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The *Smurfette* Principle

Reflections about Gender and the Nomination of Women to the International Bench

Liesbeth Lijnzaad

1. Introduction

This chapter will discuss the appointment and election of international judges, and will stress that attention should be given to the selection and nominations process, rather than merely to the election. In preparation to the elections there are, I believe, improvements to be made with respect to the election of female judges. While parity may take some time to achieve, it is high time that more attention is given to how women are nominated for election to the international bench.

Whether a problem exists with respect to the election of women to international courts and tribunals is no matter for debate: their absence is clearly visible. To look at the Tribunal I am most familiar with, it should be noted that so far five women were ever nominated for ITLOS and one of these nominations was withdrawn prior to election. Of these four eligible women, three had been elected by 2017. This is a 75% success rate for the individual nomination, which does perhaps not sound all that bad. At the same time, it implies that by now (2020) women make up only 14% of the bench at the Law of the Sea Tribunal and that is certainly not an impressive percentage.[1]

It is fair to say that the low number of nominations demonstrates just where the issue of the participation of women is problematic: maybe not so much the elections, but to a great extent the low number of female candidates. Thus, an approach focusing on improving the nomination process may yield more results in terms of increasing the number of women on the bench, rather than merely addressing the election process itself. To follow up on the assumption that it is important to invest in the selection and nomination process for candidates to judicial positions well ahead of any election, it is necessary to look at how such

[1] For a call to action see the blog by Priya Pillai, 'Women in International Law: A Vanishing Act' (*Opinio Juris*, 3 December 2018).

Liesbeth Lijnzaad, *The* Smurfette *Principle* In: *Identity and Diversity on the International Bench*. Edited by: Freya Baetens, Oxford University Press (2020). © The several contributors. DOI: 10.1093/oso/9780198870753.003.0002.

processes function: what is required before a formal nomination takes place and who has a role to play in the nomination process?[2,3]

The so-called *Smurfette* principle refers to the (visual) role of a single woman amidst a group of men. This image has been borrowed from contemporary television and movie' critique:[4] the *Smurfette* is a single woman in the company of men. It refers to a series of comic books telling the story of a small blue people living in a mushroom village in the middle of a large forest. There are 100 *Smurfs* in the village, and only one of them is a girl: *Smurfette*, all blue, curvy, and blonde amongst her male blue Smurf pals.[5] While the spectator focuses on what happens to this group of people, the woman stands visibly alone as the odd one out. Examples would be characters like *Miss Piggy* in The Muppets, or *Princess Leia* in Star Wars. Both may have a visible role amidst their male buddies, yet in the end men control the situation.

Granted, a reference to *Smurfette* in the title of this piece may draw the attention of readers who would not otherwise be tempted to read about its subject matter but it is a recognizable shorthand term for a phenomenon seen everywhere in society, in the media and indeed on international courts and tribunals. While a single woman in a prominent role amongst men has at times been viewed as a sign of modernity (think about people such as *Margaret Thatcher* or *Benazir Bhutto*), the image in fact underlines that women in such roles are an exception rather than the norm. Her visibility underlines the normalcy of a male majority as the existing standard. Thus, the presence of that single woman identifies women as strangers in a male-dominated narrative (on television, or in the movies), and it may be suggested that this is not only the case with popular visual culture but equally so in many other parts of society. Like the single blue *Smurfette,* the few female judges tend to stand out as members of international tribunals. An example would be the attention given to writing about female judges as representatives of their gender, rather than as expert lawyers. It is striking how often authors discussing the

[2] It is not possible to address all nomination processes as they vary widely and because there are some 30 international courts and tribunals. Most significantly there is a fundamental distinction between courts and tribunals that have (at least) one seat per participating State, and courts and tribunals that have a limited amount of seat thus necessitating an election. I apologize for focusing mostly on these three international courts and tribunals: the International Court of Justice, the International Tribunal for the Law of the Sea and the International Criminal Court.

[3] For earlier discussions see amongst others: Ruth Mackenzie and others (eds), *Selecting International Judges: Principle, Process and Politics* (Oxford 2010); Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication' (2016) 56 Virginia Journal of International Law 339–406; Nienke Grossman, 'Achieving Sex-Representative International Court Benches' (2016) 110 American Journal of International Law 82–95.

[4] The term was coined by Katha Pollitt, 'Hers, The Smurfette Principle' *The New York Times* (7 April 1991) <nytimes.com/1991/04/07/magazine/hers-the-smurfette-principle.html> accessed 31 January 2020. See also: Jason Richards, 'The Problem with Smurfette, what to make of the lone female in a village of 100 Smurfs' *The Atlantic* (28 July 2011). Wikipedia tells us that '[T]he Smurfette principle is the practice in media, such as film, television series and television networks, to include only one woman in an otherwise entirely male ensemble.'

[5] *Les Schtroumpfs* (the Smurfs) is a series of Belgian comic books created by Peyo in 1958.

international judiciary specifically address the role and position of the few women who have become international judges, and elaborate on their personal careers. Essentially this is writing about the *Smurfette*: a focus on the one woman who stands out confirms that the system is essentially male-oriented.

On the one hand, such attention underlines the absence of women on the (international) bench and usefully keeps this issue under attention. Yet, it is uncomfortable that such pieces single out the perseverance and steadfast work of these few female lawyers, as though either no other women would bring such dedication (which thus clarifies the low number of women on the bench), or implying that other women are simply not up to that standard.[6] This argument is known as the 'limited pool' argument: it suggests that the low number of female judges on international courts is related to the mere absence of sufficient qualified (or sufficiently qualified?) female lawyers to choose from.[7] This, it is thought, is mostly a generational issue—in due course the availability of qualified women will supposedly improve as more women study law: it is just a matter of time.[8]

In the following I will reflect on aspects of the selection and nominations process preceding the election of international judges, and offer some suggestions as to how to improve such processes in order to enhance the number of female judges. The central proposition is that a gender balance can hardly be achieved through the election process alone but needs to be addressed at a much earlier stage—that is in the preparatory phase: at the time of selection and nomination. When looked at in greater detail, it may be that more and different steps can be taken within the existing legal system that will further the election of more female lawyers to the bench.

