more of humanity would be on the bench. Since states have already agreed to quotas or aspirational targets for the ICC, ECHR, Af. Ct. HPR, and to a lesser extent in the ICTY and the ICTR, they may be willing to do so for more international courts. On the other hand, states may choose to craft more transparent and merit-driven selection

315. *See, e.g.*, SELECTING INTERNATIONAL JUDGES, *supra* note 21, at 77, 95, 102 ("Success depends to a large extent on vote trading and campaigning . . ."); Booth & Sands, *supra* note 74; TERRIS ET AL., *supra* note 13, at 34; Bohlander, *supra* note 224, at 354; IBA's Background Paper, *supra* note 225, ¶ 6.

procedures, which appear to help open the courthouse doors to women judges, possibly rendering quotas unnecessary.

CONCLUSION

Almost a quarter century after feminist approaches made their way into international legal scholarship, women continue to be present in paltry numbers in many international institutions, including international courts. While women do occupy more seats today on most courts than twenty-five years ago, on courts with no representation requirements, men usually take up at least 80% of the bench. Eight of twelve courts surveyed had fewer women on the bench in mid-2015 than in previous years.

A smaller pool of available candidates is an unpersuasive and problematic justification for the status quo. First, the data does not support it. States with higher percentages of women lawyers have not necessarily appointed more women as the pool has grown. Some states with lower percentages of women lawyers appear to appoint more women to the bench than those with higher percentages. Also, the percentage of women judges has dropped on some courts, or appears frozen at one or two women on the bench, although it is reasonable to assume the pool has grown over time. Women occupied the same number of seats on the IACHR in June 2015 as they did in 1991. The percentage of female *ad litem* judges has dropped dramatically on both the ICTY and the ICTR over time. Only one woman has ever served on ITLOS's twenty-one member bench in almost twenty years, and the African Court has never exceeded two women on its eleven-member bench.

Second, in many cases, merit does not appear to be driving the judicial selection process in the first place. If merit is not at the heart of the process, then there is no reason to suppose that the pool of women candidates is any smaller than the pool of male ones, or that naming women would result in a less meritorious bench. Third, to the extent the pool appears smaller for international courts than domestic ones, glass ceilings and discrimination in the domestic context are at least partly to blame. Declining to promote more women on this basis merely recreates and reinforces the glass ceiling at the international level. Fourth, the number of judicial slots available per year is quite low; a huge pool of women candidates is not necessary to achieve a balanced bench.

Compelling reasons exist to seek a balanced representation of the sexes on international court benches. Not only does appointing more women create more equitable employment opportunities for women who seek to become international judges, but also, it can create important ripple effects. These include greater employment opportunities for women at the domestic level and as counsel before international courts, in addition to new

mentorship opportunities and perhaps greater intent to participate in international legal affairs among girls and women.[316] Finally, greater balance on the bench will strengthen courts' normative, sociological, and democratic legitimacy.

States may choose from different options for achieving a more balanced bench. These include more transparency and rigor in selection procedures at the national nomination and international election levels, as well as participation by a broader array of stakeholders. Such measures would reduce both the likelihood and perception of bias and cronyism in judicial selection, as well as push nominators to move beyond their own contact lists and encourage a more diverse slate of individuals to apply. Aspirational statements concerning sex representativeness may also be useful in bringing attention to the issue of fair representation and in encouraging states to nominate and vote for female candidates. Finally, if these steps do not achieve sex representative benches, temporary quotas may be necessary to ensure that women get a fair opportunity to serve on international court benches.

The problem is clear. The time has come to fix it.

316. *See, e.g.*, Wolbrecht & Campbell, *supra* note 36.