The Underrepresentation of Women in the International Courts

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À minha mãe e ao meu pai que me deram asas para voar,

Ao meu irmão,

Às minhas bonitas e pacientes amizades,

À voz desafiante da Professora Benedita,

Abstract:

The underrepresentation of women in the international courts reduces the democratic, normative, and sociological legitimacy of their decisions. Although States are bound to multiple legal instruments which impose that they take measures to ensure gender equality and balance, women face gender stereotypes and suffer discrimination which in turn jeopardizes their attempts to achieve the international judiciary. The national nominations and international procedures suffer from a lack of transparency and impartial evaluation standards leading to the perpetuation of exclusive networks that prioritize political maneuvering over the technical qualification of candidates. To ensure a representative and legitimate international bench, measures must be taken to ensure *de facto* equality for women, mandatory gender quotas and aspirational language in the Statutes of the Courts are tools that may reduce the issue.

Key Words: International Courts; Women; Representation; Legitimacy; Nomination and Selection Processes; Transparency; Institutionalized screening; gender quotas;

Abbreviations

ACtHPR - African Court on Human and Peoples' Rights
art. - article
CJEU- Court of Justice of the European Union
ECHR - European Convention of Human Rights
ECtHR - European Court of Human Rights
EU – European Union
ICC - International Criminal Court
ICs - International Courts
ICJ - International Court of Justice
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the Former Yugoslavia
ITLOS - International Tribunal for the Law of the Sea
p. – page
pp. - pages
PACE – Parliamentary Assembly of the Council of Europe
para. - paragraph

TFEU - Treaty on the Functioning of the European Union

UN - United Nations

UNDT - United Nations Dispute Tribunal

UNGA -United Nations General Assembly

UNSC - United Nations Security Council

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I. Introduction

Throughout history, Women have remained excluded and underrepresented in decision-making positions. While the world has evolved and made strides towards progress, there is a persistent disadvantage faced by women,[1] who still grapple with accessing the "old boys' networks" where the future of our world is shaped and determined.

The highest offices hold the key to shaping a better world and influencing the kind of society we aspire to live in. Concretely, the adjudicative bodies, particularly the International Courts (hereinafter "ICs"), wield exceptional power to enact transformative change.

Unfortunately, women are still highly underrepresented at the International Judicial Benches, hence, Chapter II provides an overview, illustrating the number of women judges who served and are serving at the ICs. Chapter III lists possible reasons for the underrepresentation of women. Traveling on women's history of entitlement (III.1), it is clear why there is no future without memory. Understanding how women have been perceived over the years, allows a comprehension that they are often discriminated against, having their entrance hampered *ab initio* with biased appointment processes (III.3). Then, it is challenged the notion that women's voices are scarce within the pool of qualified candidates (III.2). Women are not less qualified nor incompetent, and the pool of suitable candidates is large, regardless, they are still not invited in.

This thesis proposes to provide a holistic view of the reasons why the appointment and selection processes work at the disadvantage of female candidates. Exhaustively analyzing the concrete appointment rules and procedures of all ICs is, however, beyond the scope of this thesis.

Chapter IV provides legal justifications for the need for women's presence on the IC's benches. Starting with the fact that States are bound to Conventions, that impose upon them the legal duty to do so (IV.I). It is crucial to recognize that the functions of international courts extend beyond mere adjudication, as they also play a significant quasi-legislative role in interpreting and influencing legal concepts that have a profound impact on the lives of all segments of

[1] For the purposes of this thesis, I assume that the dominant gender is masculine and the social category that is alterezing (othering) and subalterizing, in society and the law, is that of women. cfr. Catharine A.MacKinnon, "Feminism Unmodified Discourses on Life and Law", Harvard University Press, 1987 and Simone de Bauvoir, O Segundo Sexo, Vol.1 e 2 (1949) edited by Quetzal Editores, 2015

society. This includes the underrepresented gender, whose voices deserve to be acknowledged and heard (IV.2.1)

Moreover, it is demonstrated that Courts need to be representative of their recipients, (IV.2.2) and its importance in fostering legitimacy, which justifies the Court's authority (IV.2.3). However, the wife of Caesar must not only be virtuous but also appear to be, which explains why decisions must *be* fair and legitimate, but also be *perceived* like it (IV.2.4)

Furthermore, it is discussed whether men and women think differently and if their judgment varies (Section IV.3.1), and whether the perceived differences impact impartiality (Section IV.3.2).

Finally, Chapter V sheds light on the need for continued commitment to address gender imbalance. It highlights that achievements on women's rights are not either organic nor irreversible (V.1) and propose potential remedies to enhance gender diversity, such as transparency, institutionalized screening, and aspirational references to gender balance and quotas (V.2).

Thus, this thesis aims to contribute to the ongoing discourse surrounding gender representation at the ICs. By examining the reasons behind the lack of women and emphasizing the importance of gender diversity in ICs to ensure their decision’s legitimacy.

Lastly, numerous marginalized communities in society unfortunately continue to face underrepresentation. A truly diverse judicial bench will be intersectional and regard the multiple traits that perform the individuality of a judge such as race, ethnicity, and sexual orientation. In the ongoing debate regarding the legitimacy of decisions made by international courts (ICs), it is imperative to recognize the importance of intersectionality within the composition of their panels. However, despite efforts to combat various forms of discrimination, ICs still significantly short of representing all sectors of society. They have yet to achieve even the basic goal of ensuring the representation of half of the population, namely women. Therefore, this thesis suggests that the analysis primarily focuses on a gender-binary perspective.

II. State of the Art

The absence of gender diversity in the upper echelons of judiciary is evident a highly concerning. While there may be a notable presence of women within the judiciary, they often experience vertical segregation[2], predominantly occupying mid-to-lower levels of the hierarchy and being largely excluded from the highest courts. This situation is both apparent and unjust.

This scenario is not limited to the judiciary alone. The underrepresentation of women is, regrettably, a pervasive issue across various sectors, including politics, various legal professions, and corporate boardrooms. Consequently, the goal of achieving gender equality and empowering women and girls has been recognized as a critical objective for sustainable development[3]. It has been enshrined as a legal obligation through international treaties to which states have willingly obligated themselves.

The lack of women representation is, unfortunately, a transversal problem in most sectors such as politics, the multiple legal professions, or the boards of private companies. Thus, “achieving gender equality and empowering all women and girls” was elevated to a goal for sustainable development and provided as a proper legal duty, imposed by international treaties that States have bound themselves to.

[2] Anasagasti & Wuiame (1999) p.49.
[3] UN 2030 Agenda for Sustainable Development, point 25 (goal 5).

As an initial step, analyzing the numbers and levels of representation of women at ICs since their foundation is relevant. In 2015, Grossman published a work survey about the paucity of women in the ICs' benches, which is the source of the following illustrative table 1[4]:

TABLE 1
SUMMARY CHART ON THE PAUCITY OF WOMEN JUDGES ON INTERNATIONAL COURTS

Court	Women in Mid 2015 (%)	Slots Occupied by Women from 1999 to Mid 2015 (%)	Representation Requirement?	Level of Guidance or Transparency at National Level	Institutional Screening	Year Established
African Court on Human and People's Rights	2/11 (18%)	18%	Yes: aspirational	Lower	No	2006
Andean Tribunal of Justice	2/4 (50%)	17%	No	Lower	No	1984
Appellate Body of the World Trade Organization	1/7 (14%)	17%	No	Lower	Yes	1995
Court of Justice for the Economic Community of West African States	1/7 (14%)	40%	No	N/A	Yes	2001
European Court of Human Rights	15/45 (33%)	29%	Yes: aspirational 1999–2003; virtually mandatory since 2004	Higher	Yes	1959
European Court of Justice	5/28 (18%)	14%	No	Higher	N/A	1952
Inter-American Court of Human Rights	1/7 (14%)[a]	16%	No	Lower	No	1979
International Court of Justice	3/15 (20%)	11%	No	Lower	No	1946
International Criminal Court	7/18 (39%)	47%	Yes: mandatory	Lower	Yes	2003
International Criminal Tribunal for the Former Yugoslavia	Permanent: 2/19 (11%) *Ad litem*: 1/3 (33%)	Permanent: 11% *Ad litem*: 41%	Yes: aspirational for *ad litem* only	Lower	No	1993
International Criminal Tribunal for Rwanda	Permanent: 2/9 (22%) *Ad litem*: 0/1 (0%)	Permanent: 22% *Ad litem*: 35%	Yes: aspirational for *ad litem* only	Lower	No	1996
International Tribunal for the Law of the Sea	1/21 (5%)	2%	No	Lower	No	1996

Out of 12 ICs, only the Andean Tribunal of Justice managed to achieve parity. The International Criminal Court managed to achieve a parity zone of 39%. The EUtHR and the ad litem judges of the ICTR a third (33%). The CJEU (18%) as most of the other Tribunals stayed on a low critical mass and both the ITLOS, the Appellate Body of the WTO, and the Inter-American

[4] Grossman (2016) p.83.

Court of Human Rights had only a token number of women. The picture becomes darker when we pay attention to the percentage of slots occupied by women from 1999 to 2015. Stéphanie Vauchez highlighted, in 2015, that the ECtHR had 18 female judges, it took 12 years for the first woman to have a seat on the bench, and for the first 30 years, only 3 judges occupied positions on the Court.[5]

As Grossman states "women made up 20 percent or less of the bench in mid-2015", leading to "a lower percentage of the bench in mid-2015 than in previous years on two-thirds of the courts surveyed".[6]

It is indeed interesting to note, from table 1, that between 1999 and 2015 the five courts with the highest proportions of women occupying judicial positions had either the mandatory or aspirational language pertaining to gender representativeness in their statutes or selection rules. Conversely, none of the seven courts with the lowest percentages of women on the bench had such mandatory rules or aspirational language in place. This observation suggests a correlation between the presence of explicit provisions promoting gender diversity and the actual representation of women in these judicial institutions.[7]

For instance, from Erik Voeten's research work, it is possible to conclude the paucity of women on the ECtHR panels and a regression in the numbers already reached. The following figure plots the average number of women that served in a Chamber or Committee to decide the fate of an application[8]:

[5] Vauchez (2015) p. 200
[6] Grossman (2016) .83
[7] Ibid p.84
[8] Voeten (2019) p.14

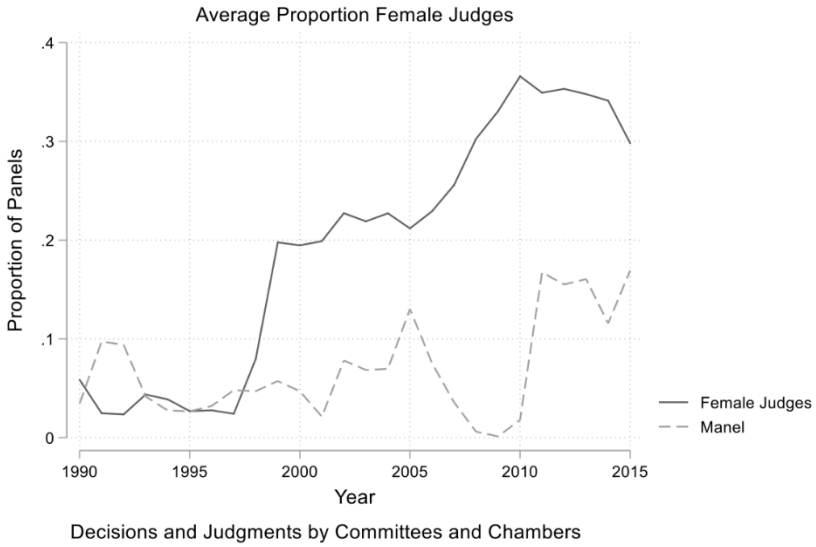

Figure 1: Average proportion of female judges on chambers and proportion of all-male chambers

Voeten identified that after the reform made by Resolution 1366[9], there was a manifest improvement in the average proportion of women between 2005 and 2010 with the proportion of female judges increasing from about 20% to about 35%. As a result, panels of all-male judges ("manels[10]") were almost extinguished during this period. Regrettably, since 2010, this increase has slowed down, and *manels* have reappeared, mostly due to smaller admissibility committees. In the sample of individual votes, 29% of all chambers before 1999 did not have a single female judge. This has reduced to only 3% of chambers since 1999, with the average proportion of female judges increasing from 2% to 31%.[11] This example reflects how fragile progress can be, when despite the Resolution, rapidly some States refused to include women on their lists and rejected including sex-representativeness in formal reforms of the Court.[12]

Seven years later, in 2022, the gender distribution of judges on different ICs and tribunals did not increase as much as one would expect. According to GQUAL, the composition of the most relevant ICs, as of September 2022 reports as follows[13]:

[9] PACE Resolution 1366 (2004): Candidates for the European Court of Human Rights where the PACE decided to reject all-male lists of candidates.
[10] A term used to refer to an "All-Male Panel" is used to highlight the exclusion of women and other marginalized groups as subject-matter experts. UN Indonesia, "Guidance for Avoiding All Male Panels" p.2
[11] Voeten (2019) p.13
[12] Vauchez (2015) p. 200
[13] Table information from "The Current Composition of International Tribunals and Monitoring Bodies" GQUAL: Campaign for gender parity in international representation, available at https://www.gqualcampaign.org/1626-2/ Updates statistics to September 2022. Last visited 21.05.2023.

