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How many women judges are enough on international courts?

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1 | INTRODUCTION

The African Court of Human and Peoples' Rights (ACtHPR) made history on August 27, 2018. The majority of its judges were female—six of 11, and the first among international courts and tribunals (ICs) to secure *sex parity*—that is, numerical equality.[1] This achievement is even more remarkable given that only 23% of the judges and arbitrators of the ICs are women.[2] The milestone also prompts us to consider more closely what considerations of legitimacy entail about the proportion of women international judges.

The present composition of ICs is clearly under legal, social, and political control, and ICs have profound effects. The persistent underrepresentation of women is especially striking since not only civil society groups, but also the states who nominate and establish election procedures have agreed several treaties that require or urge a balance of gender representation.[3] So it would seem that the parity achieved by the ACtHPR should be applauded. However, that IC may now be even more gender equal than we may have reason to require of a legitimate IC—or so this article argues. A less egalitarian composition within a "parity zone" of approximately 40% of either of the main sexes seems to suffice.

The present reflections considers various possible arguments offered concerning the impact of gender inequality on the international bench, drawing in part on studies of domestic judiciaries, as well as on available research and reflections by practitioners and women international judges.[4] Several arguments support calls to increase the proportion of female international judges—but how far? Section 2 addresses some background issues: first concerning the terms "feminism," "sex," and "gender," then, the tasks of ICs that should lead us to question the present sex inequality on the international bench.

The section finally identifies four levels of inequality found in the literature: a *token* of at least one member of either of the two prevalent sexes; a *critical mass* of 15–25%,[5] a *parity zone* of at least 40% of each, or complete *parity* of sex representation as in the ACtHPR.

The next sections consider which of these levels can be supported by plausible arguments. The aim is not to test the empirical plausibility of these arguments, which often extrapolate findings about judicial behavior from domestic judiciaries in the United States. Alas, we have only pockets of empirical research on gender and ICs.[6] So complete assessment of these arguments must wait. Section 3 explore arguments in favor of *token representation* and *critical mass* based on the substantive *outputs* of each IC, including both its judgments and interpretations. Section 4 considers arguments that lend further support to the need for a *critical mass* of either gender. The epistemic processes and workings of the IC must be fair and must be perceived to be so. The valuable effects on outcomes and procedures may often also be secured by "women sensitive" or feminist male judges.[7] However, there are also argument that support a large proportion of both sexes. Section 5 considers arguments for a *parity zone*, based on arguments of compassion, the need for epistemic competence given intersectionality, and expressions of status equality. These arguments appear sound, but do not appear to support strict *sex parity*.[8] Section 6 considers and rebuts some objections to the arguments in favor of a parity zone: that they "essentialize" gender, assume that elitist female international judges can "represent" all female gendered concerns, ignore the conflict between women's empathy and the need for impartiality,—or creates a slippery slope where ICs must "mirror" a myriad of characteristics of the affected populations.

2 | SOME PRELIMINARIES

2.1 | Feminism in international law theory

The terms "feminism" and "feminist" approaches are used in several ways in the relevant literature. For our purposes, feminist approaches to international law primarily concern how biological differences and social constructs of male and female roles, and the different experiences they lead to, affect and should affect the substance, structures, and processes of international law.[9] This article seeks to use the term "sex" for issues concerning biological and physiological characteristics that define women and men, and "gender" for categories of "feminine" and "masculine" "roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys."[10] Many feminists insist that "universal" norms should include both sexes and genders, and that international law must accommodate gendered differences[11] as well as disagreements concerning the delineation between them. Feminist approaches to international include a focus on "women's concerns, such as violence against women, reproductive rights and gender-based crimes against women in armed conflict."[12] Feminist approaches also have implications for broader issues, such as the rationale and contents of international law for humanitarian intervention to prevent violence against women, international trade that affects women's livelihood, and conceptions of statehood and state responsibility for "private" family matters.[13]

Several important broader topics sometimes referred to as "feminist" go beyond this delineation, such as international peace, or "a more egalitarian, inclusive, peaceful, just, and redistributive international order."[14] These objectives have long been central to feminist political movements such as the Women's International League of Peace and Freedom, and may often be specified with gendered analysis of power and peace. These feminist approaches avoid "*essentializing*" sex or gender as the sole or key characteristic for human behavior. They acknowledge that neither women nor men are groups with characteristics all and only other members of that group share.[15] Moreover, they recognize the complex interplay or *intersectionality* among various "identities" and "vectors of disadvantage" that

include gender, race, class, North/South, disability, postcolonial history, religious affiliation, etc.[16] So some men may have more "feminine" traits and be more sensitive to feminist concerns than some women, and vice versa. This has implications for several but not all arguments in favor of increasing the proportion of female international judges.

2.2 | The tasks and features of ICs

To understand why sex and gender may matter for the legitimacy of ICs, we must consider aspects of their roles and contributions.

For our purposes, we may regard legitimacy as a matter of why and when ICs are justified to claim that others should defer to their judgments and interpretations.[17] What reasons might a state and other "deference constituencies"[18] have to defer to an IC's judgment or interpretation? The answer, broadly following Raz' account, is that an IC exercises legitimate authority over states insofar as it enables them to better achieve their appropriate objectives—what they have reasons to do. To understand when and why this may be the case, we must consider the several important tasks and features of ICs. Its legitimate authority is at stake if the IC fails in these tasks—e.g. due to a dearth of women international judges.

