How far beyond Tokens? What gender justice on the international bench requires - Parity, Critical Mass, Gender sensitive judges

Draft, not to be cited. All suggestions are most welcome!

Abstract

Does a commitment that institutions should treat all with equal concern require all legitimate ICs to achieve gender equality on the bench – complete parity? Or might a ‘critical mass’ of 15-25%, or a ‘parity zone’ of 40% of each of the two prevalent genders suffice? How well do various such arguments withstand criticisms that they ‘essentialize’ gender, or assume that elitist female international judges can represent all other women, or lead to a slippery slope where ICs must also ‘mirror’ a myriad of characteristics of the affected populations and constituencies?

The many reasons to lament various unjust forms and levels of inequalities counsel different, only partly overlapping objectives. The composition and workings of ICs must satisfy the norms of impartiality independence and procedural fairness, especially because the ICs are tasked to uphold these very norms. There are also arguments that the international bench must be representative of those subject to it. While empirical evidence on international courts is scarce, cautious extrapolation may (for now) indicate the following:

Mechanisms of compassion, epistemic competence; and expressions of status equality seem to favour a high threshold of both the prevalent genders, beyond a ‘critical mass,’ in a ‘parity zone.’ And several of the arguments entail that more judges - regardless of their own gender – should be ‘gender sensitive.’ But – even with the paucity of empirical studies - there seem to be few sound arguments for complete equal proportions of men and women –‘gender parity.’ Several arguments against the call for a large critical mass and gender distribution within a parity zone withstands objections concerning essentialism, representativity and ‘mirroring’.

Introduction

The African Court of Human and Peoples’ Rights (ACtHPR) made gender history on August 27 2018, when the majority of its judges were female – six of 11. The ACtHPR is the first among international courts and tribunals (ICs) to secure such complete gender equality.1 Does a commitment that institutions should treat all with equal concern require all legitimate ICs to achieve such complete gender parity? Or might a ‘critical mass’ of 15-25%,2 or a ‘parity zone’ of 40% of both the two prevalent

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genders suffice? How well do such arguments withstand criticisms that they ‘essentialize’ gender, assume that elitist female international judges can represent all other women, or that such policies entail that ICs must also ‘mirror’ a myriad of characteristics of the affected populations?

Among ICs the complete parity of ACtHPR is remarkable: in total, only 23% of the judges and arbitrators of the ICs are women.3 That a regional human rights court is first might not surprise: Chinkin has long claimed that women judges are more likely in ICs dealing with ‘soft’ human rights issues or explicitly ‘gendered’ crimes rather than in ‘hard’ areas of trade and law of the sea.4 Still, the persistent and widespread underrepresentation is striking given the persistent calls for gender equity not only by several civil society groups, but by those states and bodies who nominate and elect the judges. Several treaties even require or urge a balance of gender representation.5

This article draws on a range of empirical research on judicial behavior to identify and assess normative arguments concerning this present gender imbalance: why it challenges a commitment to equal concern, and the legitimacy of ICs, and what changes are required. The role of empirical research merits some clarification [to be expanded?] While empirical evidence on international courts is scarce, cautious extrapolation may (for now) indicate that some arguments may be plausible, and others less so. Many sorts of inequalities challenge the legitimacy of institutions, especially those inequalities that are clearly under social or political control - as the international benches are; and particularly for such bodies with profound effects on others, ranging from human rights and international trade to border disputes and humanitarian intervention.

The present reflections consider the implications of various arguments concerning gender inequality on the international bench, to help assess proposed objectives and alternative strategies to promote them – and to counter some objections. The main concern here is not the veracity of these arguments. Indeed, the empirical findings used in their support are often extrapolations from narrower studies of some domestic judiciaries, often in the US. More pertinent and relevant studies are clearly needed. Some of the claims of this article survives these lacunae: three questions is what may be the strongest arguments in favour of reducing the present gender inequality on the international bench; to what extent: what are their implications; and finally: do these arguments withstand some commonly heard objections to calls to reduce gender inequality.

While there may be many reasons to lament various unjust forms and levels of inequalities, even if the empirical evidence would support such arguments, they counsel different, only partly overlapping objectives. The main conclusion is that there are some but few sound arguments for completely equal proportions of men and women – ‘complete gender parity.’ Several arguments instead favour a high threshold of 40% of of both dominant genders – a ‘parity zone’, beyond ‘critical mass’ as often conceived. And several of the arguments instead entail that more judges - regardless of their own gender – should be ‘gender sensitive’ to the direct and indirect
effects of international law that statistically are detrimental to women. [Broader laudable objectives sometimes referred to as ‘feminist’ such as peace and global justice are left aside. The objectives may often be specified with gendered analysis of power and peace, and have long been central to feminist political movements such as the Women’s International League of Peace and Freedom (WILPF, peacewomen.com). However, proponents appear to claim few implications for gender parity on the international bench. --NOTE: is this correct? ]

This complex account in favour of a ‘parity zone’ is robust against several objections against increasing the proportion of women judges. The arguments, including any necessary empirical support not yet provided, do not seem vulnerable to three charges. To remove the objectionable gender inequalities along the lines defended here does not rely on ‘essentialist’ assumptions about gender. The arguments allow that female international judges may not be ‘representative’ of other women, and do not require the benches of all ICs to ‘mirror’ all segments of the affected populations.