Gender distribution of judges in the International Courts

Table 2

Year founded	Tribunal	Current Members	Current Women	Total Historical Numbers	Total of Women
International Tribunals					
1945	International Court of Justice	15	4	111	5
2002	International Criminal Court	18	9	53	24
1996	International Tribunal for the Law of the Sea	21	5	51	6
2010	International Residual Mechanism for Criminal Tribunals ("Mechanism")[14]	25	8	34	9
Total		79	26	249	44
Regional Courts					

[14] The Mechanism is supposed to be "small, temporary and efficient structure" and is mandated to perform a number of essential functions previously carried out by the ICTR which was discontinued in December 2015, and the ICTY which was discontinued in December 2017.

1952	European Court of Justice	27	6	101	12
1991	ECOWAS Community Court of Justice	5	2	28	9
2005	Caribbean Court of Justice	7	1	13	2
1999	East African Court of Justice	11	2	25	5
Total		50	11	147	28
Regional Human Rights Tribunals					
1979	Inter-American Court of Human Rights	7	3	43	8
1959	European Court of Human Rights	44	15	204	44
2004	African Court on Human and People's Rights	11	5	36	10
Total		62	23	283	62

All considered, the number of women serving in the ICs has increased since their foundation. Yet, the progress is slow and often not consistent. There is still a long way to reach the level of gender equality and representation, that is both desirable and necessary in 2023 and beyond.

III. The of lack women in the ICs: possible explanations

The underrepresentation of women at ICs can be attributed to multiple factors, including historical biases and structural barriers that have limited opportunities for women to enter and advance within the legal ecosystem.

One of the main factors is the persistent gender bias that exists within the legal profession, which has historically been dominated by men[15]. This has created a culture and system that made it more difficult for women to enter and succeed in the field, particularly in positions of leadership and authority.

Another factor is structural barriers within international courts, including biased appointment procedures, limited outreached efforts, lack of support and mentoring for women, and unconscious biases, contribute to the persistent underrepresentation of women.

In this chapter, it will be explored the women's historical position of entitlement to decision-making positions (III.1), and debunk te notion of a "limited pool" of qualified candidates (III.2). Furthermore, it will delve into the underlying issue of biased appointment and election processes as the primary explanation for the lack of women's representation (III.3).

III. 1. Historically unentitled

Throughout history, women were often excluded from citizenship and denied access to public positions. An illustration of this can be found in the first century AD, where two women challenged societal norms and escaped the imposed silence. One of these Maesia, successfully defended herself in court. However, society struggled to accept that a woman could accomplish such a feat and labeled her as "androgynous," implying that her feminine appearance concealed a masculine nature. The second woman, Afrânia took the initiative to initiate legal cases and

[15] Schultz (2017) p.23

personally litigated them, disregarding the criticism of her "imprudence". Nonetheless, she was still denied the right to express herself fully, with the society Nonetheless, she was still denied the right to express herself fully, with the society dismissing her as "howling" and "barking".[16] The examples highlight the perception of women during Classical Antiquity period, where they were deprived of a voice. Traditional male characteristics were upheld as the ideal, and women were considered incapable of possessing the necessary skills required for public positions.

In the nineteenth century, although continental European countries adopted constitutions containing equality principles, women were not involved in the political adoption process or even in the rights that they enshrined. Only the modern constitutions of recent decades (i.e. France 1946, Italy 1963, Portugal 1974) have guaranteed legal equality for women and, thus, their right to vote and only after, the right to be admitted to the judiciary.[17] After the removal of formal barriers, additional, less overt forms of discrimination emerged. These forms not only hindered women from attaining prominent judicial positions but also prevented them from gaining the requisite experience required for judicial nominations.[18]

Despite nearly a century passing, women still grapple with the lingering effects of centuries of male leadership and dominance in public, legal and political realms[19]. As a result, numerous cultural and social barriers persist, discouraging and constraining women's participation in the legal profession. These barriers encompass limited access to higher education, restricted employment opportunities in specific fields and discriminatory practices that vary among different states. Such challenges significantly impede women's progress in the legal profession.[20]

III.2. Debunking of the limited-pool argument

Regardless of the evidence of a male privilege in the judiciary which jeopardizes women's opportunities to seat at ICs, some argue that the explanation is due to women, allegedly, making

[16] Beard (2018) pp. 25, 26
[17] Schultz (2017) p.23
[18] Vauchez point 27. (2019)
[19] MacKinnon (1987)
[20] "The world is failing 130 million girls denied education: UN experts", 23.01.2023, UN Press Release

up a much smaller percentage of the available pool of qualified candidates than men do. The argument is based on two ideas: i) the formal barriers that used to prevent women from being on the international judgeship were already removed, since they have the same legal rights and duties as men ii) thus, allegedly, women are underrepresented because they are not as competent as the male candidates.

The argument of a limited pool of qualified candidates for international judges in unconvincing due to several factors. These include the diminished influence of merit in the selection process and the persistent underrepresentation of female judges on certain courts, despite the growing number of female legal professionals.[21] It is noteworthy that jurisdictions with higher proportions of female lawyers do not necessarily appoint a correspondingly greater number of female judges in international context.[22]

Additionally, the limited-pool argument assumes that the selection processes are meritocratic, and that the candidates chosen are undoubtedly the best in the race. Yet, as will be analyzed further, the processes are commonly biased, and "international judgeships are often used to reward political loyalty or to advance political agendas, rather than to select the most qualified or meritorious candidates", in truth, they are often the result of trading of votes by the Member States across different ICs' elections.[23]

To illustrate how the lack of women is not related to their (unlikely) poor qualifications, Stephanie Vauchez studied approximately 120 curriculum vitae (CVs) of all the women presented for a seat on the ECtHR by one of the 47 member-states. Her purpose was to understand profile patterns and to refine our knowledge and understanding of the processes of judicial selection.[24]

The data they provide offers significant value as it demonstrates that gender can fulfill distinct roles within the appointment process. It serves as a tool for candidates themselves, as CVs serve as self-presentation texts wherein individuals can decide to disclose or conceal experiences and affiliations, emphasize, or downplay the significance of specific events and

[21] Grossman (2016) p. 84.
[22] Ibid For detailed data on the comparison of the percentage of female legal professionals and the numbers of international judges from different states see Grossman (2015) p. 236 and Michelson (2013)
[23] Grossman (2016) p. 86
[24] Vauchez (2015)

associations, and so forth. Additionally, it can be utilized by states, who bear the responsibility of interpreting the principle of gender balance and have the choice to do so either explicitly or implicitly, thereby portraying a gender-sensitive world or a post-gender world—wherein the relevance of such criteria would have diminished.[25]

The study revealed that a large proportion of candidates had *feminist features*, such as membership in female professional associations, networks, and institutions (both official, i.e UN Commission on the Status of Women, and activist i.e the International Council of Women), but also fields of interest connected to women's or children's rights, and scholars of feminist legal theory.[26]

Notwistanding, in recent times, although women candidates keep exhibiting a relatively common inclination towards academic or personal engagement with feminist movements and issues, it tends to be more individualized rather than institutional[27]. Regardless of whether women chose to put on such engagements because they see it as themes they care about, because they believe it can be assets in the selection process, or whether states tend to privilege self-identified feminist candidates when searching for candidates, the truth is that many of the female candidates have this kind of profile.[28]

Moreover, Vauchez reached two main conclusions: firstly, the list of women states put for the seat of an international judge are mostly "*des hommes comme les autres"*[29], which means women whose profiles are much comparable to those of their male colleagues. This phenomenon is unsurprising although limiting the IC's chance to be *de facto* diverse completely. In Section III.2.1, we observed that the prevalence of male career paths as the norm for attaining judgeships in the IC (International Court) has inevitably influenced perceptions regarding qualified and suitable candidates. Consequently, states may tend to appoint women whose credentials and attributes closely mirror those of their male predecessors, mistakenly assuming that such women are inherently superior to others with diverse legal backgrounds and expertise. Conversely, as women break into previously inaccessible spaces, they face the

[25] ibid p.210
[26] ibid p. 214
[27] ibid
[28] ibid
[29] ibid p.216

challenge of conforming to those societal expectations they know will better work to their advantage.[30]

Secondly, by contrast, women do not seem to meet all the requirements for this kind of process. Unfortunately, these cases raise a plausible suspicion that states may be using women candidates only to comply with gender balance rules when, in fact, they are rotting for the male candidates to be elected[31]. This second group does not mean these women are less qualified. They usually simply do not have visible political resources or internationalized experiences, and "the detention of purely legal/technical capital usually does not suffice to join the club".[32] However, there are instances where women may indeed have less experience, such as when they are significantly younger. A notable case is the appointment of Abigail Lofaro in Malta, whose CV appeared comparatively weaker that her male counterpart. Nevertheless, it was reported by local newspapers and the PACE that there were other women in Malta who possesses stronger professional qualification at the time, which could have been considered for the position[33]

CVs provide only a limited glimpse into the selection process, as they fail to convey the full extent of candidate's qualifications, that lies behind every election and that women candidates presented by states to the ECtHR are qualified and that probably, overlook capable women in their selection process[34]. Accordingly, as Grossman states that "It is difficult to believe that in a world of over 7 billion people, only one woman is qualified to sit on the seven-member benches of the ECOWAS, IACHR, and WTO Appellate Body, and on the 21-member bench of ITLOS." [35]

If there is a large pool of qualified women[36], the underrepresentation is probably explained by i) the fact that States are not appointing those qualified women ii) the criteria to define "the

[30] For more about women tending to "masculinizing" or adopting an "androgynous version of themselves to adapt and succeed vide Mary Beard (2018) pp. 50-53
[31] Vauchez (2015) p.216
[32] Ibid p. 219
[33] ibid (2015) p. 220. This case happened after Malta refused to comply with a both-sex rule, and when it did, both the newspapers and the PACE noted that Malta did not put forward the best female legal professionals they had which is suspicious and probably means they did it on purpose to increase the chances of the male candidate being elected.
[34] Corsi, (2021) p. 998
[35] Grossman (2016) p. 86
[36] Vauched (2015) & Grossman (2016) (Corsi 2021)

more qualified candidate" is not impartial and inherently jeopardizing women due to common gender stereotypes iii) and nomination and election rules are biased.

III.3 Biased appointment processes

Although both women and men have equal rights by law to sit at the ICs, factually, they do not stand at equal positions on the marathon to get there, nor do they face the same obstacles. One of those obstacles is the unconscious bias and gender stereotypes against women, which jeopardizes the assessment of female candidates' applications. The situation is aggravated by the vagueness of the criteria provided in the selection rules and both the lack of transparency in the processes of nomination, and the relevance of political connections.