One main function of domestic and international courts, for states and other constituencies, is to provide sufficiently *impartial adjudication of disputes* on the basis of legal norms that the IC competently and comprehensively applies to the particular case.[19] To serve this role as umpire well, an IC must satisfy several desiderata, and losers must perceive that it does so. The IC must be designed, embedded, staffed, and must operate so as to secure and exhibit several partially conflicting normative standards or considerations, including independence from any party to the dispute and impartiality among them, high legal competence, and accountability in a broad sense.[20]

A further important function of ICs is to *interpret and develop* international law norms both in order to adjudicate present and future cases, and to stabilize actors' expectations to avoid future disputes and enhance cooperation.[21]

One important feature of ICs is that an IC must seek to ensure that decisive compliance constituencies *believe that they ought to defer* to the judgment or the interpretation of the IC. ICs cannot rely on threats of sanctions to ensure compliance, as domestic courts can. The *perceived legitimacy* of ICs may, therefore, be more important than for domestic judiciaries. Vocal, well substantiated claims that an IC is illegitimate due to sex disparity thus merit particular close attention. For the IC to carry out the adjudicatory and (quasi-)legislative tasks the legal norms the IC develops and apply must arguably be and be seen as sufficiently *responsive* and *fair* not only to those involved in the dispute at hand, but also to the various interests of the many affected parties in the longer run—including both men and women.[22]

Note that different ICs have greatly different nomination and election arrangements whose impact on gender inequity provides some lessons. States that *nominate* candidates may be urged to consider a better sex balance (as is the case with the ACtHPR[23]), and the rules regarding the European Court of Human Rights (ECtHR) even *requires* states to include both sexes when they submit their lists of candidates. Other regulations primarily apply to the bodies in charge of electing among these candidates, e.g. to secure "a fair representation of female and male judges."[24]

2.3 | Sex parity, parity zone, critical mass, gender sensitivity

It is helpful to distinguish among four levels of inequality. Some arguments support at least *token representation* of one member of a group. Other arguments favor a *critical mass* of both genders.

Originally used in nuclear physics, that term denotes the amount of a material necessary to maintain a self-sustaining fission chain reaction. In the context of sex and gender on the international bench, the critical mass would be the number or percentage of women judges necessary to effect changes in the group dynamics, to ensure that they do not simply "vote like men," and to move more men to "vote like women."[25] In studies of sex and gender in corporations and parliaments, this "critical mass" is often indicated as 15–25%.[26] A "*parity zone"* is often defined as 40–60% of either of the two most common sexes.[27] Finally, *parity* would be *numerical equality* of male and female judges, or as close to that as possible.

3 | IN DEFENSE OF TOKENS: THE OUTPUTS OF ICS

One cause for concern about the present gender imbalance is that it gives us reason to think that the IC's output—the judgments and interpretations—are biased. The IC, therefore, does not carry out its central task as an impartial judicial decision-making authority. Its legitimacy is at risk. A lack of women on the various IC benches may result in unfair substantive judgments regarding various substantive issue areas. This may be due to biases in how the IC applies a particular norm to cases, and even more how it "balances" different norms.

Scholars see differences in how judges of ICs treat rape and domestic violence.[28] In domestic judiciaries there are differences regarding sex discrimination.[29] Beyond such bias regarding traditional "women's interests," there appears to be gendered voting patterns in human rights courts, as well as in investment tribunals, the ICJ, and in the WTO Appellate Body.[30]

Other worrisome patterns concern the *balancing of norms*. The ICs must often consider how to reconcile conflicts between rights of indigenous groups to maintain their culture, or the rights concerning freedom of religion, on the one hand, and on the other hand, rights to be protected against violence. How should ICs adjudicate in cases where multiculturalism is bad for women?[31] Some states also prohibit women wearing religious headscarves, to protect public order or maintain a religiously neutral public space. Male and women judges in domestic judiciaries differ on some such issues.[32]

Broader effects of ICs concern the interpretation, and hence, the development or creation of international law. The lack of women international judges sometimes skews these processes to the detriment of women's interests in a broad sense. Examples include how ICs have come to interpret some cases of rape as acts of genocide,[33] or as torture.[34] Judge Florence Ndepele Mwachande Mumba was presiding in several salient cases, and played an important role in this development of international law.[35] Whether these efforts were due to her being a woman, or other features that have made Judge Mumba sensitive to such issues of gender, is of course difficult to assess—one challenge may be to ensure "women friendly" judges, regardless of their gender.[36]

Feminist scholarship identifies a range of interpretive choices that have been detrimental to women, such as limiting violations of the right to life to "*public* actions by the State" rather than concerns about distributive justice. How international law specifies sovereignty, security, conflict or *jus cogens* also arguably gives less priority to rights to peace, to food, and to primary health care, to the disadvantage of women.[37]

How many women international judges will it take to reduce these risks? "Panel effects"[38] suggest that a mixed bench suffices.[39] Sometimes the presence of even only *one* female judge influences their male counterparts.[40] She may first prevent or reduce overtly discriminatory premises among the judges.[41] This may occur regardless of her own voting on the case.[42] Some male judges may also defer to their female colleagues on what they perceive as "women related" issues, on the assumption—correct or not—that women have more expertise. Such arguments support the need for

"token representative" of both sexes, at least for cases where "women's concerns" are perceived to be at stake.

4 | IN DEFENSE OF CRITICAL MASS: FAIR PROCESSES

Some arguments for reducing sex disparity on the international bench appeal to "democratic legitimacy."

> 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.[43]

Such claims may be interpreted as one of two concerns about standards of *fair processes*.[44] a) that ICs should ensure the value of fair deliberation, e.g. known from deliberative democratic theory; or b) that there is an unfair distribution of influence on who should be nominated and elected to the judiciary.

4.1 | Deliberative quality

Gender inequity challenges not only the judgments of ICs, but also the quality and value of their judicial deliberations: how the judges identify and bring facts and legal principles to bear, which precedents they draw on, rules of procedure and rules of evidence, the practice of publishing separate opinions, the behavior at oral hearings, etc. Deliberative democratic theory has long addressed these *epistemic* values of deliberation, where gender and diversity is important.[45] Arguably, judicial decisions should rely on the full range of relevant facts and legal norms that pertain to the case.[46] There may be epistemic gains by ensuring more female international judges, due both to individual effects and panel effects.[47]

The individual judges' own reasoning may depend in part on their sex and gender, and members of a culturally and politically dominant group may run higher risk of latent biases or prejudices. Thus, an all-male international bench selected from domestic social elites, all socialized into certain legal and judicial mindsets, are less likely than a more varied bench to discover and be sufficiently attentive to relevant biases. Including feminist perspectives arguably facilitates "mindful judging"[48] and reduces the risk of biases against women. Thus, Rebecca Badejogbin notes that

> The influence of female judges' life experiences, "cultural background, academic education, [and] personal challenges" on the judicial process does not undermine judicial impartiality but rather helps ensure that decisions reflect the diversity of the legal subjects of the courts, thus enhancing their legitimacy.[49]

