

Shattering the Glass Ceiling in International Adjudication
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Twenty-four years ago, Hillary Charlesworth, Christine Chinkin and Shelley Wright wrote a path-breaking feminist critique of international law and institutions in this Journal.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,” despite the elapse of almost a quarter century. 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 used as child soldiers. Progress in integrating women into international legal institutions is uneven at best.

For example, the influential 34-member International Law Commission and 11-member Inter-American Juridical Committee contained only 2 female members each in June 2014.² The UN human rights treaty bodies show ghettoization of women on the Committee on the Elimination of Discrimination Against Women, where women make up 22 of 23 members, and on the Committee on the Rights of the Child, where they account for 11 of 18 members.³ Yet women make 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 is relatively balanced; 7 out of 18 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

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

² Membership, available at <http://legal.un.org/ilc/ilcmembe.htm> (last visited June 26, 2014); *Members*, <http://www.oas.org/en/sla/iajc/members.asp> (last visited June 26, 2014).

³ Membership, at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Membership.aspx> (last visited June 26, 2014); Membership, at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx> (last visited June 26, 2014).

⁴ Members of the Committee on Enforced Disappearances, at <http://www.ohchr.org/EN/HRBodies/CED/Pages/Membership.aspx> (last visited June 26, 2014).

⁵ Membership, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx> (last visited June 27, 2014); Membership, at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Membership.aspx> (last visited June 26, 2014). Three out of 14 of the members of the Committee on Migrant Workers were women. Membership, at <http://www.ohchr.org/EN/HRBodies/CMW/Pages/Membership.aspx> (last visited June 26, 2014). Women made up 30% of the UN Committee Against Torture. Membership, available at <http://www.ohchr.org/EN/HRBodies/CAT/Pages/Membership.aspx> (last visited June 27, 2014).

⁶ Membership, at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> (last visited June 26, 2014).

⁷ Susan Franck et al., *The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration* 17 (on file with author).

between 1999 and 2012, while 59 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

On most international courts and tribunals, the focus of this article, men continue greatly to outnumber women on the bench. 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. International judges come from all over the world, but they do not appear to reflect vast swathes of the world's people.¹⁰ Most international court judges studied law in the top universities in their countries, while many also studied international law, and a large majority had 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 hail from three career paths: the national judiciary, academia or civil service in international organizations or for their own states as diplomats.¹² The percentage of international court judges from indigenous or poor backgrounds, minority groups within their own countries or having disability status appears to be relatively unquestioned and unknown.

We can say with certainty, however, that a great majority of international courts are not representative when it comes to gender.¹³ On eight international courts surveyed with no representativeness requirements built into their selection procedures, only 14.4% of judges were women in late 2013.¹⁴ On courts with either aspirational representativeness language or mandatory targets, 32% were women, however. Since the courts' establishment, while women have made up only 9.1% of all judges on courts without representativeness requirements, they accounted for 25% of judges on courts with such mandates or aspirations. Courts without representativeness requirements include the Inter-American Court of Human Rights (0 women),

⁸ Shashank Kumar and Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice*, 25 *EURO. J. INT'L L.* 893, 904. (2014).

⁹ *Id.*

¹⁰ 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).

¹¹ *Id.* at 17-18.

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 (2008).

¹³ 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 *infra* Part I.

¹⁴ See Part I *infra*.

the International Tribunal for the Law of the Sea (1 woman on a 21-member bench), the World Trade Organization's Appellate Body (1 woman on a 7-member bench), and the European Court of Justice (4 women on a 29-member bench).

These statistics establish that Charlesworth, Chinkin and Wright's critique of international institutions remains relevant for most international courts. While some may take for granted that sex representativeness on the bench, or generally approximating the ratio of the sexes in the general population, is worth aspiring to for a number of reasons, others appear more 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."¹⁵ There are on-going debates on whether a representativeness requirement should be applied to investment panels in the Transatlantic Trade and Investment Partnership,¹⁶ and whether commissioner and judicial diversity matters for the Inter-American Commission and Court of Human Rights.¹⁷ 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.¹⁸ While the requirements for legal, linguistic and geographical diversity are widely accepted, "attitudes towards gender balance are generally much more ambivalent."¹⁹

Yet a lack of sex representativeness affects both the normative and sociological legitimacy of international courts.²⁰ 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.²¹ Legitimacy rests in part on the impartiality of a court.²² 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

¹⁵ John R.W.D. Jones, *Composition of the Court*, in ANTONIO CASSESE, PAOLO GAETA AND JOHN R.W.D. JONES (eds.), *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 255 (2002).

¹⁶ Email discussion on OGEMID listserv (July 1-2, 2014) (on file with author).

¹⁷ CEJIL, *Proceso de selección de integrantes de la comisión y la corte inter-americana de derechos humanos: reflexiones hacia una reforma* (2014).

¹⁸ RUTH MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* 1 (2010).

¹⁹ MACKENZIE ET AL., *supra* note [()], at 48-49.

²⁰ *See* Grossman I, *supra* note [()], at 652.

²¹ 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].

²² *See* BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 17-18 (1995); *see also* David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, Working Paper No. 1154117, *13 (Georgetown University Law Center, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154177; TOM R. TYLER, *LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES* 4 (Tom R. Tyler, ed. 2007); Grossman II, *supra* note [()], at 129.

judging on international courts exist, due in part to the paucity of women on the bench.²³ But one study showed that women judges are much more likely to rule in favor of jurisdiction in International Centre for Settlement of Investment Disputes ICSID cases than men.²⁴ Another established that International Criminal Tribunal for the Former Yugoslavia panels with female judges imposed more severe sanctions on defendants who assaulted females, while men imposed more severe sanctions on defendants who assaulted men.²⁵ 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.²⁶ 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 do.²⁷

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 in the first place, 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.²⁸ Constituencies, especially those traditionally excluded from power, may continue to believe unrepresentative courts are biased against them. 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

²³ 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.").

²⁴ Michael Waibel & Yanhui Wu, *Are Arbitrators Political?*, ASIL Research Forum *35 (UCLA Nov. 5, 2011), online at http://www.asil.org/midyearmeeting/pdfs/papers/November_5_2pm/Are%20Arbitrators%20Political.pdf (visited Nov. 18, 2011).

²⁵ Kimi L. King & Megan Greening, *supra* note [[]], at 1049-1050, 1065-66.

²⁶ Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 282 (2002); *see also* Navanethem Pillay, *Equal Justice for Women: A Personal Journey*, 50 ARIZ. L. REV. 657, 665-66 (2008); *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4, paras. 696, 731 (ICTR, Sept. 2, 1998); José E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. INT'L & COMP. L. 359, 362-63 (1999).

²⁷ *See e.g.*, Patricia Wald, *Six Not-So-Easy Pieces: One Woman's Journey to the Bench and Beyond*, 36 U. TOLEDO L. REV. 979, 989 (2005); Patricia Wald, *What Do Women Want from International Criminal Justice? To Help Shape the Law* (Intlawgrrls Oct. 5, 2009), online at <http://intlawgrrls.blogspot.com/2009/10/what-do-women-want-from-international-law.html> (last visited Oct. 12, 2011); TERRIS, ET AL., *supra* note [[]], 48, 186-87 (containing comments by former ICC Judge Navanethem Pillay and former Inter-American Court of Human Rights Judge Cecilia Medina Quiroga).

²⁸ *See* Grossman I, *supra* note [[]], at 661-64.

the right to demand adjudicators from developing countries on dispute settlement panels hearing cases involving both developing and developed states.²⁹ The exclusion of women from international law making institutions historically has raised similar concerns among feminist scholars.³⁰

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.”³¹ This authority requires justification, and democratic values such as representation, provide a meaningful justification.³² Both women and men are the beneficiaries of the work of international courts and should be involved in judicial decision-making for these institutions to possess justified authority. There are, of course, other reasons beyond legitimacy, for seeking sex representation, as well as diversity of all kinds, on the bench. For instance, the presence of previously excluded groups may create mentorship opportunities and role models for others, and all individuals sufficiently qualified should have equal opportunities to serve as judges.

The absence or paucity of such a significant proportion of the world’s population from the bench not only threatens legitimacy, but also suggests that something is awry, and most likely not just for those who pursue gender equality. What other groups can be characterized as “insiders” and “outsiders” in international adjudication? 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 is flawed?

²⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 8(10), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1232 (1994) [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”).

³⁰ See Charlesworth and Chinkin, *Boundaries of International Law: A Feminist Analysis* 308 (2000).

³¹ TERRIS ET AL., *supra* note [[]], 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 GERMAN L. J. 979, 979 (2011) (stating that international judicial decisions influence future decisions); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 61, 68–76 (2013) [hereinafter Grossman III] (explaining how international courts influence the development of law and politics).

³² Gráinne De Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT’L L. 221, 226–27 (2008). Armin von Bogdandy and Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GER. L. J. 1341, 1343 (2011).

Part I provides statistics on sex representativeness on several 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 why glass ceilings continue to exist on most international courts. First, women make up a smaller percentage of elite lawyers, high level legal academics and diplomats than men. But the pool is an unsatisfying explanation for courts where there are no women at all, or only one or two women on the bench. 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 institutional screening mechanisms which interview, evaluate or rank candidates at the international level, women appear in greater numbers. Fourth, women tend to be present in higher numbers where 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 temporary mandatory targets to enhance sex representation on the bench.

This is the first full-length journal article to examine the relationship between selection procedures and sex representation on various international court benches.³³ In so doing, 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. Despite its focus on the relationship between selection procedures and sex representation, 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 credentials of these institutions. At the same time, it shows that important trade-offs may exist between inclusion of women and other less traditional candidates, and states' desires to exert a high degree of control over international judicial selection procedures.

I. How Balanced Are International Court Benches?

Table 1 provides statistics on the numbers of judges on six global courts, open to every state for participation, while Table 2 provides statistics on seven regional courts. These thirteen courts span a wide range of subject matters, ranging from human rights to the Law of the Sea to

³³ *But see, e.g.*, Jan Linehan, *Women and Public International Litigation* (Project on International Courts and Tribunals 2002), available at http://www.pict-pcti.org/publications/PICT_articles/Women1.pdf (last visited January 19, 2015) (providing a brief introduction to the topic).

international economic law to international criminal law, as well as many of the regions of the world. The snapshot data are drawn from court websites or publications during October 2013. 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.³⁴ The historical data examines the percentage of women judges on international courts since their establishment up to June 2014.

Table 1. Percent Women Judges on Global Courts

<u>Court</u>	<u>ICJ</u>	<u>ITLOS</u>	<u>ICC</u>	<u>ICTY</u>	<u>ICTR</u>	<u>WTO AB</u>	<u>Total</u>
<u>Percent Women Judges</u> Women/ total judges (Oct. 2013)	3/15 ³⁵ = 20%	1/21 ³⁶ = 5%	10/17 ³⁷ = 59%	2/18 ³⁸ perm. = 11% 1/4 ad litem = 25% Total perm. + ad litem = 13.6%	2/10 perm. ³⁹ = 20% 0/1 ad litem = 0% Total perm. + ad litem = 18.2%	1/7 ⁴⁰ = 14.3%	20/93 =22%
<u>State of Origin</u>	China, US, Uganda	Argentina	Botswana, Ghana, Latvia, Bulgaria, Kenya, Belgium, Argentina, Philippines, Japan, Dominican Republic	Pakistan, Madagascar Italy	Pakistan, Madagascar (same women on ICTY and ICTR Appellate Body)	China	

³⁴ In 2009, only 9% of ICSID arbitrators were women and 17% of WTO panel members were women. See Grossman I, *supra* note [[]], 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).

³⁵ Current Members, International Court of Justice, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Oct. 10, 2013).

³⁶ Members, International Tribunal for the Law of the Sea, <http://www.itlos.org/index.php?id=96> (last visited Oct. 10, 2013).

³⁷ Current Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20biographical%20notes.aspx (last visited Oct. 10, 2013).

³⁸ The Judges, ICTY, <http://www.icty.org/sid/151> (last visited Oct. 10, 2013).

³⁹ Report of the International Criminal Tribunal for Rwanda, UN. Doc. A/68/270-S/2013/460 (August 2, 2013).

⁴⁰ Appellate Body Members, World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Oct. 10, 2013).

% women judges since est. (June 2014)	4/103= 3.9% ⁴¹	1/38= 2.6% ⁴²	14/32= 44% ⁴³	14/35= 40% ⁴⁴ (ad litem)	3/12= 25% ⁴⁶ (ad litem)	4/25= 16% ⁴⁸	53/309= 17.2%
Women/ total				9/51= 18% ⁴⁵ (permanent)	4/16= 25% ⁴⁷ (permanent)		

Table 1 demonstrates that the International Criminal Court was the court with the highest percentage of women judges of all courts surveyed. Fifty-nine percent, or ten out of 17 judges, were women. This is the only court of those surveyed where the number of women exceeded the number of men on the bench. Overall, 14 women and 18 men have served on the bench of the International Criminal Court, amounting to a total of 44% women judges, as of June 2014.⁴⁹

⁴¹ 99 men and 4 women have been permanent members of the Court since its establishment. Members of the Court, International Court of Justice, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited June 10, 2014).

⁴² Members of the tribunal since 1996, International Tribunal for the Law of the Sea, <https://www.itlos.org/index.php?id=97&L=0> (last visited June 10, 2014).