2. Eligibility of a Candidate

Eligibility means different things to different people, and there is no uniform view of who would be an ideal candidate for the position of judge.[9] The foundational instruments of the various courts and tribunals identify individual criteria for eligibility such as the importance of a high moral character and independence,

[6] For a particularly striking example of such an approach see Joseph Powderly and Jacob Chylinski, 'The Women Judges: Leading the Line in the Development of International Law' in William A. Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Edward Elgar 2017) 143–80.

[7] Grossman's excellent research has identified the fallacy of this line of thought. See Grossman, 'Shattering the Glass' (n 3) passim; and Grossman, 'Achieving' (n 3) at 84–86. Mackenzie and others (n 3) at 165 observe that 'women are often not *seen* to be in the pool because of the exclusionary nomination processes that favour male candidates from more traditional international law backgrounds or make assumptions about career paths and candidates' motivations'.

[8] See about this idea in a domestic context, New Zealand Justice Susan Glazebrook, *It is just a matter of time and other myths*, on <www.courtsofnz.govt.nz> accessed 31 January 2020.

[9] See amongst others Mackenzie and others (n 3).

impartiality, and integrity[10], as well as broad and in-depth competence in a particular field of law. Also, overall requirements are formulated with respect to the general composition of the bench stressing the importance of the representation of major legal systems of the world and an equitable geographical distribution. These criteria will differ slightly in their formulation, but the general direction is fairly similar: international courts require experienced expert judges who are independent and impartial and will be expected to deliver quality decisions.

Given that the formal requirements for elections are clear, States may add their own wishes as they set out to look for a candidate to be elected as judge. Some States plan well ahead, and have strategies (that may describe a pathway of many years) for a candidate to be sufficiently well known in international legal circles to reach the International Court of Justice (ICJ). A good candidate has a profound knowledge of the subject matter a court is entrusted to deal with, and also understands where a State's interests lie. A candidate may be seen as a torchbearer for her State and its views on international law, and achievements will be presented as part of its commitment to international law. She should not be seen as having ideas that are too wild or creative, as States appreciate a degree of predictability and may be somewhat conservative in their views about the development of the law or the proactive role of courts.

Preferably the candidate is someone who will indeed be elected, thus making the candidacy worth the effort of the State presenting a candidate. The presentation of a candidate for the position of judge, the nomination and election campaign are expensive, not only in terms of money spent on a campaign but also in view of the bargaining chips necessary to facilitate election and the politics involved in such campaigns. Presentation of a candidate by a State implies the expectation that there is a reasonable chance the candidate will succeed. Election will be a success for the new judge, and equally so for the State who has presented the candidate.

Yet, even if the international system seems to suggest that the best international lawyers presented will be elected judges, there is no guarantee that this will be the case. It is quite clearly of great importance that the international bench consists of judges with an extensive and profound knowledge of the law, yet views on what the law is, may differ and there will invariably be nuances between interpretations. Academics and Non-Governmental Organizations (NGOs) clearly do not participate in the election of judges, but have over the years been developing their own wish lists. From an academic perspective, there is a wish to see qualified judges—so: professors with a good reputation, or indeed professors who can boast a (prior) membership of the International Law Commission (ILC). But not everyone will have been an ILC member,[11] and not all ILC members may be

[10] See for example: Article 2 ICJ Statute, Article 2 Annex VI UNCLOS, and Article 36 (3) ICC Statute.

[11] After all there are but 34 ILC members (currently 4 of whom are women), and membership is subject to regional representation.

necessarily top-notch lawyers either. Also, a good professor of international law will not necessarily make a good judge.

A great female lawyer may not be recognized as the ideal candidate for the position of judge, or would not be considered eligible for such a position. She may not participate in the social circles in which nominations are decided, and may not be perceived as a potential candidate for a judicial vacancy. There is perhaps no malice on the part of States who never nominate women, but rather the stunning absence of a reflection on the relevant legal framework and the negative impact the absence of parity has on the legitimacy of a court. That is quite apart from courts and tribunals missing out on the contribution women make, the benefits of diversity, and the importance of mixed teams as being a more effective format for performing difficult tasks. The repetition of past practice leads to the frequent re-nomination of judges or the emphasis on the judiciary as being a meritocracy (thereby not only presenting the bench as a 'closed shop', but also suggesting that male international lawyers are somehow better at this job). Such approaches ignore the applicable legal framework and do not contribute to strengthening the international bench, as they turn a blind eye to the potential of women.

The political confines of elections may have a more prominent role than is visible to the outsider. For various international courts and tribunals agreed rules on the division of seats amongst the regional groups exist, some formalized in treaties and others in political decisions.[12] Such rules are the result of political processes and are important to States. They provide a certain amount of predictability during elections: even if all States will vote[13], States putting forward a candidate will be most concerned with the direct competition within the regional group they are part of. In a way, these regional groups make the competition more transparent: the immediate competition is within the own group. However, if one considers that the election of judges should be based on an assessment of the quality of candidates, the advent of the 'agreed slate' within regional groups has sometimes thwarted the possibility of 'quality control'. Some regional groups may agree on who will be the accepted candidates for the position of judge in a particular court or tribunal and will present the exact number of candidates for the exact number of seats available, thereby obliterating any choice between candidates. Though it may appear that an agreed slate could be in favour of female candidates, on reflection this mechanism has the potential to go against the freedom of choice, and selection of the basis of merit.

[12] For ITLOS see formal rules in Article 3(2) of the Statute (Annex VI to the UN Convention on the Law of the Sea), to which further rules on the regional distribution of seats were added by the Meeting of States Parties in 2011, see doc SPLOS/201.

[13] Members of the UNGA and the UNSC for the ICJ, States Parties to UNCLOS for ITLOS and the Assembly of States Parties for the ICC.