Research on judges at US domestic courts also support this value of "cognitive diversity"—"a diversity of ways of seeing and interpreting the world"[50]

> A feminist understanding of the issues may inform the characterization of the facts, the interpretation of statute and precedent, the development of doctrine, and/or the exercise of discretion.[51]

Given the historical suppression of women and populations of the global south within and by political, legal, and social structures, biases of international law and of the patterns of judgments by ICs are to be expected.[52] It is crucial in such circumstances to identify how the "objective" and "impartial" legal norms as they have evolved in fact have biased effects in favor of the established dominant groups, so that "[h]omogeneity then becomes mistaken for neutrality."[53] To the contrary, "status-quo assumptions are just as value-laden as feminist ones."[54]

To illustrate: judge Francoise Tulkens of the ECtHR has criticized how courts handle alleged conflicts between women's rights and standards of nondiscrimination and rights concerning religion, without even hearing the opinion of the women of concern.[55] Other findings may also be relevant, such that that men are on average less averse than women to economic risk,[56] and that female domestic judges appear more concerned to incorporate a variety of perspectives.[57]

The nature of collegial deliberation may change when female judges participate. Insofar as women judges engage colleagues on arguments that heed feminist concerns more in good faith deliberation, we may expect an IC to issue somewhat different judgments and interpretations both in contents and in form. Some studies indicate that "significantly higher percentages of women judges (whether at trial or appellate level, in administrative tribunals or in courts) report occasions in which they deem gender to be relevant."[58] The sex of domestic judge has been found to have a significant and independent effect for cases of sex discrimination.[59]

The arguments presented so far favors "feminist judging" or judges perceptive to feminist concerns, but not necessarily by female judges.[60] Indeed, in some courts, men may have a stronger influence than women. So if the concern is with *affecting* the deliberations of the bench, the present existence of bias may counsel *against* appointing women:

> … a male justice who makes an argument similar to one espoused by a female justice may be more likely to be heard and taken seriously by the other justices, especially on questions where, if pro-feminist, a female justice is more likely than equivalent male justices to be perceived by as "biased."[61]

However, there are at least two arguments that support specifically female judges. Some finding show that in cases involving sexual harassment of women, male judges are somewhat more likely to defer to female judges' opinions.[62] They may presume that women is more knowledgeable about these issues.[63] Or they may defer lest they appear insensitive or pretentious. However, the latter is not consistent with another finding: Male judges are somewhat more likely to decide in favor of the plaintiff also in *later* sexual harassment cases after having decided together with a female judge.[64]

What are the implications for sex inequality on the international bench? Many maintain that a critical mass of 15–25% of similarly minded members are needed to facilitate the requisite group dynamics, for a minority group to be assertive, to reduce social pressure to act like the majority, and to increase pressure on the majority members to heed the minority.[65]

4.2 | Biased appointment processes

One argument against the current sex imbalance refer to the credibility of ICs as impartial appliers of legal rules and upholders of the rule of law. They must themselves appear impartial and comply with relevant legal standards.[66] Thus, regarding the European Court of Human Rights, Keller et al notes that

> it would be difficult to justify an institution dedicated to protecting human rights and democratic principles, including the prohibition of discrimination on the basis of gender, without adequate respect and consideration for the representation of women.[67]

This argument from *integrity* draws on ICs' need for descriptive legitimacy: they must convince the various deference constituencies that it will perform its task in securing that justice is served—and be seen to do so.

The present processes of nomination and election violate standards of procedural fairness. The patterns of gender inequality suggest that some elections are biased, given the number of suitably qualified women. The causes of some of these inequitable election results are complex, due to the multilevel interplay of different bodies. First, insofar as nominations are formalized rather than simply based on "old boys networks," the criteria for nomination and election may include past relevant experience, e.g. with international bodies, or as domestic judges—which many women may have been excluded from.[68] Second, many states volunteer to nominate women for the international bench—while some states sometimes refuse to nominate women even when required to do so.[69] Malta's and Belgium's male-only nominations to the ECtHR illuminate the challenges.[70]

The Parliamentary Assembly of the Council of Europe requires that at least one of the three candidates a state nominates for the judge to fill its post must come from the under-represented sex.[71] Lists of candidates have been rejected for failing to do so. Nevertheless, Malta both in 2004 and 2006, and Belgium in 2012, maintained that they could not find any suitably qualified woman nominee. The Assembly acquiesced, after the Rapporteur of the Committee on Legal Affairs and Human Rights explored arguments that there may be exceptional circumstances to derogate from the gender requirement for the sake of other requirements.[72]

Critics have challenged the claims made about the quality of women legal professionals in Malta and Belgium and have noted that a state can nominate noncitizens.[73] The deference of the Council of Europe bodies toward states on this matter in the absence of convincing arguments by the noncompliant states is regrettable—and would appear to challenge the legitimacy of the ECtHR.

Third, the final selection body may yield gender imbalances unless explicitly required to secure "a fair representation of female and male judges."[74] This argument from the integrity of the institution provides weighty reasons why ICs should comply with such legal standards when they exist, to avoid suspicion that the institution as a whole is unable or unwilling to apply rules impartially.[75]

Such biases challenge the legitimacy of the institution especially when the state or states have a history of discrimination against the disfavored group. The biased selection may then give rise to reasonable suspicion that the appointing bodies select individual judges not, or not only, due to their competence or other relevant criteria of qualifications, but also for other reasons. Such reasons may be that the appointing bodies only know male judges, or believe that male judges will be more favorable to them, or more suited to this office, and not whether they are sufficiently impartial and the most judicially competent judges.

While this argument appears sound, what gender proportion is required to reduce or remove such reasonable suspicions remains unclear.

5 | IN DEFENSE OF A PARITY ZONE: INTERSECTIONAL DELIBERATION, STATUS EQUALITY AND LAW MAKING

Consider now arguments in favor of not only a critical mass, but also in support of both prevalent sexes in a "parity zone" of at least 40%.