⁴³ Biographical Notes: Current Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20%20biographical%20notes.aspx (last visited June 11, 2014); Former Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/former%20judges.aspx (last visited June 11, 2014).

⁴⁴ The Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/151> (last visited June 11, 2014); Former Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/10572> (last visited June 11, 2014).

⁴⁵ The Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/151> (last visited June 11, 2014); Former Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/10572> (last visited June 11, 2014).

⁴⁶ Email from Danford Mpumilwa, Press Office, International Criminal Tribunal for Rwanda (June 17, 2014) (on file with author).

⁴⁷ *Id.*

⁴⁸ Appellate Body Members, World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited June 11, 2014).

⁴⁹ Biographical Notes: Current Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20%20biographical%20notes.aspx (last visited June 11, 2014); Former Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/former%20judges.aspx (last visited June 11, 2014).

The next highest percentage of women judges was found on the International Court of Justice. Interestingly, the ICJ had no women judges at all until 2006, when Rosalynn Higgins of the United Kingdom was elected to the bench. Since her departure, three more women have become members of the Court: Julia Sebutinde of Uganda, Joan Donoghue of the United States and Xue Hanqin of China. They are the second, third and fourth women on the bench since the Court's establishment over sixty years ago. As of June 2014, only 4% of ICJ judges had been women.⁵⁰

Next come the International Criminal Tribunal for Rwanda, the World Trade Organization's Appellate Body, and the International Criminal Tribunal for the Former Yugoslavia. On the ICTR, two of ten permanent judges were women (20%) and the sole *ad litem* judge was a man.⁵¹ As of June 2014, women had made up 25% of both permanent and *ad litem* judges to have served on the ICTR.⁵² On the WTO's AB, one of seven members was a woman in October 2013. Interestingly, women accounted for three of the seven (14.3%) Appellate Body seats in May 2010.⁵³ As of June 2014, four of twenty-five Appellate Body members, about 16%, of WTO AB judges have been women.⁵⁴ Only two of eighteen (11%) permanent judges on the ICTY were women in October 2013, and one out of four (25%) of the *ad litem* judges was a woman. As of June 2014, 40% of *ad litem* and 18% of permanent judges since the ICTY's establishment were women.⁵⁵

The International Tribunal for the Law of the Sea had the lowest percentage of women judges of any of the global courts surveyed. Only one of the twenty-one judges on the bench was a woman: Elsa Kelly of Argentina. As of June 2014, she was the only woman to have served on the ITLOS bench, along with 37 men, since its founding.⁵⁶

Table 1 also contains a list of the countries of origin of women judges. Interestingly, the vast majority of the women on these global courts came from outside of Western Europe and the United States. The women on the International Criminal Court were from Botswana, Ghana, Latvia, Bulgaria, Kenya, Belgium, Argentina, Philippines, Japan, and Dominican Republic. Only one of ten women on the ICC came from Western Europe. The women on the International

⁵⁰ See *infra* Table 3.

⁵¹ In 2010, 23% of its permanent judges were women, and 27% of its *ad litem* judges were women. Grossman I, *supra* n. [[]], at 680.

⁵² Email from Danford Mpumilwa, Press Office, International Criminal Tribunal for Rwanda (June 17, 2014) (on file with author).

⁵³ World Trade Organization (WTO) Dispute Settlement Appellate Body Members, at http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (visited May 26, 2010).

⁵⁴ Appellate Body Members, World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm#taniguchi (last visited Apr. 2, 2014).

⁵⁵ The Judges, International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/sid/151> (last visited June 11, 2014); Former Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/10572> (last visited June 11, 2014).

⁵⁶ Members of the tribunal since 1996, International Tribunal for the Law of the Sea, <https://www.itlos.org/index.php?id=97&L=0> (last visited June 10, 2014).

Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda's Appellate Chamber were from Pakistan and Madagascar. The lone women on the World Trade Organization Dispute Settlement Body's Appellate Body and on the International Tribunal on the Law of the Sea were Chinese and Argentinian, respectively. The sole ad litem judge remaining on the ICTY was Italian, however, and one of the three women on the ICJ was from the United States. The other two female ICJ judges were from China and Uganda. While not all states are parties to all of these courts,⁵⁷ a significant number of Western European and North American states are parties to or participate in most of them.

Table 2, which surveys regional courts, demonstrates that the court with the highest percentage of women judges was the Economic Community of West African States (ECOWAS) Community Court of Justice, followed by the European Court of Human Rights. Three of ECOWAS's seven judges were women in October 2013. In April 2014, however, seven new judges were elected to the ECOWAS Court: six men and only one woman.⁵⁸ Five of seventeen judges to have served on the Court since its establishment were women as of June 2014.⁵⁹

The European Court of Human Rights came in second; 37% of its 46 members were women in October 2013. In June 2014, 20% of the 170 judges to have served on the bench were women.⁶⁰ The Andean Tribunal of Justice was third; one of its four judges was a woman, amounting to 25% of the bench. Four of twenty-nine judges (14%) to have served on the ATJ since its founding are women. The African Court on Human and People's Rights came in fourth, with eighteen percent of the bench (2 of eleven judges) consisting of women. Only three of the 19 judges (15.8%) who served on the court by June 2014 were women.⁶¹

The fifth highest percentage of women judges was on the Caribbean Court of Justice. One of seven judges, amounting to 14.3% of the court, were women in October 2013. The Court's inauguration took place in 2005, and Two out of ten judges to have served on the Court

⁵⁷ 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) (ICTY) [hereinafter ICTY Statute]; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (ICTR) [hereinafter ICTR Statute].

⁵⁸ EcoCourt Newsletter, April 2014, at http://www.courtecowas.org/site2012/pdf_files/newsletter/2014/vol4_2014.pdf (last visited Nov. 14, 2014).

⁵⁹ EcoCourt Newsletter, April 2014, at http://www.courtecowas.org/site2012/pdf_files/newsletter/2014/vol4_2014.pdf (last visited Nov. 14, 2014); Current Members, Community Court of Justice, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=28&Itemid=31 (last visited June 10, 2014); Past Members, Community Court of Justice, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=29&Itemid=32 (last visited June 11, 2014).

⁶⁰ Grossman I, *supra* note [()], at 678.

⁶¹ Judges of the Court, African Court on Human and People's Rights, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/judges> (last visited June 16, 2014).

since its inauguration in 2005 were women, by June 2014.⁶² Four of 29 members of the European Court of Justice were women in October 2013 (13.7%), representing an improvement over historical numbers. Only 8.6%, or 8 of 93 judges to have served on the ECJ since its establishment through June 2014 were women.⁶³

The worst among the regional courts was the Inter-American Court of Human Rights. In October 2013, no women sat on its bench, and only a handful of women have been members since its establishment. Only four of 35 permanent judges ever to have served on the court from its founding through June 2014 were women – 11.4%.⁶⁴ In 2009, three women were serving on the Inter-American Court simultaneously. The number was subsequently reduced to two, and then to zero, after 2011.⁶⁵

Table 2. Percent Women Judges on Regional Courts

<u>Court</u>	<u>IACHR</u>	<u>ECHR</u>	<u>Af Ct. Human & People's Rights</u>	<u>ECJ</u>	<u>Andean Tribunal of Justice</u>	<u>Caribbean Court of Justice</u>	<u>ECOW AS</u>	<u>Total</u>
<u>Percent Women Judges</u>	0/7 ⁶⁶ = 0%	17/46 ⁶⁷ = 37%	2/11 ⁶⁸ =18%	4/29 ⁶⁹ =13.7%	1/4 ⁷⁰ =25%	1/7 ⁷¹ =14.3%	3/7 ⁷² =43%	28/ 111= 25%

⁶² Judges of the CCJ, The Caribbean Court of Justice, <http://www.caribbeancourtsofjustice.org/about-the-ccj/judges> (last visited June 11, 2014).

⁶³ Former Members, Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7014/#CJE (last visited June 10, 2014); *Presentation of the Members*, COURT OF JUSTICE OF THE EUROPEAN UNION, http://curia.europa.eu/jcms/jcms/Jo2_7026 (last visited June 10, 2014).

⁶⁴ Jueces que han integrado la Corte Interamericana de Derechos Humanos, provided to author by Pablo Saavedra, Secretary, Inter-American Court of Human Rights (June 14, 2014).

⁶⁵ Email from Pablo Saavedra (on file with author).

⁶⁶ I/A Court Composition, Corte Interamericana de Derechos Humanos, <http://www.corteidh.or.cr/index.php/en/about-us/composicion> (last visited Oct. 11, 2013).

⁶⁷ Composition of the Court, Council of Europe: ECHR, http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n1368718271710_pointer (last visited Oct. 10, 2013).

⁶⁸ Judges of the Court, African Court on Human and Peoples' Rights, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/judges#formerjudges> (last visited Oct. 11, 2013).

⁶⁹ Presentation of the Members, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7026/ (last visited Oct. 11, 2013).

⁷⁰ Tribunal de Justicia de la Comunidad Andina, Comunidad Andina, <http://www.comunidadandina.org/Seccion.aspx?id=29&tipo=SA&title=tribunal-de-justicia-de-la-comunidad-andina> (last visited Oct. 10, 2013).

⁷¹ Judges of the Caribbean Court of Justice, The Caribbean Court of Justice, <http://www.caribbeancourtsofjustice.org/about-the-ccj/judges>, (last visited Oct. 11, 2013).

⁷² The Bureau of the Community Court of Justice, Community Court of Justice – ECOWAS, http://www.courtecawas.org/site2012/index.php?option=com_content&view=article&id=28&Itemid=6 (last visited Oct. 11, 2013).

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Women/ Total (Oct. 2013)								
<u>State of Origin</u>	n/a	Latvia, Monaco, Austria, Armenia, Lithuania, Finland, FYRM, Georgia, Ireland, Bulgaria, Turkey, San Marino, Ukraine, Germany, Estonia, Switzerland, Sweden	Ghana, Nigeria	Romania, Austria, The Netherlands, Spain	Colombia	Guyana	Benin, Nigeria, Togo	

% perm. women judges since est. (June 2014)	4/35= 11.4% ⁷³	34/170= 20% ⁷⁴	3/19= 16% ⁷⁵	8/93= 8.6% ⁷⁶	4/29= 14% ⁷⁷	2/10= 20% ⁷⁸	5/17= 29.4% ⁷⁹	60/373 = 16.1%
Women/ total								

Graph 1 presents the percentage of permanent women judges on all the courts surveyed. The average percentage of female judges on all of the courts surveyed in October 2013 was about 22%, ranging from 0% (Inter American Court of Human Rights) to 59% (International Criminal Court). The average percentage of women judges on the regional courts and the global courts was about the same, close to 22%. The average percentage of women judges on the human rights courts (African, European and American) was 18%, while the average percentage

⁷³ Jueces que han integrado la Corte Interamericana de Derechos Humanos, provided to author by Pablo Saavedra, Secretary, Inter-American Court of Human Rights (June 14, 2014).

⁷⁴ Judges of the Court since 1959, European Court of Human Rights, www.echr.coe.int/Documents/List_judges_since_1959_ENG.pdf (last visited June 11, 2014).

⁷⁵ Judges of the Court, African Court on Human and People’s Rights, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/judges> (last visited June 16, 2014).

⁷⁶ Former Members, Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7014/#CJE (last visited June 10, 2014); *Presentation of the Members*, COURT OF JUSTICE OF THE EUROPEAN UNION, http://curia.europa.eu/jcms/jcms/Jo2_7026 (last visited June 10, 2014).

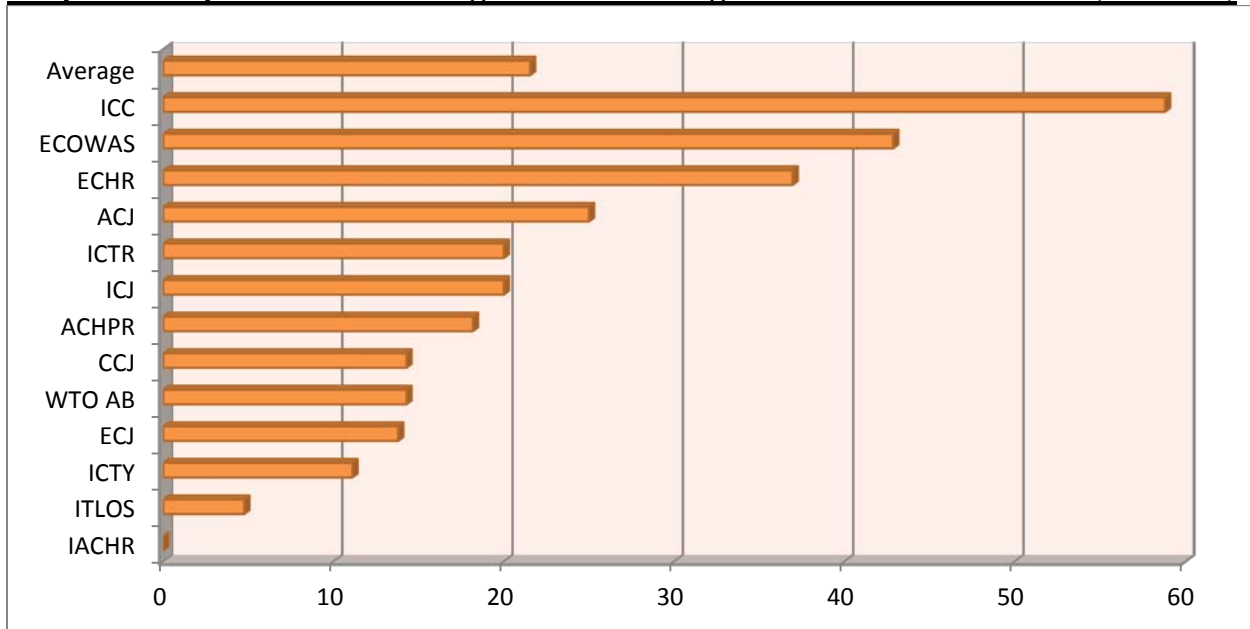
⁷⁷ Testimonio Comunitario, available at http://www.tribunalandino.org.ec/sitetjca/index.php?option=com_filecabinet&view=files&id=7&Itemid=35 (last visited December 12, 2014); Email from Angie Sasaki to author (dated Dec. 5, 2014).