III.3.1 Common Bias and Gender Stereotypes Against Women

To begin with, there are still cultural and social norms that perpetuate gender stereotypes[37], reinforcing outdated and unfair perceptions of women. Stereotypes are often concealed and linked to our unconscious thoughts, serving as both the cause and manifestation of structural disadvantage and discrimination experienced by specific groups of people. Essentially, it can be defined as widely accepted beliefs about groups of people.[38]

Due to world's history of men as the decision-makers, many of the characteristics understood as good are inherently associated with male features (ie. a deeper voice being associated with authority and consequently to leadership). Mary Beard explains, for instance, that public discourse and oratory were simply skills that women in antiquity were considered incapable of having, they were practices and competencies exclusive to masculinity, defining gender. It was one - if not *the* - attribute that defined masculinity. In fact, in ancient literature, the authority of the deep male voice, contrasted with femininity, is constantly highlighted, a deep voice signified masculine courage, while a high-pitched and feminine voice signified cowardice.[39] Other classical writers insisted that the tone and timbre of women's speech always threatened

[37] In a survey conducted by the EU, according to some interviewees, "the presence of many women in the judiciary might undermine its perceived authority since the popular image of the profession is still predominantly masculine" and one of those respondents claimed that "J*ustice was handed down by men and the fact of being male was an important component of the professional model. Authority was linked to physical presence, a powerful voice and the fear inspired*." Cfr. Anasagasti & Wuiame (1999) p 25.
[38] Timmer, p.708
[39] Beard (2018) p. 31-32

to subvert not only the male orator's voice, but also social and political stability, health, and the entire state[40]

Additionally, Schultz's research reports that female judges in 1998 started facing conflicting expectations and negative prejudices in their roles. They noted that women were expected to conform to gender-specific behavior by showing qualities such as understanding, empathy, charm, collegiality, and a certain level of feminine reserve. However, they also encounter negative biases, such as perceptions of incompetence, inability to handle workloads, subordination, lack of authority, and limited career ambition.[41]

Schultz acknowledges that with the renewal of generations, these perceptions have become less prominent, although they still persist to some extent. In a study in 2009 and 2010, both genders claimed that women were as good as men, there were no mentions of women being incompetent, however, it remained unchanged that women complained about career deficits due to "male-dominant behavior, arrogance, and excessive self-esteem".[42]

Regardless, the Author also asserts that any mention of gender started to be met with hostility from a significant fraction of the participations[43], thus one can only wonder: the observed progress genuine, or is it simply the case that expressing opinions like those given by some respondents in 1998 is now understood as politically incorrect, leading individuals to refrain from speaking out altogether?

Gender stereotypes and their impact on women were addressed by Sharyl Sandberg, who cited an experiment conducted by Professors Flynn and Anderson. The experiment involved a Harvard Business School case study featuring Heidi Rozen, an accomplished venture capitalist. Half of the students read the story as Heidi, while the other half read it with the name changed to "Howard." Despite identical achievements, students perceived Heidi as selfish and unlikable compared to the equally competent but likable Howard. The same data with one difference - gender - created completely different impressions. This experiment confirms that success is correlated with likability for men but negatively correlated with women. Stereotypes ascribe

[40] ibid
[41] Schultz (2017) p. 35
[42] ibid
[43] ibid

men with leadership qualities while women are expected to be caregivers. These opposing expectations influence professional outcomes, with traits associated with success predominantly attributed to men. Heidi's career-focused approach challenges these expectations, leading to less likability, whereas Howard aligns with typical male stereotypes. "The result? They liked him, they didn't like her"[44].

All of these unconscious biases and gender stereotypes are relevant to the appointment and selection processes of ICs because, even if the rules equal rights and duties to men and women, the evaluation's frame of reference is still masculine[45]. Timmer asks "why would women actually have to adapt to a masculine norm?"[46], I propose the following question for reflection: why should women adapt to a patriarchal society's unwritten expectations and perceptions of *competence* and *quality?* And how should the institutions prevent it?

Ultimately, the key point is that even if the rules and procedures for procedures for appointing judges appear to apply in a formal sense, the pursuit of formal equality often becomes overly fixated on technical and legal aspects. This approach fails to adequately consider the historical and social challenges faced by women and other underrepresented groups.[47]

The rules must ensure gender equality, however, ensuring *de facto* equality begins by acknowledging the actual experiences of a marginalized group within the context of existing rules or practices.[48]

III.3.2 The Nominations and selection procedures for international judgeship

Firstly, there is a problem with timing since some processes take many years which may coincide with women's childbearing and child-rearing years. As a result, some women may face a choice between pursuing a career and raising a family. Real-life cases show that, despite the difficulties, many female professionals manage to have both a career and a family and to

[44] Sandberg (2013) p. 61
[45] Timmer (2011) p.711
[46] ibid
[47] Nussbaum (2007) *apud* Timmer (2011) p.711
[48] Timmer (2011) p.711

succeed in facing challenges and obstacles their male colleagues do not have, often at the expense of making hard choices or carrying a double workload.[49]

Secondly, the rules of the game jeopardize women. In any sector, including the judiciary, there are unwritten rules that govern daily practice. These informal "rules'' shape the working patterns both inside and outside the workplace and are based on traditional male professional models.[50]

Thirdly, regarding the nominations and selection processes, there is an issue common to both, which regards the said qualifications candidates must meet. The most common qualifications provided in ICs Statutes regard ethics (judges must be of "high moral character"[51]), and their professional experience (judges must be "of recognized competence"[52]).

These kinds of discretionary criteria open room for *arbitrary* and unfair selections when the process itself is vicious and the old networks already know whom they want to pick. Although some courts mention in which fields of law candidates must have "recognized competence", there is no detailed specification. Is it having articles and literature published? Is it having previous experience in international organizations? Is it the one with more academic qualifications and specializations? Is it being a former judge from a national high court?

There is no pre-established quantitative weight for the different kinds of qualifications, nor a list of which kind of features are considered the most valued. Thus, although the criteria are vague to allow different kinds of profiles to fit in, it also reduces the accountability of the process since there is no way of comparing candidates objectively. Besides, as approached in the previous section, this kind of wide criteria eventually is interpreted by what is customary, through a male reference, making it not very gender sensitive. For instance, for the woman judge more than others, the testing to fit in the "accepted institutional actor"[53], may be discriminatory[54], given that presumptions about female care ethics in judging open questions on whether she will be suitable for" internalization of accepted ways of doing things".

[49] Anasagasti & Wuiame (1999) pp.48-49.
[50] Ibid, Beard (2018) p.66 and Aoláin (2015) p.232
[51] ICJ Statute art. 2; ECHR art. 21; ITLOS art. 2 nº1 ("highest reputation for fairness and integrity"); CJEU TFEU art.253 " persons whose independence is beyond doubt"; Rome Statute art.3 a)
[52] ITLOS' Statute art.2 "… in the field of the law of the sea"; ECHR art.21 "...in human rights law or the law of the state concerned"; CJEU, TFEU art. 253 "must possess the qualifications required for appointment to the highest judicial offices in their respective countries or be jurisconsults of recognized" competence"
[53] Fionnuala (2015) p.233 *apud Olsen (2009) p.13*
[54] Fionnuala (2015) p.233

The lack of concrete evaluation metrics eases the way for the *boys' networks modus operandi*, where favors are traded, exchanging political appointments.[55] This situation happens both in the national nominations phase - since state members are invited to provide a list of candidates[56] who must meet the qualifications provided in the statutes of the courts - but also in the election phase.

For instance, a percentage of the national higher courts' judges are political nominations, a field where politicians engage in friendship and confidence circles that mostly keep women out, and where they are also underrepresented. Thus, whenever the criteria for nomination and election for the ICs include past relevant experience, namely on international bodies or on higher courts (i.e Supreme or Constitutional Courts), women end up doubly jeopardized, in a vicious circle. This is aggravated when IC's Statutes provide that judges must possess "qualifications required *in their respective countries* for appointment to the highest judicial offices"[57], increasing the state's discretion and generating inequality between candidates.

As Bohlande alerts, judgeships can also be "seen as bargaining chips in a game of mutual nepotism" and "political expediency and diplomatic necessities more often than not will override the demands and needs of the situation". It was noted that, although formally individuals can manifest interest in the national calls to become international judges, in practice they instead need to be "called" for the position given that States are the ones proposing candidates. A crucial factor in the nomination is "being on the radar screen of, and appreciated by, one's own government, particularly by some key civil servants".[58] In the same vein, argues Vauchez, claiming the "accumulation of legal and political capital has long been the key to success for international legal elites"[59], and these elites "work to preserve their integrity and hegemony—be it in terms of race, class, or gender."[60]

Moreover, elections of judges are made in Assemblies through the votes of Member States[61], which allows for the trade of votes, having future elections for other posts in mind, but also political alliances, rather than having a technical and meritocratic base choice. Note that when

[55] Follesdal (2012) p.442
[56] ICTY Statute art.13, nº1 a) & b); ITLOS Statute art.4 nº1; TFEU art. 253; ECHR art.22.
[57] Ie. Art. 2.ICJ Statute; Rome Statute art.36 4) a) i); TFEU art. 253
[58] Terris, Roman & Swigart (2007) p. 23
[59] Vauchez (2015) p. 217
[60] Vauchez (2020) point 27
[61] ITLOS art.4. nº4; Rome Statute art.6 ECHR art.22 ICTY Statute art. 13 *bis;*

a person is elected to a sit, rather than having an objective and sustained evaluation of its application, the margin for the influence of conscious and unconscious biases is tremendous.

To illustrate, Bohlande revealed that eight of twenty-five judges at the ICTY and the shared ICTY/ICTR appeals chamber had no criminal judicial experience. Many of them had no experience in international criminal law, nor did they have even fifteen years of remarkable professional experience.[62] This is interesting, given that many seem to discuss the ("lack") of competence by female candidates to explain why they end up not being chosen, and the same standards and discussions do not seem to be relevant when they regard men.

Finally, even when Courts have aspirational language regarding gender balance, providing as a goal to consider in the election, it does not provide any consequence for the ignorance of such orientations, unless they provide for mandatory quotas.[63]

Achieving fair representation of women in the judiciary requires more than mere access to the profession. As long as informal rules continue to reflect outdated and male-centric traditions, women will consistently face unequal opportunities and a disadvantageous starting point. O rectify this, it is imperative to reevaluate these rules, establish new standard and foster equal expectations for both men and women.

IV. Why do we need more women on the bench?

Although we can sense progress, there is still a long path ahead for the goal of gender equality at the ICs to be achieved. Why is this goal worth fighting for? Why do we need more women on the international court's benches? This thesis aims to find possible responses to such questions, to wit: the state's legal duty and commitment to ensure sex-representativeness; the quasi-legislative role of the ICs; parity representation as a condition for legitimacy; the eventual differences women bring to the judiciary and court's judgments.

IV.1 States' legal duty and commitment to ensure equal sex-representativeness

[62] Bohlander (2007) p. 354
[63] Topic discussed on Section V.2.2

Not only are states legally bound to ensure that both men and women are given equal opportunities to participate; the legitimacy of ICs can be adversely affected by sex-unrepresentative benches. Conversely, this legitimacy can be enhanced by more representative benches. "International courts exercise public authority, and their authority requires justification".[64]

Numerous States willingly joined various legal instruments such as international conventions and treaties which both provide for an equal world in general terms, but also for gender equality in concrete and the arising necessary result of an equal chance for men and women to achieve public office and decision-making positions such as the international benches.