3. The Legal Framework

When addressing the absence of women on the international bench the understanding seems to be that no legal framework exists. That is not quite correct, and it should be noted that the UN system appears to have relevant rules with respect to participation in the judiciary. These rules have become somewhat obscure and it is useful to reiterate the relevant legal framework with respect to the composition of courts and tribunals within the UN system.[14]

3.1 Article 8 UN Charter

A standard with respect to the eligibility of women to the international judiciary is clearly available with respect to the ICJ. Article 8 of the UN Charter reads: 'The United Nations shall place *no restrictions* on the eligibility of men and women to participate in *any capacity* and under conditions of equality in its *principal and subsidiary organs*'. The formulation is an unambiguous one (*no* restrictions) rather than an open-ended due diligence provision that would seek to 'promote the eligibility' or 'use all appropriate measures' similar to language found in provisions elsewhere.[15] It would seem to be a fairly straightforward obligation, also because it does not appear to be confined to formal restrictions and would seem to encompass informal restrictions (otherwise known as indirect discrimination) as well.

Strikingly, the provision has been understood as covering exclusively the employment of women by the UN, in spite of the very clear *any capacity* formula suggesting a much broader scope than only female staff at the UN Secretariat. Von Schorlemer and Papenfuß, in the Commentary on the UN Charter by Simma and others, provide some historical background, highlighting that the provision's predecessor in the League of Nations' Covenant was more forward leaning as it referred to the promotion of the full participation of women in the League (Article 7(3) of the Covenant) which had a more proactive flavour.[16] Initially the drafters of the Charter had not included any provision on equality of men and women in the draft text.[17] A consideration seems to have been the fear that a specific provision would limit the freedom to select members of delegations.[18] However, a 'feminist'

[14] Even if technically neither the Law of the Sea Tribunal nor the International Criminal Court are part of the United Nations.

[15] See the discussion of Article 8 CEDAW below.

[16] Article 7(3) League of Nations Covenant reads: 'All positions under *or in connection with* the League, including the Secretariat, shall be open equally to men and women'.

[17] Sabine von Schorlemer and Anja Papenfuß, 'Article 8' in Bruno Simma and others (eds), *The Charter of the United Nations, A Commentary*, vol. 1 (3rd edn, OUP 2012) 416–44.

[18] Putting sovereignty above equal treatment.

intervention by Eleanor Roosevelt appears to have led to the inclusion of Article 8 in the Charter.[19]

The phrase '*participate in any capacity*' has led to some initial debate about the scope of article 8. The Commission on the Status of Women (CSW) in 1948 favoured a broad interpretation[20] of *any capacity* and understood the rule to contain two different obligations: an obligation internal to the UN Secretariat with regard to staff, and an obligation with regard to Member States and how they would be represented in the UN's organs, committees, or commission. In this reading, the provision would also imply an obligation with respect to participation in the principal organs of the United Nations, the ICJ presumably included. This reading by CSW was rejected by the Economic and Social Council (ECOSOC) in favour of the more limited interpretation focusing on UN staff only.[21]

When discussing the *principal and subsidiary organs* element of the text, Von Schorlemer and Papenfuß do refer to the principal organs of the UN, but do not reflect on what this would specifically mean in terms of the composition of the ICJ bench, as opposed to the composition of the ICJ registry who are UN staff. Ubeda-Saillard, in the Commentary by Cot and others, reiterates that Article 8 is situated in Chapter III of the Charter, dealing with the principal organs of the UN (the ICJ obviously being one of them) without drawing any conclusions from that, merely referring to the Secretariat in the very same sentence.[22] The discussion then focuses on the role of the internal administrative system of the UN, and how procedures before the UN Administrative Tribunal have addressed bias in the employment conditions for UN staff referring to Article 8, followed by case law addressing harassment in the workplace. Ubeda-Saillard, however, notes that there is a certain lack of clarity in the provision which addresses the Organization but fails to provide more detail about who exactly has these obligations: while the UN General Assembly deals with staff issues at a general level it is the Human Resources department that remains responsible for setting personnel standards. Member States have retained their independence with respect to the composition of their delegations.[23] Von Schorlemer and Papenfuß equally understand the provision to be vague and conclude that the provision 'raised general awareness for gender-sensitive aspects of the UN System'. They suggest its crucial importance is with respect to UN Staff Regulations, also in relation to the work of the UN Administrative Tribunal. The

[19] See Muriel Ubeda-Saillard, 'Article 8' in Jean Pierre Cot, Alain Pellet, and Mathias Forteau (eds), *La Charte des Nations Unies, Commentaire article par article*, vol.1 (3rd edn, Economica 2005) 603–30, footnote 1 at 604; and von Schorlemer and Papenfuß (n 17) para 6, at 418. Labelling an intervention as 'feminist' will be read by many as pejorative.

[20] There is some interesting messaging taking place with respect to the reception of the views of CSW: the reading with the two different elements is not that unusual considering the text of Article 8 UN Charter. However, in discussing this debate, authors frequently consider the reading as 'expansive', suggesting this reading being too bold to be acceptable.

[21] See E/RES/154B(VII) of 20 August 1948.

[22] See Muriel Ubeda-Saillard (n 19) at 603.

[23] See paras 14–16, at 610.

provision has been understood as ensuring the equality of rights of UN staff, as opposed to other participants within the UN system. Though it is comforting that the administrative system of the Organization has a helpful standard in the Charter to address equal treatment and gender issues it is remarkable that—in spite of being located in the Chapter dedicated to the UN's Principal Organs—its scope has been understood to be quite limited. This suggests that for States the United Nations is 'them', not 'us': rules concerning equal access are for staff, not for delegations or for elected positions.[24]

The sovereignty argument is a traditional one, and it may be time for a reconsideration. Even if no obvious sanction would exist with respect to the composition of delegations to the organs of the United Nations or to not proposing candidates for the position of judge, Article 8 is a useful reminder of the desirability of a better representation of women across the UN system, the principal organs included. Without questioning sovereign authority with respect to the composition of delegations to the United Nations, or the system established with respect to nominations to the International Court, Article 8 Charter may require a fresh discussion about its implementation, given that it appears to have been last discussed in 1948. It could be envisaged that such a discussion might take place in the 6th Committee (Legal) of the General Assembly at the start of the next triannual nominations period, if only to draw attention to the importance of diversity on the Court. Alternatively, CSW could be the right forum to look back at its initial position and the contemporary relevance of that position.

