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ORIGINAL ARTICLE

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The (un)changing face of ICJ advocacy

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Abstract

Despite the growing recognition of representation as a fundamental principle in global governance, the ICJ Bar continues to exhibit pronounced gender imbalances. This study adopts an empirical frame of reference to scrutinise the gender and professional composition of legal teams appearing before the ICJ over the last decade. It involves a systematic examination of oral proceedings in contentious cases before the Court between 2013 and 2023, breaking down the gender and professional role of counsel for each party in every case. The manifest invisibility of women in international courtrooms challenges the perceived neutrality of the international legal system and raises the question; is international law gendered? This article posits that the predominance of male and academic perspectives delimits the interpretation and application of international law as issues and viewpoints that could strengthen the adjudicatory process are at risk of being overlooked. Thus, the findings herein seek to contribute to a nuanced and holistic discourse that not only informs academic scholarship, but also empowers practitioners to navigate the complexities of the ever-evolving international legal order. The integration of representative voices and heterogeneous perspectives in representations to the Court is a cornerstone of a legitimate, equitable, and effective international system. This article calls for a concerted effort by the international community to diversify the faces of ICJ advocacy.

Keywords: ICJ-Bar; gender; representation; empirical; advocacy

1. Introduction

While extensive literature exists on the theory and practice of international law, 'legal scholarship lacks a robust body of literature that systematically examines the profession itself'.[1] This article studies the gender and professional composition of legal teams appearing before the International Court of Justice (ICJ or the Court) in contentious proceedings between 2013 and 2023.[2]

*I thank Benjamin Salas Kantor for his early supervision and encouragement of this project. The work builds on Shashank P. Kumar and Cecily Rose's study of lawyers appearing before the International Court of Justice in the prior decade. It further draws on the shrewd observations of international feminist legal scholars; including, among others, Hillary Charlesworth, Loveday Hodson, and Nienke Grossman.

[1]S. Kumar and C. Rose, 'A Study of Lawyers Appearing before the international Court of Justice, 1999–2012', (2014) 25 *European Journal of International Law* 893, at 894.

[2]2023 is the Court's busiest year yet with 20 cases on the docket as of 26 October. See Honourable Judge Joan E. Donoghue presenting the Annual Report of the International Court of Justice, 1 August 2022–31 July 2023, to the United Nations General Assembly on 26 October, available at documents-dds-ny.un.org/doc/UNDOC/GEN/N23/235/33/PDF/N2323533.pdf?OpenElement. Unfortunately, due to the pending status of these cases, they have not been included in this survey (though judgments on preliminary objections, where rendered prior to 2023, have been accounted for). It is not improbable that the increased case load of the Court will affect the composition of legal teams presenting before it. Thus, the ICJ's current docket is ripe for further analysis.

Understanding who shapes international law is not a mere academic exercise; it is a crucial step towards enhancing the efficacy and adaptability of the international legal system. The study that follows aims to contribute to the development of a body of work on the international legal profession and its (un)changing spokesmen.

The 'ICJ mafia', in Ian Brownlie's words, reflects the prevailing impression that advocacy before the Court is dominated by a small elite.[3] Indeed, Judge Joan Donoghue, in her speech on the 75th Anniversary of the ICJ, reflected:

> [e]ach time that I gaze out at the delegations representing parties ... I am struck that their composition bears too much resemblance to the groups of persons who gathered in 1945 to draft the Charter of the United Nations and the Statute of the Court. Very few of the counsel are from developing countries and almost all, regardless of nationality, are men.[4]

This study provides an empirical analysis of gender and professional representation in oral proceedings before the Court and offers some reflections on the consequences for international law and practice. The article begins with a summary of past findings to situate the study in its historical context (Section 2), followed by an explanation and justification of its chosen empirical methodology (Section 3). It proceeds to present the results identified and their implications for the character and content of international law (Section 4). Finally, the article contemplates the legal significance of these observations in light of critical feminist theory and makes a normative appeal to challenge the status quo (Section 5). Representation at the ICJ is not merely a matter of equity; it is a prerequisite for crafting legal norms and policies that are legitimate, effective, and enduring.

2. A historical problem

An early study by Kurt Gaubatz and Matthew MacArthur in 2001 documented 'the extent of the Western monopoly of international legal practice at the ICJ', and on this basis argued that international law 'is not as international as its name implies'.[5] Gaubatz and MacArthur tracked the case law of the ICJ from its establishment in 1948 through 1998.[6] The data collected included 47 contentious cases involving 50 countries and 593 legal team members.[7] Their findings revealed that Western legal teams mainly comprised of their own nationals, whereas non-Western states tended to engage teams with lower national representation.[8] Among the legal teams representing OECD states, 46 out of 50 had 60 per cent or more national members.[9] In contrast, among the 47 legal teams representing non-OECD states, 18 had 60 per cent or more nationals, while 29 had less than 60 per cent nationals.[10] Additionally, out of 148 non-national lawyers working in these teams, only six (4 per cent) were from non-OECD states.[11] Among the 44 lawyers who appeared in such roles more than once, only one, Eduardo Jiménez de Aréchega, was from a non-OECD state.[12] Moreover, 77 per cent of non-national lawyers were from France, the United Kingdom, the

[3]A. Pellet, 'Adieu, James Crawford', (2021) 20 *The Law and Practice of International Courts and Tribunals* 465.

[4]J. Donoghue, 'Reflections on the 75th Anniversary of the International Court of Justice', (2021), available at www.un.org/en/un-chronicle/reflections-75th-anniversary-international-court-justice.

[5]K. Gaubatz and M. MacArthur, 'How International is "International" Law?', (2001) 22 *Michigan Journal of International Law* 239, at 241. This question was again picked up by Anthea Roberts in her 2017 book—'Is International Law International'—introducing the idea of comparative international law by identifying the ways in which difference, dominance, and disruption affect international legal communities, A. Roberts, *Is International Law International?* (2017).

[6]Note the exclusion of case law dating from the Permanent Court of International Justice.