5.1 | Anti-essentialist and intersectional deliberation

The epistemic argument for a broad range of perspectives lends support to a parity zone in light of the anti-essentialist and intersectional features of feminist theory.[76]

There is no *one* "women friendly" perspective that women in general—and women judges in particular—will share. Essentialism is implausible, and among such a wide range of persons we can expect many perspectives to be influenced by factors such as race, social class, geography, professional training etc. Several also underscore the challenges of *intersectionality*: Among the populations that merit particular concern are those facing multiple, interacting forms of systemic oppression such as women from the global south, or who are sexual minorities, with disabilities, etc. Several "critical" perspectives including postcolonial feminism, attune to concerns of intersectionality and essentialism, are relevant.[77]

So there will be several different views about salient facts not only between men and women, but also among women. While many men may share several of these perspectives, it seems implausible that these ranges of perspectives overlap fully with those of male international judges, however, gender sensitive. Thus, several argue for greater diversity—including sex and gender, for a more "reflective judiciary."[78]

A further argument for particular attention to sex diversity is the history of marginalization. Correcting and avoiding possible biases against many women, and populations in the global south should be high priority. At least two implications merit attention. First, such bias does not assume that male—or female—judges intentionally ignore or devalue the impact on "women's interests" or broader feminist perspectives. Rather, "in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns."[79]

Second, non-essentialism and intersectionality require that the international bench must include a large number of the various genders, and include judges with a broad range of backgrounds and "identities." We should not only call for "More women – but which women?"[80]—since different women will be affected differently by the judgments and interpretations.[81] It is not obvious that women generally, and the skewed sample of female international judges in particular, are more likely to identify the relevant issues for overlooked parties to the dispute and beyond in general,—and for the many different women in particular. We have reason to doubt these claims of "cultural feminism." The intersectional perspective reminds us that there is no reason to believe that female international judges are *representative* of women "as a group." Their socioeconomic background, aspirations and professional training may render their compassion with women and "gender issues" less different from their male colleagues.[82]

We can also recall that intersectionality has implications for male judges. Thus, in the U. S. Courts of Appeals, researchers have found a pattern of judgments in civil cases that have a gendered dimension: Male judges are more likely to vote in a "feminist" direction if they have at least one daughter.[83] Whether similar patterns exist for international judges is unknown.

Arguments from intersectionality and anti-essentialism require neither sex parity nor critical mass, but inclusion of gender sensitive judges—be they male or female. A case might nevertheless be made that there is a *higher likelihood* that female international judges will be attentive to the relevant facts, than will the male international judges. Some findings from the domestic judiciaries in the US support this hypothesis: regarding cases of sex discrimination,

> the probability of a judge deciding in favor of the party alleging discrimination decreases by about 10 percentage points when the judge is a male. Likewise, when a woman serves

> on a panel with men, the men are significantly more likely to rule in favor of the rights litigant.[84]

To ensure sufficient epistemic diversity the international benches need to be more diverse—including several women with a range of backgrounds, to make it more likely that a broad range of gender relevant perspectives are included. A critical mass of women does not seem sufficient, since each female—and male—international judge will or should bring distinct perspectives to the deliberations. This would seem to counsel that both prevalent sexes should be at least in the "parity zone" of 40–60%. Anti-essentialism and concerns about intersectionality does not support a stricter requirement of absolute parity between the two sexes. The epistemic gains are not clear by a precise 50% split among the two dominant sexes. Male international judges may be concerned about "women's" issues, however, defined, and not all women colleagues can be expected to do so.

However, these arguments also lead us to conclude that a percentage requirement—e.g. of at least 40% for either prevalent sex—is not enough to secure sufficient sensitivity and diversity of perspectives. Consider if 50% of the judges are women who all hail from similar geographic, socioeconomic and educational backgrounds. Then, the concerns stemming from intersectionality would still challenge the legitimate authority of the IC. Thus, more requirements may be necessary to ensure that a broad array of gender perspectives are represented on the international bench.

5.2 | Status inequality

Several express concern that the legitimacy of a court is at stake if a "segment of the population is excluded from membership."[85] One way to interpret this is drastic sex inequity on the international bench expresses "status inequality," detrimental to the "recognition respect" owed all members of society.[86]

The international judge is an office that is publicly claimed to be filled on the bases of certain criteria—such as nationality and specified forms of merit. When some segments of the population who satisfy these criteria are drastically under-represented in such offices, this may be evidence of a difference in real equality of opportunity. This may indicate that those in power fail to give appropriate recognition to their merit,[87] and that they regard members of these segments as "ineligible, or less eligible than others, for valued roles and various associational goods"[88] This public expression of status inequality is inconsistent with a commitment to treat all individuals with equal respect. It signals to men and women that women cannot expect to be treated as equals by the basic institutional structure of society.[89]

One might object that sex inequality on the international bench is not so much an "expression," but perhaps only an unintentional and unforeseen effect of uncoordinated actions, an excusable oversight. This defense is flawed for several reasons. These are public positions, filled by procedures with the express claim that they are in part meritocratic: "The normative legitimacy of international courts and tribunals is arguably weakened when merit is not a driving factor in the selection of judges."[90] And the inequality occurs in societies with long histories of ignoring and oppressing the interests and equal status of women. This makes it less plausible to hold that this inequality has come about simply by accident.

What if the resultant drastic inequality is the unintended effect of complex multilevel election procedures, or is a function of past performance as a *de facto*, *per se* unobjectionable selection criteria?[91] Such path dependencies may be correct. Nevertheless, in several societies, the population has come to expect equality of recognition. Then, evidence of unequal treatment may be regarded as offensive

since they imply that the authorities in charge fail to change the policies that imply that some persons are of less worth than others. "Once a population comes to expect equality of recognition, even small deviations from equality of treatment may be seen as deeply offensive insofar as they imply that some people are of less worth than others."[92] The fact that responsible actors do not adjust these procedures and criteria to alleviate their effects amounts to an expression of status inequality. For instance, the understandable interest parties have in appointing experienced arbitrators can and should be regulated both to avoid "double hatting" by a club of arbitrators,[93] and to replenish the pool of aging arbitrators with a more varied crop.[94]

This argument from status inequality clearly requires more than a "token representative," but it is not clear that complete sex parity is required insofar as several other considerations are also relevant. But all sexes are included in significant proportions—beyond what is needed for the "critical mass" effects. The implication appears to be that status equality considerations support "parity zone" of both prevalent sexes.