3.2 Article 8 CEDAW

It may not come as a surprise that another relevant provision that may be of some use with respect to the strengthening of number of women on the international bench can be found in the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). Article 8 CEDAW reads: 'States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to *participate in the work of international organizations*'.

Unlike Article 8 UN Charter, this provision—as have many provisions in CEDAW—uses a due diligence formula which urges all States to use their best efforts and appropriate measures to improve the opportunities for women to participate in the work of international organizations. Unfortunately, Article 8 CEDAW has hardly had the attention it deserves and remains a bit of a sleeping provision. In the *Travaux* of the Convention, the description of the drafting of this Article

[24] NB a similar issue with respect to parity has arisen with respect to the appointments of Special Rapporteurs and similar representatives of the United Nations.

takes a mere two and a half pages, demonstrating that the authors of CEDAW at the time of drafting did perhaps not consider this a crucial right.[25] Apparently Article 8 (international representation) was a spinoff from Article 7 (participation in political and public life). Wittkopp, in the Commentary by Freeman, Chinkin, and Rudolf, notes that the provision was uncontroversial during negotiations even if this was the first time that the right to participation in the work of international organizations is mentioned in a human rights instrument.[26] The provision obliges States to take appropriate measures to ensure women have the opportunity to represent their governments at international level, and the opportunity to participate in the work of international organizations. This is the familiar dual obligation where it concerns women: both the representation of their State as well as non-discriminatory access to the work of international organizations, more or less mirroring Article 8 UN Charter.

The eligibility of women to international courts and tribunals—whether as judge, prosecutor, or indeed civil servant—seems to have escaped the attention of the supervisory Committee on the Elimination of All forms of Discrimination against Women (the Committee) so far. While the work of judges may not be considered to encompass the representation of their Governments in a diplomatic sense, it constitutes most certainly the participation in the work of international organizations. Article 8 has not been the subject of much academic research itself either, let alone from the perspective of judicial appointments more specifically.[27] It appears to have been the odd one out as well in the various commemorative publications celebrating the Convention. Here again, when the provision is addressed the attention turns to its importance for UN staff and the role of the UN Administrative System, or alternatively drifts towards the importance of the presence and participation of women in the field of peace and security and conflict resolution.

The CEDAW Committee has not drafted any specific General Recommendation so far about the composition of the international bench.[28] General Recommendations 8(1988) and 23(1997) nominally address Article 8 CEDAW, the later recommendation focusing on employment issues and to a limited extent the composition of representative organs within the United Nations. It could be suggested that the Committee focus on women in the international judiciary and take up

[25] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff 1993).

[26] Sarah Wittkopp, 'Article 8' in Marsha A. Freeman, Christine Chinkin, Beate Rudolf (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women, a Commentary* (OUP2012) 221–31.

[27] Art 8 CEDAW is not often discussed in legal literature either. See Claudia Martin, *Article 8 of the Convention on the Elimination of All Forms of Discrimination against Women: a Stepping Stone in Ensuring Gender Parity in International Organs and Tribunals* (posted 14 September 2015)<www.gqualcampaign.org> accessed July 2019.

[28] General recommendations are based on Article 21 CEDAW and provide a general interpretation of the Convention by its supervisory committee.

this matter by drafting either a new General Recommendation, or by reviewing Recommendation 23, to stress the importance of a gender balance in international courts and tribunals.[29] Such a strengthened General Recommendation will serve as a guide to the discussion between the Committee and States Parties in the debate about their national reports: how has your State tried to contribute towards an improved gender balance on the international bench? A strengthened General Recommendation may just take Article 8 CEDAW out of its hibernation.

4. Nomination of Candidates

Turning now to the actual selection and nomination of candidates, we must reflect on what this process entails. How are candidates selected, and what institutional guarantees exist, or could be established, in order to improve the gender balance on the bench? In a number of judicial institutions where every participating State has a national judge, the selection process will be largely regulated by domestic procedure (whether or not formalized) and the quality and inclusiveness of the selection process should be addressed at national level.[30] Sometimes pre-selection at national level is required after which an international body will provide advice or decided based upon a list of candidates presented by States.[31] Systems were all States have a 'national' judge presumably provide more clarity about how and when to address concerns with respect to the nomination of female candidates and I will not further address these here.

In other situations, States nominate candidates for election who need to fulfil the criteria for the position of judge as contained in the foundational document, but about whose selection nothing is prescribed. The Law of the Sea Tribunal is a case in point, which does provide a list of criteria but has no specific rules about the selection of a candidate. That means it is essentially a matter of picking a candidate, presenting and formally nominating her and getting that person elected. Who the 'right candidate' is, whether consultations with human resources persons takes place, who exactly makes the selection, or whether the selection is a competitive or political process, all of that will differ from State to State. Selection will clearly also depend on the type of expertise required for a particular court or tribunal. Such processes may not be transparent, yet increasingly parliaments take an interest in selection leading to more formalized and indeed published rules for the selection.[32]

[29] Or in fact, it may be helpful for an NGO to present a draft General Recommendation to the Committee in order to facilitate such debate.

[30] Such as the European Court of Justice, its Court of First Instance or the European Court of Human Rights.

[31] For example, see Article 22 European Convention on Human Rights.

[32] Thus, there may be international rules (provided in the Statute of a particular international court) as well as national rules on selection processes.

For some courts the process for the presentation of candidates is more institutionalized. The statutes of the ICJ and ITLOS speak about geographical diversity, representation of the principal legal systems of the world but not about fair gender representation, unlike the International Criminal Court (ICC) Statute's Article 36(8)(a)(iii). Perhaps a difference between courts dealing with interstate disputes as opposed to the character of international criminal proceedings is of relevance here. In the following I will first comment on the nomination process for the International Court of Justice and the International Criminal Court, before addressing the relevance of other roles and positions prior to being nominated as a candidate in the next paragraph.