Outline

The present article draws on research about judicial behaviour to explore the various reasons to be concerned with gender inequality on the international judiciary, based on a normative commitment that institutions must satisfy a normative requirement of equal concern for the individuals subject to them. Several studies contribute to describe, understand and assess patterns, proposed causes, impacts and strategies to address the current gender imbalance on ICs. Some extrapolate from research on domestic judiciaries, or from ‘critical’ perspectives, including post-colonial feminism, attune to concerns of intersectionality and essentialism. Thus contributions ask not only: Why not “More women – but which women?”

Before considering these arguments critically, section 1 addresses some preliminary issues: how ‘feminism’ is used in this setting; the differences between gender parity, the parity zone, critical mass and gender sensitivity; and the several tasks ICs serve in our multilevel legal order, that may render them legitimate – or not. Legitimacy is a matter of how well an IC enables states and other deference constituencies to better achieve their appropriate objectives - what they have reasons to do.

The reasons against the present gender imbalance concern various aspects of the ‘performance’ of ICs, in several senses. Section 2 summarizes arguments that point to the substantive effects of each IC, including both its judgments and interpretations. Section 3 considers arguments that the processes that pertain to ICs must be fair, and perceived to be so among their deference constituencies – states, individuals, other international organizations etc. The composition and workings of ICs must satisfy the norms of impartiality and procedural fairness, especially because the ICs are tasked to uphold these very norms. There are also arguments that the international bench must be representative of those subject to it. Any one of these arguments, if successful, suffice to conclude that the present inequality is unjust.
However, the implications differ among the arguments. Section 4 therefore considers more closely the case for parity, parity zone, critical mass and gender sensitivity for three mechanisms central to these various arguments against the present gender disparity: *compassion* or empathy; *epistemic competence*; and *expressions of status equality*. One conclusion is that none of these arguments support strict *gender parity* - equal number of men and women judges. But several arguments support a *parity zone*, beyond a large *critical mass* of gender sensitive judges, as well as *female judges* on the international benches.

Section 5 concludes and responds to some objections concerning essentialism, representativity and ‘mirroring’. The upshot is that not even the arguments from reflecting impartiality and fair procedures support complete *gender parity* in ICs which address disputes, review other bodies, or make law in areas where discrimination of women historically has occurred. There are however several arguments offered in favour of a *parity zone* – i.e. at least 40% women international judges.

1 Some preliminaries

**Feminism in international law theory**

The terms ‘feminism’ and ‘feminist’ approaches are used in different ways in the 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.11 This includes both insistence that ‘universal’ norms should include both genders, and nuanced accommodation of international law to gendered differences12 – and disagreements concerning the delineation between those. Topics clearly include traditional “women’s concerns, such as violence against women, reproductive rights and gender-based crimes against women in armed conflict.”13 Feminist approaches has implications for broader issues such as the rationale and contents of international law concerning humanitarian intervention to prevent violence against women, trade that affects women’s livelihood, and conceptions of statehood and state responsibility for ‘private’ family matters.14 Such feminist approaches can avoid ‘essentializing’ gender as the sole or key characteristic, and instead acknowledge both that neither women nor men are coherent groups,15 and the complex interplay or *intersectionality* among various ‘identities’ and vectors of disadvantage including gender, race, class, North/South, disability, religion etc.16

There are several important broader topics sometimes referred to as ‘feminist’ that go beyond the feminist approaches as defined here. These include issues many feminists have addressed, that lack a clear gender element, such as international peace, or “a more egalitarian, inclusive, peaceful, just, and redistributive international order.”17
Gender Parity, Parity Zone, Critical Mass, Gender Sensitivity

For more fair processes and outcomes, many will agree that one token woman on the international bench is not enough. However, some of the arguments of justice addressed below would not seem to require numerical equality – i.e. parity - of male and female judges. Some argue in favour of 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 gender on the international bench, the critical mass would thus be the number or percentage of female judges necessary to effect changes in the group dynamics, to ensure that they do not simply “vote like men,” and to increase shifts among men to “vote like women.” In various studies of gender in corporations and parliaments, such a ‘critical mass’ is often indicated as 15-30%. The ‘parity zone’ is often defined as 40-60%. A further, separable concern is to ensure sufficient gender sensitivity among the judges. We return below to the forms of sensitivity, and to what. Since the feminist approach sketched above eschews essentialism and acknowledges intersectionality, it recognizes that some men may be more sensitive to such matters than some women. Thus from this feminist perspective, it may be unobjectionable to include some men on the Committee for the Convention on the elimination of Discrimination against Women (CEDAW) – a committee that consists of “experts of high moral standing and competence in the field covered by the Convention.”

The tasks functions and functioning of ICs

Four somewhat conflicting aspects of the roles and contributions of ICs merit particular attention.

1. Many ICs serve a subsidiary role relative to domestic authorities: the ICs may typically (but not always) be engaged only when domestic remedies are exhausted and they may defer to proper domestic decision-making. These subsidiary functions arguably render the perceived legitimacy of the IC more important than for domestic judiciaries. The IC cannot as easily rely on threats of sanctions to ensure compliance. Instead, decisive compliance constituencies must believe that they ought to defer to the judgment or the interpretation of the IC. Claims that an IC is illegitimate, e.g. due to gender disparity, thus merit close attention.