[7]See Gaubatz and MacArthur *supra* note 5, at 251.

[8]Ibid.

[9]Ibid., at 252.

[10]Ibid.

[11]Ibid., at 257.

[12]Ibid., at 259.

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United States, Belgium, and Italy.[13] Thus, Gaubatz and MacArthur asked whether international law is truly international.

One might similarly ask: is international law gendered? In a 2014 study, Shashank Kumar and Cecily Rose sought to reaffirm the truism—that oral proceedings before the Court are a reserved domain—along several axes, including gender.[14] They revealed that 'oral proceedings before the ICJ are dominated by male international law professors from developed states'.[15] Out of the 205 lawyers who appeared before the Court between 1999 and 2012, 23 were women (11.2 per cent). These 23 female lawyers accounted for 7.4 per cent of the total speaking time for all oral arguments.[16] Over 70 per cent of the lawyers appearing before the Court in that period were OECD nationals. Similar imbalances were observed concerning lawyers from high-income economies and nations with very high human development indices.[17] Notably, the 'Western Europe and Other Group' and the United States accounted for close to 70 per cent of all lawyers, with the United States leading the charge before France and the United Kingdom.[18] Another significant aspect was the professional background of these lawyers. Almost 80 per cent of those appearing before the Court were either academics or government lawyers.[19] These disparities were even more pronounced among advocates who appeared repeatedly before the Court.[20]

While the two preceding studies test and prove their own hypotheses, the verdict is clear: underrepresentation has characterised submissions to the Court throughout its history.

3. Methodological parameters

This study seeks to identify the progress made in the last decade with respect to the representativeness of counsel appearing before the ICJ.[21] While, in its limited scope, the study confines itself to a discussion of gender parity—not nationality—it also takes into account the professional role of counsel.[22] In terms of its design, it imports a methodological approach similar to the 2014 study, and draws further insight from behavioural analyses of international courts and tribunals.[23] The adopted empirical methodology may be contrasted with a more conventional qualitative approach to this subject. As Kumar and Rose explain, though empirics often sit uncomfortably with the legal profession, a numerical assessment allows for an objective and comprehensive review of international litigation practice. The study focuses on (i) the ICJ as opposed to other international adjudicatory bodies; (ii) oral as opposed to written proceedings;

[13]Ibid., at 258.

[14]See Kumar and Rose, *supra* note 1.

[15]Ibid., at 893.

[16]Ibid., at 904.

[17]See Kumar and Rose, *supra* note 1, at 901–2.

[18]Ibid., at 905.

[19]Ibid., at 908.

[20]A distinct group of lawyers that repeatedly appear before the Court.

[21]Ibid., at 894–5. For a critique of the use of empirical methods see generally G. Hernández, 'The Judicialization of International Law: Reflections on the Empirical Turn', (2014) 25(3) *European Journal of International Law* 919.

[22]Professional status is based on the primary affiliation provided in the final judgment of the Court.

[23]'The Current Composition of International Tribunals and Monitoring Bodies', *GQUAL Campaign for Gender Parity in International Representation*, 2015, available at www.gqualcampaign.org/1626-2/; Y. Zhang, 'Equitable Representation on International Benches and the Appointment of Tribunal Members in Investor-State Dispute Settlement: A Historical Perspective', (2023) 14(4) *Journal of International Dispute Settlement* 428; A. Chandrachud, 'Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making?', (2013) 38 *Brooklyn Journal of International Law* 487; F. Baetens, 'Identity and Diversity on the International Bench: Implications for the Legitimacy of International Adjudication', in F. Baetens (ed.), *Identity and Diversity on the International Bench: Who is the Judge?* (2020), 1, at 2–4; C. Boyd, 'Representation on the Courts? The Effects of Trial Judges' Sex and Race', (2016) 69(4) *Political Research Quarterly* 788. And for another innovative approach, see T. Soave, 'A New Generation of Litigators', in T. Soave, *The Everyday Makers of International Law: From Great Halls to Back Rooms* (2022), 54.

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and (iii) legal representatives as opposed to political agents.[24] It departs from its predecessors by analysing the representativeness of counsel appearing before the Court rather than the individual representative. In any given case, appearing counsel—whether at the preliminary objections or merits stages—have been accounted for. The purpose of this study is not to provide a complete historical overview of gender and professional participation in international proceedings. Instead, it has the more limited goal of testing whether the conclusion from a decade earlier still holds true, and/or what progress might have been made since.

3.1 The World Court

The decision to focus on the ICJ is influenced by both legal and practical considerations.[25] Chief among them is the Court's role as the principal judicial organ of the United Nations (UN). The ICJ occupies a distinctive place in the province of public international law—it stands as the sole permanent international court of general jurisdiction. Unlike its counterparts, the ICJ's authority knows no geographical or subject matter constraints, making it an opportune forum for both practice and study. The long-standing tradition of the Court, dating from 1946 (with its predecessor, the Permanent Court of International Justice, tracing back to 1922), has bestowed upon the ICJ a historical significance and enduring influence in the evolution of international law.[26]

As Kumar and Rose recognise, the transparency of ICJ proceedings further makes it a prime subject of analysis.[27] The Court's oral proceedings are typically open to the public—accessible via live streams and transcripts—though they are not alone in doing so.[28] International criminal tribunals have similarly produced hundreds of publicly accessible transcripts, providing a foundation for research focused specifically on the evolution of international humanitarian law and international criminal law.[29] Likewise, the International Tribunal for the Law of the Sea releases publicly available transcripts which could form the subject of a similar analysis in that context.[30] In contrast, hearings before investor-state arbitral tribunals and even inter-state dispute tribunals are generally confidential, with the exception of a select few, including some ICSID proceedings.[31] If transparency levels at international adjudicatory bodies were to increase in the future, comparable studies could be conducted elsewhere.