Nominations to the ICJ take an unusual route, and rely mostly on an outside body. Formally it is not a State that selects and nominates, but a national group of the Permanent Court of Arbitration (PCA)[33]. The Secretary General of the United Nations will request nominations, and the national groups will respond directly to the Secretary General with a list of persons they consider to be in a position to accept the duties of member of the Court. This group has the independent authority to nominate up to four persons for election to the ICJ, as is described in Article 5 of the ICJ Statute. No more than two persons nominated may have the same nationality as the national group, and consequently the national groups may and will nominate people of a nationality other than their own. This nominations' process is detached from the State, even if the national groups tend to be composed of academics and lawyers with a certain connection to that State. It is the national group itself which sends its nominations for the ICJ elections directly to the UN Secretary-General. Though the independence of these national groups has been questioned, many of them will independently make up their own mind. Co-nomination of candidates (from other States) is common, and is seen as an expression of support for a particular candidate. In spite of the independent role of the national groups, contacts will undoubtedly be used to learn whether or not a particular candidate is likely to be supported by their own State, as national support will be necessary to ensure a successful campaign.

The nominations' process for the ICC specifically requires the participation of women on the bench as Article 36(8)(a)(iii) refers to a fair representation of female and male judges. Article 36 (4)(a) ICC presents two different manners for nominating candidates to the International Criminal Court. Either States use their domestic procedure for the nomination of candidates for appointment to highest judicial offices, or States follow the procedure used for the nomination of candidates to the ICJ. In both cases the ICC Statute seeks to take some distance from the States themselves by referring to procedures that are not strictly governmental. The scrutiny of the first option—the parallel with the appointment of the highest

[33] If no such group exists, a specific procedure is provided in Article 4(2) and (3) ICJ Statute.

judges—seems to lie with domestic authorities, while the second option takes us back to the national group of the PCA. Unlike the procedure in Articles 4 and 5 of the ICJ Statute, only one candidate may be nominated for each ICC election.

The origins of Article 36(4)(a)(ii) are not very well documented. It appears that the general sense at the time of the drafting was that the national group could be relied upon to present a suitable and qualified candidate, as their focus would be on the legal (rather than political) qualities of the person to be nominated. Writing about Article 36, Gonfrier only refers to both options in the selection process but omits a discussion of the scope of the role of the national group of the PCA.[34] Jones writing about the same subject refers to Article 36(4)(a)(ii) as implicitly including the possibility to nominate candidates from States other than the State of the national group of the PCA concerned.[35] Otherwise, most of the attention during the drafting of the ICC seems to have gone into the system with the two distinct lists created by Article 36(3)(b), which is not relevant to this chapter.

National groups may—similar to the existing practice with respect to the ICJ—also consider nominating candidates that are not their nationals. So far however, no co-nomination practice similar to that under the ICJ Statute has developed within the ICC. This may be a consequence of a lack of awareness of the ICJ nominations process in ICC circles, and it is to be regretted: co-nominations tend to reinforce the eligibility of candidates. The candidate presented by one State obtains increased credibility when there is visible support for her elsewhere—as expressed through co-nomination. Such a broader interpretation of Article 36(4)(a)(ii) ICC would be in line with the faith expressed in the national groups by the drafters of the Rome Statute, and could presumably increase the (co-)nomination of female candidates.

Even if some Commentaries consider that the procedure involving the national group of the PCA is self-evident, it should be noted though that it is somewhat unclear from the text of the Rome Statute whether these groups are independently corresponding with the Secretariat of the Assembly of the States Parties.[36] This must be presumed to be the case, given the parallel with the ICJ nominations where

[34] Olivier Gonfrier, 'Article 36' in Julian Fernandez and Xavier Pacreau (eds), *Statut de Rome de la Cour Pénale international, commentaire article par article* (Pedone 2012) 973.

[35] John R W D Jones, Chapter 4.4 *Composition of the Court*, footnote 50, at p 245 referring to discussions in the PrepCom on the use of the ICJ-system as this would 'ensure that merit would be a paramount consideration in the election of judges' (see para 37 PrepCom Report); in Antonio Cassese, Paola Gaeta, and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (OUP 2002).

[36] Even if relying on the same body, the text of Article 5 (1) ICJ Statute ('… the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration …') and of Article 36(4) (a) (chapeau) ('Nominations of candidates for election to the Court may be made by any State Party …') and (ii) ('By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court') Rome Statute are not strictly identical.

the Group communicates directly with the UN Secretary General. At any rate, it must be considered *contra legem* for a government to prevent, or to not submit a nomination made by a national group under Article 36(4) to the Secretariat of the Assembly of States Parties. In the run up to the elections, the Advisory Committee on Nomination, established on the basis of Article 36(4)(c) Statute will be monitoring the nominations' process, and will seek to evaluate the quality of the nominees as well as their regional spread and the gender balance.

For two important international courts, the ICJ and the ICC, the national group of the Permanent Court of Arbitration plays a crucial role. Hence, we must address our attention to this not very well-known body. The national group of the PCA finds its origin in Article 44 of the 1907 Convention for the Pacific Settlement of International Disputes,[37] which indicates that Parties may select four persons of known competency in international law and of the highest moral reputation available to accept the duties of arbitrator. These so-called 'members of the Court' are essentially people on a list who are available as arbitrator, having a renewable six years' appointment. However, apart from being available for arbitration, their most important task is the nomination of candidates for the position of judge at either the ICJ or the ICC as discussed above.[38]

In 2016, there were 121 States Parties to the 1899 and the 1907 Convention for the Pacific Settlement of International Disputes. They had nominated a total of 273 members of the Court.[39] Amongst these members were 48 women: 26 States had one woman in their national group, eight States had two women, while Norway and Romania stood out with a majority of three women in their national group. By 2018 the figures had changed somewhat: of the 121 States Parties, 37 national groups had no female members, 26 groups had one woman in their midst, and 15 had two women (and no national groups with three women remained)—so the number of female members of the Court had risen to 56.

The composition of the national groups and their role in the selection process is of crucial importance. The relevance of the participation of women in a nominations' process, as is the case with members of the Permanent Court, is not necessarily that 'women nominate women'. There may be an element of female solidarity, and a mixed selection committee is at any rate desirable if interviews are to be conducted. The importance lies also in ensuring that those responsible for selection and nomination have access to a wide variety of relevant networks, and that thus

[37] And before that, Article 23 of the 1899 Convention for the Pacific Settlement of International Disputes.