⁷⁸ Judges of the CCJ, The Caribbean Court of Justice, <http://www.caribbeancourtofjustice.org/about-the-ccj/judges> (last visited June 11, 2014).

⁷⁹ Current Members, Community Court of Justice – ECOWAS, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=28&Itemid=31 (last visited June 10, 2014); Past Members, Community Court of Justice – ECOWAS, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=29&Itemid=32 (last visited June 11, 2014); EcoCourt Newsletter, April 2014, at http://www.courtecowas.org/site2012/pdf_files/newsletter/2014/vol4_2014.pdf (last visited Nov. 14, 2014).

on the regional integration courts (Caribbean, European and African) was 24% and on the international criminal courts was 30%.

Graph 1. Comparison of Percentage of Women Judges on International Courts (late 2013)



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?⁸⁰ First, smaller numbers of women in the available pool of candidates may help to explain the statistics to some extent. Nonetheless, on courts with an extreme overrepresentation of men, for example when no women or only one woman is present, the pool of available candidates alone is an unconvincing explanation. A 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 be more likely to have 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

⁸⁰ A United Nations Study estimated that in 2010, there were 101.6 males per 100 females in the world. United Nations, Population Division, Statistics, *available at* <http://esa.un.org/unpd/wpp/Excel-Data/population.htm> (last visited May 26, 2014).

One explanation for the paucity of women judges on international courts is that they make up a small percentage of the available pool of candidates. Judges are usually selected from the top of the legal profession in each country, and 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 only a small proportion of lawyers. For example, Saudi Arabia only recently allowed women to become lawyers.⁸¹ According to a recent study by Ethan Michelson, 36% of all countries have fewer than 30% female lawyers.⁸² And only 36% of the world's lawyers are women.⁸³

While numbers are high in some states, numbers alone do not paint an accurate picture of women's status in the 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 were only 35% of practicing barristers and 11% of Queen's Counsel in 2010.⁸⁴ A similar dynamic exists in the South African courts.⁸⁵ In 2003, nearly 60% of law schools in the UK had never had a female professor and 83% of all law professors were men.⁸⁶ A 2003 book examining women in the legal profession from a comparative perspective found that women were underrepresented in the most lucrative sectors and highest echelons of the profession in most countries surveyed, including Canada, Australia, New Zealand, UK, Israel, Germany, Holland, Poland, France and Japan.⁸⁷ Several studies reach the same conclusions in the United States.⁸⁸

⁸¹ 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>.

⁸² Ethan Michelson, *Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers*, 20 IND. J. GLOBAL LEGAL STUD. 1071, 1089 (2013).

⁸³ *Id.* at Table A6, 35. 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.*

⁸⁴ About the Bar: Statistics, The Bar Council, <http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/statistics/#AllBarStats>, (last visited March 23, 2014).

⁸⁵ 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, s. C (2006).

⁸⁶ Celia Wells, *The Remains of the Day: The Women Law Professors Project*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS 227 (Ulrike Schultz & Gisela Shaw, eds., 2003).

⁸⁷ Fiona M. Kay & Joan Brockman, *Barriers to Gender Equality in the Canadian Legal Establishment*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS, *supra* n. 86, at 60; Rosemary Hunter, *Women in the Legal Profession: The Australian Profile*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS, *supra* n. 86, at 89; Georgina Murray, *New Zealand Women Lawyers at the End of the Twentieth Century*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS, *supra* n. 86, at 128-29; Clare M.S. McGlynn, *The Status of Women Lawyers in the United Kingdom*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS, *supra* n. 86, at 139; *see* Bryna Bogoch, *Gender, Trials and Professional Performance in Israel*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS, *supra* n. 86, at 251 (While "occupational segregation" exists in Israel, women "have reached the peak of the profession in the public sphere."); Ulrike Schultz, *The Status of Women Lawyers in Germany*, in WOMEN IN THE WORLD'S LEGAL PROFESSIONS, *supra* n. 86, at 285, 278-9 (pointing

Although lower levels of the judiciary in many countries are increasingly feminized, men continue to be significantly overrepresented in most countries, especially at intermediate and highest court levels.⁸⁹ In 2010, women generally made up 0%, 8%, 18%, 25%, 33%, and 35% of the higher courts of Paraguay, Guatemala, Brazil, Chile, El Salvador and Costa Rica's higher courts, respectively.⁹⁰ 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.⁹¹ 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.⁹² Overall, for 65 of 78 states surveyed, women made up 33% or less of the bench.⁹³ (The study does not indicate which states have pre-existing gender quotas and which do not.)

Studies have identified numerous causes for the low numbers of lawyers at the highest levels of the profession at the domestic level, including the inflexible structure of specific work environments such as large private law firms, shouldering a disproportionate burden of domestic responsibilities, opting out to care for family due to family-unfriendly policies, preferring

out that less than 6% of law professors in Germany were women in 2003); Leny E. de Groot- van Leuwen, *Women in the Dutch Legal Profession (1950-2000)*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS*, *supra* n. 86, at 343, 354; Malgorzata Fuszara, *Women Lawyers in Poland under Impact of Post-1989 Transformation*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS*, *supra* n. 86, at 375-6, 383; *see also* Anne Boigeol, *Male Strategies in the Face of the Feminisation of a Profession*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS*, *supra* n. 86, at 405, 412-13; Yuriko Kaminaga & Jorn Westhoff, *Women Lawyers in Japan: Contradictory Factors in Status*, in *WOMEN IN THE WORLD'S LEGAL PROFESSIONS*, *supra* n. 86, at 480-1.

⁸⁸ *See, e.g.*, Steven A. Boutcher & Carole Silver, *Gender and Global Lawyering: Where are the Women?*, 20 *IND. J. GLOBAL LEGAL STUD.* 8, (2003), *available at* <http://ssrn.com/abstract=2258221>.

⁸⁹ *See, e.g.*, Maritza Formisano & Valentine M. Moghadam, *Women in the Judiciary in Latin America: An Overview of Progress and Gaps*, UNESCO (2005), 4, 20 (discussing Latin America).

⁹⁰ Sital Kalantry, *Women in Robes*, *AMERICA'S Q.* 83, 84 Table I (Summer 2012) (citing Economic Commission for Latin America statistics from 1998-2010), <http://www.lwv.org/files/Women%20in%20Robes-Sital%20Kalantry.pdf> (last visited May 22, 2014).

⁹¹ 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 3* (2010).

⁹² UN Women, 2011- 2012 Progress of the World's Women Figure 2.6 (New York: UN Women, 2011).

⁹³ *Id.*

increased flexibility, and outright discrimination.⁹⁴ The paucity of women judges in domestic courts in some countries, or at the highest levels of the profession in most countries, make the pool of candidates even smaller at the international court level. Further, serving as an international judge may require a person to uproot their family and move to another country, or require extensive and expensive commuting. This is challenging for both men and women with familial or community obligations. If women shoulder these obligations disproportionately, they will also be disproportionately affected.

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 International Court of Justice. In the 33 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.⁹⁵ Only four female lawyers appeared before the ICJ more than once in the entire 13 year period, while 59 men appeared more than once during the same period, and these four female lawyers accounted for only 2.9% of the speaking time.⁹⁶ There are calls for increased diversity among counsel before the International Criminal Court as well.⁹⁷ 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.⁹⁸

Yet a smaller pool is an insufficient explanation for the paucity of women judges on most international courts. Outstanding women experts in human rights in the Americas could fill all seven seats on the Inter-American Court of Human Rights. None sat on the bench in October 2013. Highly qualified women work in the field of the Law of the Sea as well, but only one of twenty-one judges on the Law of the Sea Tribunal was a woman during the same time period. The same arguments can be made about the other courts on the low end of the representativeness spectrum. And in October 2013, women made up 59% of judges on the ICC, but only 11% and 20% of permanent judges on the ICTY and the ICTR, respectively, although all three courts deal with international criminal law. Presumably, ICC judges should have similar qualifications to those on the ICTY or ICTR. Further, there are many qualified women in North America and Europe, yet they appear underrepresented among women judges internationally. Finally, the pool does not explain the peaks and valleys in the statistics. Both the ECOWAS Court and the WTO Appellate Body had three women on their seven-member benches just a few years ago, but

⁹⁴ See, e.g., generally, Leah V. Durant, *Gender Bias and the Legal Profession: A Discussion of Why There Are Still So Few Women on the Bench*, 4 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 181 (2004); Boutcher & Silver, *supra* note [[]], at 9.

⁹⁵ Kumar & Rose, *supra* note [[]], at 904.

⁹⁶ *Id.*

⁹⁷ ICC-ASP/12/Res.8, § 33 (27 Nov. 2013), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res8-ENG.pdf.

⁹⁸ See Cowan, *supra* note [[]], at s. 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...”).

they only had one each by late 2014. The Inter-American Court of Human Rights, too, had three women on the bench, but had none in late 2014. The point is that the limited pool argument is unpersuasive for courts where women are absent from the bench or present in paltry numbers. It simply cannot be that no woman in North, South or Central America or the Caribbean is qualified to sit on the Inter-American Court of Human Rights and that only one woman in a world of over 7 billion people is qualified to sit on the Law of the Sea Tribunal or the World Trade Organization's Appellate Body.

B. There's an opening? 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 what procedures are utilized to identify candidates for the pool. This process generally takes place at the national level. 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 thirteen courts surveyed fall into the first group, while the ECHR and the ECJ fall into the second, and ECOWAS and the CCJ 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 October 2013 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 the merits of those who do make it.

1. Group 1: Little Guidance or Transparency

The ICJ, ICC, AfCHPR, ICTY, ICTR, WTO, 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."⁹⁹ Interviews of individuals involved in selection, however, showed that few actually engage in the recommended consultation.¹⁰⁰ 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; the number of candidates nominated by a group cannot be greater than double the number of seats to be filled.¹⁰¹ There are no separate guidelines or best practices available to states concerning

⁹⁹ Statute of the International Court of Justice arts. 4-10, 26 June 1945, 59 Stat. 1055 (1945), TS No. 993 [hereinafter ICJ Statute].

¹⁰⁰ MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note [()], at 142-43.

¹⁰¹ ICJ Statute, *supra* note [()], art. 5(2).

domestic nominations processes. In October 2013, women made up 20% of the fifteen-member bench, while historically, they accounted for only 4% of ICJ judges as of June 2014.

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 International Court of Justice.¹⁰² Nominations must include a statement describing the candidate's competence in criminal law and procedure or relevant international law areas, and their language capabilities.¹⁰³ Once the Secretariat receives the nominations, it must place them and any accompanying information on the ICC website as soon as possible.¹⁰⁴ 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, 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.¹⁰⁵

During its 10th Session (2011-2012), the Assembly of State Parties agreed on the creation of an Advisory Committee on Nominations.¹⁰⁶ Despite its name, however, the Advisory Committee on Nominations plays no role whatsoever in the nomination process. Rather, it evaluates whether nominees already proposed by states meet the requirements of the Rome Statute, and is discussed further below.¹⁰⁷ 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.¹⁰⁸ 59% of the judges on the ICC bench in October 2013 were women, while 44% of the judges to have served on the bench between its establishment and June 2014 were women.

¹⁰² Rome Statute of the International Criminal Court art. 36(4), 17 July 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁰³ *Id.*

¹⁰⁴ ICC-ASP, Sixth Session, Res. ICC-ASP/3/Res.6, para. 8 (Sept. 10, 2004) [hereinafter Procedure for nomination to ICC].

¹⁰⁵ Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP12/Res.8 (Advance copy) para. 27 (Nov. 27, 2013), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res8-ENG.pdf [hereinafter Strengthening the ICC].

¹⁰⁶ Res. ICC-ASP-10-Res.5-ENG, paras. 19-20 (Dec. 21, 2011). 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. *Id.*

¹⁰⁷ Report of the Bureau on the Establishment of an Advisory Committee on Nominations of judges of the International Criminal Court, Tenth Session, U.N. Doc. ICC/ASP/10/36 (Dec. 21, 2011).

¹⁰⁸ Strengthening the ICC, *supra* note [()], 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;"); MACKENZIE ET AL., *supra* note [()].

States parties to the constitutive instrument of the African Court on Human and Peoples' rights 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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.¹¹²

In July 2014, one man was re-elected, and two men and one woman were elected to replace two men and one woman.¹¹³ In October 2013, women made up 18% of the bench, and accounted for 16% of all judges to have served on the court through June 2014.