3.2 Oral proceedings in contentious cases

The choice to focus on oral rather than written advocacy is 'guided by the particular significance of oral proceedings at the Court, and by the prominent role that individual expertise and skills can play at this stage'.[32] Parties tend to offer distilled versions of their key arguments in the oral proceedings, which draw particular attention from the Court. Counsel's delivery, courtroom manner, and responsiveness influence how judges perceive and interpret the arguments presented. These contextual cues are not fully captured in the written proceedings. The oral phase holds

[24]See Kumar and Rose, *supra* note 1.

[25]Ibid., at 895–6.

[26]International Court of Justice, 'History', available at www.icj-cij.org/history.

[27]See Kumar and Rose, *supra* note 1, at 895–6.

[28]International Court of Justice, Rules of Court (1978), Arts. 59, 71, available at www.icj-cij.org/rules.

[29]See, e.g., the International Criminal Tribunal for the former Yugoslavia.

[30]The hearings are public, unless the Tribunal decides otherwise or the parties request that the public not be admitted. Statute of the International Tribunal for the Law of the Sea (Annex VI to the United Nations Convention on the Law of the Sea), Art. 26, para. 2, available at www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf; International Tribunal for the Law of the Sea, Rules of the Tribunal, ITLOS/8 (2009), Art. 74, available at www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.

[31]See Kumar and Rose, *supra* note 1, at 896.

[32]Ibid.

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symbolic value as well, offering a rare occasion for state parties to confront their legal adversaries in a peaceful and formal manner. Finally, it is faced with counsel that the identity of the advocate is likely to exert the most influence on the arguments presented and how they are perceived by the judges.[33] This is not to say that lawyers working behind the scenes do not play significant roles in the factual and legal development of cases, but that due to the difficulties in evaluating their contributions, they are not covered by this study.

The exclusion of advisory proceedings from this data set is also noteworthy. The composition of legal teams presenting oral statements in advisory hearings has been markedly different from those in contentious disputes, making meaningful comparisons challenging. According to Kumar and Rose, there are typically a greater number of participating states in advisory proceedings with varying degrees of attachment to the issues at stake.[34] In these instances, each state is often represented by a smaller team, including by just a single individual.[35] These representatives also speak for notably shorter intervals as compared to their counterparts in contentious proceedings—often for less than an hour.[36] As a result, states are less likely to engage external counsel and are more likely to be represented by senior government officials, which may account for a higher representation of women. The recent proceedings in the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* Advisory Opinion provides an illustrative example.[37] Fifty states and three international organisations participated in the oral proceedings. Thirty-three delegations were represented by just one representative, usually their agent. With the exception of Palestine—which was allotted three hours—each delegation was given 30 minutes to present their oral submissions. Of the 82 advocates, including agents,[38] presenting to the Court, 19—or 23.2 per cent—were women. Promisingly, seven delegations were represented entirely by women in the oral proceedings; represented by a single female advocate was Brazil, Chile, Colombia, Cuba, and Egypt while the first all-female teams were led by the Maldives and Namibia respectively. Women were also represented in greater numbers in the international organisations present, of which two out of six—33.3 per cent—were female advocates. While this deviation is worth noting, the incorporation of advisory proceedings into this study would have skewed the results.[39]

3.3 The counsel advocate

The study focuses on 'counsel' and 'advocates', rather than 'agents', in keeping with its emphasis on international law and lawyers not foreign affairs and diplomats.[40] Agents and co-agents that also act as advocates and counsel are nevertheless excluded as the choice of agent is, in many respects, a political one.[41] Agents are the face of the litigation and, accordingly, are often selected

[33]Ibid., at 897.

[34]Ibid.

[35]International Court of Justice, 'Advisory Proceedings', available at www.icj-cij.org/advisory-proceedings.

[36]See generally UN Web TV, ICJ Advisory Proceedings, available at webtv.un.org/en.

[37]*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Request for Advisory Opinion submitted by the General Assembly of the United Nations, ICJ Compte Rendu 2024/4.

[38]Due to the unique organisation of advisory proceedings, and in contrast to contentious ones, no distinction is made between political agents and legal counsel in this illustration. The referenced statistics include all oral pleadings submitted to the Court.

[39]See Kumar and Rose, *supra* note 1, at 897.

[40]Discretion has been used where an individual appears to perform multiple function and usually turned on the individual's legal background.

[41]While it is true that agents may, at times, speak to legal aspects of the case, the reason for distinguishing them is that their criteria for selection are inherently different from those of counsel/advocates. This is evidenced by the fact that agents are usually a national and government representative (often without legal training). Though there may be some exceptions, the outright exclusion of agents provides consistency and dependability and avoids introducing subjective criteria that leave their inclusion to discretion and individual assessment. The current approach—which is also the one adopted by Kumar and

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based on their appeal to domestic audiences rather than the Court.[42] That said, the designation of the specific role of any given litigator is not always easy to identify.

Article 42(2) of the ICJ Statute provides that state parties 'may have the assistance of counsel or advocates before the Court'.[43] The term 'may' indicates that states are not obligated to appoint any counsel or advocate to aid the agent representing them.[44] Notably, there are no definitions of 'counsel' and 'advocate' in the Statute. Shabtai Rosenne suggests that 'counsel' pertains exclusively to individuals with legal qualifications,[45] such as members of national bars or law professors, and Eduardo Valencia-Ospina contends that 'advocate' is synonymous with lawyer.[46] Antonio Brotóns proposes that 'advocate' should refer only to individuals who present arguments in court, while 'counsel' encompasses those who offer advice to the state during the written phase.[47] The International Law Association (ILA) adopts a comprehensive definition, considering 'counsel' as anyone 'representing, appearing on behalf of, or providing legal advice to a party in proceedings before an international court or tribunal', regardless of their professional legal training or membership in a bar association.[48] In the ICJ's practice, states have the freedom to use the terms 'counsel' and 'advocate' interchangeably, without any legal distinction being recognised between the two designations.[49] Any legal representative—whether counsel or advocate—recognised by the Court as presenting oral arguments and/or replies forms part of this empirical analysis.

For purposes of professional designation, that which is declared in the Court's official records is taken to be determinative.[50] This holds true even where an individual is seen to wear different hats across cases.[51] Despite potential discrepancies in the designation of counsel, this approach honours state choices and reflects the progression of professional careers over time.

