



Discussion Paper for GQUAL Workshop #6
Achieving Gender Parity on the International Court of Justice Bench

I. Introduction

This discussion paper begins by describing the current and historic gender composition of the International Court of Justice bench (“ICJ”) and provides information concerning selection procedures. The remainder of the paper lays out ideas, questions, and suggestions in bullet point format on three topics: challenges to achieving gender parity, recommendations for action, and possible next steps to implement these recommendations. These are intended to spark discussion among workshop participants, to attain a deeper understanding of obstacles to achieving parity and to develop potential solutions. The paper concludes with a brief bibliography.

II. Current and Historic Gender Composition

The bench of the International Court of Justice is currently composed of twelve men and three women. The women are Judges Xue Hanqin (China), Joan E. Donoghue (United States), and Julia Sebutinde (Uganda). Judge Hanqin joined the Court in June 2010, and she was re-elected in February 2012. Judge Donoghue joined the Court in September 2010 and was re-elected in February 2015. Judge Sebutinde joined the Court in February 2012. The only other woman to have served as a member of the ICJ since its establishment in 1946 is Dame Rosalynn Higgins, who served on the Court from 1995 to 2009. She served as President from 2006 to 2009. Four out of 106 ICJ judges, or 3.8 percent, have been women. Four women have served as *ad hoc* Judges, while 113 men have. They are Louise Arbour (Canada), Suzanne Bastid (France), Hilary Charlesworth (Australia), and Christine van den Wyngaert (Belgium).¹

III. Selection Procedure

According to the Statute of the ICJ (“the Statute”), at least three months before the date of the election of ICJ judges, the United Nations Secretary General must invite members of national groups of the Permanent Court of Arbitration belonging to member states of the ICJ Statute and members of national groups not represented in the Permanent Court of Arbitration to nominate candidates for the ICJ.² These national groups, composed of up to four individuals named by states, are charged with nominating candidates to the ICJ bench.³ The national group “is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.”⁴ National groups may nominate no more than four candidates, and not more than two of them may be of the nationality of the national group.⁵ The number of candidates

¹ This data is available on the ICJ website, <http://www.icj-cij.org/en/court>.

² ICJ Statute, arts. 5, 4.

³ *Id.*, art. 4.

⁴ *Id.*, art. 6.

⁵ *Id.*, art. 5.



nominated by a group cannot be greater than double the number of seats to be filled.⁶ Extensive interviews of individuals involved in selection of ICJ judges showed that the recommended consultation is relatively rare.⁷ There are no separate guidelines or best practices available to states concerning domestic nominations procedures.

Once states nominate candidates to the ICJ, the General Assembly and the Security Council each vote separately on the candidates.⁸ Candidates who receive an absolute majority of votes in both chambers are elected.⁹ As they vote, “electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization of the principal legal systems of the worlds should be assured.”¹⁰ If seats remain unfilled after the first meeting held for election, the Statute contemplates that second and third meetings may take place, and if necessary, the General Assembly and Security Council may form a joint conference for choosing names for remaining vacant seats for the consideration of the General Assembly and the Security Council.¹¹

Article 31 of the ICJ Statute allows for the appointment of *ad hoc* judges. Parties to a case may nominate an *ad hoc* judge if there are no judges of their nationality on the current ICJ bench,¹² for a maximum composition of 17 judges.¹³ Candidates for *ad hoc* judge selection might draw from the same pool as permanent judges, given that nominees “shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.”¹⁴ States parties can also request an *ad hoc* judge to be appointed in advisory proceedings, and this process will also be governed by Article 31.¹⁵

IV. Challenges to Achieving Gender Parity on the ICJ Bench

These bullet points contain some preliminary ideas and questions about the challenges to achieving gender parity on the ICJ bench for the consideration of the Working Group and panelists and to foster discussion and debate. We look forward to receiving feedback on this list. What is missing? What should be removed? Which are the most important and least important on this list? How do they interact with each other?

- *The pool and the pipeline.* How many qualified women candidates are there for these positions, and where do we find them? Even if a limited pool or “leaky pipeline” exists, does it explain the paucity of women on the ICJ in 2017?

⁶ *Id.*

⁷ RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 142-42 (2010).

⁸ ICJ Statute, arts. 8, 4.

⁹ *Id.*, art. 10.

¹⁰ *Id.*, art. 9.

¹¹ *Id.*, arts. 11-12.

¹² *Id.*, arts 31(2), 31(3).

¹³ *Id.*, art. 31(5).

¹⁴ *Id.*, art. 31(2).

¹⁵ Rules of the Court, art. 102.