5.3 | Developing/making international law

A further reason to include a large number of women judges stem from the task of ICs to interpret and develop international law. Such interpretation or developing of law often amounts to law making, shaping future expectations and outcomes. At the same time, such legislative tasks are unavoidable if the judges are to decide the brought before them. Unlike legislators, the judges must be sufficiently independent from the states who nominate or elect them, to ensure the necessary impartiality between the parties to a dispute. Without direct accountability mechanisms, we cannot expect or hope that the IC should engage in a majoritarian "balancing" of the distribution of benefits and burdens at the end of deliberations about alternative possible interpretations. Still, for this (quasi-)legislative task to be legitimate, the legal norms the IC develops must arguably be and be seen to be sufficiently *responsive* and *fair* not only to those involved in the dispute at hand, but also to the diverse others who affected by the longer term impact of such interpretations—including both men and women.[95] Therefore, the international bench should include a broad range of perspectives, which again support a parity zone of both sexes, given anti-essentialism and the many different backgrounds and views of both men and women. However, it does not seem appropriate to require parity for this reason, both because of the rejection of gender essentialism, and because of the need to include a broad range of perspectives. Furthermore, the need for strict proportional representation may be less strict since judges are not accountable delegates primarily focusing on the distributive aspects of their (quasi-)legislative tasks, but rather on the legal merits of the case. Again, these arguments also support further requirements in addition to a percentage of both prevalent genders, to seek to secure a broad array of gender perspectives on the international bench.

6 | DEFENDING THE CALL FOR LESS SEX INEQUITY ON THE INTERNATIONAL BENCH

The upshot of this review is that there are several reasons to object to the present sex inequity on the international bench. If the empirical claims are supported, several arguments support a parity zone of male and female judges, with good reason to aim for diversity of backgrounds and sensitivities for all judges on each of the ICs. However, the arguments do not support strict numerical gender equality.

We now turn to consider objections against these conclusions and their premises, including such concerns as whether female judges can be expected to be "representative"; and the risk of a slippery slope toward full mirror representation of all segments of the population. Why believe that

> women would transform institutions without simultaneously—or alternatively—being transformed by them …? Why did we believe that women appointed to positions of power would be 'representative' of women as a group, rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status quo? Why did we assume that women appointed to these positions would have the capacity to represent the whole, diverse range of women's perspectives and experiences? And why did we imagine that individual women would want potentially to risk their newly-acquired status by taking a stand on behalf of other women, when it would be much safer for them to keep their heads down and attempt to gain some legitimacy amongst their sceptical peers and jealous subordinates? After all, women have not exactly been welcomed into the halls of power with open arms, and invited to rearrange the furniture.[96]

Consider several of these concerns.

6.1 | A Tradeoff between judicial competence and gender?

In the past, there might be concerns that reducing the sex inequality would require sacrificing judicial merit of the candidates in order to select women.[97] There may be some disagreement about how to measure such merit, including relevant experience.[98] But the high number of very qualified female legal professionals leaves little doubt that better, more transparent and public nomination procedures and more attention to secure more relevant background experience for more women would remove any need for such triage—Malta's and Belgium's claims notwithstanding. In addition, the epistemic arguments for gender parity would seem quite similar to those supporting requirements already in place to include judges from several regions, legal traditions and areas of legal expertise. Such requirements have apparently not constrained the pool so severely as to sacrifice legal quality.

6.2 | Underlying commitment to essentialism?

Calls to increase the proportion of women international judges may be challenged for relying on "essentialist" premises. They may challenge assumptions of "cultural feminism" that focuses on the "difference" that female judges will bring.[99]

Consider a theoretical account informed by Carol Gilligan's theory, holding that: "women judge 'in a different voice', that is, they apply a feminine 'ethic of care' as opposed to the masculine 'ethic of justice'."[100] This depends on a problematically essentialist premise. There is no reason to believe that all women bring the same perspectives or feminist commitments to the bench in ways that will make for more "women friendly" outcomes. One reason is concerns about intersectionality, that it matters *which* women are included. Women judges who come from elite backgrounds, variously defined, are not guaranteed to share outlook or solidarity with poor women of color from the global south.

In response, the arguments laid out above accept intersectionality and reject essentialism.[101] Still, the concerns deserve more attention, such as objections that "cultural feminism" entails that women bring more empathy, and hence, problematic bias to the ICS.

6.3 | Compassion challenges impartiality?

Critics might object to calls for more female international judges that claim that female judges have more compassion with affected parties than do male judges—and particularly with the women involved in the cases.[102] This objection indicates that the role of compassion in the epistemic argument merits more attention.

One concern sometimes heard is that judges should not extend empathy to any party in the dispute. That distorts the reasoning and judgment, at the risk of yielding unfair, partial or poorly reasoned decisions.[103] The role of the judge is not to be responsive to the relative urgency of the parties' present needs and interests and "balance" empathy toward the parties, but rather simply apply the legal norms properly to the case. From this point of view, the panel effect of female judges may give further ground for concern—for instance that in some domestic courts, to have a women on the bench deliberating in gender discrimination cases moves the entire panel in the direction of the plaintiff.[104]

In defense, we should distinguish empathy from compassion.[105] Compassion is 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.[106] At least two responses seem appropriate regarding the value of compassion for international judges. The need for such compassion among judges is not inconsistent with applying the law. To the contrary, it would seem an appropriate motive and strategy to facilitate and motivate the judges' epistemological search as widely as possible for appropriate legal norms and arguments.

A second argument in favor of compassion concerns the tasks of international judges as interpreters, developers and *makers* of international law. For these tasks they will indeed need to perceive and "balance" the various, sometimes conflicting reasons based on the interests of several parties to future disputes, details which the judges cannot foresee. A broadly oriented attitude of compassion with the potentially affected representative parties, therefore, seems highly appropriate and important when the judges craft and develop legal norms.

It thus appears defensible and consistent with judicial impartiality to rely on mechanisms of compassion in arguments for a less gender imbalanced international court.

6.4 | Too little too late?