[38] See for a detailed description of these national groups: Remy Jorritsma, *National Groups: Permanent Court of Arbitration (PCA)*, Max Planck Institute Luxembourg for Procedural Law Research Paper Series | No. 2017 (8).

[39] Nominating members of the Permanent Court is a discretionary power, and not all States have nominated four people. In some cases, States fail to renew appointments when the appointment period has run out. This implies the disappearance of members from the PCA list, and thus the loss of nominating power.

a diverse group of potential candidates is considered. It is undeniable that women have other networks than men, even if these may overlap. Also, as relative outsiders in a men's world, women may take a different approach to the selection process as such: rather than starting with 'who do we know', considering first 'what kind of person are we looking for', to be followed by a search for persons fitting the profile.[40] A more open approach away from the old boys' network of senior lawyers provides the potential of opening up the selection process to unexpected candidates, and indeed to well-qualified female candidates. Mixed selection panels are likely to present a more balanced selection of candidates to the benefit of the international courts and tribunals.

5. Seniority of the Candidate

Eligibility depends on many things, but there is an understanding that a credible candidate is someone who has demonstrated over the course of her career to have obtained such relevant expertise and experience that would make her suitable for the position of judge. Academic publications alone will not be enough to convince States to vote for a candidate; a certain measure of experience in relevant positions adds to the impression of 'seniority' that is considered required for such positions. In general terms, this would refer to experience as an arbitrator, as either a judge ad hoc or as an agent in a case before an international court or tribunal, or as expert and member of a professional body (whether as member of the PCA, the ILC, or the *Institut de Droit International*). Additionally, diplomatic experience or work within the United Nations are also considered relevant in the informal list of what makes up relevant experience.

Imprecise, yet fairly well-understood informal criteria are considered by States when evaluating candidates for judicial positions. This suggests that it is interesting to explore pathways to such relevant experience, in order to address the question as to how to obtain such seniority. This is not the place to fully embark on such research, as this is an initial exploration without looking at figures and statistics (for now), yet certain questions can certainly be identified for further research. Let us gloss over the types of positions that may demonstrate a candidate's capability to take on the role of judge. One could think about courtroom experience, such as acting as a judge or judge ad hoc, as an arbitrator in interstate conflict, as Agent or Counsel for a State before an international court. Below I will explore women's participation in such positions and how this could be strengthened.

[40] This observation is based on my participation in a domestic selection panel for ICSID arbitrators.

5.1 Having Been a Judge Ad Hoc

Before the Second World War, the Permanent Court of International Justice (PCIJ) never had any female judges, and since its inception the ICJ has had only four women elected to the bench. An additional four female judges ad hoc have been appointed, all four from Western States and none of them have continued to become a full member of the Court. Yet, Van den Wyngaert went on to become a judge at the International Criminal Court and Charlesworth is currently acting as ICJ judge ad hoc for a second time. Something similar may be said about the Law of the Sea Tribunal which has so far only had three female judges, and only recently welcomed its first female judge ad hoc.[41]

Looking at the membership of women in the International Court, it does not seem bold to suggest that there appears to be a higher chance for women from the five permanent members of the UN Security Council (the so-called P5 countries) to be elected to the Court, as compared to nationals of other States.[42] This is likely related to the presumed informal understanding that the P5 States ought to be represented on the bench. If that is a broadly supported view, the nomination of a female candidate will not be perceived as risky, however, the existence of such an informal norm may also be questioned.

5.2 Having Been an Agent

Another way of demonstrating relevant prior experience is previous participation in a court case, preferably in the role of agent. Such a role implies the overall responsibility of representing a State before a court, and requires active participation in procedural strategy and knowledge of judicial work. It also implies presenting pleadings before a court, thus having experienced the procedure from the other side of the room.[43] The number of cases in which female agents have represented their States has significantly grown since 2000. In cases before the Law of the Sea Tribunal, female agents only start to appear after 2010 and indeed in its most recent case, the Law of the Sea Tribunal had two female agents before it.[44] Advisory

[41] At the ICJ: Suzanne Bastid in *Application for the Revision and Interpretation of the Judgement in Continental Shelf* (1985); Christine Van den Wyngaert in *Arrest Warrant* (2002); Louise Arbour in *Obligation to Negotiate Access to the Pacific Ocean* (preliminary objections, 2015); Hilary Charlesworth in *Whaling in the Antarctic* (2014), and *Arbitral Award of 3 October 1899* (ongoing). At ITLOS: Anna Petrig in *M/T San Padre Pio* (2019).

[42] Rosalyn Higgins (United Kingdom, 1995–2009), Hanqin Xue (China, 2010–present), Joan Donahue (United States, 2010–present). Julia Sebutinde (Uganda, 2012–present) is the odd one out.

[43] Current ITLOS judges Neeru Chadha and I have both been agents of our States before the Tribunal.

[44] Ms. Cicéron Bühler representing Switzerland, and Ms. Uwandu representing Nigeria in Case 27, *The M/T San Padre Pio* (2019).

proceedings tend to attract more female representatives in any case (including from international organizations).

5.3 Having been an Arbitrator

When looking at the election of judges to the international bench, the appointment of arbitrators may not be an obvious part of the discussion. However, this is relevant as there is often a close connection between persons acting as arbitrator and as judge: having been active as an arbitrator demonstrates the required expertise for the position of judge and appears to improve the likelihood of being elected or selected as a judge. Consequently, arbitration may be seen as useful preparatory practice for the bench.[45] If previous experience as an arbitrator is favourable to nomination for the position of judge, then how does one become arbitrator in an interstate case?

5.3.1 The appointment of arbitrators by States

Unlike a court of tribunal with a permanent composition, States enjoy a large measure of autonomy in nominating arbitrators. This offers them the possibility of determining who should be an arbitrator irrespective of the views of their opponent. Clearly, in nominating an arbitrator, States are looking to find 'the right person' who will ensure that a profound knowledge of international law, common sense, and a proper understanding of the position of the nominating State itself will be reflected around the table in the arbitral tribunal. With the focus on finding the right person, considerations such as the desirability of choosing a female lawyer become secondary, if present at all. States rarely seem to select women for such positions and that is regrettable. The number of female arbitrators is surprisingly low. Few women have risen to the top in international arbitration, yet differences may exist between commercial arbitration, investment arbitration, and 'traditional' interstate arbitration.