2. One main function of domestic and international courts for states and other deference constituencies is to provide sufficiently impartial dispute settlement on the basis of legal norms established independent of the particular case, that the IC competently and comprehensively applies to the particular case. Some disputes take the form of judicial review of legislation and policies: whether there is a breach of the treaty. Disputes mainly concern the application of unclear treaty norms. In order to address and sometimes resolve such disputes by applying pre-existing legal rules, even the losing parties must accept and respect the judgments - even when not all their claims are fully satisfied.

To serve this role as umpire an IC must satisfy several desiderata – and losers
must perceive that it does so: The IC must be designed, embedded, staffed and
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,
including to professional norms and ideals of the judiciary.24

3. A further important function of ICs is to interpret and develop international law
norms, in order to adjudicate present and future cases, and to stabilize actors’
expectations to avoid future disputes and enhance cooperation. This (quasi-
)legislative function is arguably partly according to the state parties’ instructions,
insofar as they have agreed to treaties that are vague or that intentionally are
designed to develop over time.25

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 various interests of the many affected
parties in the longer run – including both men and women.26

4. Different ICs have greatly different nomination and election arrangements. This
makes it more difficult to identify the interacting causes of the present gender
inequity, and the best modes of improvement.

Some ICs, but not all, incorporate gender distribution requirements in
different ways. States that nominate candidates may be urged to consider gender
balance (as is the case with the ACtHPR27), - the European Court of Human Rights
(ECtHR) even requires them to include both genders when they submit their lists of
candidates.28 Other regulations primarily apply to the bodies in charge of electing
among these candidates. Thus the Statute of the International Criminal Court
requires the States when they elect judges to take into account the need for ‘a fair
representation of female and male judges.”29 And the ACtHPR likewise, Art 14: “3. In
the election of the judges, the Assembly (of Heads of State and Government of the
OAU) shall ensure that there is adequate gender representation.”

2 The effects of ICs

One set of reasons to be concerned about the present gender bias on the international
bench is the risk that the output – the judgments and interpretations – will be biased,
contrary to the reasons parties may have to submit cases to an impartial judicial
decision-making authority.

Substantive judgments

We may find unfair patterns in judgments due to lack of women on the various IC
benches, regarding various substantive issue areas. There are complex but
surmountable challenges to identify significant patterns, both regarding how the IC
applies a particular norm to cases, and even more how it ‘balances’ different norms
in particular cases.

Some of the most immediately observable patterns are male versus female
international judges’ recognition of and responses to harms suffered disproportionately by women. Thus there are differences in how judges of ICs treat rape and domestic violence. Other issues where there are patterns in domestic judiciaries, where we may assume similarities for ICs include sex discrimination (in general), and cases that explicitly involved (1) employment discrimination on the basis of gender by private actors, (2) employment discrimination on the basis of pregnancy by private actors, (3) reproductive rights or abortion ...

beyond these harms, to avoid stereotyping of ‘women’s interests’, one might seek to identify any gendered voting patterns, not only in human rights courts, but in investment tribunals, the ICJ, or in the WTO Appellate Body.

One kind of bias regarding judgments may occur in the balancing of norms, e.g. concerning rights of indigenous groups and freedom of religion, against rights to be protected against violence: e.g. when multiculturalism is bad for women. One example is how to adjudicate cases of women wearing headscarves for religious reasons. It seems difficult to identify patterns in the ‘balancing’ of such legal norms, yet such influence may be very important on the ground. There is evidence that male and women judges do make somewhat different judgments on some such issues, at least in some domestic judiciaries.

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To illustrate such patterns: research on the Canadian Supreme Court found that among the judges starting at the time when women were first appointed, the three first women judges had the highest levels of dissenting opinions. (xxxnote that US courts showed that panels led by women had significantly fewer dissenting opinions (ref).

**Interpretation**

Other important effects of ICs concern the interpretation and hence the development – and creation - of international law. The lack of women international judges may skew these processes in problematic ways, to the detriment of women’s interests in a broad sense. One example of the more ‘traditional’ kind may be how ICs have come to interpret some cases of rape as acts of genocide, or as torture. Judge Florence Ndepele Mwachande Mumba was presiding in several salient cases, and played an important role in this development of international law. Whether these efforts were due to her being a women, or other features that have made Judge Mumba sensitive to such issues of gender, is of course difficult to assess.

Beyond such cases, feminist scholarship points to a broad range of interpretive choices in international law that have been detrimental to women. Examples include limiting violations of the right to life to “public actions by the State” rather than concerns about distributive justice. The way 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, which are more to the disadvantage of women.

Are there any areas of international law where we can be sure that disputes will not have different effects on men or women? sexes, e.g. maritime delimitation.
Would only ‘status inequality’ apply?

3 Processes
In addition to problematic consequences of the drastic gender inequality on international benches, there are independent reasons to be concerned when gender inequality violates standards of fair processes, in several ways.