We may agree that if the aim is to fundamentally reconstruct international law in a more feminist direction—however, this is defined—appointing more female international judges is too little and too late both as regards the life time of international law and of the individual judge. The conceptualization and interpretation of international law is already sex biased,[107] perhaps beyond repair. Those elite female lawyers selected for the international bench will be selected and socialized toward skills and personality traits often through elite legal training to think like male judges.

In response, the arguments offered in favor of a parity zone are slightly more optimistic yet modest: the empirical research does show variations among the judges, and sex and gender impact on the deliberations. There is no claim that the elite women on the international bench can represent the diverse range of women's experiences, or that they will be, or need to be, particularly daring in acting

"on behalf of" women. But a little more diversity of perspectives among international judges is still an improvement.

6.5 | Parity zone - no Panacea?

It is important to recall that the arguments presented make limited claims about the removal of bias. More women judges will not remove all worrisome bias by providing all relevant perspectives. The arguments sketched above only holds that more female judges may *reduce* the risk of bias and lack of relevant perspectives and arguments in the judicial deliberations of the panel of judges as a whole. There is no claim that all biases will disappear.[108]

Indeed, research on US judges suggest that the judges' ideology—liberal or conservative—and party affiliation—Republican or Democrat—has a much greater impact on their voting than their gender.[109] It appears likely from these studies that gender differences in judgments is largely due to a selection bias: that the female judges are more likely to be liberal and Democrat. Whether there are similar *election biases* for international judges remains to be explored. It is also an open question whether such a bias will remain over time, if states elect more female international judges. In addition, the arguments canvassed above also lead us to support further requirements than a percentage goal, to ensure that an array of gender perspectives are represented among the international judges.

6.6 | Will women favor women's issues?

Some might object to this conclusion that we cannot assume that any judge is likely to feel particularly strongly in favor of "the" sections of the population that each "represents." [110]One may worry that the women elected to ICs are not in fact particularly "feminist."[111] Indeed, there are examples of male judges voting "feminist"—and that personal experiences influence decisions—e.g. the fathers of daughters referred to above.[112]

However, the arguments for a parity zone of female international judges make no assumption that those selected are particularly likely to promote "women's" interests, or be on average more compassionate than their male colleagues. Indeed, there is no assumption that any of the international judges should be regarded as "representatives" of the interests of their own gender in any sense reminiscent of delegates that decide by majority rule. Such assumptions are not made even in those courts whose election procedures ensure "representation" from various affected parties—such as the ECtHR, where the bench considering any case against a state always includes the judge nominated by that state. Such assumptions would both threaten ideals of impartiality and ignore the epistemic value of joint deliberation among judges. The arguments for a better balance among male and female international judges would rather regard the judges as "trustees" not "representatives" in Burke's sense.[113] The judges should make decisions according to their interpretation of the law, informed as well as possible also by means of joint deliberation, giving no particular *weight* to the interests of their "constituents."

It is consistent with these arguments that some men may be more perceptive than some women, also as regards effects that more often concern women. It does not seem correct that

> women's life experiences—in particular, their experiences of pregnancy, child-birth, child-rearing, and juggling work and family responsibilities, as well as often of sexism and discrimination—are very different from men's. Thus, the inclusion of women's experiences will make law more representative of the variety of human experience.[114]

Many men with children, possibly also judges, may well have more experience in child-rearing and in juggling work and obligations of child care than do many women without children. And intersectionality suggests that also many men suffer discrimination—especially members of various marginalized minorities. To what extent these variations also hold for candidates for the international bench is an open question. Still, we should not assume that male judges, however, carefully selected, will contribute as broad a range of relevant arguments as a more diverse bench—with inter alia more female judges.

Nor does the argument assume that there are particular "women's issues" that can be uncontroversially identified, with one clear "feminist" response that female international judges can reliably be expected to uphold. To recapitulate, we have reason to expect "feminist" perspectives to have implications for a broad range of interpretations and applications of international law—many of which as yet unknown, and which will be contested also among female judges.[115] This is why the requisite parity zone of both prevalent genders requires more than a standard "critical mass" of female judges, large enough to allow for such internal disagreements and nuances.

6.7 | Slippery slope toward mirror representation?

Critics may worry that these arguments in favor of increasing the proportion of female international judges entail that all segments of the relevant populations be proportionally represented on the international bench. Indeed, some hold that even though the focus is on "women judges and gender difference, … all of the arguments apply, mutatis mutandis, to other forms of diversity."[116] Do the arguments presented lead to requirements that the IC should secure "an exact portrait, in miniature, of the people at large"?[117] This would seem implausible and impractical.

In response, recall first that the arguments offered only support both prevalent sexes in the "parity zone," not complete parity. Second, the arguments for including members of certain categories on the international bench are stronger when they have suffered historical patterns of inequality of status, patterns that likely have influenced the norms, procedures and interpretive practices of the ICs. The composition of ICs tasked to uphold the rule of law must also assure deference constituencies that the institution consists of impartial individuals who follow unbiased procedures, against reasonable suspicions. Historic patterns of exclusion or domination against a particular segment of the constituencies would be one such case.[118]

These caveats notwithstanding, similar arguments for certain kinds of diversity on the international bench may be appropriate. Indeed, the benches of several ICs must "reflect" different regions, legal systems, legal expertise, or relevant career experiences.[119] Other relevant forms of diversity in addition to sex may vary with the issues the IC addresses, but may arguably sometimes include gender diversity beyond "male" and "female," ethnicity, persons with disabilities, or judges trained at different academic institutions.[120] The purpose of the gender diversity as with several of these other requirements is not to ensure that "the" woman perspective is included—the intersection and anti-essentialist arguments dismiss such ideas. Rather, female as much as male judges can be expected to offer several, sometimes conflicting perspectives and arguments—especially when drawn from different backgrounds.

7 | CONCLUSION: WHAT LEGITIMACY REQUIRES: LARGE PROPORTIONS OF BOTH GENDERS, SOME STEPS TO GET THERE

The upshot of these objections is that several arguments appear to support claims that a legitimate IC requires that both prevalent sexes are in the "parity zone"—assuming that the requisite empirical

claims are credible. It also seems appropriate to take steps to elect more judges who are sensitive to a wide range of women's concerns, broadly defined—both men and women. The valuable effects on outcomes and procedures may often also be secured by "women sensitive" male judges. These arguments appear to withstand objections to other arguments in favor of similar conclusions.