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, who meet the qualifications requirements and are not of the same nationality as each other or as a sitting member of the other tribunal or Appeals

¹⁰⁹ Protocol to African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights arts. 11(2) and 12, June 10, 1998, Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force Jan. 25, 2004) [hereinafter Protocol to African Charter].

¹¹⁰ Protocol to African Charter, *supra* note [109], art. 12.

¹¹¹ 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, at http://legal.au.int/en/sites/default/files/2954.14_Bc-olc-66.5_Eng_0.pdf.

¹¹² Letter to Ministries of Foreign Affairs/External Relations of all Member States from the African Union Commission, Reference: BC/OLC/66.5/2954.14, at http://legal.au.int/en/sites/default/files/2954.14_Bc-olc-66.5_Eng_0.pdf.

¹¹³ African Court on Human and Peoples' Rights, New Judges Appointed to the Court, at <http://www.african-court.org/en/index.php/news/latest-news/545-new-judges-appointed-to-the-court> (last visited November 21, 2014).

chamber.¹¹⁴ 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,”¹¹⁵ no such requirement exists for permanent judges. No other guidance is provided as to national nominations. Fourteen and 18% of judges on the ICTY and the ICTR, respectively, were women in October 2013. Since their establishment, 27% and 25% of judges on the ICTY and ICTR through June 2014 were women. On the ICTY, as of June 2014, 40% of *ad litem* judges since establishment were women, while only 18% of permanent judges were women. On the ICTY, women have made up 25% of both permanent and *ad litem* judges.

The constitutive instruments and rules of procedure (when relevant) of ITLOS, IACHR, and ATJ say nothing about suggested or required procedures for national nominations, beyond specifying qualifications for judges and nationality requirements.¹¹⁶ For example, the Statute of the Inter-American Court provides that judges must be “elected in an individual capacity from among 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.”¹¹⁷ States may nominate up to two appropriately qualified candidates to the Law of the Sea Tribunal,¹¹⁸ three to the Inter-American Court of Human Rights,¹¹⁹ and three to the Andean Tribunal of Justice.¹²⁰ When states nominate three candidates to the Inter-American Court, at least one must be a national of a state other than the nominating state.¹²¹ In October

¹¹⁴ S. C. Res. 1329, Annex I art. 13, 13*bis*, UN Doc S/RES/1329 (2000); S. C. Res. 1431, Annex I, art. 12, 12*bis*, UN Doc S/RES/1431 (2002). Judges “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.” *Id.*

¹¹⁵ S. C. Res. 1329, Annex I art. 13, UN Doc S/RES/1329 (2000);

¹¹⁶ See United Nations Convention on the Law of the Sea Annex VI, opened for signature Dec. 10, 1982, 1833 UNTS 397 [hereinafter ITLOS Statute]; Rules of the Tribunal, 28 October 1997 (as amended on 15 March and 21 September 2001, and on 17 March 2009), Doc. ITLOS/8, 17 March 2009; Statute of the Inter-American Court on Human Rights, OAS Res. 448 (DC-O/79), OAS Official Records OEA/Ser P/IX.0.2/80, Vol. 1, at 98 [hereinafter IACHR Statute]; Rules of Procedure of the Inter-American Court of Human Rights, 2000, available at http://www.corteidh.or.cr/regal_ing.pdf. [hereinafter IACHR Rules of Procedure]; American Convention on Human Rights, 22 Nov. 1969, O.A.S.T.S. 36; OAS Off. Rec. OEA/Ser L/V/II 23, Doc. 21, Rev. 6 (1979); reprinted in 9 I.L.M. 673 (1970) [hereinafter American HR Convention]; Andean Subregional Integration Agreement, May 26, 1969, 8 ILM 910 (1969); Treaty Creating the Andean Tribunal of Justice, May 28, 1979, 18 ILM 1203 (1979) [hereinafter ATJ Treaty].

¹¹⁷ IACHR Statute, *supra* note [()], art. 4.

¹¹⁸ ITLOS Statute, *supra* note [()], art. 4.

¹¹⁹ IACHR Statute, *supra* note [()], art. 6. 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. *Id.*

¹²⁰ ATJ Treaty, *supra* note [()], art. 7.

¹²¹ IACHR Statute, *supra* note art. 7.

2013, women made up 5%, 0%, and 25% of the judges on ITLOS, IACHR, and ATJ, respectively. Only one woman and 37 men had served on ITLOS since its establishment through June 2014. Eleven percent of the judges on the IACHR had been women by June 2014. Fourteen percent of judges on the ATJ have been women since its founding through December 2014.

States are not required to nominate members of the WTO Appellate Body, but they may forward suggestions to the Director-General.¹²² The WTO DSU offers no guidance on what procedures delegations should use in coming up with names to propose, even though the United States and the EU always nominate candidates to fill their unofficial reserved spots on the bench.¹²³ The United States generally nominates at least two people when proposing individuals to fill its unofficial spot.¹²⁴ 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.”¹²⁵ Critiques have been raised concerning the increasing politicization of the WTO AB nominating process, as well as the need to ensure geographic diversity on the bench.¹²⁶ One of seven members of the Appellate Body was a woman in October 2013. Women have made up 16% of Appellate Body members since its establishment through June 2014.

2. Group 2: The Greatest Amount of Guidance and Transparency

The Parliamentary Assembly of the Council of Europe, which is responsible for electing judges to the European Court of Human Rights, provides the highest level of guidance on national nominations. States nominate lists of three candidates, which are eventually voted on by the Parliamentary Assembly of the Council of Europe. The Committee of Ministers has issued guidelines and examples of best practices to states on the national nomination process and the drawing up of lists.¹²⁷ Resolution 1646(2009) of the Assembly provides that states should issue

¹²² *Id.*

¹²³ Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO, para. 13, WT/DSB/1, approved by the Dispute Settlement Body on February 10, 1995, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=13919&CurrentCatalogueIdIndex=0&FullTextSearch (last visited Nov. 14, 2014) [hereinafter WTO Prep Cmte Recs]. Ruth Mackenzie, *The Selection of International Judges*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 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).

¹²⁴ Pauwelyn, *supra* note [123].

¹²⁵ WTO Prep Cmte Recs, *supra* note [123], para. 13.

¹²⁶ Pauwelyn, *supra* note [123]; see also Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and international courts: The politics of judicial appointment at the World Trade Organization*, 0 EURO. J. INT'L REL. 1 (2012); Daniel Pruzin, *WTO Selection Panel to Recommence Search For Appellate Body Judge Following Deadlock*, International Trade Daily: News Archive (January 21, 2014).

¹²⁷ Nomination of candidates and election of judges to the European Court of Human Rights, Eur. Parl. Assemb., 2009 Sess., Res. 1646 (2009) [hereinafter Parl. Assemb. Res. 1646], available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1646.htm>;

public and open calls for candidates, describe how candidates were selected, and transmit names to the Assembly in alphabetical order.¹²⁸ The Assembly also strongly urged member states

to set up – without delay – appropriate national selection procedures to ensure that the authority and credibility of the Court are not put at risk by ad hoc and politicised processes in the nomination of candidates. Furthermore, it invites the governments of member states to ensure that the selection bodies/panels (and those advising on selection) are themselves as gender-balanced as possible.¹²⁹

In 2004, the Parliamentary Assembly informed states that it would no longer consider lists of candidates which did not include at least one individual of the under-represented sex.¹³⁰ After Malta refused to submit a female candidate in a list provided to the Parliamentary Assembly in 2006, the Chairperson of the Ministers' Deputies of the Council of Europe sought an advisory opinion on the legality of the Parliamentary Assembly's rejection of a unisex list.¹³¹ The European Court of Human Rights concluded that the Parliamentary Assembly could not reject a unisex list of candidates where a Party has taken "necessary and appropriate steps" to ensure that the list contains a member of the under-represented sex without success, and especially where it has used an open and transparent procedure, such as a public call for candidates.¹³² 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."¹³³ Since the Advisory Opinion was issued, states have provided unisex lists on at least two occasions.¹³⁴

Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights – Explanatory Memorandum, 1138 Meeting, 28-29 March 2012, CM(2012)40 addendum final (March 29, 2012).

¹²⁸ Parl. Assemb. Res. 1646, *supra* note [[]].

¹²⁹ *Id.*

¹³⁰ Candidates for the European Court of Human Rights, Eur. Parl. Assemb., 2004 Sess., Res. 1649 (2004).

¹³¹ The questions asked were:

- “(a) can a list of candidates for the post of judge at the European Court of Human Rights, which satisfies the criteria listed in Article 21 of the Convention, be refused solely on the basis of gender-related issues?
(b) are Resolution 1366 (2004) and Resolution 1426 (2005) in breach of the Assembly's responsibilities under Article 22 of the Convention to consider a list, or a name on such list, on the basis of the criteria listed in Article 21 of the Convention?”

European Court of Human Rights, 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 paras. 1-7 (Feb. 12, 2008).

¹³² *Id.* at para. 54.

¹³³ Guidelines of the Committee of Ministers, *supra* note [[]].

¹³⁴ *See, e.g.*, List and curricula vitae of candidates submitted by the Government of the Republic of Moldova (28 Aug. 2012), at

<http://assembly.coe.int/Documents/WorkingDocs/2012/COE.PACE.WD.COM.13027.2012.EN.p>

In 2010, the Committee of Ministers established an Advisory Panel of Experts on Candidates for Election as Judge to the ECHR to advise states parties on whether proposed candidates meet the criteria of the European Convention on Human Rights.¹³⁵ The Resolution establishing the panel states that it consists of seven individuals chosen from members of highest national courts, former judges of international courts and other “lawyers of recognized competence,” and “[t]he composition of the Panel shall be geographically and gender balanced.”¹³⁶ Members of the panel are appointed by the Committee of Ministers after consultation with the President of the European Court of Human Rights for three-year terms, renewable once.¹³⁷ Before submitting their lists of three judicial candidates to the Parliamentary Assembly, states must forward the names and CVs to the panel.¹³⁸ The panel then reviews the materials submitted and prepares an opinion on the suitability of the candidate.¹³⁹ If the panel has doubts about a candidate, it may seek additional information from the state party. If a candidate is considered unsuitable, the panel must notify the state party of its view in confidence, and the state is supposed to nominate a new candidate, although this does not always take place.¹⁴⁰ When a state provides its final candidate list to the Parliamentary Assembly, the panel will provide its views, confidentially, to the Parliamentary Assembly for review.¹⁴¹ Despite the extensive guidance provided to states at the national nomination stage, a recent study found that while some states have adopted more open and transparent procedures, and some have detailed selection procedures rooted in formal legal procedures, “[s]tates’ practice is extremely erratic.”¹⁴² In October 2013, 17 of 46 (37%) judges on the bench were women, and 20% of all judges to have served on the bench since its establishment through June 2014 were women.

df (proposing three male candidates); Letter to the Secretary General of the Parliamentary Assembly from the Belgian Federal Department of Justice, dated 7 July 2011, at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12986&lang=en> (proposing three male candidates)

¹³⁵ Resolution on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, Committee of Ministers of the Council of Europe, CM/Res(2010)26, (10 Nov. 2010) [hereinafter CM/Res(2010)26].

¹³⁶ *Id.*, para. 2.

¹³⁷ *Id.*, para. 3.

¹³⁸ *Id.*, para. 5.

¹³⁹ *Id.*

¹⁴⁰ Laurence Burgogue-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* 14,18 (2014), available at <http://humanrights.nd.edu/research/areas-of-research/regional-human-rights-systems/the-future-of-the-inter-american-human-rights-system> (last visited July 22, 2014).

¹⁴¹ CM/Res(2010)26, *supra* note [()], para. 5.

¹⁴² Burgogue-Larsen, *supra* note [()], at 4. This article provides an excellent overview of selection procedures in a number of states.

States appointing candidates to the ECJ receive some guidance as well.¹⁴³ The Treaty of Lisbon, which entered into force in 2009, added a new element to the judicial selection procedure consisting of an advisory panel. Article 255 established a panel to “give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General” before the governments make their selections.¹⁴⁴ 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.¹⁴⁵ The President of the Court of Justice proposes six of the candidates, and the European Parliament proposes the seventh candidate.¹⁴⁶ Panel members serve four year terms renewable once.¹⁴⁷ 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.¹⁴⁸ The panel then forwards its opinion to member state governments.¹⁴⁹ There is no guidance on procedures to be followed by states in generating names for the panel’s review in the first instance. The bench in October 2013 was composed of four women and twenty-five men (14% women), while historically, women made up only 9% of judges on the bench as of June 2014.

3. Group 3: No National Nomination Procedure

The Caribbean Court of Justice and the ECOWAS Court have no national selection procedure at all. Judges to the Caribbean Court of Justice are appointed by a majority vote of the Regional Judicial and Legal Services Commission. The RJLSC is charged with making judicial, official and employee appointments to the Court, setting terms and conditions of service for non-judicial employees, and terminating appointments.¹⁵⁰ The RJLSC is composed of the President of the CCJ, two persons nominated by the Organization of the Commonwealth Caribbean Bar Association and the Organization of Eastern Caribbean States Bar Association, the Chairman of Judicial Services Commission of a Contracting Party, the Chairman of a Public Service Commission of a contracting party, two members of civil society nominated by the Secretary General of the Community and the Director-General of the OECS, two jurists nominated by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the council of Legal Education, and

¹⁴³ Treaty Establishing the European Community art. 221, Nov. 10, 1997, 1997 O.J. (C 340) [hereinafter EC Treaty].