Procedural fairness
One argument for gender equity on the international bench is sometimes introduced as ‘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.40

equal participation of men and women in the justice system is an inherent and essential feature of a democracy without which the judiciary will lose public confidence.41

Such claims that gender inequity is ‘undemocratic’ may perhaps most plausibly be interpreted as one of three concerns:42 a) an unfair distribution of influence on who should be nominated and elected to the judiciary; b) that ICs should ensure the value of fair deliberation, e.g. known from deliberative democratic theory; or c) that the composition of ICs, perhaps as all other institutions, should ‘mirror’ or be a ‘descriptive representation’ or ‘miniature portrait’ of the relevant compliance constituencies. These claim merits more elaboration.

Biased appointment processes
Do norms of impartiality and equality apply to the (international) judiciary to require gender parity? Why and when might such arguments be sound? As a general rule for bodies of authority this argument does not appear convincing. It is not obvious that (members of) a monitoring or review body must itself satisfy the norms which that body reviews. For instance, it is not obvious that the members of an electoral supervisory body to safeguard accountability of officials to the electorate should be elected by and be subject to recall by majority rule. To the contrary, some bodies - such as ICs - are set up to be ‘counter majoritarian.’ However, there may be cases when might arguments that the norms the institution should apply must be seen to hold internally also. One reason is that it may be important to convince the various deference constituencies that the IC will perform its task in securing that justice is served – and seen to do so. Kofi Annan made the point succinctly, in ways relevant to the legitimacy of ICs.

At the international level, all states - strong and weak, big and small - need a framework of fair rules which each can be confident that others will obey […] Those which seek to bestow legitimacy must themselves embody it; and those who invoke
international law must themselves submit to it”.\textsuperscript{43}

A challenge to the IC serving this task is if gender inequity of the international benches indicate that the processes of nomination and election violate standards of procedural fairness. Indeed, the patterns of gender inequality give reason to believe that the election is biased. This is so even when the causes of some of these inequitable election results may be complex, due to the multilevel interplay of different bodies. States sometimes refuse to nominate women even when required to do so, arguing more or less convincingly that none are qualified – as has been the case both with Malta and Belgium for judges to the ECtHR.\textsuperscript{44}

In order to secure a better balance among the sexes on the bench, the Parliamentary Assembly of the Council of Europe has required that at least one of the three nominated (?) candidates for each post as judge must come from the under-represented sex.\textsuperscript{45} The Assembly has often sent lists of candidates back to the state to urge compliance with this requirement. Nevertheless, one country – Malta – both in 2004 and 2006 maintained that they could not find any suitably qualified woman nominee. In consequence, the Rapporteur of the Committee on Legal Affairs and Human Rights explored arguments that there may be exceptional circumstances where a state has done everything possible to include members of the under-represented sex in the list of candidates – but without success because of the requirement to satisfy the other criteria concerning the choice of the best qualified candidates.\textsuperscript{46}

Critics have challenged the claims about the quality of legal professionals in Malta, and also noted that Malta could even nominate non-Malta candidates. After this, the Assembly has also granted Belgium permission to submit a list of three men – again from a country which clearly has very many well qualified women, and which could also nominate non-Belgians. The deference of the Council of Europe bodies toward states on this matter merits further scrutiny.

Even when states comply with explicit gender balancing requirements when presenting a slate of nominees, such as for the ECtHR, the final selection body may yield gender imbalances unless explicitly required to avoid it. This appears to occur when the states is required to secure “a fair representation of female and male judges.”\textsuperscript{47} In contrast, the ACHPR complies, and satisfies the legal requirement upon it that “3. In the election of the judges, the Assembly (of Heads of State and Government of the OAU) shall ensure that there is adequate gender representation.”

An argument from the integrity of the institution provides particularly weighty reasons why ICs should comply with these legal standards, when they exist. Bodies that are tasked to apply rules objectively and impartially should themselves abide by whichever rules that apply to them, to avoid suspicion that the institution as a whole is unable or unwilling to apply rules impartially. Thus when ICs have rules of composition and procedure, these should be followed – also in cases that require gender balance:
Whether or when men and women judge differently is irrelevant. States have committed themselves to giving men and women equal opportunities to participate in governance at all levels, through the Convention on the Elimination of Discrimination Against Women, the International Covenant on Civil and Political Rights, the UN Charter, and other soft law instruments. No exception to these obligations can be made based on proof that men and women decide differently.  

Thus

the presence of women judges signals equality of opportunity for women in the legal profession who aspire to judicial office, and demonstrates that judicial appointment processes are what they claim to be—fair, meritocratic, and non-discriminatory.  

This integrity argument seems to be what authors appeal to when they observe that

The consistent overrepresentation of male judges in international courts raises questions about the integrity of selection procedures, which can undermine the legitimacy and the public authority of international courts.

The consistent overrepresentation of one group on the bench, when not caused by limitations in the pool, raises questions about the integrity of selection procedures more generally, which can affect perceptions of a court’s legitimacy. Alternatively stated, policies or procedures that result in diminished opportunities for participation of half the world’s population can undermine these institutions’ public authority by failing to reflect the world’s population and by giving rise to actual or perceived bias.

These concerns about bias by some parties in the appointment processes are more plausible under two conditions that clearly seem to hold in the case of gender on the international bench: a) When a state or states has an appointment pattern that violates explicit legal norms or recommendations concerning gender even when clearly well qualified nominees are available; and b) when the state or states have a history of discrimination against the disfavoured 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 have not sought candidates unknown to them, because they believe that male judges will be more favourable to them, or because they believe that these - male - judges are more suited to this office. Any of these arguments give reason to question whether the IC includes sufficiently impartial and the most judicially competent judges.