3.4 Limitations and qualifications

Whereas this study generally seeks to mirror the methodology of earlier studies, there are some caveats. As such, it is cautioned that the research does not lend itself to a complete comparative analysis. For instance, the limited scope of this article precludes consideration of variables beyond gender identity and professional role, such as nationality and language capabilities.

Rose—is believed to be the more methodologically rigorous. The mirroring of methodological parameters used in the past also facilitates continuity and comparability across studies and time. See also Judge Oda's reference to 'ambitious private lawyers' in his Declaration in Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Provisional Measures) [2000] ICJ Rep 111, 131–3; F. Berman, 'Article 42', in A. Zimmermann et al., (eds), *The Statute of the International Court of Justice: A Commentary* (2012), 1083. Lawyers who appear as advisers or experts or in any capacity other than that of counsel are also not included.

[42]E. Valencia-Ospina, 'International Courts and Tribunals, Agents, Counsel, and Advocates', in *Max Planck Encyclopedia of Public International Law online* (2006).

[43]See Rules of Court, *supra* note 28, Art. 42(2).

[44]M. Longobardo, 'States' Mouthpieces or Independent Practitioners? The Role of Counsel before the ICJ from the Perspective of the Legal Value of their Oral Pleadings', (2021) 20 *The Law and Practice of International Courts and Tribunals* 54, at 60.

[45]S. Rosenne, 'International Court of Justice: Practice Directions on Judges ad hoc; Agents, Counsel and Advocates; and Submission of New Documents', (2002) 1 *The Law and Practice of International Courts and Tribunals* 223, at 225, fn. 5.

[46]See Valencia-Ospina, *supra* note 42, para. 10.

[47]A. Brotóns, 'The International Legal Consultancy of Governments from the Outside', in C. Jimenez Piernas (ed.), *The Legal Practice in International Law and European Community Law: A Spanish Perspective* (2006), 489, at 500.

[48]International Law Association, The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (2010), Principle 1.

[49]See Longobardo, *supra* note 44, at 60.

[50]Or, more accurately, the first title that fits within one of the identified categorisations. Where no relevant title is listed, the advocate is included in the 'other' category.

[51]E.g., Mr. Vaughan Lowe being recorded as either professor or barrister depending on designated title in the official judgment of the Court.

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Furthermore, the extent to which earlier studies accounted for hearings on preliminary matters is unclear.[52] Here, the legal teams at the preliminary objections (including jurisdiction and admissibility) and the merits (including reparations where applicable) stages complement each other.[53] That is, each counsel advocate is accounted for only once per case, but any deviations in team composition between the two stages of the litigation are factored in. It makes no difference to the analysis if the team stays consistent because, otherwise, the new team members will have been taken into account. The choice was made to focus on final decisions of the court to the exclusion of hearings on provisional measures or other orders. In essence, the study seeks to highlight who shapes international law; while provisional measures might affect the situation on the ground for a limited time, they are by definition temporary and not products of the robust legal processes of their final counterparts. They simply are not entitled to the same legal weight. Practically, legal teams remain fairly constant between the provisional and final stages of a litigation. The effort to avoid duplication of teams and members thus leads to the natural exclusion of provisional measures.

In a related move to avoid double counting, each party's legal team is recorded only once in countersuits or cases where the same parties are litigating what is essentially the same claim.[54] Likewise, where one party institutes proceedings against several counterparties on the same issue, the applicant's legal team is counted only once while the respondent teams are accounted for separately.[55]

Finally, in breaking with earlier analyses, this article is not interested in the individual advocates before the ICJ, but in the representativeness of their advocacy. It does not state, therefore, how many women appear before the Court, but rather how many appearances were by women (some of whom will have appeared more than once). It tracks the number of representations made in the name of academia, government, bar councils, private practice, or in some other capacity, rather than the number of appearing academics, government lawyers, barristers, private practitioners, and other professionals themselves. In this way, the study enables an assessment of how courtroom dynamics—the gender and professional background of the advocates—may shape international law.

4. Judging gender: continuing disparities at the ICJ

International courts are adjudicating a growing number of disputes and are increasingly influential in shaping the principles of international law. 'Whether international law and international institutions should actively seek out "diverse viewpoints" is not just an inquiry

[52]Cf. Kumar and Rose, *supra* note 1; see Gaubatz and MacArthur *supra* note 5.

[53]Here jurisdiction, admissibility, and preliminary objections judgments fall within the same category, while merits and reparations judgments are taken together. On Jurisdiction and admissibility: *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment of 5 October 2016, [2016] ICJ Rep. 255; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Jurisdiction and Admissibility, Judgment of 5 October 2016, [2016] ICJ Rep. 552; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 833. On reparations: *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment of 2 February 2018, [2018] ICJ Rep. 15; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment of 9 February 2022, [2022] ICJ Rep. 13.

[54]E.g., *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018, [2018] ICJ Rep. 139; *Appeal relating to the Jurisdiction of the ICAO Council under Article II,* Section 2*, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment of 14 July 2020, [2020] ICJ Rep. 172; *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Judgment of 14 July 2020, [2020] ICJ Rep. 81.

[55]E.g., *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), (Marshall Islands v. Pakistan), (Marshall Islands v. United Kingdom)*, *supra* note 53.

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reserved for the politically correct.'[56] Rather, its answer is directly tied to their independent success. Despite growing demands to scrutinise the composition of international courts and tribunals, there is a notable lack of scholarly focus on the under-representativeness of the counsel appearing before them.[57] The relative scarcity of international women advocates makes empirical research on gender dynamics a rare sight—the corollary of which is a failure to consider the significance of the inclusion of gendered viewpoints in international courtrooms. This study aims to address that omission.

4.1 Gavels and gender gaps

In the 29 contentious cases before the ICJ from 2013 through 2023,[58] 39 states appeared before the Court as applicants, respondents, as parties in proceedings brought by Special Agreement, or as intervenors.[59] A number of states were repeat litigants before the Court during this period. Between 2013 and 2023, 244 relevant pleadings were submitted to the Court. The number of

[56]N. Grossman, 'The Effect of the Participation of Women Judges on the Legitimacy of International Courts and Tribunals', (2011) 105 *Proceedings of the ASIL Annual Meeting* 452, at 452.