Both UN institutions[65] and its signatory States are bound to UN Charter's provisions, namely article 8 which provides 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."* just like its preamble which "*reaffirm 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*"

Several human rights treaties demand the commitment of States to promote and ensure gender equality. Firstly, art. 2 of the International Covenant on Civil and Political Rights provides that States will "undertake *to ensure the equal rights of men and women to the enjoyment of all civil and political right*s", namely the access to public office and general decision-making positions. Likewise, Art. 7 of the UN Convention on the Elimination of all Forms of Discrimination against Women demands States take 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 hold public office and perform public functions at all levels of government"* which must be read in articulation with art. 8 whereby States compromise 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*

[64] Grossman (2016) p.88

[65] For instance: the ICJ, the UN's principal judicial organ, whose Statute forms an integral part of the UN Charter; The ICTR which was established in 1994 by the UN Security Council through Resolution 955 in the aftermath of the Rwandan genocide; The ICTY was established by the UN Security Council in 1993 through Resolution 827 to address the atrocities committed during the conflicts in the former Yugoslavia, which began in the early 1990s; The ICC which operates as an independent judicial institution, but has a cooperative relationship with the UN established by the Rome Statute.

international organizations". In addition, the Beijing Declaration and Platform for Action, endorsed by 189 countries, emphasized the importance of the full participation of women in decision-making, calling for equal opportunities and participation of the sexes "in all national, regional and international bodies and policy-making processes."

These normative commitments rely on the UNGA's intent to promote concrete results. In February 1997, Resolution 51/69[66] urged States to "*commit themselves to gender balance (...) in all international bodies, institutions, and organizations, notably by presenting and promoting more women candidates.",* eighteen years later, in 2015, Resolution 70/133[67] was adopted, urging for gender parity throughout the UN. In 2019, the Human Rights Council adopted Resolution 41/6 that " *Calls upon States, and encourages the United Nations and other international institutions, to promote a balanced gender representation and equitable geographical distribution in the composition of international bodies at all levels…"*[68]. Moreover, it originated a report on current levels of representation of women in human rights organs and mechanisms such as the Advisory Committee, the treaty bodies, and the special procedures established by the Human Rights Council. The Council also requested for the report to include good practices by States in nominating, electing, and appointing candidates to ensure balanced gender representation, in line with the system-wide strategy on gender parity, and recommendations to assist the Council and Member States in that regard. [69]

Besides the UN legal instruments, many regional organizations have their own human rights legal tools such as the American Convention on Human Rights (art. 23 " *Every citizen has the right and opportunity to take part in the conduct of public affairs" and "to have access, under general conditions of equality, to the public service of his country")* and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (art. 4 provides for the reorganization of women's right to "*have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making").*

The African Charter of Human and People's Rights (art. 13 "All citizens shall have "*right of equal access to the public service of his country"* and the "*State shall ensure the elimination*

[66] Resolution Adopted by the UNGA, 10.02.1997, para. 27
[67] Resolution nº70/133 adopted by the UNGA, 23.02.2016 para 27.
[68] Resolution on the Elimination of all forms of discrimination against Women and girls, adopted on 10.07.2019
[69] Current levels of representation of women in human rights organs and mechanisms | OHCHR (last visited 21 May 2023)

of every discrimination against women'"). Art. 9/2 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa affirms that "*States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making".*

Moreover, the ECHR provides in art.14 a general prohibition of discrimination (*1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*). Furthermore, in 2004 the PACE approved Resolution 1366 whereby it was announced they would no longer "*consider lists of candidates where (...) the list does not include at least one candidate of each sex*.[70]

The EU Member States are bound by the European Charter of Fundamental Rights which provides in art. 23 the states must ensure equality between men and women "*in all areas, including employment, work and pay".* Clarifying that *"The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex".* Also, the EU has been assuming a commitment to a Union of equality with the Gender Equality Strategy 2020-2025.

Irrefutably, States have a legal obligation to advocate and strive for gender equality in international court systems. This legal responsibility has already been established, and the ramifications of its disregard are numerous. In the subsequent chapters, we will examine further dimensions that exhibit why this duty should be a priority rather than just "one more duty" and factors that may explain why States fail to fulfill this obligation.

IV.2 Legitimacy and representation

[70] PACE Resolution 1366 (2004): Candidates for the European Court of Human Rights at para 3.ii

Although Court's primary function is adjudicative and to interpret facts and apply the law, ICs have a quasi-legislative role that implies clarifying and elaborating legal rules (IV.2.1). Such idiosyncrasy explains how diversity in the IC's bench has higher importance than in regular domestic courts, and how the underrepresentation of women (V.2.2) generates a lack of democratic, normative, and sociological legitimacy of IC's decisions (IV.2.3 & 4).

IV.2.1. The political role of international Courts

Unlike legislative bodies" of "representative democracies" primary function is to "represent the substantive interests of the represented"[71], the court's primary function is *adjudication*, which signifies they are expected "to conform to standards of proper judicial practice, including standards of legal reasoning, legal interpretation, and procedural fairness, and norms of judicial independence and impartiality."[72]

Yet, Courts have additional functions besides the strict deductive legal reasoning. One such function is the development of international law, which requires the exercise of discretion in the interpretation and application of the law, in weighing legal principles, in the interpretation and assessment of factual circumstances, and in filling in gaps in the law.[73]

Moreover, courts clarify international legal norms, creating case law with a binding force equal to codified law. Inevitably, ICs may determine how fundamental rights must be interpreted (i.e. ECtHR; ACtHPR), decide which states committed crimes (i.e. ICC), and ultimately shape the world. International judges are important political actors[74] whose decisions have significant implications for the global political landscape.[75] In sum, in performing their adjudicative functions, by interpreting a complex body of international norms with authority, they go beyond dispute resolution, exercising public power that extends a state-centered model.[76]

[71] Mansbridge (1999) pp. 628-657
[72] Holst & Langvatn (2021) p. 475
[73] ibid. p.476
[74] About the political role of ICs cfr Alter (2014)
[75] See the impact on the international community, for instance, of the CJEU decision Flaminio Costa v ENEL (1964) which established the primacy of European Union law or Van Gend en Loos v. Nederlandse Administratie der Belastingen decision which established the Principle European Law's Direct Effect.
[76] Torbisco-Casals (2021) Section 2.

Although courts are expected to decide through impartial legal reasoning, higher courts - starting at the national level with Supreme and Constitutional courts - undeniably assume a political role.[77] That is the reason in most states part of the judges' spots in these Court are of political nomination – just like in ICs where States appoint candidates. Consequently, just like in legislative bodies, a substantive interest representation[78] is a relevant concern also in ICs.

Besides, they often have the distinct purpose of representing states, with the primary recipients of their judgments being the signatories to the relevant treaties. On the other hand, private individuals or the global community were not typically the focus of international court proceedings, however, their jurisdiction has evolved, and individuals have also become international law subjects. After the second world war, with the emergence of International Human Rights, international law has been providing individuals rights and duties, in some cases extending their legal personality to questions of direct criminal responsibility[79]. Additionally, individuals have been given the opportunity to sue states, including their own, for violations of their rights under international law[80].

The current challenge is to heighten awareness among States of the need to expand their focus to represent not only states but also groups of individuals who are considered constituencies. This shift requires a broader understanding of representation beyond state-centric perspectives and necessitates a commitment to acknowledging and advocating for the diverse interests and concerns of specific groups within the population namely - and this work purpose - Women.

Likewise, the legal norms ICs develop must be both perceived and demonstrated to be responsive and fair, not only to the parties involved in the immediate dispute but also to the broader community that may be impacted by the longer-term effects of such interpretations.[81]

[77] To address whether courts should have such a political role, and whether said additional functions represent a possible detour from the separation of powers proper of democratic institutions is, however, beyond the scope of this thesis.
[78] Substantive representation refers to the extent to which representatives advocate policies and laws that advance the interests of the group they represent, regardless of whether members of that group hold the position of representative Mansbridge (1999 & 2003).
[79] ICC's Rome Statute Art. 25
[80] Art. 263/4 TFEU enables individuals to litigate before the CJEU.; Art. 34 of the ECHR provides that the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties before the ECtHR; Art. 30 f) of Protocol on the Statute of the African Court of Justice and Human Rights provides that individuals are entitled to submit cases before the Court.
[81] Folllesdal (2012) p.445

This includes ensuring that the interests and rights of all individuals, regardless of gender, are adequately considered and addressed in the development and implementation of legal norms. For instance, various interpretive decisions have had adverse impacts on women, namely through the interpretation of cases[82] of rape as acts of genocide[83] or torture[84].

The following sections will address the theories of representation and democratic legitimacy and how they can be applied to ICs.

IV.2.2 Democratic Legitimacy and Representation

The theory of representation can be traced back to ancient Greece and Rome, where the concept of direct democracy emerged. However, democratic representation and civic participation was not linear and did not include women. In Ancient Rome, women were continuously excluded from traditional civil participation[85], namely from acquiring the statute of citizens, even after the proclamation of the Antonine Constitution.[86] Representation translated into the idea of a representative government, where citizens elect representatives to make decisions on their behalf, emerged much later, in the 17th century with philosophers such as John Locke, who argued in "Two Treatises of Government" (1689), that representation was essential for a democratic government that derived from a social contract between the people and the ruler (the state). Herein, the purpose of the said contract was to protect the natural rights of people, for such, he considered that it was essential to ensure that the government remained accountable to the people, listening to their voices, and representation was the key to achieving this accountability. Women also spoke out about their own representation. For instance, Olympe de Gouge's 1791 Declaration on the Rights of Women and the Female Citizen[87], in Article 10 states not only of the right of women to have an opinion and a voice but of the right of women

[82] These interpretations and development of international law benefited from the involvement and notable role of the female Judge Florence Mumba. Cfr. The Furundzija case and in the Kunarac, Kovac, and Vukovic case. Cf. Acevedo (2020) *apud* Folllesdal (2012) p.439
[83] ICTY Cases Prosecutor V Anto Furundžija (1998, para 164–86); Prosecutor V Dragoljub Kunarac Et Al (2001 paras 436–64, 515–43)
[84] ICTY Case Prosecutor V Zejnil Delalić Et Al *("Čelebići")*, para 475–96; ECtHR case Aydin V Turkey 1997
[85] However, women could, in exceptional circumstances, publicly defend their particular interests (their houses, their kids) they could not speak for men nor the community as a whole. To illustrate, *Hortênsia* escaped punishment from her public interventions regarding a wealth tax to finance a war effort that was affecting women. Such permission only happens because she explicitly acted as a representative of the women of Rome (and only the women). (Beard 2018 p.29)
[86] ANDO (2016) pp.7-27
[87] Available at Déclaration des droits de la femme et de la citoyenne | BNF ESSENTIELS

accessing tribunes, as long as these public manifestations do not hinder the public order established by law.

In the 18th century, James Otis, an American lawyer, gave a speech in response to the British government's attempts to levy taxes on the American colonies without their consent or representation in the British Parliament. Otis left a mark on history with his famous quote, continuing to resonate: "No taxation without representation"[88].

Given the above and the political role of ICs[89], democratic theory can be applied to the question of judicial representativeness, as Lady Brenda Hale, affirmed, "Difference is important in judging and gender diversity, along with many other dimensions of diversity, is a good, indeed a necessary, thing. However, the principal reason for this is not our different voice, but democratic legitimacy".[90]

In fact, some authors have been arguing that ICs exercise a form of public authority as "part of the overall framework of democratic politics" since ICs are not immune or insulated from processes at the domestic level, which challenges the perception of these courts as impartial entities solely responsible for objectively settling cases. Instead, they are increasingly viewed as active participants in democratic politics. This recognition of their influence has significant implications for our understanding of democratic legitimacy and the representativeness of democratic institutions. In this context, contemporary concepts of democracy require courts to better mirror the political communities that have created them.[91]

In short, the power and authority of the State are predicated upon the consent of its subjects. Thus, the democratic legitimacy of decisions made by authoritative bodies - such as an IC - is dependent on the ability to represent all segments of society that will be impacted by such decisions. There are scholars, even, who argue that ICs' legitimacy needs to be beyond *representative* of society, but *reflective* of society.[92] Thus, descriptive representation affects the legitimacy of ICs.[93]

[88] J.Bell, "No taxation without representation (Part 1)", Journal of the American Revolution
[89] Section IV.2.1
[90] Vauchez (2019) point 32.
[91] Ibid point 35
[92] Caserta & Madsen (2019) point.11
[93] Larsson, Squatrito, Stiansen, St John *(*2023)

Accordingly, there is a growing recognition that the legitimacy of international adjudicatory bodies is no longer solely reliant on external factors like the interpretation of domestic and international laws and the normative authority they hold. Increasingly, internal factors such as the composition and identity of these bodies are seen as influential factos that shape their legitimacy.[94]

Specifically, "the presence of women judges increases the democratic legitimacy of the judiciary because a bench including women is more representative of the wider society which it serves than a bench with no women"[95]. In turn, the lack of women raises concerns about the fairness and impartiality of the justice system, particularly as it relates to the needs and experiences of women.