Deliberative quality

Other important processes concern the quality and impact of judicial deliberations. Gender inequity challenges not only the consequences of the judicial deliberations, but gives reason to question their intrinsic value.

The effects of the deliberations include how the judges identify and bring facts and legal principles to bear, which precedents they draw on – as well as rules of
procedure and rules of evidence, the practice of publishing separate opinions, the behavior at oral hearings, etc. Illustrations must suffice, without claims that they exhibit patterns. A female international judge lamented the lack of presentations of the affected women, suspecting paternalism. In a dissenting opinion in the Sahin v Turkey case concerning headscarves, judge Francoise Tulkens criticized how courts handle alleged conflicts between women’s rights and standards of non-discrimination and rights concerning religion:

I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and nondiscrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. “Paternalism” of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy . . . What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.52

Some find that men are on average less averse to economic risk.53 If this also holds for the men and women elected as international judges, we might expect an IC with a more equal number of men and women to argue differently e.g. concerning standards of reasonable precaution, or engage in other forms of judicial politics.

The broad array of impacts on the deliberations may make it difficult to identify any gender bias. A further research challenge is the ‘panel effect.’54 Having both genders present on a judicial panel may affect the reasoning and understanding of other judges on the panel. There may be several mechanisms at work.55 A mixed bench may firstly prevent or reduce overtly discriminatory premises among the judges. The mere presence of a female judge on the bench may ‘sanitize’ in this way, regardless of her own voting on a case.56 Secondly, there is some evidence that the nature of collegial deliberation appears to change when female judges participate. Thus several studies point to the importance of having a ‘critical mass’ of a minority group to be assertive – to reduce social pressure to act like the majority, and to increase pressure on the majority members to act like the minority.57 However, in some judicial settings the presence of even only one female judge often appear to influence their male counterparts in some decisions, as research shows by comparing mixed benches in domestic courts to all-male benches.58 Insofar as women judges do tend to engage colleagues more on arguments that heed feminist concerns more, and judges engage in good faith deliberation and exchanges of views, we may expect an international bench with both genders represented to issue somewhat different judgments and interpretations both in contents and in form. Their colleagues may simply heed their female colleague’s arguments, - but it may also be that some male judges defer to their female colleagues on what they perceive as ‘women related’ issues where the men believe – correctly or not – that the women have more expertise.

On the other hand, some caution that 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 appointing men:
Perhaps even more troubling, implicit gender bias may persist even within the workings of the Supreme Court itself. If this is so, as Justice Ginsburg has recently pointed out, 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."\(^{59}\)

A further reason based on increasing the deliberative quality in favour of gender representation on the IC gets closer to the ‘democratic’ argument. For this task, it becomes especially important that the members of the bench can be trusted to identify and ‘balance’ the impact of a sufficiently broad range of alternative interpretations.

**Mirroring/descriptive representation and status inequality**

There is at least one further argument that the international bench should ‘mirror’ the proportion of men and women at large worth elaborating, in addition to the arguments against the appearance of biased selection processes and to further the deliberative quality. Several express concern that the legitimacy of a court is at stake if a “segment of the population is excluded from membership.”\(^{60}\) How is this best interpreted?

Drastic gender inequity on the international bench expresses ‘status inequality’ in the following sense. The international judge is an office that is publicly claimed to be filled solely on the bases of certain criteria – such as nationality, and specified forms of merit. When some segments of the population are drastically under-represented in such offices, this imbalance in real equality of opportunity is an expression and evidence that those in power regard members of these segments as “ineligible, or less eligible than others, for valued roles and various associational goods.”\(^{61}\) This public expression of status inequality is inconsistent with a commitment to treat all individuals with equal respect.

**4 Implications: how many female judges is enough?**

Many of the arguments canvassed above rely on one of three different mechanisms, with different implications regarding claims to secure gender parity, critical mass or gender sensitivity.

**Compassion**

Some argue that female judges have more compassion with affected parties than do male judges – and particularly with the women involved in the cases.\(^{62}\) This claim is sometimes associated with ‘cultural feminism’ that focuses on the ‘difference’ that female judges may bring.\(^{63}\) One elaborated theoretical account informed by Gilligan’s theory holds that: "women judge ‘in a different voice’, that is, they apply a feminine ‘ethic of care’ as opposed to the masculine ‘ethic of justice’.”\(^{64}\) We return to concerns against ‘cultural feminism’ based on essentialism below, after some comments.
concerning the operative emotion or sentiment. Critics might object that judges should not extend empathy to any party in the dispute, because that distorts the reasoning and judgment, at the risk of yielding unfair, partial or poorly reasoned decisions. 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.

In defense of the value of compassion for international judges, at least three different responses seem appropriate. Note the focus on compassion understood as the judge’s ability and commitment to be concerned with others’ circumstances and experiences, rather than empathy in the sense of shared emotional experience.