[57]Ibid.

[58]In chronological order: *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Judgment of 11 November 2013, [2013] ICJ Rep. 281; *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 44; *Maritime Dispute (Peru v. Chile)*, Judgment of 27 January 2014, [2014] ICJ Rep. 3; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, [2014] ICJ Rep. 226; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, [2015] ICJ Rep. 665; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, [2015] ICJ Rep. 3; see *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *supra* note 53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, *supra* note 53; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 53; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, *supra* note 54; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment of 2 February 2018, [2018] ICJ Rep. 15; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment of 1 October 2018, [2018] ICJ Rep. 507; *Jadhav (India v. Pakistan)*, Judgment of 17 July 2019, [2019] ICJ Rep. 418; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment of 8 November 2019, [2019] ICJ Rep. 558; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment of 11 December 2020, [2020] ICJ Rep. 300; *Appeal relating to the Jurisdiction of the ICAO Council under Article II,* Section 2*, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, *supra* note 54; *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, *supra* note 54; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021, [2021] ICJ Rep. 71; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment of 12 October 2021, [2021] ICJ Rep. 206; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment of 1 December 2022, [2022] ICJ Rep. 614; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 21 April 2022, [2022] ICJ Rep. 266; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 53; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, [2021] ICJ Rep. 9; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of the 22 July 2022, [2022] ICJ Rep. 477; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, [2023] ICJ Rep. 51; *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Judgment of 6 April 2023, [2023] ICJ Rep. 262; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, [2023] ICJ Rep. 154.

[59]New Zealand in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ibid.

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lawyers who appeared on behalf of each party in oral proceedings varied from case to case, presumably depending on factors such as the prominence and political sensitivity of the dispute, its complexity, and the resources available to the party.[60] The largest team of oral advocates was composed of 11 lawyers while the smallest teams consisted of one advocate.[61]

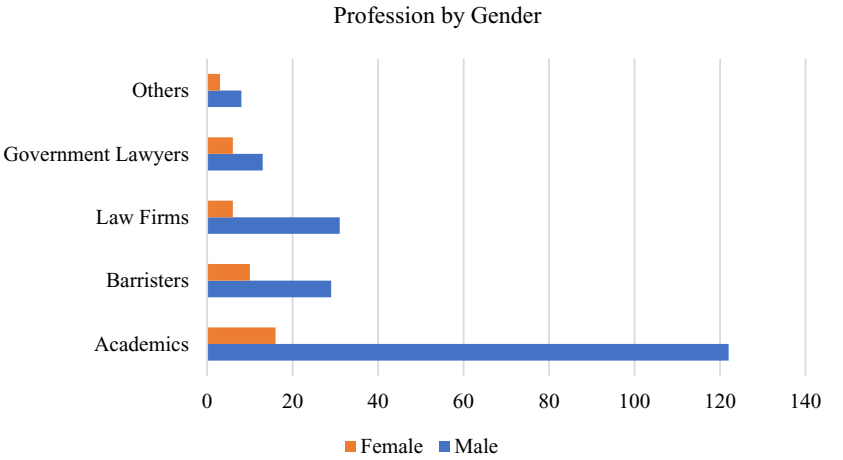

Figure 1. Illustrating disparities in male/female appearances before the ICJ by professional role.

As can be observed in Figure 1, of the 244 pleadings made to the Court between 2013 and 2023, only 41—or 16.8 per cent—were made by female advocates. Of those 41, 16—39 per cent—were by academics; six—14.6 per cent—were by government lawyers; ten—24.4 per cent—were by barristers; six—14.6 per cent—were by law firms; and three—7.3 per cent—were made in some other capacity. In contrast, out of the 203—or 83.2 per cent—male submissions to the Court, an overwhelming majority of 122—60 per cent—were by academics; 13—6.4 per cent—were by government lawyers; 29—14.3 per cent—were by barristers; 31—15.3 per cent—were by law firms; and eight—3.9 per cent—were made in some other capacity. It is noteworthy, therefore, that gender imbalances play out not only within but also across professional groups. Despite the overwhelming presence of academics at the Court, women make up only 11.6 per cent of this demographic. By contrast, women make up proportionately greater shares of practicing barristers and government lawyers, 25.6 per cent and 31.6 per cent respectively. Thus, the professions in progressively gendered order are academics, private practitioners, barristers, 'others', and lastly government lawyers. The only legal team composed of more female than male advocates was the US delegation on preliminary objections in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America).*

[60]See Kumar and Rose, *supra* note 1, at 902.

[61]The DRC in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 53 and both India and Pakistan in *Jadhav (India v. Pakistan)*, *supra* note 58 respectively.

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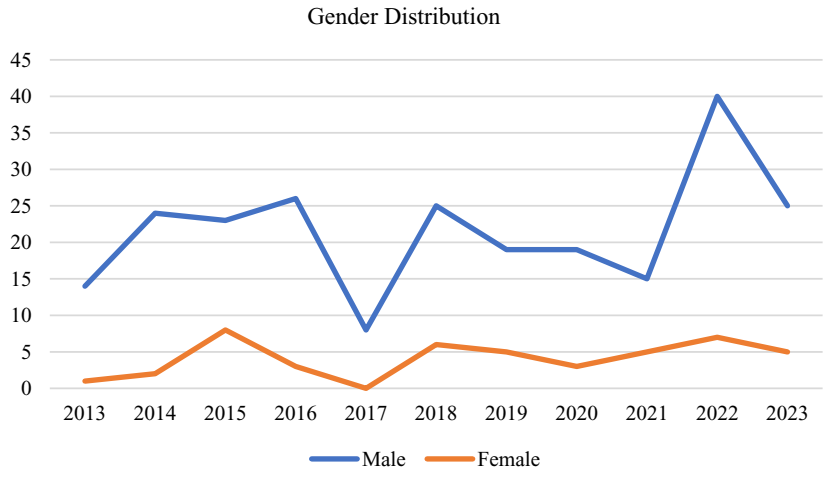