¹⁴⁴ Treaty on the Functioning of the European Union art. 255, May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU Treaty].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; Burgorgue-Larsen, *supra* note [[]], at 14.

¹⁴⁷ European Council Decision Relating to the Operating rules of the Panel Provided for in Article 255 of the Treaty on the Functioning of the European Union (2010/124/EU), Annex, para. 3.

¹⁴⁸ *Id.* at paras. 6-8.

¹⁴⁹ *Id.* at para. 8.

¹⁵⁰ RUTH MACKENZIE ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 7, 281 (2d ed. 2010).

two persons nominated jointly by the Bar or Law Associations of the Contracting parties.¹⁵¹ The only direct participation by states in selecting judges is that the President of the Court is selected by a ¾ majority vote of the member states.¹⁵² The RJLSC publicly advertises positions, reviews applications, creates a short list, and then interviews specific candidates.¹⁵³ The designers of the CCJ chose this approach to selection because they wanted to “insulate the appointments process from political influence” and insure the independence of the judges.¹⁵⁴

For ECOWAS, 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.¹⁵⁵ 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 without representation on the Court.¹⁵⁶ The reform was instituted, also, 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ Interestingly, it appears that the home state of the candidate is no longer formally involved in the nomination process for its candidates to the Court, although candidates without a state’s support are unlikely to survive the Authority’s vote.¹⁶⁰ In June 2014, 29% and 20% of ECOWAS’s and the CCJ’s judges, respectively, had been women since their establishment. Forty-three percent of ECOWAS’s judges were women in October 2013, but in the election that followed, only one woman remained on the bench. The CCJ had only one woman on the bench in October 2013.

¹⁵¹ *Id.*

¹⁵² Agreement Establishing the Caribbean Court of Justice art. IV(6), Feb. 14, 2001, 2255 U.N.T.S. 321 [hereinafter CCJ].

¹⁵³ Kate Malleon, *Promoting Judicial Independence in the International Court: Lessons from the Caribbean*, 58 INT’L & COMP. L. Q’ERLY 671, 681 (2009).

¹⁵⁴ Malleon, *supra* note [153], at 679.

¹⁵⁵ Protocol A/P.1/7/91 on the Community Court of Justice art. 3, July 6, 1991 [hereinafter 1991 Protocol].

¹⁵⁶ 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).

¹⁵⁷ ECOWAS Newsletter, 4 (October 2006), available at http://www.ecowas.int/publications/en/newsletter/ECOWAS_NewsLetter_01-Eng.pdf (last visited November 12, 2014).

¹⁵⁸ Mojeed Olujinmi Abefe Alabi, *Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa* 147 (Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester) (2013). An advertisement for a judicial position was even posted on an internet job site: <http://m.ngcareers.com/job/2013-10/judge-at-national-judicial-council#sthash.GIX3Q2vd.sVzCrGir.dpbs> (last visited November 14, 2014).

¹⁵⁹ *Id.*, at 148.

¹⁶⁰ *Id.*, at 148-49.

Both courts are relatively new, however, so it is difficult to draw conclusions about the impact of greatly diminishing the role of states in nominating candidates on the percentage of women who make it to the 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, although the courts with lower percentages of women historically appear to have more opaque procedures. For example, ITLOS, IACHR, ICJ, ATJ and WTO Appellate Body all have had 16% or fewer women on the bench historically. Only 9% of judges on the ECJ have been women, but the new commission to screen national nominations only came into effect in 2009, and there appear to be no procedural or other requirements for bringing names to the commission. On the other hand, the Court with the greatest amount of guidance on national nomination procedures, the ECHR, had the third highest number of women judges on the bench in October 2013. The International Criminal Court, however, had the highest percentage of women judges both in October 2013 and historically, but provides little guidance to states on national nominations procedures. (The ICC also has a quota system at the election stage, discussed below, which may help to explain the high numbers of women judges on that court.)

A number of factors make conclusions difficult to draw about the relationship between national nomination procedures and sex representativeness. First, the sample size of thirteen 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. What does emerge from the comparison, however, is that in the last twenty years, one court was created with virtually no state role in nominations (CCJ), states eliminated their own role in identifying candidates on another court (ECOWAS), and two others have added advisory committees on national nominations (ECHR and ECJ). States nominating candidates to the ECHR have also been provided with extensive guidance and best practices concerning national nomination procedures. The ECJ and the remainder of the courts surveyed have surprisingly little in the way of concrete instruction to states at the national nomination stage, or transparent procedures.

The lack of a transparent procedure and clear standards 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 International Court of Justice 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 "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.”¹⁶¹ 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,¹⁶² but very few women have ever served on that body; only 2 of 34 members elected in 2011 were women.¹⁶³

Further, opaque nomination procedures are likely to make it more difficult for outsiders even to be aware of 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.”¹⁶⁴ 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.¹⁶⁵ Individuals known to the decision-makers and who lobby for the position are most likely to succeed.¹⁶⁶ A few states appeared to have more structured and transparent procedures, but these were relatively rare.¹⁶⁷ 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.”¹⁶⁸ 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.¹⁶⁹

Similarly, in their interviews of international commercial arbitrators, Dezalay and Garth were told that “It’s a mafia because people appoint one another. You always appoint your friends—

¹⁶¹ YVES DEZALAY and BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 10, 18 n. 7 (1996).

¹⁶² Dapo Akande, Patrick Robinson of Jamaica Elected to the ICJ (November 19, 2014), at <http://www.ejiltalk.org/patrick-robinson-of-jamaica-elected-to-the-icj/>.

¹⁶³ Membership, International Law Commission (2012-2016), at <http://www.un.org/law/ilc/> (last visited Jan. 19, 2015).

¹⁶⁴ MACKENZIE ET AL., *supra* note [()], at 64.

¹⁶⁵ *Id.* at 64.

¹⁶⁶ *Id.* at 65.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 95.

¹⁶⁹ TERRIS, ET AL., *supra* note 10, 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.” MACKENZIE ET AL., *supra* note[()], at 86.

people you know,” and “[i]t is a club. They nominate one another. And sometimes you’re counsel, and sometimes you’re arbitrator.”¹⁷⁰ 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.

What about sex representation aspirations or requirements at the national nomination level? 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 African Court on Human and Peoples’ Rights are supposed to give “[d]ue consideration” to “adequate gender representation in the nomination process.”¹⁷¹ 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. Only 18% of judges on the bench in October 2013 were women, and 16% of judges since its establishment until June 2014 were women.

On the other hand, 40% of *ad litem* judges to have served on the ICTY are women, while only 18% of permanent judges are. 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. But, there was no difference in sex representation for *ad litem* and permanent judges on the ICTR. Women made up 25% of both benches. Like the African Court, there is no statutory guidance as to how states should go about implementing the need for fair representation on the bench into their procedures, or how they should go about nominating candidates generally.

A sex representativeness requirement at the national nomination level may be making a difference, however, at the European Court of Human Rights. The Parliamentary Assembly, since 2004, refuses to consider three-nominee lists containing no members of the under-represented sex, barring extraordinary circumstances. It had the third highest number of women judges on the bench in October 2013: 37%. Although women have made up only 20% of the Court since its founding in 1959, the Parliamentary Assembly changed the rules on sex representation in 2004. The great majority of the judges on the bench today were elected under the new rules, and the percentage of women on the bench today is more than double the historical numbers, suggesting that mandating sex representation at the national nomination level may have an impact on who ends up as a judge. At the same time, the ECHR has much more transparent and detailed guidance on nominations at the national level than any other court, and the Parliamentary Assembly appears to subject national nominations to much greater scrutiny than electors to other international courts. Whether transparent procedures or a refusal to consider unisex lists are responsible for greater sex representation is up for debate.

¹⁷⁰ DEZALAY & GARTH, *supra* note [()], at 10.

¹⁷¹ Protocol to African Charter, *supra* note [()], art. 12.

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 those doing the nominations 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. Aspirational statements that states should consider sex representation at the national nomination stage appear to be of limited effectiveness in achieving it, without a transparent and open procedure for selecting nominees or an outright rejection of lists of candidates that do not meet the representativeness requirement.

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, no state is involved in the election of any CCJ judges (except the President),¹⁷² and 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 with the greatest amount of direction to states at the international selection phase, as well as screening mechanisms, are the International Criminal Court and the European Court of Human Rights. These are followed by a second group, which includes ECOWAS and the WTO Appellate Body; both courts have screening committees, but little statutory guidance on selecting among candidates. The third group has no screening and some statutory guidance, and it includes the AfCHPR, the ICTY and the ICTR. The remainder of the courts – the IACHR, ICJ, ITLOS, and the 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 has among the lowest number of women judges historically and the group with the highest amount of screening and direction had a greater number of women on the bench.

1. Group 1: Quotas and Screening

States are provided the most guidance as to how to select among nominees in the International Criminal Court. First, the Statute requires that no two judges be nationals of the same state,¹⁷³ 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

¹⁷² Agreement Establishing the Caribbean Court of Justice art. IV(6), Feb. 14, 2001, 2255 U.N.T.S. 321 [hereinafter CCJ].

¹⁷³ Rome Statute, *supra* note [()], art. 36(7).

female and male judges.”¹⁷⁴ They must consider, too, the need to include judges with legal expertise on specific issues such as violence against women or children.¹⁷⁵ 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.¹⁷⁶

Judges are elected at a meeting of the Assembly of State Parties by secret ballot.¹⁷⁷ The persons elected are the candidates who obtain the highest number of votes and a two-thirds majority of the States present and voting.¹⁷⁸ 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.¹⁷⁹ States are instructed to vote such that at least 9 and no more than 13 candidates from list A and at least 5 and no more than 9 candidates from list B are seated on the Court at all times.¹⁸⁰ 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.¹⁸¹ Only ballots complying with the voting requirements are valid.¹⁸² Elections continue until all spots are filled.

The Assembly of State Parties created an Advisory Committee on Nominations to assist states in vetting candidates for judgeships in 2011.¹⁸³ The Advisory Committee evaluates whether nominees proposed by states meet the requirements of the Rome Statute.¹⁸⁴ 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 2012.¹⁸⁵ The Committee has conducted interviews with nominees and reached conclusions about their proficiencies in the working languages of the Court and the

¹⁷⁴ *Id.*, art. 36(8)(a)(iii).

¹⁷⁵ *Id.*, art. 36(8).

¹⁷⁶ Procedure for nomination to ICC, *supra* note [()], para. 11.

¹⁷⁷ *Id.*, art. 36(6)(a).

¹⁷⁸ *Id.*

¹⁷⁹ Rome Statute, *supra* note [()], art. 36(5).

¹⁸⁰ Procedure for nomination to ICC, *supra* note [()], para. 20.

¹⁸¹ *Id.*

¹⁸² *Id.*, para. 22.

¹⁸³ Res. ICC-ASP-10-Res.5-ENG, paras. 19-20 (Dec. 21, 2011). 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. *Id.*

¹⁸⁴ Report of the Bureau on the Establishment of an Advisory Committee on Nominations of judges of the International Criminal Court, Tenth Session, U.N. Doc. ICC/ASP/10/36 (Dec. 21, 2011).

¹⁸⁵ Election of the Advisory Committee on Nominations – 2012 Nomination, International Criminal Court, http://www.icc-cpi.int/en_menus/asp/elections/advisorycommitteenominations/Pages/election%20acn-%202012.aspx (last visited Apr. 30, 2014).

extent of their relevant knowledge and experience.¹⁸⁶ A candidate whose qualifications were questioned by the Advisory Committee was not elected to the bench in 2013.¹⁸⁷ Of all the courts surveyed, the ICC had the highest percentage of women judges both historically as of June 2014, and sitting on the bench in October 2013.

The European Court of Human Rights, too, provides both guidance and screening during the elections process. Rather than states voting on the candidates, members of the Parliamentary Assembly of the Council of Europe choose the judges. Like the ICC, the ECHR 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 parties on their nominees, discussed above. In 1996, the Assembly requested that states utilize a standardized CV 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.¹⁸⁸ The sub-committee’s conclusions were then forwarded to the Assembly before the vote.¹⁸⁹ As of January 2015, the Subcommittee will be replaced by a Committee on the Election of Judges to the European Court of Human Rights.¹⁹⁰ The new committee, composed of twenty people, will study the standardized CVs of all candidates, interview candidates, prepare a report to the Assembly with a recommendation and a ranking of candidates, along with the reasons for its recommendations and rankings, and seek 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.”¹⁹¹ The committee may also report to the Assembly on any questions related to the national selection procedure.¹⁹² Any decision to reject a list of candidates or to consider a

¹⁸⁶ Report of the Advisory Committee on Nomination of Judges on the work of its Second Meeting, Twelfth Session, U.N. Doc. ICC/ASP/12/47, Para. 10 (Oct. 29, 2013) *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-47-ENG.pdf; *Id.*, Annex 2.

¹⁸⁷ *Id.*; Current Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20biographical%20notes.aspx (last visited Jan. 10, 2014) (listing Judge Geoffrey A. Henderson as a sitting judge of the ICC).

¹⁸⁸ On the procedure for examining candidatures for the election of judges to the European Court of Human Rights, Eur. Parl. Assemb., 1996 Sess., Res. 1082 (1996), *available at* <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta96/ERES1082.htm>.