Secondly, 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 final 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. However, the implications for the gender composition of the bench are not obvious. Several crucial yet empirically open questions remain: whether not only women generally, but the skewed sample of female international judges in particular, are more likely to have compassion with the wide range of parties to the dispute and beyond in general, and with women in particular. We have reason to doubt these claims of ‘cultural feminism’ expressed as women being more compassionate in general. In fact, some findings Furthermore, the intersectional perspective reminds us that female international judges are not 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. Thus Dixon notes that “it is important to consider the link between this role and the justices’ own experiences of gender discrimination. More recently appointed female justices are much less likely to experience the same degree of discrimination and therefore are also less likely to approach claims of gender discrimination in the same way.”

Intersectionality also 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.
Regarding men, some research indicates that having daughters may influence their judging:

male judges who have daughters are more likely to vote in a liberal direction—
despite not having those ascriptive characteristics that would otherwise be linked to
more progressive views on women’s rights issues. To this extent, despite Sonia
Sotomayor’s comment that “a wise Latina woman with the richness of her
experiences would more often than not reach a better conclusion than a white male
who hasn’t lived that life,” we find that empathy could be a crosscutting effect.
Indeed, what the quasi-experiment of daughters shows is that the transformative
impact of personal relationships is not, and need not be, limited to one group or one
party.\textsuperscript{68}

Whether similar patterns exist for international judges is unknown.
The compassion mechanism therefore seem to require neither gender 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 compassionate in the relevant sense, 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.”\textsuperscript{69}

\section*{Epistemic}

Deliberative democratic theory has long addressed the epistemic role of deliberation,
where gender and diversity is important. Often, decisionmaking should rely on the
broadest range of the relevant facts and legal norms that pertain to the case.\textsuperscript{70}

In its deliberative function, a representative body should ideally 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.\textsuperscript{71}

There might be several reasons to believe that there are epistemic gains to the judicial
deliberations by ensuring more female international judges, due both to individual
effects and panel effects.\textsuperscript{72}

The individual judges’ own reasoning may depend on their gender. Members of a
culturally and politically dominant group 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 unlikely to discover and be
sufficiently attentive to biases that disadvantage other affected parties. More
diversity in general, and more feminist perspectives in particular, arguably reduce
the risk that biases against women and ‘women’s perspectives will go uncorrected.
There is evidence from several quarters for this epistemic argument for ‘cognitive
diversity’ – “a diversity of ways of seeing and interpreting the world”.\textsuperscript{73} Thus
research on judges at US domestic courts focusses on

Particular characteristics of feminist judging include paying attention to previously excluded or marginalized voices and experiences and construing the facts of the case from that perspective; being alert to intersectional experiences of gender and race/ethnicity, religion, sexuality, age, and disability; placing facts and issues within their broader social and legal context, often drawing upon relevant social science research and legislative background materials; and reasoning from context and the reality of lived experience rather than in abstract, categorical terms. 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.74

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.75 Indeed, 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 favour of the established dominant groups.

Note that this argument presented so far favours ‘feminist judging’, but not necessarily by female judges. However, there are at least two arguments that support female judges specifically. Firstly, some studies of domestic judges 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.”76 This might support the reports by some individual female judges:

Several prominent female international court judges—including Patricia Wald, Navanethem Pillay, and Cecilia Medina Quiroga—have proposed that the presence of female judges may make a difference to understanding the facts in a case and to judicial decision making.77

Furthermore, studies support hypotheses of such epistemic effects for deliberative bodies such as domestic panels of judges. Here the gender of the judge also appears to have a significant and independent effect:

we observe consistent gender effects in only one—sex discrimination. For these disputes, 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.78

Characterized in this way, our results are consistent with an informational account of gendered judging; .... our results may provide empirical fodder for a class of normative claims supportive of diversity on the bench; namely, “the greater the diversity of participation by [judges] of different backgrounds and experiences, the greater the range of ideas and information contributed to the institutional process,” and the higher the likelihood of altered deliberations in response.79
So even if the required ‘cognitive diversity’ might in principle be secured by ‘gender sensitive’ judges of either gender, in cases involving sexual harassment of women, male judges are somewhat more likely to defer to female judges’ opinions. The precise motivation of male judges is of course difficult to discern. They may defer to a female colleague because they presume that she is more knowledgable about these issues, - regardless of whether this presumption is correct. Or they may defer because to disagree would make them appear insensitive or pretentious. However, the latter is not consistent with another finding of longer term effects: Male judges are somewhat more likely to decide in favour of the plaintiff in later sexual harassment cases after having decided together with a female judge.

What are the implications for gender inequality? Some findings suggest that the epistemic benefits accrue with only one female judge on a panel, to effect such deliberative changes on the judgments. Indeed, there are reasons to hold that the ‘critical mass’ of ‘similarly minded’ members of the international bunch must be higher than the ‘standard assumptions’ of a critical mass of 15-30% to facilitate the group dynamics. Anti-essentialism entails that there will not be one “women friendly” perspective that a minimum of 15% women will share. Not only is essentialism implausible, but among such a large range of persons, we can expect many perspectives to be influenced by factors such as race, class, training etc. So on a wide range of issues there will be several different views about what are salient facts and legal norms – also among women. It seems implausible that these ranges of perspectives overlap fully with those of male judges – also the many ‘gender sensitive’ – though they may tend to share characteristics of elite socioeconomic backgrounds etc. To ensure sufficient ‘cognitive diversity’, therefore, it seems sound to insist that the bench is more diverse – including several women. This counsels that both prevalent genders are in the ‘parity zone’ of 40-60%.