Figure 2. Illustrating gender disparities in advocacy practices before the ICJ over time.[62]

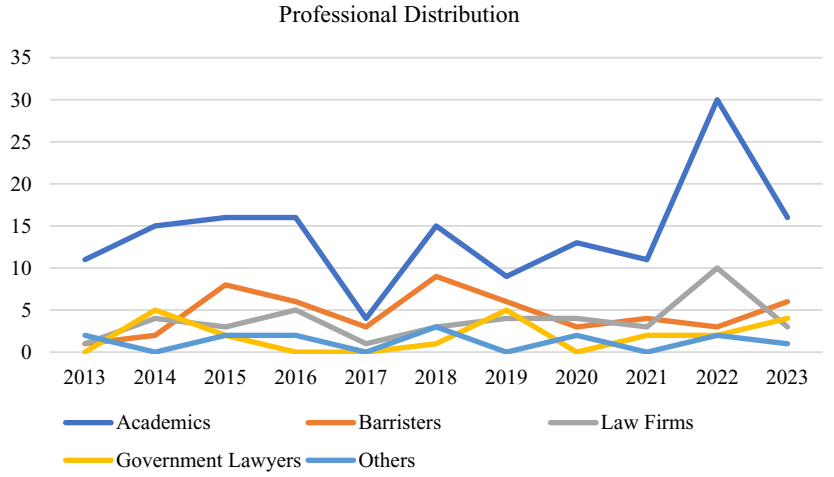

Figure 3. Illustrating professional representation before the ICJ over time.[63]

Hence, as demonstrated in Figure 2, and to the extent a comparison can be made with Kumar and Rose's 2014 study, women advocated before the Court a greater number of times between 2013 and 2023 than there were female advocates between 1999 and 2012. In the last decade, as shown in Figure 3, academics presented arguments to the Court 56.6 per cent of the time, government lawyers accounted for 7.8 per cent, barristers for 16 per cent, law firms for 15.2 per cent, and 4.5 per cent were made in some other capacity. In the prior decade, 44.9 per cent of advocates were academics, 34.2 per cent were government lawyers, 10.2 per cent were sole practitioners, 8.3 per cent were lawyers from law firms, and 2.4 per cent were lawyers who worked in another capacity.

[62]Note that to get an accurate reflection of yearly representation, the legal teams at both the jurisdictional/admissibility and merits stages are counted separately. In contrast to the other figures in this study, there is, therefore, some element of double counting in the interest of an accurate model by year.

[63]See ibid., the same qualification applies.

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Cumulative statistics such as these may lead to the inference that the problem of underrepresentation is a historic one that is steadily improving over time.[64] These figures nevertheless reveal that, while representativeness is on the rise, progress remains slow, inconsistent, and far from linear. In the words of Loveday Hodson, '[t]he problem of representation is certainly an enduring one'.[65]

One plausible explanation for the patterns that have been observed is the value of prior experience when advocating before the Court. Between the ICJ's Statute, Rules, Handbook, and Practice Directions, it would seem that the Court's procedures have been extensively codified. Unlike domestic legal systems, however—where courts, bar associations, and councils often dictate the procedures for oral arguments—there is more flexibility in legal proceedings before the ICJ to accommodate the meeting of different legal cultures and practices. Efforts to diversify involve bringing new faces before the Court which the emphasis on experience renders easier said than done. The informal norms and customs that govern how experienced actors interact with the Court lead to a strong preference for 'repeat players'.[66]

Another factor may be the disruptive potential of the woman advocate—a referent to Loveday's concept of the 'totemic judge' in the judicial context.[67] The role of the counsel advocate, much like that of the judge, is imbued with implicit gendered norms. The 'totemic' advocate whose male gender is neither noted nor questioned operates from within, reflecting—while simultaneously concealing—the gendered structures of the international judicial process.[68] 'His apparent genderless-ness mirrors the apparent genderless-ness of international law; he operates within international law's constraints and serves to normalize, rather than challenge, them.'[69] The female advocate, conversely, is a disruptive force as her very presence places gender in the frame. She, 'by virtue of her counter-normative visibility', threatens to destabilise these structures, and 'may be tolerated only in so far as her gender is either cloaked or, alternatively, inflated and emphasized' to the point that the advocate becomes a token representative rather than a professional in her own right.[70] She is the impossible advocate because she can never be genderless.

Erika Rackley's early work laid the path for thinking about women in such figurative terms:

> Her physical appearance threatens to upset aesthetic norms; her presence is an inescapable irritant, simultaneously confirming and disrupting the established masculinity of the bench [or, in this case, the floor]. As such, the woman judge [or advocate] is almost a contradiction in terms.[71]

This line of thinking led Loveday to observe that 'gender is everywhere yet is apparent (almost) nowhere'.[72] While the idea that the gender composition of courts and tribunals matters has broad institutional as well as normative support, there is little agreement on the question of why it matters. Inquiring into the ways in which gender operates in practice in international courts—including how it is embodied, experienced, understood, and replicated by counsel—can point to structural injustices that undergird the stark statistical inequalities in courtrooms. The absence of

[64]Which in turn draws on Erika Rackley's use of metaphors to reveal the gendered nature of the judicial role. See L. Hodson, 'Gender and the international judge: Towards a transformative equality approach', (2022) 35 *Leiden Journal of International Law* 913, at 914; E. Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor', (2002) 22 *Legal Studies* 602.

[65]Ibid.

[66]E.g., the practice of submitting answers to questions in writing only after the conclusion of oral hearings.

[67]See Hodson *supra* note 64.

[68]Ibid., at 921.

[69]Ibid., at 914.

[70]Ibid., at 914, 921.

[71]See Rackley, *supra* note 64.

[72]See Hodson, *supra* note 64, at 914.