IV.2.2.1 Descriptive representation

In 1967, Hanna Pitkin argued that representation is a fundamental part of democratic governance, as it allows for the expression of diverse interests and perspectives. Pitkin theorized representation as a complex concept with multiple meanings, distinguishing between formal, descriptive, substantive, and symbolic representation.[96]

To this thesis, the focus will be on the concepts of substantive and descriptive representation. Substantive representation is "acting in the interests of the represented in a manner responsive to them"[97] in other words, it is a real "policy responsiveness" when public policies consider the impact they may have on different groups and seeks to advance a group's policy preferences and interests. Secondly, Pitkin considered that if women's perspectives and experiences remain underrepresented in decision-making, policies, and practices would not reflect their needs and concerns and therefore have negative implications for democracy. Descriptive representation, Pitkin considered that it would exist "when representatives resemble their constituents in some key respect or set of respects, such as race, ethnicity, gender, or social class. Descriptive representation is concerned with the extent to which representatives mirror the social

[94] Caserta, Madsen (2019)
[95] Follesdal (2021) p. 440
[96] Pitkin (1967)
[97] ibid p. 209.

characteristics of their constituents, and with the extent to which those social characteristics are represented in the political process.".[98]

In 1999, Mansbrige described descriptive representation as when "representatives are in their own persons and lives in some sense typical of the larger class of persons whom they represent".[99] Similar to the idea of a "mirror representation", the purpose is to ensure that representatives feel their constituencies' needs in their skins, as their own - because most of them do. Susan Dovi argues that male representatives may not always be aware of how public policies affect female citizens. Therefore, having more women in decision-making positions could help ensure that the interests and concerns of women are not overlooked or ignored, and improve the functioning of democratic institutions and address the diverse needs of citizens.[100]

There are, whatsoever, costs for the benefits to achieve descriptive representation. One of the primary challenges is the difficulty of accounting for all relevant characteristics of the group being represented[101]. Simply including a token representative or even a critical mass may not be sufficient, and proportionality is called for, since "a variety of representatives is usually needed to represent the heterogeneous, varied inflections and internal oppositions that together constitute the complex and internally contested perspectives, opinions, and interest's characteristic of any group"[102]. In fact, the most skeptics may ask: "what about left-handers? or yellow-skin people with a redhead?"[103] Should these characteristics be considered? It would be impossible to ensure the representation of all sets of characteristics and eventual combinations, therefore the focus on the aggregation of groups with conflictive interests.[104]

Mansbridge argues that for "ruling assemblies" to represent *substantive interests* they must include "at least one representative who can speak for every group that might provide new information, perspectives, or ongoing insights relevant to the understanding that leads to a decision".[105] Similarly, to ensure the legitimacy of ICs decisions, it is crucial that they encompass the aggregation of conflicting interests within their constituency. Therefore, it

[98] Ibid p. 78
[99] Mansbridge (1999) p.629
[100] Dovi (2007) pp. 307 e sgs.
[101] Holst &.Langvatn, (2021) p. 478
[102] Mansbridge (1999) p.636
[103] Ibid p.634
[104] Holst &.Langvatn, (2021) p. 478 Mansbridge p.634
[105] ibid p. 634

becomes necessary for all relevant groups to be adequately represented by their own representatives, allowing for all relevant groups to be adequately represented by their own representatives, allowing for the inclusion of all conflicting interests and maintaining the legitimacy of the decision-making process.

Lastly it is important to be mindful of the "size of the bench" when considering diversity in ICs, since there are limited spots available[106]. This limitation poses challenges in achieving a comprehensive range of diversity. Additionally, the critique of the size of the recruitment pool often arises, suggesting that there might be a scarcity of competent candidates with the relevant characteristics required for high-level technical abilities in an adjudicative body[107]. However, as already demonstrated, this argument lacks persuasiveness, as there is evidence to refute the notion of a limited pool of qualified candidates.

IV.2.3 Normative Legitimacy

International courts and international dispute settlement bodies are expected to base their decisions on accepted principles of international law, such as customary international law, treaty law, and general principles of law recognized by states. The decisions of these courts can be seen as normatively legitimate when they are based on these principles and are perceived as fair, impartial, and consistent with the values and interests of the international community.

A Court is legitimate "when it possesses justified authority" which ultimately will make people accept it because "of a general sense that the authority is justified".[108] In other words, normative legitimacy refers to the "moral rightfulness of authority"[109]. There are three criteria to assess whether an International Court is perceived as legitimate: "when they i) are fair and unbiased, ii) interpret and apply norms consistent with what states believe the law is or should be, and iii) are transparent and infused with democratic norms."[110]

Regarding criterion on i), Grossman asserts that "courts where one sex is severely under- or over-represented lack normative legitimacy because they are inherently biased", since "these

[106] Holst &.Langvatn, (2021) pp. 478, 479
[107] ibid
[108] Bodansky (1999) *apud* Grossman (2012) p.651
[109] Torbisco-Casals (2021) Section 2.
[110] Grossman (2009) p.153

institutions wield public authority, yet they fail to reflect fairly those affected by their decisions".[111] Thus, as long as almost half of the population[112] (women) are mostly left out of the decision table, we can be sure that IC's decisions have their legitimacy jeopardized.

Furthermore, the propensity to accept a decision by its receptors is important to the effectiveness of any decision-making body. For ICs this dimension is a cornerstone: many ICs have the specific function of representing states and rely on them to enforce their decisions. Although there are mechanisms in place to ensure compliance with these decisions, often, they are limited in their effectiveness. An expression of this is how geographic representativeness is included in many IC's statutes: presenting to ensure all states feel they have a voice and consequently more bound to IC's decisions. [113]

States unfortunately do not always accept decisions easily, and the worst thing that can happen to ICs is for their decisions to find elevated contestation among States' constituencies. The more legitimate the decision feels for its receptors, the higher the chance of its acceptance.[114] Especially since, as international law evolved, two phenomena come up: i) legal areas which International Court's jurisdiction covers multiplied; and consequently ii) individuals and private companies earned the right to litigate on the international playfield, becoming international players and simultaneously addressees of International Court's decisions.

Expanding the scope of accountability and responsiveness can enhance the credibility of ICs and increase the acceptance of their decisions as authoritative. To achieve this, it must be considered the perspectives and reasons put forth by all parties involved, including both minorities and majorities. By bolstering the legitimacy of international adjudication beyond the consent of states it helps fulfilling an integrative role of the international community, composed not only by states but by civil society and individuals.[115]

[111] Grossman (2012) p.674
[112] UN projects roughly equal number of males, females worldwide by 2050 | Pew Research Center
[113] Holst &.Langvatn, (2021) p. 476
[114] Tom R. Tyler, "Legitimacy, and International Criminal Justice: International Perspectives" (2007) a*pud* Grossman (2012) p. 650
[115] Neus Torbisco-Casals (2021). Section 8.

IV.2.4 Sociological Legitimacy

Notwithstanding, besides the normative legitimacy of decisions, we must acknowledge the importance of sociological legitimacy, which refers to the perceptions of impartiality and fairness of the court's decisions. Plurality and proper representation of different social groups, in particular when historically excluded groups are invited to the table, impacts how the society "believes" ICs "have the right to rule".[116] Herein, a certain degree of trust in institutions is needed, especially from a sociological perspective, for legitimacy,[117] since "constituencies are likely to question the authority of a court that lacks representation of the discriminated group"[118].

Moreover, and although there is no unique female judge able to represent all women, nor the presence of a woman will necessarily bring a feminist approach, the receptors of IC's decisions often believe that gender influences the way judges interpret the law and facts and consequently the ultimate decision[119]. Thus, regardless of whether men and women judge differently or not, people believe they do, therefore the mere presence of uncommon members to this kind of panel highly impacts the sociological legitimacy of the Court's decisions.

As an example of the influence of women's presence on court panels, data from the Netherlands showed that female lawyers were subject to disciplinary proceedings less frequently than male colleagues. Although there was no evidence of differences in ethical behavior between male and female judges in Western Europe and North America, in developing countries, the participation of women in higher political and judicial positions has helped to restore public trust in the judiciary[120] since women have been shown less susceptible to bribery.[121]

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[116] Grossman (2012) p. 651. In the same vein, Judge Gladys Kessler, Former President of the National Association of Women noted that "the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged." in Bertha Wilson, "Will Women Judges Really Make a Difference? (1990) p. 518

[117] Torbisco-Casals (2021). Section 6.

[118] Ibid p. 661

[119] Ibid

[120] Winifred Kamau, "Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions" (2013) *apud* Schultz p.36

[121]Monique Cardinal, "The impact of Women on the Administration of Justice in Syria and the Judicial Selection Process" (2013) *apud* Schultz p. 36

Furthermore, in the post-World War II**,** many groups lobbied for the inclusion of women in the ICs seeking gender representation, in part because they believe women were needed in the decision-making bench to ensure perpetrators of rape would be punished, since Nuremberg prosecutor had chosen to ignore sex-based violence against women and did not introduce evidence nor prosecuted these kinds of crimes.[122] Consequently, groups like the National Alliance of Women's Organization, the Organization of the Islamic Conference, and the Lawyers Committee for Human Rights fought for the election of Gabrielle Kirk Macdonald and Elizabeth Benito for the ICTY bench. Strongly claimed for a selection of judges that would be "designed to ensure diversity in terms of geographic origin, gender, and religion"[123] and believing that the presence of women would help to "assure full justice to women in the former Yugoslavia who have been and continue to be brutalized in sex-specific ways, but also to correct the historic trivialization of the abuse of women in war".[124]

And foremost, there is a perception of bias in the bench when specific groups have been kept excluded and apart from decisions-making spheres. The historical behavior of judges towards underrepresented groups, both inside courtrooms and in their rulings, can lead constituencies to question the impartiality of judges and the judiciary. The ongoing exclusion of these groups from the bench reinforces perceptions of bias and unfairness in the judicial system, which can be reduced if previously excluded groups are included in the judiciary.[125]

A self-explanatory example is the apartheid and what colored communities suffered. In his trial, Mandela asked a white judge: "Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere, the scales of justice are evenly balanced?".[126]

[122] Grossman (2012) p. 661

[123] Letter from the Laywer's Committee for Human Rights to United Nations Secretary-General (1993) *apud* Grossman (2012) p. 662

[124]Letter of the National Alliance of Women's Organizations to the Secretary General of the United Nations, The United Nations Commission of Experts, the Members of the Security Council, and the United Nations Office of Legal Counsel (1993) *apud* Grossman (2012), p. 662

[125]Grossman (2012) p. 664, in the same vein Follesdal (2021) p. 449

[126] Nelson Mandela, The Struggle is My Life: His Speeches and Writings Brought Together with Historical Documents and Accounts of Mandela in Prison by Fellow-Prisioners 135 (International Defence and Aid Found 1986)

Groups that suffer discrimination by a judicial system are unlikely to accept and perceive a decision as legitimate while their exclusion remains. There is no trust that the system will take into consideration their needs and wishes. Can we blame them?

In short, at the international level, sociological legitimacy, holds even greater significance compared to domestic contexts, as ICs have limited coercive power to enforce compliance with their decisions. Consequently, the acceptance of ICs mandates and the exercise of public authority as binding by states becomes crucial for effective domestic compliance. Just like other international institutions, ICs "will only thrive if they are viewed as legitimate by democratic publics"[127]. From a normative standpoint when the international judiciary generates binding rules, it becomes even more imperative, from a democratic perspective, that those who are legally bound by such a normative system perceive themselves as being bound "in their own name".[128]

IV.3 Different gender translates in different judgment?