A further reason to be particularly concerned to secure gender diversity for epistemic reasons is the history of marginalization. Correcting and avoiding possible biases against the many women, and populations in the global south, should be high priority.

At least three implications merit attention. Firstly, these mechanisms do not assume that male judges intentionally ignore or devalue the impact on ‘women’s interests’ or broader feminist perspectives. As Mill pointed out regarding parliaments,

"We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, 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."

Secondly, while these arguments do not seem to support numerical equality of male and female international judges, they require both that many judges are ‘gender
sensitive,’ and in addition that the international bench includes a large number of the various genders – as well as from other segments of the affected parties, insofar as these populations may be differently affected by the judgements and interpretations.

Thirdly, the arguments from compassion and epistemic diversity pose difficult research challenges in order to trace the impact of women on the bench for judgments and interpretation. We cannot simply look at the voting patterns of individual judges, but must consider patterns among panels, including those of mixed gender panels, and control for many factors. These challenges do not entail caution about the need to address gender inequality on the international bench, but that other arguments may be more decisive

**Status inequality**

The argument from status inequality relies on a claim that visible drastic gender inequity on the international bench is a public expression of status inequality. This raises issues about what should count as an ‘expression,’ e.g. instead of a more or less unintentional effect of uncoordinated actions which can reasonably be overlooked. I submit that the former is more plausible as regards these cases of gender inequity for several reasons. These are public positions, filled by procedures with the express claim that they are in part meritocratic. And the inequality occurs in societies with long histories of ignoring and oppressing the interests and equal status of women – which makes it less plausible to hold that this inequality has come about simply by accident. Even if the resultant drastic inequality is the unintended effect of complex multilevel election procedures and/or a function of past performance as a de facto, per se unobjectionable selection criteria, the fact that responsible actors do not adjust these procedures and criteria to alleviate their effects, does amount to an expression of status inequality.

Note that this argument from status inequality would also hold against a ‘token representative’ – but it might not require complete gender parity, as long as genders 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 genders.

5 Defending the call for less gender inequity on the international bench

The upshot of this review is that there are several reasons to object to the present gender inequity on the international bench. While no argument seems to require a strict numerical gender equality, several support a parity zone of male and female judges, with good reason to aim for diversity of backgrounds and sensitivities for each of the ICs. Note that these arguments are assessed on the basis that the empirical claims will be supported by research. This would seem to entail that even the best empirical support seems insufficient to 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 representativity of all segments of the population.

**A Tradeoff between judicial competence and gender?**

In the past, concerns might be raised that measures to reduce the gender inequality on the international bench would require selection because the nominees are women, or be especially gender sensitive – instead of selecting on judicial merit. In response, firstly, the number of highly qualified female legal professionals leave no doubt that better, more transparent and public nomination procedures would remove any need for such triage. In addition, the epistemic and compassion arguments would seem quite similar in form as requirements already in place for several ICs to include judges from several regions, legal traditions and areas of legal expertise – without such requirements constraining the pool so severely.

**Non-essentialism?**

Several sound criticisms against some arguments for gender equality on the bench reject ‘essentialist’ premises: there is no reason to believe that all women bring the same perspectives or feminist commitments to the bench. One reason is concerns about intersectionality, that the various societal institutions may have combined detrimental effects. Thus those women judges who come from elite backgrounds variously defined may not share outlook or solidarity with poor women of colour from the global south.

In response, the arguments developed above may accept intersectionality and reject essentialism. The epistemic argument only holds that more female judges may reduce the risk of bias and lack of relevant perspectives and arguments in the judicial deliberations – there is no claim that all biases will disappear. Thus we can agree to question

the degree to which the diversity requirements translate to substantive plurality and diversity of viewpoints in practice can be questioned, particularly given that most ICJ judges – despite their national origin – will have received at least part of their legal education in Western Europe or the United States of America, thereby affecting their legal philosophy.

**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 gender biased perhaps beyond repair, and 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. Indeed, 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.89

In response, the arguments offered in favour of a parity zone are slightly more
optimistic yet modest: the empirical research does show variations among the judges,
and gender impact on the deliberations. And a reduction of bias, not its complete
removal, is all the arguments claim: A broader range of female judges may reduce
this bias and ameliorate the interpretations of international law.

**Will women favour women’s issues?**

There is no claim that any judge is likely to feel particularly strongly in favour of
‘the’ sections of the population that each ‘represents.’ Iris Marion Young’s main point
about representation in legislatures also appear to hold with some modification for judiciaries, that ”Having such a relation of identity or similarity with constituents
says nothing about what the representative does.”90 Though the research cited above
does seem to show some indication of more gender sensitivity on some issues by
girl’s 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 the contrary, we have
reason to expect ‘feminist’ perspectives to have contested 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.91 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. It is the need for the broad range of perspectives that
counsels against drastic gender inequality.

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. This does not conflict with observations that any
variations among men or women in these regards are likely to be at most a difference
in degree or in median representatives: some men may be more perceptive than
some women as regards effects on women. The arguments do not assume that
all judges bring their life experience to the process of judging, and 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.92

Many men with children have more experience in child-rearing and in juggling work and obligations of care than do many women without children. Any 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 – which the present arguments do not depend on.