- *National nomination procedures.* To what extent do national nomination procedures drive the lack of gender parity? For example, what role do opaque and closed national nomination procedures, lack of guidelines or lack of best practices for nomination at the national level affect parity at the ICJ?
- *Screening at the international level.* Is the lack of substantive screening once candidates are nominated affecting parity? What about political horse-trading in securing positions?
- *Ambivalence.* To what extent are states, the United Nations, and other key stakeholders ambivalent about gender balance on the ICJ? What incentives or obligations do states have to name female candidates? To what extent is ambivalence an obstacle to achieving parity?
- *State or regional differences.* To what extent do challenges to achieving parity differ depending on the state or region involved?
- *Sexism.* Is it responsible for the failure to nominate female judges at the national level or for the failure to elect them at the international one?

V. Recommendations

This section lays out tentative bullet point ideas for the panel and Working Group's consideration and to foster discussion and debate about how to remedy the problem of women's underrepresentation on the ICJ bench. What is missing from this list? What should be removed? How might these recommendations interact with each other?

- *The pool and the pipeline.* Locate, recruit, encourage, mentor, and assist female candidates, beginning with law school and continuing through all career stages. Promote a state policy of a female pipeline for domestic judges; civil servants; etc.
- *National Nomination Procedures.* Develop and distribute best practices and guidelines for national nomination procedures. Adopt these by resolution in the United National General Assembly, relevant regional bodies, or by individual States.
- *Ambivalence.* Foster a United Nations based advocacy campaign to encourage key leaders, like the Secretary General, UNOHCHR, and/or key agencies to advocate for gender parity on the bench.
- *Ambivalence.* Create state centered campaigns to advocate for gender parity. Target specific states and actors. Identify "champion" states that can lead this effort at the regional and international levels. Craft region specific campaigns.
- *Ambivalence.* Formulate persuasive arguments that address the interests of both states and international bodies. More clearly and powerfully articulate the benefits of gender parity so as to create enthusiasm and political will for change.
- *Screening.* Create and promote new screening mechanisms for ICJ candidates. Create a unit/position for this purpose within an existing UN office or within states?
- *Link the national and international selection processes.* Create a platform for transparent interaction between the national nomination and international election phases to ensure both national and international actors and agencies are engaged and accountable

VI. Next Steps – Implementation

We are collecting recommendations for an action plan and sketch some ideas below. Again, these are starting points for brainstorming, meant to foster discussion and debate. We invite



participants to come prepared to discuss what solutions would look like on a practical level. Who can and who must be involved in implementation to make this effort successful? What is the most effective way to achieve change?

- *State focused approach.* Target specific states, advocating nomination of female candidates? Who will lead this? Individuals? Advocacy groups? Allies within the diplomatic corps?
- *Candidate focused approach.* Target promising female candidates, encouraging and assisting, linking them to relevant state or IO actors.
- *International Law Commission Approach.* Anecdotally, it appears that judges are often drawn from the ILC. What role could the ILC play in promoting and achieving parity? Is it strategic to focus on gender parity at the ILC as a precursor to gender parity at the ICJ, or are these two separate issues? Can they be addressed concomitantly?
- *UN approach.* What key actors and bodies should be included at the UN to call for gender parity on the ICJ? Who could lead such an effort?
- *Add transparency to the existing merit based approach.* Transparent merit based approaches to selection would allow careful monitoring by advocacy groups. How to get this approach approved and endorsed, and actually implemented by States?
- *Use a comparative approach.* What can we learn from successful efforts at other courts, like the ECtHR and the ICC, to promote specific steps to achieve gender parity? Are quotas or rules on putting forward candidates from the “under represented sex” necessary?

VII. Bibliography

You may find the following short list of resources useful as additional background reading. We are happy to hear from you regarding additional suggestions for background reading.

RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN, AND PHILIPPE SANDS, *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* (Oxford 2010)

If you are unable to access this book ahead of the conference, you may find the following background paper to the book useful:
http://www.ucl.ac.uk/laws/cict/docs/Selecting_Int_Judges.pdf

DANIEL TERRIS, CESARE P.R. ROMANO, AND LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* (Brandeis University Press 2007)

Nienke Grossman, *Achieving Sex Representative International Court Benches*, 110 AM. J. INT'L L. 82 (2016)

Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT'L L. 339 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472054

Cecily Rose, *Justifying Arguments About Selection Procedures for Judges at International Courts and Tribunals: A Response to Nienke Grossman*, available at



<https://www.asil.org/blogs/justifying-arguments-about-selection-procedures-judges-international-courts-and-tribunals>

For a comparative perspective, you may view the selection procedure for judges at the European Court of Human Rights, at http://website-pace.net/en_GB/web/as-cdh

Given its potential relationship to the pool of ICJ judges, you may also be interested in the selection procedure for membership to the ILC, at <http://legal.un.org/ilc/ilcmembe.shtml>