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women advocates matters because it is both 'symptom and cause of the gendered way in which international law and international institutions operate'.[73] Hence, the composition of legal teams has practical (Section 4.2) as well as symbolic significance (Section 4.3).

4.2 Filing for inclusion

Efforts to promote heterogeneity and inclusivity in international legal practice are essential to shaping the international legal system itself. The perspectives voiced before the ICJ become particularly important in the Court's role in the formation of customary international law. 'Fairness, independence and impartiality do not—indeed cannot—require the judge to become a blank slate upon which the evidence and arguments in each case are written afresh.'[74] The perspective of the advocate affects how the legal argument is perceived by the judges. Diverse advocates bring unique experiences to legal discourse, enriching the depth and breadth of arguments presented to the Court. The lack of representation and inclusion in the advocates before the ICJ not only impedes the potency of the Court, but also undermines the principles and objectives of international law. By integrating new and critical perspectives and ensuring the active participation of diverse voices, a legal system that is not only more equitable and just, but also more resilient and reflective of the world it seeks to govern can take form.[75] That being said, while recognising that international law affects men and women differently, this article cautions against embracing the idea of a distinct and universal 'feminine reasoning'.[76] Much feminist scholarship has been concerned with the 'identification of a distinctive women's voice that has been overwhelmed and underestimated in traditional epistemologies'.[77] The concern here, however, is not the recognition of a single, triumphant female truth but distinctive women's experiences.[78] The normative structure of international law has allowed female perspectives on the operation of the law to be silenced or discounted, and issues of particular concern to women to be either ignored or undermined.[79] It is this disclaimer of lived experiences that deprives international law of its universal cogency.

Just as counsel's gender affects the pleading and presentation of a case, their professional background frames and shapes the issues before the Court. For instance, the dominance of academics and government lawyers, may mean that the arguments presented to the Court do not genuinely reflect the concerns of those affected on the ground, as lawyers with strong ties to civil society or human rights advocacy are notably underrepresented.[80] Representative legal teams are likely to enhance the quality of judicial deliberations.

4.3 Legitimacy on trial

The representativeness of lawyers appearing before the ICJ enhances its legitimacy as an impartial and fair judicial institution, fends of criticisms of selectivity and bias, and bolsters public trust and

[73]Ibid., at 913 (abstract).

[74]R. Hunter, 'An Account of Feminist Judging', in R. Hunter et al. (eds.), *Feminist Judgments: From Theory to Practice* (2010), 30, at 31.

[75]L. Hodson and T. Lavers, *Feminist Judgments in International Law* (2019).

[76]See, e.g., C. Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process', (1985) 1 *Berkeley Women's Law Journal* 39; C. Menkel-Meadow, 'Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law', (1987) 42 *University of Miami Law Review* 29; S. Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication', (1986) 72 *Virginia Law Review* 543.

[77]H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law', (1991) 85(4) *American Journal of International Law* 613, at 615.

[78]H. Charlesworth, 'Feminist Methods in International Law', (2004) *Studies in Transnational Legal Policy*, at 159.

[79]See Hodson and Lavers, ibid., at 8. For an inquiry into what difference feminist judges can make see R. Hunter, 'Can Feminist Judges Make a Difference?', (2008) 15 *International Journal of the Legal Profession* 7.

[80]See Section 4.1, *supra*.

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confidence in its decisions.[81] As the legitimacy crisis of international courts intensifies, those committed to the liberal regimes they interpret and uphold are enjoined to grapple with the normative, sociological, and democratic implications of unrepresentative judicial processes.[82] Gender and professional representation may affect international judicial legitimacy in three distinct ways: the objective manifestation of the right to adjudicate; the subjective conception of that right; and the public recognition of it.[83] As Nienke Grossman posits 'the relevant question is not whether international law should accommodate diverse viewpoints, but rather what will happen to its legitimacy if it fails to do so'.[84]

If men and women present differently to the Court, its normative legitimacy depends on both genders for the impartial disposition of its judicial functions.[85] Empirical studies that examine whether men and women perform the judicial task differently, that is relying on essentialist assumptions of gender, have generally proved inconclusive.[86] This significantly detracts from the argument that gender matters due to presumed inherent differences in the ways men and women make decisions. By extension, it may be reasoned that arguments directly correlating gendered advocacy with judicial outcomes do not make the case for representative legal teams. Rather, according to Loveday, the 'normative and procedural differences ... that have been attributed to (judicial awareness of) gender'[87] may be ascribed to the 'ways in which identities shape individuals' relationship to structures of power'.[88] While there is no 'universalizable category' in which women can be demonstrated to judge or advocate in a distinctive manner, judges and advocates whose identities diverge from—or disrupt—the traditional image of international law may be more inclined to identify and challenge the system's exclusions and shortcomings.[89]

Even if, in actuality, there was no normative benefit to be gained by increasing women's participation in advocacy efforts, gender representation matters to the sociological legitimacy of the Court for the simple reason that there putatively is such a benefit.[90] As Grossman has emphasised elsewhere, the very belief—justified or not—that gender informs how cases are viewed or presented to the bench challenges the perceived neutrality of the court proceedings if representativeness is not achieved.[91] This is particularly the case where a lack of representation is tied to historical exclusion and/or discrimination.[92] There is a long tradition of excluding women from international lawmaking.[93] Thus, the legitimacy of the Court will continue to be questioned, at least in some quarters of the international community, until women and diverse voices are more adequately represented in the figures herein. The inclusion of historically excluded groups strengthens sociological legitimacy, whilst ongoing exclusion reinforces perceptions of illegitimacy.

Finally, the representativeness of legal teams appearing before the ICJ implicates democratic legitimacy.[94] It is true that international institutions do not lay claim to the same democratic

[81]On analogising judicial representation see S. J. Kenney, 'Thinking about Gender and Judging', (2008) 15 *International Journal of the Legal Profession* 87; E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (2013).

[82]See Grossman, *supra* note 56, at 455.

[83]N. Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?, (2012) 12(2) *Chicago Journal of International Law* 647.

[84]See Grossman, *supra* note 56, at 455.