This thesis also proposed to study whether gender influences the judge's decisions on ICs and, therefore, the development of international law. If there is evidence, of different reasoning marked by gender, and, ultimately, such eventual differences have - and to what extent - a prominent impact on the judiciary and international court's decisions.

Gender equality on the bench a relatively new concern, and while the number of female judges is also still small, ergo, there are few empirical studies of gender in ICs and in international disputing settlement mechanisms. However, some research[129] have shown that there is no evidence to suggest that there is significantly different judgments or decision-making between the genders. As a matter of fact, in a survey conducted by the European Commission in fifteen EU states, both male and female judges, advocates, and public prosecutors when asked about the impact of gender on the conduct of their profession have replied negatively, perceiving "absence of any difference between women and men in terms of decision-making".[130]

[127] Buchanan, Allen, & Keohane (2006) p.407
[128] Torbisco-Casals (2021). Section 2.
[129]Voeten (2019), Boyd (2010)
[130] Anasagasti & Wuiame (1999) p. 22.

IV.3.1 Is there a gender effect?

Despite the limited evidence, some studies[131] suggest a gender effect in international criminal law cases, especially regarding situations of sexual assault and sex discrimination cases. Namely, in a study of ICTY judges showed when charges of sexual violence are at stake, "the interaction of judicial and victim enders matters for the sentencing outcome". Furthermore, they found that female judges imposed more severe sanctions on defendants who assaulted women, while male judges imposed more severe sanctions on defendants who assaulted men.[132] Similarly, former ICTY' Judge Wald mentioned "five major gender-crime precedents crafted when at least one female judge sat on the bench".[133]

According to the supra-referred survey conducted by the European Commission, those interviewed considered that gender does have an impact in cases that involve violence against women or children, family issues, and to a lesser extent, sexual discrimination**.** The study found a recognition of gender's influence, although it was particularly prevalent among women who were interviewed. Those with such an opinion considered that "women are sensitive to victims' situation", "women understand the situation better" and generally they have "a better grasp of the facts.[134] In the same sense, Judge Navanethem Pillay suggested that "women come with a particular sensitivity and understanding about what happens to people who are raped"[135].

Conversely, those interviewed considered that the gender of a judge does not influence cases related to commercial, administrative, or tax law since they are perceived "as technical areas where individual feelings do not come into play".[136] In the same vein, Justice Sandra Day

[131] Voeten (2019),
[132] Kimi L. King and Megan Greening, Gender Justice or Just Gender? The Role of Gender in Sexual assault Decisions at the International Criminal Tribunal For The Former Yugoslavia,88 Soc Sci Q at 1049-50 . See also p. 1065-66 ("Having a female judge on cases with female victims increases the sentences by about 46 months .... Female judges seem to be protecting female victims in sexual assault cases .... All male panels give lengthier sentences by 106 months if there is a male victim than those including female jurists.")
[133] Wald (2009) *apud* Grossman (2012) p.658
[134] Anasagasti & Wuiame, (1999) pp. 23, 24.
[135] Terris, Romano & Swigart (2007) p.48 *apud* Grossman (2016) p.89
[136] ibid

O'Connor[137] once said that "a wise female judge will come to the same conclusion as a wise male judge".

On the other hand, although the notion that a wise man and a wise woman will inevitably arrive at the same conclusions is often reiterated, it is an oversimplification[138]. Obviously, different wise women (or men) may reach different conclusions. A more accurate view is that being a woman and experiencing societal treatment as such can significantly shape the judge's lens through which they perceive and approach issues and potential solutions. A judge's overall perspective is a culmination of their life experiences, and if they have faced disadvantages or discrimination as a woman, they are likely to be sensitive to the subtle expressions of such biases or paternalistic attitudes."[139]

Regarding a case where a teenage girl was subjected to a strip search by school authorities, Justice Ginsburg commenting on her male colleague's behavior stated that "They have never been a 13-year-old girl" and that she did not think her colleagues, some of them, "quite understood".[140] In fact, several of the male judges were comfortable with the search, and Justice Breyer even affirmed that as a 13-year-old, between boys that would be a normal situation in the locker room.

This case highlighted the importance of judges' experiences and own views to assess which kinds of actions are to be considered offensive or intrusive. Naturally, the fact that men and women often experience life differently, gender influences their beliefs, thoughts, and therefore their judgment.[141]

Misconception can arise due to expectations placed on women. Contrary to certain beliefs, a study on the decisions of the ICTY judges concluded that "women are neither more nor less likely to sentence those found guilty to lengthier sentences" and that "despite a heightened awareness of the victimization of women in the Balkan Wars, women sentence no differently

[137] The first woman to serve on the US Supreme Court
[138] Wald (2005) p. 979,989 *apud* Grossman (2012) p.658
[139] ibid
[140] Lewis (2009)
[141] Wald (2005) p. 979,989 *apud* Grossman (2012) p.658

than a man." This research challenges assumptions about gender-based differences in sentencing practices. [142]

Furthermore, a study by Erik Voeten analyzed the decision-making patterns of judges at the ECtHR and the potential impact of gender. For such this end, the author used a dataset of over 45,000 judgments to examine the voting behavior of individual judges and the overall decision-making process of the court.[143]

Voeten's study shows that there is only limited evidence to support arguments based on fundamental differences between male and female judges, concluding that sex/gender may be a relevant factor in certain limited circumstances. Nonetheless, the author found that female judges are on average more likely to vote in favor of the applicant (the person or group bringing the case) than male judges are. Yet, there is no evidence that female judges will favor female applicants, neither are female judges more receptive to human rights cases filed by women. The only area where Voeten found evidence for a "gender applicant specific effect" is on discrimination issues where female judges are more open to considering such claims made by women, potentially due to their higher likelihood of having experienced similar situations themselves.[144]

Notwithstanding, Voeten notes that there are gender effects on civil and political liberties such as a free trial, discrimination, and privacy cases. Such effect is not as strong, though, as the effect on physical integrity rights where female judges were more likely to find a violation of the Convention[145], just like they were keener to favor applications from detained individuals than their male colleagues.

All the findings considered, the gender composition of courts affects how all kinds of issues are assessed, and not only the so-called "women's rights matters". When cases have a higher relation to gender associated issues, women's experience brings an added value – just like men do in reverse. However, even when that is not the case, I believe the sensibility for the matters, the angle of analysis, and which kind of values they prioritize may be different. Different life

[142] Meernik, King & Dancy (2005) pp. 683, 698 *apud* Hodson (
[143] Voeten (2019)
[144] ibid p.22
[145] ibid p.24

experiences will always affect the way we perceived the world, and as it was argued above, gender is an important influencer of such.

Notwithstanding, the research available is not entirely conclusive and while gender may have some influence on judicial decision-making, it is just one of many factors that can affect how judges interpret and apply the law. Other factors, such as personal experience, legal ideology, and professional background may have a greater impact on decision-making[146].

Still, even if we are not able to conclude the judgment itself is substantially diverse, Ulrike Schultz studied how female legal professionals' behavior and style of work are not like men's. Thus, the question is whether and how a growing share of women in the judiciary would change the legal practice ways and customs. Schultz believes "The influence of women in the judicial system should not be underestimated as their attitudes, their style of work, and their communicative behavior are different, and as they bring in different life experiences as women and mothers, which should be valued"[147].

In 1982, Gilligan argued that men follow a 'logic of justice,' relying on abstract rules and universal principles for objective decision-making. Conversely, women tend to use a 'logic of care,' emphasizing relatedness and responsibility towards others. Gilligan suggests that women are socialized to prioritize caregiving and acknowledging the importance of this perspective could significantly impact the judiciary.[148]

In 1991, Tannen revealed that men adopt a report-style communication emphasizing independence and social status negotiation, while women prioritize relationship-building, creating community and avoiding isolation. These suggest that contrasting communication styles have significant implications for the legal profession as language plays a vital role in legal practice. As women tend to communicate differently than men, "it cannot be without consequence for any kind of legal practice and will change the legal profession".[149]

[146] ibid p.19, .22
[147] ibid
[148] ibid p.30
[149] ibid p.31

However, both these works are essentialist[150], and no "women-fits-all" exists - a black woman will have different perspectives and experiences than a white woman[151]. The same reasoning applies to a younger or older woman. A more, or a less qualified. The factors and traits are infinite. Thus, it must be recognized that people's identities and experiences are shaped by multiple dimensions of their social identity, such as race, gender, and class, which are intersected and overlapped, creating unique experiences of both discrimination and privilege.[152]

Moreover, this thesis' discussion does not aim to address whether specific characteristics in women arise from societal gender construction and impositions, or biological tendencies. Nor does it assert that gender will inevitably have a greater impact on judges' decisions compared to other factors such as race or class. Notwithstanding, "it could be considered as a step backward to deny all relevance to gender as a factor that informs and shapes women's, and men's experiences and reactions."[153]

As stated above, we cannot strictly assume that a whole specific set of characteristics will be delivered by a man or a woman just because of their gender. Nonetheless, the expectations society has for both genders or ultimately different experiences societies subject to each gender, induce men and women to have different experiences- and both are precious to a better function of the judiciary.

IV.3.3 The Importance of Mindful Judging[154]

Experiencing the world as a woman influences the way of assessing some cases and therefore the decisions[155]. Whether the baseline for such is the judge's "feelings" or purely personal experiences which every judge has - male or female - leads to (deceptive) arguments that challenge the impartiality of such decisions. Some raise the concern of whether judges should

[150] See the debate between critical race theory (Harris 1990) and feminist critical theory (MacKinnon 1991) with regards to the essential woman and exclusionary forms of radical feminism, which brought to light long growing tensions between these schools of thought. For inquiries into intersectionality refer to Crenshaw (1989).
[151] Crenshaw p. 149 (1989)
[152] Ibid. Crenshaw coined the term "intersectionality" defining it as a metaphor for understanding the ways that multiple forms of inequality or disadvantage sometimes compound themselves and create obstacles that often are not understood among conventional ways of thinking
[153] Vauchez (2019) Point.21
[154] Torbisco-Casals (2021) Section 7.
[155] Hodson (2022) p.11

extend empathy to any party in a dispute, alerting to the fact that such a pattern of behavior may distort "the reasoning and judgment, at the risk of yielding unfair, partial or poorly reasoned decisions."[156]

Nonetheless, such an understanding does not feel right. Compassion and empathy must be properly understood as the judge's ability, energy, and commitment to be concerned with others' circumstances and experiences, and to identify the relevant facts and legal norms, rather than empathy in the sense of shared emotional experience".[157] In this context, empathy should not be interpreted as purely emotional or just as an affective state, which could potentially clash with impartiality, but rather has an important cognitive dimension.[158]

Moreover, there is a possibility that a homogeneous composition of the bench perpetuates social biases in rulings, which extends beyond the deliberate intentions or overt bias of the adjudicator and encompasses unconscious biases. Unconscious bias hampers the judges' ability to thoroughly consider the arguments and interests of individuals belonging to marginalized groups. In this context, mindfulness refers to the adjudicator's capability and willingness to impartially evaluate the claims and concerns of minority plaintiffs, which can be compromised by the judge's affiliation with a dominant group or culture.[159]

An example of this is when international conventions prioritize civil and political rights over cultural, social, and economic rights, which can lead to the concealment of gender-based structural inequalities. This choice has consequences that are not impartial and "tend to privilege male dominant social positions and values".[160] For instance, individual property rights, especially in investment claims may be prioritized, over collective land or environmental claims. However, when collective claims are brought forth by indigenous groups, this interpretation can diminish the significance of group rights, such as cultural preservation, in favor of an individualistic view of rights that favors a liberal political ideology. Consequently, women and minority defendants often express dissatisfaction with judges who typically come from privileged socio-cultural backgrounds and may struggle to empathize with

[156] Follesdal *(*2021) p.447
[157] ibid
[158] Torbisco-Casals (2021) Section 7.
[159] ibid
[160] Ibid

their perspectives or recognize the importance of issues that require personal experiential understanding.[161]

Consequently, it would seem an appropriate motive and strategy to motivate the judges' epistemological search as widely as possible for appropriate legal norms. Secondly, the tasks of international judges as developers of international law require them to perceive and "balance" the various, sometimes conflicting reasons, based on the interest of several parties to future disputes, details which the judges cannot foresee.[162]

Besides, is it possible for judges to fully ignore their background and beliefs when they are deciding? We must acknowledge the reality: it always plays a role. Even when justices do not assume it. For instance, a study from the U.S Courts of Appeals discovered that "having daughters leads individuals to have more liberal political and social positions than those who have sons".[163]

Indeed, gender serves as an aspect of identity that shapes our lived experiences, encompassing experiences of inequality and discrimination. Numerous judges have openly acknowledged the influence of personal experience and identity, including gender, on their judging.[164]

Likewise, Françoise Tulkens argued for the need to fight the myth of an "ideal of an impartial and neutral judge", claiming that fundamental rights lead to the contextualization of the norm which, when assumed by the judiciary, translates into interpretative practices that are sensitive to the diversity of interests and values involved. These practices spell the end of the myth of the literal meaning of norms and the fiction of the neutral judge"[165]

Besides, it is undesirable to have judges who are apart from the feelings and motivations of their decisions' addressees. Applying the law in a blind and heartless way is not impartiality. Rather, is a robotic way of perceiving the judge's role that I cannot support. If judges were not to use their brains and hearts, why would humans be needed for the job? We could just program an algorithm with case law and codified law and wait for the (un)fair results that would come.