¹⁸⁹ Election of judges to the European Court of Human Rights, Eur. Parl. Assemb., 1999 Sess., Res. 1200 (1999), *available at* <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta99/ERES1200.htm>.

¹⁹⁰ Evaluation of the implementation of the reform of the Parliamentary Assembly, Eur. Parl. Assemb., 2002 Sess., Res. 2002 (2014), *available at* <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21049&lang=en>.

¹⁹¹ Evaluation of the implementation of the reform of the Parliamentary Assembly, Eur. Parl. Assemb., 2014 Sess., Res. 2002 (2014) *available at* <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21049&lang=en>.

¹⁹² *Id.*

single-sex list of candidates requires a two-thirds majority of votes cast.¹⁹³ When the committee chooses to recommend rejection of a list, it must provide its reasons to the Assembly.¹⁹⁴ Committee members are expected to have “appropriate knowledge or practical experience in the legal field.”¹⁹⁵ The ECHR had the third highest percentage of women on the bench in October 2013, following the ICC and ECOWAS.

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

ECOWAS and the WTO Appellate Body 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.¹⁹⁶ 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 one candidate to states for a vote.¹⁹⁷

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, the Chairman of the Dispute Settlement Body, and the Chairmen of the Goods, Services, TRIPS and General Councils makes proposals for new members.¹⁹⁸ The Selection Committee requires candidates to take a written exam and to participate in an interview process.¹⁹⁹ Then, member states vote on the proposed slate of candidates.²⁰⁰ Most, if not all of the time, candidates proposed by the Selection Committee are elected.²⁰¹ 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.²⁰² 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.²⁰³ Forty-three percent of sitting ECOWAS judges were women, but only 14% of Appellate Body members were women in October 2013. Five of 17 judges to have served on

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Karen J. Alter et al., *supra* note [()], at 760. ECOWAS Newsletter, 4 (October 2006), available at http://www.ecowas.int/publications/en/newsletter/ECOWAS_NewsLetter_01-Eng.pdf (last visited November 12, 2014).

¹⁹⁷ Abefe Alabi, *supra* n. [()], at 148.

¹⁹⁸ WTO Prep Cmte Recs, *supra* note [()], para. 13.

¹⁹⁹ Pauwelyn, *supra* note [()].

²⁰⁰ Dispute Settlement Understanding, *supra* note [()], art. 17. Appellate Body Members, World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited June 11, 2014).

²⁰¹ Pauwelyn, *supra* note [()].

²⁰² *Id.*

²⁰³ Pruzin, *supra* note [()].

ECOWAS were women, as of June 2014, while 4 of twenty-five Appellate Body members have been women.

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

Once state nominees to the African Court of Human and Peoples' Rights arrive at the Assembly of Heads of State and Government of the African Union, states elect judges to the court by secret ballot.²⁰⁴ 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."²⁰⁵ 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."²⁰⁶ No additional guidance is provided as to how the Security Council creates 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.²⁰⁷ 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."²⁰⁸ 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."²⁰⁹ Then, whichever candidates receive an absolute majority of votes of the General Assembly are elected.²¹⁰

The African Court of Human and Peoples' Rights was composed of 18% women judges in October 2013. Only 16% of judges to have served on that court through June 2014 were women. In October 2013, the ICTY and the ICTR had 11% and 20% permanent judges respectively, and 18% and 25% *ad litem* judges, respectively. 40% of all permanent judges to have served on the ICTY by June 2014 were women, while 25% of permanent judges were women on the ICTR. Women made up 18% and 25% of all *ad litem* judges to have served on the ICTY and the ICTR respectively, by June 2014.

4. Group 4: No Screening and Little Statutory Guidance

²⁰⁴ *Id.*, art. 14.

²⁰⁵ *Id.*, art. 14(2), (3).

²⁰⁶ ICTY Statute, *supra* note [()], art. 13 *bis*; ICTR statute, *supra* note [()], art. 12.

²⁰⁷ ICTY Statute, *supra* note [()], art. 13; ICTR Statute, *supra* note [()], art. 12.

²⁰⁸ ICTY Statute, *supra* note [()], art. 13; ICTR Statute, *supra* note [()], art. 12.

²⁰⁹ ICTY Statute, *supra* note [()], art. 13*ter*

²¹⁰ *Id.*

There are no institutional mechanisms for evaluating or ranking nominees at the Inter-American Court of Human Rights, the International Tribunal for the Law of the Sea, the Andean Tribunal of Justice, or the ICJ, although they do have some requirements for voting related to geographic distribution of judges. After states nominate candidates to the Inter-American Court of Human Rights, parties to the American Convention on Human Rights vote by secret ballot on the candidates.²¹¹ No two judges can be nationals of the same state.²¹² For the International Tribunal on the Law of the Sea, after states nominate candidates, states parties vote by secret ballot as well. 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 states parties.²¹³ 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.²¹⁴ The ITLOS Statute also provides that “[i]n the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.”²¹⁵

Once states nominate candidates to the ICJ, the General Assembly and the Security Council independently vote on the candidates.²¹⁶ Candidates who receive an absolute majority of votes in both chambers are elected.²¹⁷ Traditionally, candidates proposed by the permanent members of the Security Council always get elected.²¹⁸ States may not elect two nationals of the same state.²¹⁹ 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.”²²⁰ For the Andean Tribunal of Justice, each state nominates three candidates, and then each judge must be unanimously selected by all four contracting parties.²²¹ No commission is involved in vetting candidates or providing guidelines to states in voting at the international level.

²¹¹ IACHR Statute, *supra* note [()], arts. 6-9; American Human Rights Convention, *supra* note [()], arts. 53-54. 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 [()], art. 10.

²¹² IACHR Statute, *supra* note [()], art. 4.

²¹³ ITLOS Statute, *supra* note [()], art. 4.

²¹⁴ *Id.*, art. 3

²¹⁵ *Id.*, art. 2. There is no vote required for ad hoc judges appointed by states when relevant.

ITLOS Statute, *supra* note [()], art. 17.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ MACKENZIE ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 151, at 7.

²¹⁹ ICJ Statute, *supra* note [()], 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. *Id.*, art. 9.

²²⁰ ICJ Statute, *supra* note [()], art. 9.

²²¹ ATJ Treaty, *supra* note [()], art. 7.

These courts have among the lowest numbers of women on the bench historically. Only 11% of the judges to have served on the IACHR are women, while 3% of the judges on ITLOS, 4% of the judges on the ICJ, 14% of the judges on the Andean Tribunal, and 16% of the judges on the AfCHPR have been women.

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.²²² In a study of judges on the ICTY and ICTR, Michael Bohlander determined that eight out of 25 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 international criminal law, and many did not have even fifteen years of relevant professional experience.²²³ 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."²²⁴ 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.²²⁵ Scholars have noted states' difficulty in verifying independently the qualifications of proposed candidates.²²⁶ Political factors appear to play "the important, if not central, role" in elections, at least where the ICJ and the ICC are concerned.²²⁷ 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."²²⁸

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

²²² TERRIS ET AL., *supra* note [()], at 34 ; MACKENZIE ET AL., *supra* note [()], at 77 ("Success depends to a large extent on vote trading and campaigning..."); *Id.* at 102.

²²³ 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).

²²⁴ International Bar Association's Human Rights Institute, Background Paper to the Institute's Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals, para. 6 (31 October 2011).

²²⁵ TERRIS, ET AL., *supra* note 10, at 34.

²²⁶ *Id.* at 34-35.

²²⁷ MACKENZIE ET AL., *supra* note [()], at 101.

²²⁸ International Bar Association, Background Paper to the Institute's Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals (31 October 2011).

relatively high numbers of female judges in October 2013, and historically, as of June 2014. These include the ICC (59%, 44%), the ECHR (37%, 20%), and ECOWAS (43%, 29%). The WTO Appellate Body, however, had only 14% women judges in October 2013, and 16% historically. The courts with the lowest numbers of women historically included those with the least amount of institutional screening, such as the IACHR (11%), ITLOS (3%), the ICJ (4%), the Andean Tribunal of Justice (14%) and the AfCHPR (16%). Although it is difficult to disentangle national nominations procedures, screening mechanisms, and emphasis on equal representation on the bench in constitutive instruments, there may be a correlation between selecting for merit and a more diverse bench.

The extent to which non-governmental organizations and other stakeholders are involved in the screening of candidates and the degree of candidate information accessible to the public may also affect the 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."²²⁹ 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 2012.²³⁰ Civil society organizations urged states to use more rigorous, open, transparent and participatory procedures in national nominations to the African Court on Human and Peoples' Rights.²³¹ The Center for Justice and International Law is encouraging states to consider reforming and opening selection procedures for the Inter-American Court of Human Rights.²³² Others have complained that the late listing of WTO Appellate Body member candidates precludes substantive public debate about their merits.²³³

Courts with requirements and explicit aspirations to include both women and men on the bench appear to have greater numbers of women on the bench. Only one court's elections procedures require that women be put on the bench at the international level: the ICC. Although the AfCHPR, the ICTY and the ICTY have aspirational language for sex representativeness at the international election level, only the ICC requires states to vote for a preset number of male

²²⁹ Delivering on the promise of a fair, effective and independent Court > Election of ICC and ASP Officials > Judges, <http://www.iccnw.org/?mod=electionjudges> (last visited December 15, 2014).

²³⁰ 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, available at <http://www.hrw.org/news/2012/04/11/letter-european-court-human-rights-regarding-selection-procedure-candidates-russian-> .

²³¹ See supra note 113.

²³² CEJIL, supra note [].

²³³ Pauwelyn, supra note [].

and female judges, among other requirements. The screening committee of the ECHR has to consider whether the nominating state followed the required procedures in generating its list of candidates and that it includes members of the under-represented sex, prior to ranking the candidates for the Parliamentary Assembly’s vote. Following the Advisory Opinion of the European Court of Human Rights discussed above, however, states may submit lists with no women if exceptional circumstances exist and the state followed open procedures in soliciting and evaluating candidates. The ICC has the greatest number of women on the bench compared to all other courts.

Looking at both national nomination and elections procedures, courts with aspirational or mandatory representativeness requirements have achieved more sex representation overall on the bench than those without such requirements. As of June 2014, women have made up only 9.1% of judges on courts without sex representativeness mandates, as compared to 25% of judges for courts with them. The 25% number, however, includes all ECHR judges since it was founded, while the change in nomination procedures took place in 2004. Consequently, it likely understates the impact of representativeness requirements. In late 2013, the percentage of female judges serving on courts without representation requirements was 14%, while it was 32% for courts with representation requirements.

Table 3. Female Participation on Courts without Sex Representativeness Requirements

Name	ICJ	ITLOS	IACHR	ECJ	ATJ	ECOWAS	WTO AB	CCJ	Total
% permanent women	4/103= 3.9% ²³⁴	1/38= 2.6% ²³⁵	4/35= 11.4% ²³⁶	8/93= 8.6% ²³⁷	4/29= 13.8%	5/17= 29.4% ²³⁸	4/25= 16% ²³⁹	2/10= 20% ²⁴⁰	32/350= 9.1%

²³⁴ 99 men and 4 women have been permanent members of the Court since its establishment. Members of the Court, International Court of Justice, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited June 10, 2014).

²³⁵ Members of the tribunal since 1996, International Tribunal for the Law of the Sea, <https://www.itlos.org/index.php?id=97&L=0> (last visited June 10, 2014).

²³⁶ Email from Pablo Saavedra, *supra* note []].

²³⁷ Former Members, Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7014/#CJE (last visited June 10, 2014); *Presentation of the Members*, COURT OF JUSTICE OF THE EUROPEAN UNION, http://curia.europa.eu/jcms/jcms/Jo2_7026 (last visited June 10, 2014).

²³⁸ Current Members, Community Court of Justice – ECOWAS, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=28&Itemid=31 (last visited June 10, 2014); Past Members, Community Court of Justice – ECOWAS, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=29&Itemid=32 (last visited June 11, 2014); EcoCourt Newsletter, April 2014, at http://www.courtecowas.org/site2012/pdf_files/newsletter/2014/vol4_2014.pdf (last visited Nov. 14, 2014).

²³⁹ Appellate Body Members, World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited June 11, 2014).

judges since establishment (June 2014)									
Women/total									
% permanent women judges (October 2013)	3/15 ²⁴¹ = 20%	1/21 ²⁴² = 4.7%	0/7 ²⁴³ = 0%	4/29 ²⁴⁴ =13.8%	1/4 ²⁴⁵ =25%	3/7 ²⁴⁶ =42.9%	1/7 ²⁴⁷ = 14.2%	1/7 ²⁴⁸ =14.2%	14/97= 14.4%

Table 4. Female Participation on Courts with Representativeness Requirements

Name	ICC	ICTY	ICTR	ECHR	Af. Ct HPR	Total
Historical Statistics on % women judges (June 2014)	14/32= 44% ²⁴⁹	14/35= 40% ²⁵⁰ (ad litem)	3/12= 25% ²⁵² (ad litem)	34/170= 20% ²⁵⁴	3/19= 16% ²⁵⁵	68/268= 25%

²⁴⁰ Judges of the CCJ, The Caribbean Court of Justice, <http://www.caribbeancourtofjustice.org/about-the-ccj/judges> (last visited June 11, 2014).