**Slippery slope toward mirror representation?**

Critics may worry that these arguments in favour of increasing the proportion of female international judges entail that all segments of the relevant populations be proportionally represented on the international bench – in effect securing “an exact portrait, in miniature, of the people at large”?93 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.”94 This would seem implausible or impractical.

In response, recall firstly that the arguments offered only support both prevalent genders in the ‘parity zone,’ not full proportionality. Secondly, the arguments for including members of certain categories on the international bench are stronger when they have suffered historical patterns of inequality of status that likely have influenced the norms, procedures and interpretive practices of the ICs. The composition needs to 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. Bodies of authority that are required to uphold standards of equal access and respect or non-discrimination should be particularly concerned to avoid procedures and a composition which reasonably may be suspected to maintain historical inequality or culture of exclusion. Thus several note that

identitarian representativeness does not imply the ‘representation’ of any sort of difference but, more narrowly, of “historically-rooted patterns of exclusion” of specific sub-groups (women, postcolonial communities, etc.).95

These caveats notwithstanding, similar arguments for certain kinds of diversity on the international bench may be appropriate. Recall, for instance, that several of the ICs require the bench to ‘reflect’ different regions, legal systems, legal expertise, or relevant career experiences.96 Other relevant forms of diversity in addition to male/female gender 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.97 The purpose of
the gender diversity as with several of these other requirements is not to ensure that ‘the’ women perspective is included – the intersection and anti-essentialist arguments dismiss such ideas. Rather, the female as much as the male judges can be expected to offer several, sometimes conflicting perspectives and arguments.

**The women judges may not be especially ‘feminist’**

One may worry that the women elected to ICs are not in fact particularly ‘feminist.’ However, the arguments for a parity zone of female international judges make no such assumption that those women international judges 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. 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.’

6 The objective: large proportions of both genders, and how to get there.

The upshot of these objections is that several arguments appear to support calls to increase the proportion of female international judges – assuming that the requisite empirical claims are credible. It also seems appropriate to take steps to elect more judges who are sensitive to 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. However, the argument to ensure status equality, and the law developing tasks of ICs, both support a large proportion of both genders – in effect something like the ‘parity zone,’ though not gender parity. These arguments appear to withstand objections to other arguments in favour 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.”

Statements and formal requirements to include both genders in nominations and appointments seem to have an impact—though some selection bias may be possible. And even a required quota may be ignored, as in the Malta saga. Legal requirement 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.” This 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:

    In the field of international law, the states are the bastions that pose most resistance to various forms in which the concept of gender can be taken into account.

    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, membership on the International Law Commission.

    a lack of transparency and the closed nature of nomination processes on most international courts may depress the percentage of women on the bench over-all. By contrast, institutionalized screening after nomination may increase balance on the bench.

    Domestic and international screening committees may enhance the quality control and de facto reliance on standards 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.

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11 This is a slight revision of the phrase in Chinkin 2010, section 3.
13 Chinkin 2010, Section 25.
14 Ibid.
17 Otto 2016, 493.
21 CEDAW Art 17. Cf the ICC Statute, which holds that “States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children” United Nations, Rome Statute of the International Criminal Court (Entered into Force 2002), A/Conf.183/9 (1998), Art 36 8 (b). – men may have such expertise.
26 Protocol on the establishment of the ACtHR, Art 14.
28 … a requirement not all states comply with (Tulkens 2015) cf the case of Malta.
29 ICC Statute Art. 36 (8) (a) (iii).
30 Otto 2016.
34 Christina L. Boyd, Lee Epstein, and Andrew D. Martin, “Untangling the Causal Effects of Sex on Judging,” American Journal of Political Science 54, no. 2, April (2010); for such patterns for two women US Supreme Court judges – otherwise voting more according to political party patterns, cf Palmer 2002 (ref).
violations of international law (Patricia Viseur Sellars, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation," Office of the United Nations High Commissioner for Human Rights (OHCHR) (2008)). Judges at the Tokyo Tribunal included among war crimes “murder, rape, and other cruelties” The Complete Transcript of the Proceedings of the International Military tribunal for the Far East, 22 Vols., R. Pritchard and S. Zaide (eds.), 1981, vol. 1 at 1029 (cited by Sellars).; rape is mentioned in the governing statutes of the International Criminal Court for the former Yugoslavia (ICTY) art 5 (g) as crime against humanity; likewise the International Criminal Court for Rwanda (ICC), art 3 (g). The Rome Statute of the ICC: Article 7 (1)(g) lists rape, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence of comparable gravity as crimes against humanity:

38 The Furundzija case and in the Kunarac, Kovac and Vukovic case. See in general http://lusakavoice.com/2013/04/19/justice-florence-mumba-reflects-on-womens-rights-and-gender-justice/
41 ______ 2003.
44 Tulkens 2015; Charlesworth and Chinkin 2000.
45 Resolution 1366 (2004) on Candidates for the European Court of Human Rights,
46 Para 14 of report by rapporteur, and Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights.,(2008).
47 ICC Statute Art. 36 (8) (a) (iii).
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56 Testing of this hypothesis is urged by ibid., 1786.

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