In this respect, reference must be made to the very clear stance taken by the International Centre for the Settlement of Investment Disputes (ICSID) secretariat and its Secretary-General Meg Kinnear on the importance of appointing female arbitrators in international investor-State dispute settlement (ISDS) and ensuring parity in arbitration. Not only does the ICSID Secretariat collect and present information about the appointment of women in order to monitor improvement, but in situations in which it is called upon to appoint arbitrators itself (essentially the role of Appointing Authority, discussed below, under 5.3.2) it focuses on the importance of appointing women. In 2017, 24% of the appointments of arbitrators made

[45] This is the case with respect to interstate cases, the role of arbitrator presumably has little relevance to nominations in the field of international criminal law.

by ICSID were women and by 2018, 50% of the new designations by the Chair of its Administrative Council were women.[46] Otherwise, a best practice of gender awareness has led to specifically including women on lists when suggestions of persons for the role of arbitrator were required.

Related to this strategy is the 2015 'Pledge' initiative agreed within international commercial arbitration circles with respect to increasing the number of women acting as counsel or arbitrator.[47] Its aim is 'to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity' and interested law firms as well as individuals can express support for this pledge—thereby adding their voice to the importance of the issue. Clearly this is, however, not just about a pledge, but most of all about taking steps that in reality ensure the participation of more women in this field, be it as counsel or as arbitrator.

The experience and expertise of female lawyers continues to be undervalued, thereby perpetuating the image of arbitration as a male fortress. It could be suggested that States make a public commitment to appoint one-third women when appointing arbitrators—but that suggestion may be too bold. An intermediate step might be a commitment to include at least one-third women on the existing lists of arbitrators.[48] This would at least demonstrate the availability of many qualified women and will open possibilities to more diversity on arbitral tribunals.

5.3.2 The role of the Appointing Authority in appointing arbitrators

The role of the Appointing Authority is not a frequently discussed aspect of the constitution of arbitral tribunals. Yet, it is a crucial position in the sense that through the good offices of the Appointing Authority arbitrations will take place in spite of the silence of the respondent in an arbitration. This mechanism means that the lack of cooperation by the non-participating respondent Party will not hamper dispute settlement from taking place: an arbitral tribunal will be established and the dispute settlement procedure will commence without the active support of the defendant. The role of the Appointing Authority as a fall-back mechanism for the appointment of arbitrators thus implies the authority to select and appoint arbitrators.

The position of Appointing Authority is not a personal task, in the sense that it is attached to a formal position and is carried out by whoever holds that position at the time a request for the appointment of arbitrators arrives.[49] This position will

[46] See Meg Kinnear and Otylia Babiak, *International Investment Arbitration Needs Equal Representation*, Centre for International Governance Innovation, published 9 April 2018 (available at cigionline.org, last visited 31 January 2020). And Meg Kinnear, *Advancing diversity in international dispute settlement*, published 8 March 2019 <blogs.worldbank.org> accessed 31 January 2020).

[47] See <www.arbitrationpledge.com> accessed 31 January 2020 for more detail.

[48] Such as the members of the PCA, the list with ICSID arbitrators, or the lists under Annexes VII and VIII UNCLOS.

[49] Officials acting as Appointing Authority are, for example, the ICJ president, the ITLOS president, or the Secretary-General of the PCA.

ideally be established prior to a dispute in order to be effective when necessary, so it will appear in a treaty text (such as for example Article 3 of Annex VII UNCLOS) or may be included in a contract in the case of a private-public agreement. Various institutions provide for model texts to ensure a proper reference to an appointing authority.[50] The Appointing Authorities' role is an important one, as it is the security valve in the international arbitration system. It would be useful to research how arbitrators are selected in situations where an Appointing Authority is called upon to assist with the composition of an arbitral tribunal. The practice of the officials who act as Appointing Authority is not very well documented and has not been the subject of much academic reflection.[51]

Little research has been done into who are appointed in this manner and whether or not specific patterns can be discerned. It would seem that some Appointing Authorities strive for a regional spread amongst the arbitral tribunal (provided a five-person tribunal is called for), and that very few women have ever been appointed by Appointing Authorities in interstate disputes. In a recent article, Gao has looked in detail at the practice of the President of the International Tribunal for the Law of the Sea acting as Appointing Authority under Article 3 of Annex VII UNCLOS.[52] The Article clarifies that the respective ITLOS presidents have been called upon as Appointing Authority in nine cases so far. The author provides an overview that is as predictable as it is revealing: a total of 22 arbitrators were appointed by the President, and in all cases these were men (even if parties may have suggested the appointment of capable female lawyers). It is difficult to find similar aggregated information about the work of other Appointing Authorities but it would be surprising if another pattern would appear: presumably appointments by Appointing Authorities do not generally differ from appointments by States, leading to a very limited participation by female arbitrators.

The Appointing Authority may appear to be an autonomous institution, charged with the important task of ensuring that an arbitral tribunal is instituted, in spite of the lack of collaboration from the defendant in the arbitration. However, in spite of appearances, the Appointing Authority is not completely autonomous and does not exist in a vacuum. He or she will be part of some international institution where States in the end have overall responsibility for the work of the institution.

[50] See for instance model arbitration clauses referring to the Permanent Court of Arbitration, include a provision on the Secretary-General acting as Appointing Authority (see <www.pca-cpa.org> accessed 31 January 2020.

[51] Muhammad Zafrulla Khan, 'The appointment of arbitrators by the President of the International Court of Justice' Il processo international, studi in onore di Gaetano Morelli (1975) 14 Comunicazioni e studi 1021–42, at 1021 writing 'Paradoxically it is a function which is nowhere provided for in the texts governing the International Court and establishing the office of President'. Peter Tzeng, 'Appointing Authorities: Self-Appointment, Party-Appointment and Non-Appointment' in Freya Baetens (ed), *Legitimacy of unseen actors in international adjudication* (CUP 2019) 164–88.