What might then be done? Some of the findings may be briefly summarized thus. One conclusion seems to be that

> In future nomination battles, there is a strong argument that feminists concerned about promoting gender equality at the level of substantive legal outcomes, not just symbolism or internal professional organization, should focus directly on the demonstrated commitment of a particular judicial nominee—whether male or female—to certain substantive feminist ideals".[121]

Statements and formal requirements to include both genders in nominations and appointments do appear to have an impact[122]—though some selection bias may be possible. Legal requirements to nominate and elect a gender balanced slate seem appropriate. Grossman notes that "For courts where states were required by statute to take sex into account when nominating or voting for judges, a higher percentage of women sat on the bench in mid 2015."[123] Alas, even a required quota may be ignored, as in the Malta and Belgium sagas. Such formal requirements would seem especially appropriate as long as a main challenge to increase the proportion of female international judges is the preferences of the nominating states.[124] In addition, the arguments stemming from intersectionality also support further requirements to ensure that an array of gender perspectives are represented on the international bench.

Transparency about nomination and election procedures may also contribute to publicity about the de facto qualifying stepping stones such as being noticed by the appropriate civil servants,[125] or membership on the International Law Commission.[126]

Domestic and international screening committees may enhance the quality control and de facto reliance on standards,[127] such as the systems for election of ECtHR judges including domestic and Council of Europe bodies. International screening committees appear to increase the number of women judges.[128]

The arguments presented here are limited in scope, and depend on further empirical research. The epistemic argument for a broad range of perspectives, especially given intersectionality, support the need to ensure status equality, and the law-developing tasks of ICs, all support a large proportion of both sexes—in effect something like the "parity zone," though not numerical equality. Further requirements are also justified to ensure a broad range of perspectives—but a 50% representation of both genders would not secure that objective. We have a long way to go, but some paths are promising.

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ENDNOTES

[1] —for institutions that standardly have an odd number of members. Six women and five men, http://www.african-court.org/en/index.php/news/press-releases/item/245-three-new-judges-elected-to-the-african-court-on-human-and-peoples-rights-vp-justice-ben-kioko-re-elected-for-second-term

[2] As of 2015, international tribunals had 72 members of which 12 women; regional courts 62/12; regional human rights tribunals 64/22, hybrid courts 57/13, WTO Appellate Body 7/1 in total 262/60. (http://www.gqualcampaign.org/1626-2/); cf Grossman (2016, 83).

[3] www.gqualcampaign.org; www.coalitionfortheicc.org/document/better-balance-better-justice-improving-gender-equality-international-criminal-court.

[4] Among the first contributions may be Linehan (2003). Observations by judges are largely drawn from a recent volume edited by Baetens (2020).

[5] McCall and McCall (2007, 68).

[6] Among exceptions are Greenwood (2017) for investment arbitration.

[7] Cf. Hessler (2021).

[8] For a similar position cf. Badejogbin (2020, 122, 138).

[9] This is a slight revision of the phrase in Chinkin (2010, section 3). For helpful overviews of the history and more precise accounts of varieties of feminist theory in international law, see Bailliet (2017).

[10] Office of the Prosecutor (2014, 3); cf. Charlesworth and Chinkin (2000, ch. 1).

[11] Otto (2016).

[12] Chinkin (2010, section 25).

[13] Chinkin (2010).

[14] Otto (2016, 493).

[15] Mohanty 1984, 74; cited in Chinkin 2010.

[16] Otto (2016, 492); Chinkin (2010, section 13).

[17] Raz (2006); Follesdal (2020).

[18] Dai (2005).

[19] Shapiro (1981).

[20] Cf. Tamanaha (2004). For tensions among these values, cf. Dunoff and Pollack (2017).

[21] Pauwelyn and Elsig (2012); Stone Sweet and Brunell (2013).

[22] Charlesworth and Chinkin (2000, 1).

[23] Protocol on the establishment of the ACtHR, Art 14.

[24] ICC Statute Art. 36 (8) (a) (iii), and cf. ACtHPR, Art 14.

[25] Collins et al. (2010).

[26] Kanter (1977); Dahlerup (1988, 276–96); for a critical overview cf. Childs and Krook (2008).

[27] Goetz (2008); Parliamentary Assembly (2006, 131).

[28] Otto (2016); Doherty (2020).

[29] Glynn and Sen (2015, 43).

[30] Rittich (2001); Hunter (2015, 136); Hughes (2020).

[31] Okin (1999).

[32] Boyd et al. (2010).

[33] *Prosecutor V Anto Furundžija* (1998, para 164–86); *Prosecutor V Dragoljub Kunarac Et Al* (2001 paras 436–64, 515–43). For a longer history cf (Sellars 2008).

[34] *Prosecutor V Zejnil Delalić Et Al ("Čelebići")*, para 475–96; for the ECtHR: *Aydin V Turkey* 1997: rape of an inmate constitutes torture.

[35] The Furundzija case and in the Kunarac, Kovac, and Vukovic case. Cf. Doherty (2020), Acevedo (2020), and general http://lusakavoice.com/2013/04/19/justice-florence-mumba-reflects-on-womens-rights-and-gender-justice/

[36] Tulkens (2015); Keller et al. (2020, 195–6).

[37] Charlesworth and Chinkin (2000); Chinkin (2010), Charlesworth and Chinkin (1993), 75; Otto (2016).

[38] For some challenges and responses, Boyd et al. (2010).

[39] Peresie (2005).

[40] Winter (2004); Massie et al. (2002); Peresie (2005); Farhang and Wawro (2004), referred to by Harris and Sen (2018); Boyd, et al. (2010, 389).

[41] Harris (2018) considers some such mechanisms regarding race-related cases.

[42] Peresie (2005, 1786) urges testing of this hypothesis.

[43] Hunter (2015, 123) refers to the House of Lords Constitution Committee; Kenney (2013); Malleson (2003).

[44] Follesdal (2018).

[45] These epistemic arguments appears to overlap with what Boyd terms "informational," cf. Boyd (2010); Boyd et al. (2010).