[161] Ibid
[162] Follesdal *(*2021) p. 447
[163] Glynn & Sen, (2014) p. 40
[164] Hodson (2022) p.922
[165] Tulkens (2014) p. 593 *apud* Hodson *(*2022)

IV.3.4 Conclusion

Research indicates that men and women are equally effective decision-makers in general, with some variations in specific areas such as discrimination and physical integrity rights. However, available studies do not support the notion that men and women consistently exhibit different judging patterns.

In fact, the idea that women are only required in courts dealing with "women issues" is absolutely misleading. The decisions rendered by ICs about matters, for instance, of international economic law, maritime delimitation, and the employment of military force exert influence over both genders and are equally significant for men and women, as they involve shared concerns and interests[166].

Indeed, "Whether or when men and women judge differently is irrelevant."[167] In particular, "women should bear no added obligation to "represent" women, particularly because no such litmus test is applied to male candidates."[168] No one discusses which topics are "man topics". Likewise, although the presence of women increases the legitimacy of the Courts, Tulkens waives a red flag, asserting that "The presence of women on the bench cannot be considered in itself a condition for the legitimacy of international courts".[169] Women should not be on the bench just to "legitimate" or "justify" anything, women must be present at the ICs simply because there is no reason for them not to be there.[170]

V. The need for more commitment and effective solutions

There are various reasons that explain the lack of female representation at the ICs, and legal arguments supporting the necessity of having women in such positions. If women face unfair discrimination based on factors unrelated to their abilities and merits, our responsibility is to create a world where both genders have equal opportunities. By doing so, unquestionably, women will attain the highest positions. Yet, they currently do not. To identify effective

[166] Grossman (2016) p.94
[167] ibid
[168] ibid
[169] Tulkens (2014) p.587
[170] Tulkens (2015)

remedies that can address this imbalance floor is our legal and moral duty. The following sections offer suggestions aimed at rectifying the problem or, at the very least, making progress towards its resolution.

V.1 Achievements on Women's Rights are not organic nor irreversible

Unfortunately, the world has been watching a backsliding in women's[171] rights in multiple areas. Take as an example the overrule of the right to abortion by the US Supreme Court and the weakening of the Istanbul Convention with Poland wanting to formally withdraw.

The lack of representation of women in decisions making positions is historical, although recent data show an increase of female judges on the international bench, as Sally Kenney stated "Contrary to popular belief, women's progress is not natural, inevitable and, she rightly adds, [not] irreversible[172]".

Such a pessimist but realistic view is corroborated by a recent study (2021) from the Human Rights Advisory Committee on the Current levels of representation of Women in Human Rights in Organs and mechanisms which characterized the progress as *incomplete, slow-paced, and uneven.*[173]

The problem of representation is certainly an enduring one.[174] It is clear that, unfortunately, where mandatory quotas do not exist, "natural progress" seems to be a circumstantial good phase rather than a solid accomplishment. Even when progress is consistent, it is frequently far from what would be desirable.

A good example of how initiatives to bring gender balance can be like the myth of Sisyphus[175] - on the right track and still end up grabbed down to where it started - is the sad story of the Resolutions on Candidates for the ECtHR.

[171] Democratic Backsliding And The Backlash Against Women's Rights: Understanding the current challenges for feminist politics, UN Women
[172] Kenney (2013)
[173] Study of the Human Rights Committee, "Current Levels of Representation of Women in Human Rights Organs and Mechanisms - Ensuring Gender Balance, 10.02.2021, A/HCR/AC/25/CRP 1
[174] Hodson (2022).
[175] Tulkens (2015) p.224

Illustrating how fragile some accomplishments can be, in 2012, the ECHR achieved 40% of women's presence on its bench, although it is worth noting, rapidly, by the end of 2012, the situation shifted with the appointment of a male judge.

Secondly, although the PACE[176] had concerns regarding gender balance since the 1990s, it took until 2004 for a proper proposal to formalize gender balance as a mandatory requirement for states' nominations.[177] Resolution 1366 (2004)[178], it was required the inclusion of at least one candidate for each sex in the lists of candidates for election to the ECtHR. However, opposition to this resolution was found among multiple actors within both the PACE and the Committee of Ministers, which lead to amendments that created "escape routes"[179]. In 2005, Resolution 1426 para. 2, the Assembly noted "the continued existence of a clear imbalance between the sexes in the membership of the court" since 11 out of 44 judges were female at the time (para. 3). Yet, as a consequence of an all-female list presented by Latvia[180], Resolution 1366 gained an exception to "when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong". However, Latvia's exception proves the rule.

The regression of PACE began after the submission of all-male lists by Malta and the Slovak Republic. While the Slovak Republic had a current female judge and only women serving as their permanent representatives at the Council of Europe, Malta failed to provide a valid explanation for their all-male list. Both lists were rejected, and although the Slovak Republic agreed to submit a new list, Malta refused to comply. This disagreement led to a conflict where Malta accused PACE of overstepping its powers by introducing unforeseen criteria to the judicial selection process. Malta insisted that gender criteria were "illegitimate on merits".[181]

In 2006 Malta presented, again, an all-male list, though this time, managed to gather support, and the Committee of Ministers asked the PACE to "consider the possibility of modifying its own rules to allow exceptional derogation from the rule where the authorities of the Contracting Party concerned present convincing arguments to the Committee of Ministers and the

[176] PACE elects ECtHR' judges, from a list of three candidates presented by the signatory States, provided in ECHR's art. 22
[177] Hodson (2022) p.918
[178] PACE Resolution 1366 (30 .01.2004) decided "not to consider lists of candidates where (2.) the list does not include at least one candidate of each sex"
[179] Vauchez (2015) p.201
[180] Latvia justified its all-female list explaining that no male candidate had applied after the national advertisement of the position.
[181] Vauchez,(2015) p. 204- 205. See her article for the full and detailed story.

Assembly to the effect that, in order to respect the requirements concerning the individual qualifications of candidates, it could not do otherwise than to submit a single-sex list"[182]. As of 2023, there are only 10 women out of the 46 members of the Committee of Ministers.

On the other hand, PACE's Committee on Equal Opportunities for Women and Men found that "the notion that the rule could play out to the detriment of the other criteria is an assumption that damages the credibility of female candidates and female judges on the European Court of Human Rights" since it " presupposes that a State may face a situation where there is not one single woman at least as qualified as a man - which is impossible".[183]

Ultimately, the Court was asked to deliver an advisory opinion stating that "in not allowing any exceptions to the rule that under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention".

Finally, Resolution 1366 was amended by Resolution 1627 (2008)[184], with a slight change by Resolution 1841(2011)[185] ending up with the extra following paragraph "The Assembly decides to consider single-sex lists of candidates of the sex that is over-represented in the Court in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of art. 21 para. 1 of the ECHR. Such exceptional circumstances must be duly so considered by a two-thirds majority of the votes cast by members of the Sub-Committee on the Election of Judges to the ECtHR. This position shall be endorsed by the Assembly in the framework of the Progress Report of the Bureau of the Assembly."

As Hennette Vauchez highlights, the implementation of the 40% threshold for gender representation had the unintended consequence of restricting female participation, causing it to be seen as a "ceiling rather than a floor"[186].

[182] Committee of Ministers, Candidates for the European Court of Human Rights, Resolution 1649 (2004), Doc. 10506 (22.06.2005). This is aggravated by the fact that it is not mandatory for the State to appoint a national citizen, which increases the pool of potentially qualified candidates.
[183] Vauchez (2015) p. 206
[184] PACE Resolution 1627 (30.09. 2008)
[185] PACE Resolution 1841 (16.09.2011)
[186] Vauchez (2015) p. 209. At the time of her writing, the ECtHR had 16 female judges, representing approximately 34% of the total judges. As of 2023, there are 15 women sitting on the ECtHR.

All considered, it is astonishing how even one of the foremost institutions dedicated to the defense of human rights, including gender equality, can make strides and yet experience setbacks. It is disconcerting that a fleeting moment when female representation reached 40% in the tribunal's history sparked numerous opposing forces against the pursuit of effective measures to grant definitive gender balance in its composition. This example serves as a profound elucidation of how the gains achieved in women's rights can be swiftly eroded.

V.2 What can be done?

There are no quick fixes for addressing the underrepresentation of women in decision-making bodies. This issue extends beyond the judiciary and involves broader societal dynamics and deep-rooted challenges. Achieving profound and lasting change requires an evolution within society itself. Prejudices and stereotypes cannot be eradicated overnight. However, the law has often acted as a moral guide for shaping the desired society, and legal rules can serve as powerful tools in promoting gender equality and driving transformative change.

Some solutions might pass from more transparent and monitored nominations election processes (V.2.1), to both aspirational language and mandatory gender quotas in IC's statutes or rules of procedure (V.2.2).

V.2.1 Transparency and Institutionalized Screening

The lack of transparency and inclusivity in the national nomination procedures enables the selection of candidates who have strong connections within the system. Those responsible for making nominations have limited motivation to look beyond their personal networks or to avoid favoring individuals who may benefit them professionally or validate their own credentials. When transparency and openness are absent, it not only becomes challenging for prospective candidates to participate but also there is a lack of accountability for those making the nominations.[187]

This problem was advanced by Anasagasti and Wuiame, claiming that especially for higher positions, vacancies for judges and public prosecutors are not always widely advertised. This situation is aggravated by the fact that women are in the first place often segregated from the

[187] Grossman (2016) p. 90

man-dominated professional circles and networks where such opportunities arise and are more easily disclosed. Also appointing was disadvantageous for women, the role of politics and the discretionary criteria ("special merits") used to determine certain appointments. [188] 24 years later, as we widely discussed already, obstacles for women remain up to date, as the linked provocation: *if nobody disputes women's competence and intelligence, what is the problem?*

The lack of transparency assumes a higher importance due to the vagueness of the IC's criteria of selection, which vary depending on the specific court and allow for multiple interpretations (honest and dishonest ones), a topic previously discussed in section III.3.2. On the one hand, enhancing transparency regarding nomination and election procedures serves to increase awareness of the actual qualifying factors, such as gaining recognition from relevant civil servants or obtaining membership in the International Law Commission.[189] At the national level, greater transparency in the nomination process can involve making information publicly available on the selection criteria, detailed information about the qualifications and experiences of the candidates, and allowing civil society organizations to provide input on the selection process.[190] This can reduce the risk of bias and ensure that the most qualified and diverse candidates are considered for nomination.

Also, if there is nothing to hide, there is no reason not to give more publicity to the processes. Also, promoting accountability and creating a sense of visibility and oversight can potentially diminish the inclination to disregard regulations. The fear of negative audits and feedback can instill a heightened level of caution and diligence, thereby fostering a greater adherence to the rules.