²⁴¹ Current Members, International Court of Justice, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Oct. 10, 2013).

²⁴² Members, International Tribunal for the Law of the Sea, <http://www.itlos.org/index.php?id=96> (last visited Oct. 10, 2013).

²⁴³ I/A Court Composition, Corte Interamericana de Derechos Humanos, <http://www.corteidh.or.cr/index.php/en/about-us/composicion> (last visited Oct. 11, 2013).

²⁴⁴ Presentation of the Members, Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_7026/ (last visited Oct. 11, 2013).

²⁴⁵ Tribunal de Justicia de la Comunidad Andina, Comunidad Andina, <http://www.comunidadandina.org/Seccion.aspx?id=29&tipo=SA&title=tribunal-de-justicia-de-la-comunidad-andina> (last visited Oct. 10, 2013).

²⁴⁶ The Bureau of the Community Court of Justice, Community Court of Justice – ECOWAS, http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=28&Itemid=6 (last visited Oct. 11, 2013).

²⁴⁷ Appellate Body Members, World Trade Organization, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm, (last visited Oct. 10, 2013).

²⁴⁸ Judges of the Caribbean Court of Justice, The Caribbean Court of Justice, <http://www.caribbeancourtofjustice.org/about-the-ccj/judges>, (last visited Oct. 11, 2013).

²⁴⁹ Biographical Notes: Current Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20biographical%20notes.aspx (last visited June 11, 2014); Former Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/former%20judges.aspx (last visited June 11, 2014).

²⁵⁰ The Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/151> (last visited June 11, 2014); Former Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/10572> (last visited June 11, 2014).

Women/total		9/51= 18% ²⁵¹	4/16= 25% ²⁵³ (permanent)			
% permanent women judges in October 2013	10/17 ²⁵⁶ = 59%	2/18 ²⁵⁷ perm. = 11% 1/4 ad litem = 25% Total perm. + ad litem = 13.6%	2/10 perm. ²⁵⁸ = 20% 0/1 ad litem = 0% Total perm. + ad litem = 18.2%	17/46 ²⁵⁹ = 37%	2/11 ²⁶⁰ = 18%	33/102= 32%

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

While a limited pool may be partly at fault for the low numbers of women judges on most international courts, it fails to explain the complete absence of women from the IACHR bench or the presence of only one or two women on other courts' benches, such as the WTO's Appellate Body and the International Tribunal for the Law of the Sea. Also, the fact that the vast majority of women serving on global courts in late 2013 hailed from outside of Western Europe and the United States suggests that the pool alone is not an adequate explanation for the paucity of women judges on international courts. Opaque nominations procedures at the national level

²⁵² Email from Danford Mpumilwa, Press Office, International Criminal Tribunal for Rwanda (June 17, 2014) (on file with author).

²⁵⁴ Judges of the Court since 1959, European Court of Human Rights, www.echr.coe.int/Documents/List_judges_since_1959_ENG.pdf (last visited June 11, 2014).

²⁵⁵ Judges of the Court, African Court on Human and People's Rights, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/judges> (last visited June 16, 2014).

²⁵¹ The Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/151> (last visited June 11, 2014); Former Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/10572> (last visited June 11, 2014).

²⁵³ *Id.*

²⁵⁶ Current Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20%20biographical%20notes.aspx (last visited Oct. 10, 2013).

²⁵⁷ The Judges, International Criminal Tribunal for the Former Yugoslavia, <http://www.icty.org/sid/151> (last visited Oct. 10, 2013).

²⁵⁸ Report of the International Criminal Tribunal for Rwanda, UN. Doc. A/68/270-S/2013/460 (August 2, 2013) *available at* http://www.unictr.org/Portals/0/English%5CAnnualReports%5CA-68-270-S-2013-460_EN.pdf.

²⁵⁹ Composition of the Court, Council of Europe: ECHR, http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n1368718271710_pointer (last visited Oct. 10, 2013).

²⁶⁰ Judges of the Court, African Court on Human and Peoples' Rights, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/judges#formerjudges> (last visited Oct. 11, 2013).

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 appear to draw greater numbers of women to the bench. Also, 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.” Yet the Inter-American Court of Human Rights has no women on the bench and no representativeness requirements.

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,²⁶¹ 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 International Court of Justice and the International Criminal Court, Mackenzie and her colleagues found that interviewees expressed mixed views about the importance of sex representation requirements. One questioned the need for emphasizing gender given the increased enrollment of women on law faculties in the West. Others expressed concerns that appointing female candidates would result in a drop in quality of judges. 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 election. While the requirements for legal, linguistic and geographical diversity were widely accepted, “attitudes towards gender balance are generally much more ambivalent.”²⁶²

²⁶¹ See, e.g., SALLY KENNEY, *GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (2013) (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).

²⁶² MACKENZIE ET AL., *supra* note [[]], at 48-49.

This ambivalence may be explained by a lack of knowledge and interest in the goings-on of most international courts by domestic constituencies. 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.

Minimal direct advocacy on the issue of sex representation on most international courts historically may also 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.²⁶³ Perhaps the same applies to the inclusion of women judges on the International Criminal Court. The reason the Rome Statute has a gender representativeness requirement is because groups advocated vigorously for it.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ Arguably, the ICC has had such high representation of women judges because NGOs and sympathetic states pushed for the 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."²⁶⁷

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.²⁶⁸ Groups, including 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 of Human Rights. 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. On the other hand, it is rare to hear people decrying the paucity of women judges on the International Tribunal for the Law of the Sea.

²⁶³ KENNEY, *supra* note [()], at 65.

²⁶⁴ Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT'L CRIM. L. REV. 643, 650 (2011).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ TERRIS ET AL., *supra* note [()], at 19.

²⁶⁸ Franck et al., *supra* note 8, at [()]; Sergio Puig, *Social Capital in the Arbitration Market*, 25 EURO. J. INT'L L. 387, 401, 404-405 (forthcoming 2014).

III. Proposals for Reform

The paucity of women judges on international courts may be explained, to some extent, by a limited pool and incentives to keep the pool limited, opaque and closed selection procedures at the national nomination and international voting levels, and a lack of advocacy around and sunlight on the issue of representativeness on the bench. In light of these conclusions, what reforms to judicial selection procedures would increase sex representativeness on international benches? This Part does not consider which steps might be taken to increase opportunities for women to advance in the legal profession at the domestic level, since this is a topic that many have already studied and varies substantially by the country and legal culture concerned. Instead, it proposes methods for enhancing openness and transparency at the national nomination and international voting level. It also analyzes why states may, in many instances, be against what appear to be reasonable and legitimacy-enhancing reforms. Mandatory or aspirational targets may be advisable should enhanced procedures fail, or as an alternative to them. The feasibility or desirability of alternative procedures or targets 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 completely unfettered and unguided discretion in selecting nominees, 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 hope that judges will have. Like the procedures for nominating judges to the European Court of Human Rights, 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. 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 which represent the relevant constituencies in a particular state. If commissions are used, they

should reflect the diverse makeup of the society.²⁶⁹ States could also create commissions composed of relevant stakeholders at the international level to vet candidates proposed by states, as the ICC, the ECHR, ECOWAS and the ECJ are currently doing to 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.²⁷⁰ 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.²⁷¹

Shining light on, requiring systematization of and involving more stakeholders in selection procedures will ultimately 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.

Enhanced and transparent selection procedures are likely to enhance the legitimacy of international courts in a number of ways. For a court's authority to be justified, both normatively and sociologically, its judges must be impartial, as well as perceived to be impartial.²⁷² If judges are chosen in a manner that does not achieve impartiality or that is perceived as failing to achieve it, then the court will be perceived as illegitimate. Requiring an independent commission to select or vet candidates may protect against this phenomenon to some extent, although the commissioners may be subject to such a litmus test themselves. Also, if those being nominated or chosen for international judgeships lack or are perceived to lack the necessary qualifications, then the court will lose legitimacy. If, "in many states, nominations are handed out to reward

²⁶⁹ Some have criticized US 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 WISC. WOMEN'S L. J. 67, 82-3, Appendix 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 (rev. 2008), 1. 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 [[]], at s. E.

²⁷⁰ International Bar Association's Human Rights Institute, Background Paper to the Institute's Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals, para. 5 (31 October 2011).

²⁷¹ *Id.*

²⁷² Grossman III, *supra* note [[]], at 67.

political loyalty rather than legal excellence,”²⁷³ as Philippe Sands, Cherie Booth and others have proposed, legitimacy is directly threatened: why listen to the dictates of an incompetent decision-maker?

More transparency, rigor and participation in selection procedures by various stakeholders reduce both the likelihood and perception of bias and cronyism. Also, enhanced selection procedures make it possible for numerous individuals to vet candidates and ensure they are qualified for the job. Opening up nominations and elections procedures will encourage nominators to move beyond their own connections and to consider a more diverse slate of candidates, as well as encourage a broader group of candidates to apply. If these reforms result in enhanced sex representativeness, they will strengthen the democratic legitimacy of these institutions as well. A bench composed of both men and women strengthens the normative, sociological and democratic legitimacy credentials of international courts.²⁷⁴ When men and women approach judging differently, the presence of both is necessary for impartiality. Even if they don't approach judging differently, constituencies of international courts may perceive that they do, threatening the perceived legitimacy of a court. Finally, the gross disproportion between the percentage of women who make up the world's population and the percentage who sit on these decision-making bodies invites serious questions about democratic legitimacy. Enhancing representativeness will help to justify the authority of these institutions.

B. Counter-arguments to Enhanced Selection Procedures

Despite the arguments in favor of reforms to existing selection procedures, states may have principled reasons to reject them. 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.²⁷⁵ Keeping the selection process primarily in the hands of individual states may allow states more effectively to 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.

²⁷³ Cherie Booth & Philippe Sands, *Keep Politics out of the Global Courts*, *The Guardian* (July 13, 2001).

²⁷⁴ *See generally, supra* [[]].

²⁷⁵ *See generally* Voeten, *The Politics of International Judicial Appointments*, *supra* note [[]]; Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669, 670-1 (Fall 2007).

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 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 European Court of Human Rights.²⁷⁶ 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 Appellate Body to ensure their consistency with states' interests.²⁷⁷ They have *de facto* vetoed candidates who disagree or are perceived to disagree with them on important policy matters.²⁷⁸ 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."²⁷⁹ 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.²⁸⁰ 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.²⁸¹ 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 committee is composed of individuals representing states with diverse interests.

But if a state's goals are to promote the rule of law (as opposed to geopolitics) or signal a commitment to a particular normative regime, it may prefer to appoint judges through transparent and merit-based process. Alternatively, whether states perceive adjudicators as trustees of a particular legal regime, rather than agents who merely reflect their policy

²⁷⁶ Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, *supra* note [()], at 670-71

²⁷⁷ 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 [()], at 4.

²⁷⁸ Steinberg, *supra* note [()], at 264.

²⁷⁹ Eric Posner and John Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 26-27 (2005).

²⁸⁰ Posner and Yoo, *supra* note [()], at 27.

²⁸¹ Posner and Yoo, *supra* note [()], at 28.

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.²⁸²

Agents, on the other hand, are expected to be loyal to and implement the decisions of the Principal.²⁸³ 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 who 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 normative legitimacy of these institutions. And it appears that such enhanced procedures result in greater opportunities for women, and perhaps other outsiders' participation on the bench. States' decisions to reject or adopt enhanced procedures will likely turn on their underlying motivations in joining a specific court in the first place. If the state seeks to shape judicial outcomes, it may prefer tight control over the nomination and election process; if, on the other hand, it wants to signal commitment to a particular regime or cultivate the rule of law in an area, it may favor enhanced procedures. Interestingly, states' specific goals in the context of particular international courts may be having a significant impact on the diversity of the bench.

C. Aspirational or Mandatory Targets or Quotas

Enhanced procedures may not be acceptable to states, or they may not work to change the status quo. What about 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. As of June 2014, women have made up only 9.1% of judges on courts without sex representativeness mandates, as compared to 25% of judges for courts with them. In late 2013, the percentage of female judges serving on courts without representation requirements was 14%, while it was 32% for courts with representation requirements. Consequently, the adoption of aspirational language or of mandatory targets may

²⁸² Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EURO. J. INT'L RELATIONS 33, 35 (2008).

²⁸³ Alter, *Agents or Trustees?*, *supra* note [[]], at 39-40.

result in better 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 court benches to women are not only permitted by international law, but also may be required by it. The United Nations Charter in article 8 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.”²⁸⁴ Courts affiliated with the United Nations in some way or another 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), among others. The fact that only four women have served as members of the ICJ bench in over sixty-five years raises questions about whether the UN is achieving the mandate established in article 8.

The International Covenant on Civil and Political Rights specifies 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.”²⁸⁵ These include “the right and the opportunity... (a) to take part in the conduct of public affairs” and “(c) [t]o have access, on general terms of equality, to public service in his country.”²⁸⁶ The Human Rights Committee, charged with interpreting the convention, explained article 25(c):

To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secure tenure, ensure that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.²⁸⁷

Current selection and election procedures in many cases appear inconsistent with this mandate. Again, it is difficult to believe that women are being afforded equal opportunities for participation when so few are present on the bench.

²⁸⁴ United Nations 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.”

²⁸⁵ International Covenant on Civil and Political Rights art. 3, *adopted* Dec. 19, 1966, art. 3, 999 U.N.T.S. 171.