[52] Jianjun Gao, 'Appointment of Arbitrators by the President of the ITLOS pursuant to Article 3 of Annex VII of the LOS Convention: Some Tentative Observations' (2017)16 Chinese Journal of International Law 723–49.

Consequently, such Member States will have the possibility—when discussing the work related to the role of Appointing Authority—to stress the importance of appointing female arbitrators. This does not necessarily limit the discretionary authority of the Appointing Authority, but sets a guideline for appointments to be made within existing rules.

5.4 Membership of Professional Bodies

Returning to eligibility, it is common to rely on someone's *curriculum vitae*. The candidate must be perceived as having a certain seniority, expressed in professional experience and membership of those crucial societies considered to be at the heart of the profession. International law is a conservative environment, and participation in an august body that seems to embody the core of the international legal tradition is seen as proof of eligibility to such a senior position as that of international judge. Membership of such groups seems to imply an implicit guarantee of legal quality. The aim here is to investigate participation in such fora, in view of the importance attached to such memberships. Apart from the national group of the PCA (discussed under 4 above), two bodies stand out as august and learned groupings of eminent lawyers—the non-governmental *Institut de Droit International* and the ILC.

The famous *Institut de Droit International* was founded in 1873 and was awarded the Nobel Peace Prize in 1904. As a private association, its aim is to contribute to the development of international law and to further its implementation. Over the years, the *Institut* has produced several reports on the development of international law that became influential contributions to debates about international law matters. Many of its members have been arbitrators or judges at the PCIJ or ICJ, quite apart from their individual academic contributions.[53] Thus one may safely say that the *Institut* is 'the place to be' for international lawyers, it is a judicial powerhouse. The *Institut* has rather specific membership rules and limits its membership to 132 members. Potential members need to be proposed by existing members or national groups of members—apparently, it is not possible to self-nominate as there is no open membership. Currently out of these members, only 21 are women.[54]

A somewhat similar body exists embedded in the United Nations: the International Law Commission, consisting of 34 independent members elected for a five-year term and nominated by UN Member States.[55] It is a subsidiary body of

[53] Eyffinger lists 51 IDI members acting in 134 PCA arbitrations between 1902 and 2019, and 64 members elected to the bench of either the PCIJ or the ICJ. See Arthur Eyffinger, 'Tobias Asser's Legacy: The Pertinence of the Institut de droit international to The Hague' (2019) 66 Netherlands International Law Review 313–51, footnotes 2–5, at 315.

[54] See <www.idi-iil.org> accessed 31 January 2020.

[55] See <www.legal.un.org/ilc/> accessed 31 January 2020.

the General Assembly with the mandate to codify international law and the promotion of its progressive development—which is laid down in its 1947 Statute. Since its inception, the ILC has been working on prominent issues of international law leading to drafts for treaties on a variety of issues as well as other documents bringing together the state of current law, and work on its progressive development. Not very many women are or have been members of the ILC; the first female members appeared in 2001 and currently only four women are members. Here again, women have only recently become members of the ILC but parity has by no means been reached yet.

As we have seen, membership criteria of these professional bodies are inherently restrictive and have not been favourable to women. Attaching great importance to membership of such bodies in a way implies outsourcing the selection of candidates, in as much as it means implicit reliance on their criteria for membership. What may appear to be an autonomous and sovereign selection process for candidates is in fact relegated to a different, and often less visible, process in another forum. Moreover, one look at bodies like the ILC or the *Institut* when addressing gender parity in international courts is enough to understand that these are not necessarily shining examples of parity themselves.

6. Exploring Future Steps on the Basis of Existing Rules

Starting out with the plight of *Smurfette*, who may attract attention as the only woman in the room and whose presence suggests progress without having a true impact, this chapter has focused on various aspects of the process of selecting and nominating candidates for the position of judge on an international court or tribunal. It is mostly a story about the roles of elites in the selection and nomination processes for the international judiciary, and about ways of changing this.

When considering the limited participation of women on the international bench at this time, and looking specifically at the ICJ, ITLOS, and the ICC, different steps may be suggested to improve the number of women on the bench within the existing legal system. It will be useful to mobilize various fora to agree to guidelines with respect to nominations. Such steps need not disrespect the sovereign authority to nominate candidates for judicial positions, but will be an expression of the importance attached to parity and indeed to Article 8 UN Charter. Particular attention has been given to the general legal framework governing the participation of women in the work of international organizations and how existing provisions such as Article 8 UN Charter and Article 8 CEDAW could benefit from a revised reading. Looking at the nominations process, the role of the national groups of the PCA and the gender balance amongst their members deserve

attention. Building on the relationship between arbitration and courts or tribunals it is considered necessary to also address the position of women in arbitration, as this is often seen as a preparatory stage for the position of judge.

Another suggestion is to develop a public commitment in the near future on the part of those involved in selection and nomination processes to expressly address the participation of women in the international judiciary. Such a commitment (a vow? a pledge?) by those who are in a position to nominate candidates to the ICJ or the ICC would imply expressing the intention to specifically consider women in the selection process. This would in itself not pre-empt any decision about the selection, but would be a forceful reminder of the need to look wider for relevant candidates. A similar commitment by those who hold the position of Appointing Authority would be a logical pendant. As the Appointing Authority is an international official, the representative body of the international organization concerned[56] could also invite the Appointing Authority to be proactive in this respect. Again, this in itself will not determine the choices made, but it would be a clear message as to the responsibility of such authorities with the default role of selecting arbitrators.

As this chapter demonstrates, parity will not just happen. Parity requires determination and attention, as well as people in key positions being aware of their role, acting on the basis of a plan, and seizing opportunities when they present themselves. Electing female judges is a step towards balanced and adequate participation by women at all levels in the international legal system, courts and tribunals included. It is time for the *Smurfette* to disappear from the international bench, or rather for her to be joined by a multitude of other qualified female lawyers to continue carrying the torch for international law. Perhaps she could be inspired by Astrid Lindgren's character Pippi Longstocking who famously said, 'I have never tried that before, so I think I would definitely be able to do that'.

[56] The UN General Assembly, the PCA's Administrative Council or the meeting of the States Parties to the UN Law of the Sea Convention for example.