However, after the national nominations, the international selection process must have an institutionalized screening mechanism. It involves creating an independent body to screen and assess the qualifications of potential candidates to ensure that they meet the required standards for appointment to the bench, they could vet and recommend candidates for election, and most importantly, guarantee there is no discrimination in the process. Screening can be an attempt to ensure women candidates are given fair consideration and evaluation alongside their male counterparts.

[188] Anasagasti & Wuiame (1999) pp.29 e sgs
[189] Follesdal (2021) p.450
[190] ibid

Screening mechanism has their correlation with higher representation of women demonstrated. To illustrate, three out of four courts, which employ systematic screening methods to interview and assess applicants, displayed a relatively high representation of female judges either in mid-2015 or since their inception, whichever occurred later. These courts are the ICC, ECtHR, and ECOWAS, with 39% of the total slots occupied by women, 33%, and 14% of women serving as judges respectively in mid-2015. Conversely, the courts with the lowest percentages of women representation since establishment included those with the least amount of screening, such as the Andean Tribunal of Justice (12%), IACHR (10%), ICJ (3%), and ITLOS (2%).[191]

In sum, the ICC and the ECHR are the courts that exert the most influence on states during the international selection phase, along with their screening mechanisms. There is a second group consisting of the ECOWAS and the World Trade Organization Appellate Body, both of which have screening committees but limited statutory guidance regarding candidate selection. Another group, including the AfCtHPR, the ICTY, and the ICTR lack institutionalized screening processes but do possess some statutory guidance. The remaining courts— the Inter-American Commission on Human Rights, ICJ, ITLOS—provide minimal statutory direction and lack institutionalized screening mechanisms at the international level. Notably, the group with the least statutory direction and no institutionalized screening has historically had a lower representation of women judges, while the group with greater screening and guidance has a higher proportion of women serving on the bench.

V.2.2 Aspirational references to gender balance and quotas

As already approached, States have a legal duty to achieve gender balance, as signatories' states of multiple Human Rights conventions. ICs are adjudicative bodies of international institutions which are the propellants of those conventions and thus bound by them. Yet, it seems like those norms *per se*, are not strong enough to affect the IC's nominations and selection process.

From a political perspective, aspirational references to gender balance and fair representation are, however, relevant given that it demonstrates political commitment and sharpens the moral

[191] Grossman (2016) p. 91

compass to the path we want to be on. It brings the concern to the table in a way that otherwise would not. Thus, IC's rules of procedure and statutes, must implement their own references to the need for gender balance as a goal, and preferably as a mandatory requirement in its composition. Note that by aspirational references[192] is meant the political commitment to achieving gender parity through mere guidelines or other non binding soft law instrument without actually engaging in objectives, enforceable mechanisms of hard law which would lead to actual parity (such as measures of affirmative action like gender quotas).

In fact, ICs where states were required by statute to take gender into account when nominating or voting for judges, a higher percentage of women sat on the bench in mid 2015. Examples include the ICC[193], the ECtHR[194], the ACtHPR[195], and the ad litem benches of the ICTR and ICTY.[196] In mid 2015, 32% of the judges on these courts were women. Where a "fair representation" of the gender was not aspired to or required, women made up only 15% of the bench.[197]

Notwithstanding, women's presence remains at low levels, which leads to the necessity of stricter measures. Foremost, amendments to statutes and rules of procedure of the courts must be made to include mandatory gender quotas. This measure is like braces on teeth: they look ugly, and they are uncomfortable in the beginning, yet they work and after some time, the irregularities are fixed. Quotas are an effective and pragmatic tool but also, by definition, "a temporary measure, aimed at eradicating inequality that was built up over time, once that is done, quotas will be lifted by the principle of equal treatment it is interpreted by ICs of human rights".[198]

[192] Grossman (2016)
[193] Rome Statute Art. 36(8)(a)(iii) provides that states must consider a "fair representation of female and male judges" when voting.
[194] PACE Resolution 1366 decided "not to consider lists of candidates where (2.) the list does not include at least one candidate of each sex"
[195] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, Art. 14(2), (3), 1998 which provides that the international selection must ensure that there is "adequate gender representation".
[196] ICTY's Statute Art. 13 (1)(b) and Statute of the ICTR, Art. 12 ter(1)(b) both provide that States must take " into account the importance of a fair representation of female and male candidates".
[197] Grossman (2016) p.82
[198] Turan (2015)

For instance, the Protocol to the African Charter specifically called for "adequate gender representation in the nomination process" and emphasized the Assembly's responsibility to ensure such representation in the election of judges. Despite these provisions, neither the law alone nor repeated requests from the court's Office of Legal Counsel for states to nominate women candidates resulted in the desired outcome. Consequently, parity in the ACtHPR was only attained when the Office found introduced a penalty that disqualified states from failing to submit at least one woman candidate, thus enabling the achievement of gender parity.[199]

Furthermore, while the geographic representation of states at the International Courts[200] is *prima facie* not perceived as quotas, they illustrate the concept of representation to ensure legitimacy that we analyzed in Section IV.2. If the rationale is identical, another way to ground gender quotas is by arguing that "gender should be given equal weight as geography".[201]

The UN has been considering parity and diversity as "twin goals"[202], stating that "while each entity should work to bring these two goals together, as highlighted by the Secretary-General geographic representation cannot be used as an excuse not to achieve gender parity".[203] For instance, both UNDT and the United Nations Appeals Tribunal – have always had a significant women's presence on the bench which is probably correlated with the fact that Tribunals' Statutes state that the appointment of judges shall take both geographical representation and gender balance into account.[204]

However, ITLOS's statute, for instance, provides in Art. 2, para 2, and Art. 3, para. 2, that equitable geographical distribution shall be assured and that there shall be no fewer than three members from each geographical group, as established by the UNGA. No such rule or mandatory quota exists for gender balance.

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[199] Corsi (2021) p.981

[200] For instance, article 9 of the ICJ provides that "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured"

[201] Corsi (2021) p. 999

[202] UN System- wide Strategy on Gender Parity pag.8 para.2 available at: www.un.org/gender/sites/www.un.org.gender/files/gender_parity_strategy_october_2017.pdf (Last visited may 21 2023)

[203] ibid

[204] UNDT Statute Art. 4(2)

Likewise, regarding the ICJ, Corsi proposed expanding the "convention of geographical distribution used to ensure diverse representation on the ICJ bench to include gender parity", suggesting that modification by the UNGA and UNSC to the internal procedural rules, allowing the rejection of lists which do not comply with a gender balance requirement. In other words: creating gender quotas for the ICJ composition.

All ICs which do not have mandatory gender quotas on the nomination and election processes (ie. ICJ; ITLOS; AfCHPR), should amend their statutes and rules of procedure to have explicit rules like the first PACE Resolution 1366 (2004). And yet, without more transparent nomination processes, and concrete criteria for election, a requirement on having women on the candidate lists will still not be enough to get them elected.

Additionally, the ICC mechanism to ensure gender balance effective as it is, should serve as an example to be replicated by other courts. If the available number of candidates is less than twice the required number to meet gender (and regional) voting criteria, the president of the Assembly of States Parties holds the authority to prolong the nomination period for up to six weeks. During the voting phase, every state party is obligated to vote for a minimum number of candidates from each gender, and only ballots that satisfy all the specified voting requirements, including gender representation, are considered valid. Since its establishment, the percentage of women on the ICC has consistently remained above 39%, and women have secured 47% of all judicial positions.[205]

Nonetheless, there are some counterarguments put forward by those who believe progress should be "organic" and do not support normative instruments to fix this, some call it, a "social" issue. However, the issue is, in fact, much more profound: it is a philosophical, political, and most importantly, normative, and legal issue.

Firstly, and by far the most common criticism made to mandatory gender quotas is the argument that having a "saved spot" for someone "just because" of a specific characteristic – *in casu*, gender - does not promote merit and can put unqualified women on the bench. This, in the case

[205] Grossman (2016) p. 93

of adjudicative bodies, would have severe costs when compared to elected assemblies, as this could affect the court's primary function of adjudicating impartially.[206]

I wonder: are we supposed to believe there are no qualified women in the millions of citizens in each state to be appointed every 9 years? As the former ECtHR judge Françoise Tulkens highlights, "behind that argument of competence and qualifications, an apparently neutral and worn out argument, lies merely the expression of an entrenched discrimination."[207] Sections III.2 and III.3 also demonstrated how the limited pool of qualified candidates argument is unpersuasive, and how even with the increase of women in all legal professions they remain kept out, mainly due to how biased appointment processes are. Conversely, as Grossman remarkably provokes "they do not appear to fault gender when a less qualified man is elected; instead, such an election is attributed to other causes, such as flawed selection procedure".[208] Unfortunately, it ends up being a matter of perspective and narrative.

An example is Professor Eva Brems, which was excluded from Belgium's all-male list to the ECtHR, under the justification that the only woman who had applied to the national call was "underqualified". As Tulkens highlights, it was "insulting" to Professor Brems, considering her curriculum. In truth, perhaps the Belgian Government was afraid of her "overly high-caliber skills", or wanted someone who was not a full-time academic, or, who knows, they simply believed Belgium already had a Woman for a long time on that spot and truly wanted a man[209].

Some argue that beneficiaries of quotas might be seen as lesser or less competent than their male counterparts, despite having equal or superior qualifications. As rephrased by Grossman, "Women would not be in the courtroom but for the quota". Thus, this association between quotas and a perceived decline in the competence of judges would pose a risk to the credibility and authority of the court.[210]

Despite the critics, quotas have been proven effective. However, to create mandatory quotas within International Courts' statutes, it is imperative to garner substantial support from states. Research has been indicating that a mere critical mass of one-third of states can bring

[206] Holst (2021) p. 479
[207] Tulkens (2015) p. 226
[208] Grossman (2016) p. 94
[209] Tulkens (2015) p.226
[210] Grossman (2016) p.280

meaningful change, as the backing of "critical" states and the socialization of other states can transform a minority standpoint into a consensus.[211] To get states' support they must feel validation from their constituents, and preferably, pressure to act. Lobbying initiatives like GQUAL, which advocates for gender parity in international representation, could potentially influence key national governments to endorse gender parity within the ICs.[212]

By implementing these measures, ICs may overcome the structural and systemic barriers that have historically limited women's representation on the bench, promoting greater gender diversity and balance in ICs and leading to more representative and effective decision-making.

VI. Conclusion

The underrepresentation of women on the benches of ICs is an evident issue that needs attention and action. Achieving gender balance is not solely about numerical parity but is also fundamental for fostering a legitimate and inclusive international judicial system. Dispelling myths surrounding the qualifications and relevance of women in decision-making processes is essential, as women are fully capable of effectively contributing to multiple areas.

However, while we cannot assume there is only one certain type of woman, recognizing the unique experiences and challenges women face in their careers, as well as during the nomination and selection processes, is crucial in striving toward gender balance.

Transparency is fundamental to ensure fair selection processes, both on the national and international level. Although the screening mechanism can help with more attention and people watching these processes, it is not undefeatable. Gender quotas, as mandatory requirements for legitimate benches, are, therefore, an effective and needed measure.

Furthermore, the underrepresentation of women reflects deeply ingrained societal beliefs, perceptions, traditions, and unconscious biases, which cannot be ignored. Overcoming these barriers is a societal commitment that demands examination and rectification of the systemic

[211] Finnemore & Sikkink (1998) pp. 901-903
[212] Corsi (2021) p. 999

exclusion that women have historically faced. Regardless of the origins of the differences between men and women, it is imperative to question and address the systematic exclusion of one group. "If these groups were identical in their reasoning and approach to legal analysis, how can we justify the systematic exclusion of one of them?"[213]

The transformation of the judiciary will be evident when we cease the need for reassurance and speculation regarding the representation of women. A truly changed judiciary will emerge when both male and female judges actively advocate for a humane judicial system.[214] In this man's world, I am sure we will have a women's future, so society and states are committed to fixing this issue.

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