²⁸⁶ *Id.*, art. 25.

²⁸⁷ Human Rights Committee, General Comment to Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, para. 23, CCPR/C/21/Rev.1/Add.7 (27 August 1996.)

The Convention on the Elimination of Discrimination against Women provides further evidence of a state obligation to take steps to include women on courts. Article 7 provides that States Parties shall “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... to participate in the formulation of government policy and the implementation hereof and to hold public office and perform all public functions at all levels of government.”²⁸⁸ The CEDAW Committee subsequently clarified that these obligations extend “to all areas of public and political life” and are not limited to those spelled out in article 7.²⁸⁹ “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.”²⁹⁰ International courts fall within the scope of the obligation to ensure participation of women.

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.”²⁹¹ Article 11 adds that “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: ... (b) [t]he right to the same employment opportunities, including the application of the same criteria for selection in matters of employment.”²⁹² The treaty also provides explicitly that

[a]doption 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.²⁹³

In other words, states agreed that the use of special measures of a temporary duration may very well be appropriate to foster equality. As of June 2014, 188 states considered themselves to be parties to CEDAW.²⁹⁴

²⁸⁸ Convention on the Elimination of All Forms of Discrimination Against Women art. 7, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

²⁸⁹ U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 23: Political and Public Life, 16th Sess. 1997, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom22>.

²⁹⁰ *Id.*

²⁹¹ CEDAW, *supra* note 288, art. 8.

²⁹² *Id.*, art. 11.

²⁹³ *Id.*, art. 4(1).

²⁹⁴ United Nations, Status of Treaties, Convention on the Elimination of All Forms of Discrimination Against Women 1, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-

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: “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.”²⁹⁵ In the Beijing Platform, states agreed to

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.²⁹⁶

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.”²⁹⁷ 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. 111²⁹⁸ and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.²⁹⁹

8&chapter=4&lang=en (last visited June 19, 2014). 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.

²⁹⁵ Fourth World Conference on Women, Beijing Declaration and Platform for Action, para. 13 (1995) <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

²⁹⁶ *Id.*, para. 190(a).

²⁹⁷ *Id.*, para. 190(j).

²⁹⁸ ILO Convention No. 111 specifies that states 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, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256 (last visited June 26, 2014).

²⁹⁹ 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%20the%20Rights%20of%20Women.pdf>.

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.³⁰⁰ For example, France requires all political parties to list equal numbers of men and women in most elections,³⁰¹ Rwanda's Constitution specifies that at least 30% of each decision-making body must be composed of women.³⁰² Argentina mandates that women must be placed in electable positions on party lists.³⁰³ The Iraqi Constitution aims for at least one-quarter of the Council of Representatives to consist of women.³⁰⁴ 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."³⁰⁵ Belgium recently adopted a quota for women on its constitutional court.³⁰⁶

In response to low participation of women on European corporate boards and low growth rates over time, some legislatures have instituted mandatory minimum requirements.³⁰⁷ 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.³⁰⁸ Since the institution of the quota, participation on corporate boards rose from 25% in 2004 to 42% in 2009.³⁰⁹ 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 40% participation of each sex within eight years.³¹⁰ In late 2010, France

³⁰⁰ Susan Franceschet et al., *Conceptualizing the Impact of Gender Quotas*, in *THE IMPACT OF GENDER QUOTAS 3* (Susan Franceschet et al., eds., 2012).

³⁰¹ *Id.* at 27.

³⁰² Constitution of Rwanda, art. 9(4), at <http://www.rwandahope.com/constitution.pdf> (last visited June 27, 2014).

³⁰³ Franceschet et al., *supra* note [()], at 44-45.

³⁰⁴ Constitution of Iraq, art. 49, available at http://iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

³⁰⁵ Constitution of South Sudan, art. 123(6) at <http://www.goss.org/docs/Transitional%20Constitution%20of%20South%20Sudan.pdf> (last visited June 27, 2014).

³⁰⁶ 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.”)

³⁰⁷ European Commission, Director General for Employment, Social Affairs and Equal Opportunities, *More women in senior positions: Key to economic stability and growth* 44 (January 2010). The percentage of women on Europe's corporate boards grew less than 3% points, to a total of 10.9%, from 2003-2009. *Id.*

³⁰⁸ *Id.* at 45.

³⁰⁹ *Id.* (internal citation omitted).

³¹⁰ European Commission's Network to Promote Women in Decision-making in Politics and the Economy, Working Paper, *The Quota-instrument: different approaches across Europe* 12 (June 2011),

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.³¹¹ The Netherlands, Italy, and Belgium also adopted quota laws.³¹² Austria, Denmark, Finland, France, Germany, the Netherlands, Poland, Spain, Sweden, and the United Kingdom make reference to gender in corporate governance codes.³¹³ A study by the European Commission's Network on 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 and governments to make fast and fundamental changes in the representation of women in decision-making."³¹⁴ In November 2013, the EU Parliament voted to require European companies to hire 40% women for corporate board positions by 2020.³¹⁵ 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.³¹⁶

D. Counterarguments to Aspirational or Mandatory Targets or Quotas

Despite the now widespread use of quotas at the political level, on corporate boards, and to a lesser extent, in judiciaries, a number of counter-arguments to the use of mandatory targets 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. There is no inherent requirement to reject or accept a candidate. From a political standpoint, it may show domestic political constituencies that the state from which they hale has at least a political commitment to sex representation. Yet it is not clear how effective aspirational language is. In June 2014, only three women had ever served on the ACHPR's bench, while 16 men had. But the ACHPR is a young court, and it may be too early to assess the impact of its representativeness language on the bench's composition. The ICTR's percentages of male and female judges were the same for ad litem judges, to whom the representativeness requirement applies, as for permanent judges, which suggests such language has little impact. On the other hand, women made up 40% of the ad litem judges for the ICTY, but only 18% of the permanent judges, raising the possibility that the aspirational language did make a difference. Also, the Inter-American Court of Human Rights is the only human rights or international criminal court with no such language and it had no sitting female judges in June 2014, and only 11% female judges in its history.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 13.

³¹⁴ *Id.* at 15.

³¹⁵ *European Parliament News*, Press Release, 40% of seats on company boards for women, Nov. 20, 2013, at <http://www.europarl.europa.eu/news/en/news-room/content/20131118IPR25532/html/40-of-seats-on-company-boards-for-women> (last visited June 27, 2014).

³¹⁶ 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).

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.³¹⁷ 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 International Criminal Tribunal for Rwanda in part because there were “too few [women judges] to conduct empirical analysis...”³¹⁸ 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.³¹⁹ Another study showed that women judges were much more likely to rule in favor of jurisdiction in cases under the auspices of the International Centre for the Settlement of Investment Disputes than men.³²⁰

A number of studies have sought to understand the relationship between gender and judging in the United States, scholarship which 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.³²¹ 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.³²² Another study showed that asylum applicants randomly assigned to women judges were 44% more likely to prevail than those facing male judges.³²³

Anecdotal evidence at the international level may also be instructive in understanding that a gender diverse bench makes a difference. A number of female judges have made statements implying that they thought their experiences as women gave them a particular sensitivity in certain cases. These include former D.C. Court of Appeals and International Criminal Tribunal for the Former Yugoslavia Judge Patricia Wald, former International Criminal Court Judge Navinathem Pillay, and former Inter-American Court of Human Rights Judge Cecilia Medina.³²⁴ For example, Judge Wald wrote:

...being 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

³¹⁷ *Id.* at 8.

³¹⁸ King & Greening, *supra* note [()], at 1050.

³¹⁹ *Id.* at 1065-66.

³²⁰ Waibel & Wu, *supra* note [()], at *34-35.

³²¹ 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 Studies 1, 7 (2003).

³²² Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am. Pol. Sci. 389, 390, 406 (2010).

³²³ Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Phillip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 342 (2007).

³²⁴ Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, *supra* note [()], at 647-48.

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.³²⁵

She has also pointed to five different major gender-crime precedents issued when at least one woman sat on the bench.³²⁶ 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.”³²⁷ Former Inter-American Court Judge Cecilia Medina Quiroga posited that her womanly perspective changed the reparations outcome in a case involving a massacre and rape in Guatemala.³²⁸

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.”³²⁹ 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...”³³⁰ 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.”³³¹ 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.”³³² 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.³³³

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

³²⁵ Wald, *Six Not-So-Easy Pieces: One Women Judge’s Journey to the Bench and Beyond*, *supra* note [[]], at 989.

³²⁶ Wald, *What do Women Want from International Criminal Justice? To Help Shape the Law*, *supra* note [[]].

³²⁷ Terris et al., *supra* note [[]], at 48.

³²⁸ *Id.* at 186-87.

³²⁹ Emily Bazelon, *The Place of Women on the Court*, *New York Times* MM22 (July 12, 2009) (interviewing Justice Ruth Bader Ginsburg).

³³⁰ Bertha Wilson, *Will Women Judges Really Make a Difference?* 28 *Osgoode Hall L. J.* 507, 515 (1990).

³³¹ Brenda Hale and Rosemary Hunter, *A Conversation with Baroness Hale*, 16 *Feminist Legal Studies* 237, 245 (2008).

³³² Miriam Anasagasti and Nathalie Wuiame, *Women and Decision-Making in the Judiciary in the European Union* 8, 23-4 (European Commission 1999).

³³³ Hana Evenor, *Women on the Bench* 93-95, in *WOMEN IN LAW* (Shimon Shetreet, ed. 1998).

different ways, and victims may feel less comfortable relating such stories to a unisex court.³³⁴ Further, for human rights courts in particular, some constituencies will question the values and impartiality of a *human* rights court when half of humanity is missing from the bench. If women judges relate to rape or crimes of violence against women in a different 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 Appellate Body?

It matters, 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. “The de facto lawmaking role played by international judges cannot be denied.”³³⁵ This authority requires justification, and democratic values such as representation provide one such meaningful justification.³³⁶ 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. Alternatively, if these groups are identical in their reasoning and approach to legal analysis, how can we justify the systematic exclusion of one of them?

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.”³³⁷ Similar arguments could be made concerning mandatory judicial targets. 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 – 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

³³⁴ Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, *supra* note [{}], at 647-48.

³³⁵ TERRIS ET AL., *supra* note 10, 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 GERMAN L. J. 979, 979 (2011) (stating that international judicial decisions influence future decisions); Grossman III, *supra* note [{}], at 68-76 (explaining how international courts influence the development of law and politics).

³³⁶ Gráinne De Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT’L L. 221, 226–27 (2008). Armin von Bogdandy and Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GER. L. J. 1341, 1343 (2011).

³³⁷ Franceschet et al., *supra* n. 300, at 3.

women qualified to sit on the Inter-American Court of Human Rights, in all of South, Central and North America, and ten women in the entire world qualified to serve on the Law of the Sea Tribunal. The pool of qualified women may be smaller than the pool of qualified men, but it is hard to believe that it is as low as one or none. Women do, after all, serve as presidents, foreign ministers, judges, and professors around the world. Women have attended Harvard, Oxford, and other prestigious universities for many years now.

Another counter-argument to mandatory targets is that beneficiaries of a mandatory target may be perceived as somehow inferior or less capable than their male peers, even if they are equally or even more qualified. Women would not be in the courtroom if not for the quota. A 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. 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 representative benches may be more impartial, if and when men and women judge differently, or be perceived to be impartial, even if men and women do not differ in their decision-making. And 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 International Criminal Court, the European Court of Human Rights, the African Court on Human and Peoples' Rights, 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 procedures, which appear to help open the courthouse doors to women judges, potentially rendering mandatory quotas unnecessary.

IV. Conclusion

Men are overrepresented on the vast majority of international courts, particularly those without representativeness requirements of any kind. By analyzing the causes of this phenomenon, important flaws in selection procedures for most international courts are apparent. Procedure matters. The identification and selection process at the national level appears opaque and closed. This lack of transparency and openness provides low incentives to nominators to consider a broad array of candidates beyond their own networks. Although the pool of qualified female candidates may be smaller than that of their male contemporaries, it is difficult to fathom that it is as low as one or none, especially when women from developing countries are more likely to serve on international courts than women from developed ones. Consequently, reforms are needed to provide equal opportunities to both men and women to serve on these important international law bodies. Possibilities include the use of nominating commissions at the domestic or international levels, the development of best practices for nominations at the national level, a requirement to publicize procedures when a vacancy occurs or report on procedures undertaken, and screening and ranking commissions to vet candidates at the international level. Yet states who want close control over the selection of their judges are likely to reject such changes, at least for a significant subset of courts. Should states reject these kinds of reforms, or

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should they fail to increase sex-representativeness, aspirational targets or quotas may be worth considering.

At the same time, instituting quotas without addressing opacity at the national nomination level, or the geopolitical rather than merit-driven orientation of international judicial elections for many courts is deeply unsatisfying. Applying a gender lens shows that selection procedures on international courts have many flaws beyond simply the paucity of half the world's population on the bench. Ultimately, the goal is not only to enhance the legitimacy of international courts because more of the world is represented on their benches, but also to ensure that election processes are fair, open and merit-driven, qualities which may also strengthen a court's legitimacy. States' choices to act in one way or another, or not at all, provide important clues about whether states intend to use courts as their Agents, or yet another forum for pursuing geopolitical interests, or as Trustees, law-declaring and clarifying judicial bodies.

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