[46] Some regard this as a component of the compassion or empathy argument. One may argue that empathy is not only an affective state, but also has an important cognitive dimension, cf. Del Mar (2014), referenced by Torbisco-Casals (2016, 634); and Torbisco-Casals (2021, THIS ISSUE). And see Holst and Langvatn (this issue).

[47] Boyd et al. (2010, 391); Badejogbin (2020); Doherty (2020, 354).

[48] Torbisco-Casals (2021).

[49] Badejogbin (2020, 124), citing Schmalz (2017).

[50] In the context of cognitive diversity for legislatures, Landemore (2013, 1210).

[51] Hunter (2015, 131).

[52] Anghie (2004).

[53] Hunter (2015).

[54] Hessler (2021).

[55] *Leyla Sahin V.Turkey (Gc)* (2007) dissenting opinion para 12; and cf L'Heureux-Dube (1997, 103).

[56] Agnew et al. (2008), but cf. Sarin and Wieland (2016); and Borghans et al. (2009).

[57] Harris and Sen (2018), referring to Haire and Moyer (2015, 52–53).

[58] Resnik (1996, 963). Cf. Grossman (2016); referring to Wald (2005); Terris et al. (2007, 38, 186–87).

[59] Boyd et al. (2010, 389).

[60] Thus Doherty recognizes the contributions of Prosecutor David Crane and Judge Pierre Boutet in developing international criminal law concerning sexual violence in conflicts (Doherty 2020, 359).

[61] Dixon (2010).

[62] Peresie (2005, 1784); Boyd et al. (2010, 389).

[63] Peresie (2005, 1783).

[64] Ibid., 1784.

[65] Oliver and Marwell (2001); Kanter (1977); McCall and McCall (2007); Childs and Krook (2008); Collins, et al. (2010).

[66] Limbach et al. (2004), 4; Kofi Annan, Secretary-General's address to the General Assembly (2004) https://www.un.org/sg/en/content/sg/statement/2004-09-21/secretary-generals-address-general-assembly; Kosař (2015, 132–33); Torbisco-Casals (2021).

[67] Keller et al. (2020, 198).

[68] Lijnzaad (2020, 43); Keller et al. (2020, 193); Drummond (2020). Dawuni (2020).

[69] Keller (2020), Dawuni (2020).

[70] Hennette-Vauchez (2015); Tulkens (2015); Charlesworth and Chinkin (2000); Kosař (2015, 129–33); Keller et al. (2020, 202).

[71] Resolution 1366 (2004) on Candidates for the European Court of Human Rights.

[72] Para 14 of report by rapporteur, and European Court of Human Rights (2008).

[73] Though the ECtHR prohibits requiring states to nominate a woman judge if the state shows that none satisfy the other requirements, European Court of Human Rights (2008), para 52.

[74] ICC Statute Art. 36 (8) (a) (iii), and the ACtHPR.

[75] Grossman (2016, 94); Hunter (2015, 123), who refers to Hale (2001); Kelley (2007).

[76] Cf. Mansbridge (1999), e.g. 637. For careful and critical extensions of Mansbridge's arguments, cf Holst and Langvatn (2021).

[77] Mohanty (1984); Charlesworth et al. (1991); Charlesworth and Chinkin (2000), Rittich (2001), Dawuni (2020, 512 pp).

[78] Shetreet (1998, 189); Epstein et al. (2003, 944); cited in Boyd et al. (2010, 406–07).

[79] Mill (1861).

[80] Hennette-Vauchez (2015); Tulkens (2015).

[81] Cf. Greenwood (2017); Polonskaya (2018).

[82] Dixon (2010).

[83] Glynn and Sen (2015, 53). The researchers also note that nearly 30% of female judges, but only 8% of male judges, have no children—raising important issues of equality of opportunity and representativity.

[84] Boyd et al. (2010, 389).

[85] Maule (2000–2001, 296).

[86] Cf Darwall (1977), "basal self-respect" Dillon (1997), Fraser and Honneth (2003).

[87] Darwall (1977).

[88] Scanlon (2018, 32).

[89] Dillon (1997); Torbisko-Casals (2021).

[90] Rose (2016).

[91] Epstein et al. (2003); Kosař (2015).

[92] Fraser and Honneth (2003).

[93] Langford et al. (2017).

[94] Greenwood (2017).

[95] Charlesworth and Chinkin (2000); Torbisco-Casals (2021).

[96] Hunter (2015, 7–8).

[97] Kumm (2012).

[98] Cf. Holst and Langvatn (2021).

[99] Chinkin (2010, section 10).

[100] Hunter (2015, 125).

[101] —as did and does Gilligan, cf. Heyes (1997, 146).

[102] Glynn and Sen (2015).

[103] Bloom (2016).

[104] Farhang and Wawro (2004), Peresie (2005), cited in Harris and Sen (2018).

[105] Cf also Torbisco-Casals (2021).

[106] Bloom (2016).

[107] Charlesworth and Chinkin (2000).

[108] Mistry (2018).

[109] Cox and Miles (2008); Cohen and Yang (2019), in Harris and Sen (2018).

[110] Young (1997, 354), cited in Mansbridge (1999).

[111] Dixon (2010).

[112] Segal (2000), 144–45.

[113] Burke (1980).

[114] Hunter (2015, 124), and references therein.

[115] But for some illuminating examples, cf. Charlesworth and Chinkin (2000).

[116] Hunter (2015, 122).

[117] Adams (1776); I owe this reference to Landemore (2010).

[118] Dallara and Vauchez (2012, 5–6); I owe this reference to Graziadei (2016, 74). For similar claims, cf Kumm (2012); Grossman (2012, 647).

[119] The P5 Convention ensures that the five permanent members of the UN Security Council are always represented on the International Court of Justice (Fassbender 2012); For legal expertise cf. the International Criminal Court, Article 36(5) of the Rome Statute. For a comparative overview, see MacKenzie et al. (2010).

[120] Epstein et al. (2003, 960).

[121] Dixon (2010).

[122] Grossman (2016, 92).

[123] Grossman (2016, 82).

[124] Tulkens (2015), referencing Charlesworth and Chinkin (2000).

[125] Grossman (2016, 90), citing Terris et al. (2007, 23).

[126] Grossman (2016, 90).

[127] Ibid., 91.

[128] Ibid.

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