[85]Ibid., at 453.

[86]See Hodson, *supra* note 64, at 913; C. Boyd, L. Epstein and A. Martin, 'Untangling the Causal Effects of Sex on Judging', (2010) 54(2) *American Journal of Political Science* 389, at 392.

[87]See Hodson, ibid., at 929.

[88]Ibid., at 923.

[89]Ibid., at 925.

[90]See Grossman, *supra* note 56, at 454.

[91]Ibid.

[92]See Grossman, *supra* note 83, at 647.

[93]See Charlesworth, Chinkin and Wright, *supra* note 77.

[94]See Grossman, *supra* note 56, at 454.

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mandate as their national counterparts. Courts and tribunals are products of the state-centric and, at least in a democratic sense, largely unaccountable structures of international law.[95] While the appointment of international counsel is often driven by political calculations and national interests, considering gender representation in the composition of legal teams comports with the institutional values of the state-sanctioned international order. The inclusion of women contributes to the legitimacy of the Court by challenging the male-dominated norms and practices that often influence international appointments.[96] For purposes of democratic legitimacy, the subject-matter before the Court may lend additional support for the participation of those directly affected by the issue at hand. Just as geographical diversity reinforces the legitimacy of international courts, gender and professional representation are further legitimating factors. Although the relationship between democratic legitimacy and international litigation is a relatively new area of scholarly discussion, it is clear that democratic principles can provide an additional source of legitimacy for international judicial processes.[97]

There is more at stake, however, than simply advocating for equal representation of women in the courtroom.[98] This discussion aims to shift the focus away from proving essential differences between male and female advocates to examining how gender influences international legal processes and shapes the overall legal framework. The insistence on representative voices in international courts and tribunals is critical not just to their legitimacy, but also to expose the underlying practices that contribute to underrepresentation in the first place.[99] As international courts adjudicate an increasing number of high-stakes cases, demands for greater representation are expected to grow louder. Advocates of both genders, committed to the integrity of the ICJ and the laws it upholds, should take these demands seriously. The present-day picture points to a discernible, albeit gradual, trend towards greater gender parity.[100] Yet, as the data reveals, certain pockets of international legal practice remain resistant to this trend, underscoring the need for sustained efforts to diversify.[101]

5. Changing the face of international adjudication

This study is born from a paradoxical position that encompasses both optimism about the transformative potential of international law and frustration at its failure to bring about systemic change. The challenge will resonate with those familiar with Third World Approaches to International Law, otherwise known as TWAIL.[102] Feminist Approaches to International Law, or—as it were—FAIL, raise many of the same concerns. Feminist critiques of international law have highlighted the limitations of adhering strictly to formal legal processes.[103] It is imperative to engage critically with this critique, while also acknowledging the potential of the international system to integrate and be shaped by feminist insights. The aim is not merely to include heterogeneous voices as participants in the international conversation, including as advocates before the ICJ, but to embed their perspectives and experiences into the creation and interpretation of legal norms and standards. This does not, however, necessitate the deconstruction of the international legal system as we know it but advocates for its evolution, making it more inclusive and responsive to the needs of a diverse global populace. The challenge lies not in the rejection of the system's fundamental tenets, but in the collective ability to actualise

[95]See Hodson, *supra* note 64, at 921.
[96]Ibid.
[97]See Grossman, *supra* note 56, at 455.
[98]See Hodson, *supra* note 64, at 928.
[99]Ibid.
[100]See Section 4, *supra*.
[101]See Hodson, *supra* note 64, at 916.
[102]M. Mutua, 'What is TWAIL?', (2000) 94 *Proceedings of the ASIL Annual Meeting* 31.
[103]H. Douglas et al., *Australian Feminist Judgments: Righting and Re-writing Law* (2014).

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the internationally proclaimed values of equity and inclusivity. The feminist critique, therefore, is not an end but a starting point for constructive engagement. Increasing the representativeness of advocates in proceedings before the ICJ is a first step.

5.1 The feminist critiques

International women's activism came to the fore with the League of Nations; 'its history is however yet to be written'.[104] Following the Second World War, feminist perspectives on human rights began to take shape, both within the UN and elsewhere.[105] The 1970s marked a significant period in the development of feminist legal theories.[106] These advancements played a crucial role in the adoption of the 1979 Convention on the Elimination of Discrimination Against Women (CEDAW), which further motivated international feminist engagement.[107] While the international women's movement has brought the language of empowerment into international law, it has arguably been less adept at giving this language life on the ground.[108] The data presented in this study points to a legacy of resistance that holds contemporary relevance.

Prominent feminist scholars, the like of Hillary Charlesworth, Christine Chinkin, and Shelley Wright, have consistently corroborated the continuing exclusion of women from international lawmaking.[109] They have targeted the gendered language of international legal texts as employing masculine norms and assumptions, with profound implications for the interpretation and implementation of the law.[110] Feminists have rigorously questioned the premise of objectivity in international law, exposing how its standards and norms often reflect the biases and interests of dominant groups.[111] They challenge the foundational structures of the international legal order as imbued with patriarchal values that inherently limit and constrain.[112] The result of which is a legal framework that not only fails to address the specific issues facing women and marginalised communities, but also perpetuates gender inequalities on a global scale.[113]

Feminists have further targeted the gendered composition of international organisations. The dearth of women in high-ranking leadership positions in international institutions creates a trickle-down effect. From the lack of female candidates in the election for UN Secretary General to the sparsity of female judges at the ICJ, gender representation matters to the standing and legitimacy of a system that increasingly recognises the absence of women as 'bring[ing] contestation to outcomes in sustained ways'.[114] And it matters not only in the decision-making process, but in the ways in which issues are presented. The absence of women in the development of the law has led to an 'unfinished jurisprudence that reinforces the boundaries and gendered

[104]B. S. Chimni, 'Feminist Approaches to International Law: The Work of Hilary Charlesworth and Christine Chinkin', in B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2017), 358. See also G. Caglar, E. Prügl and S. Zwingel, 'Introducing Feminist Strategies in International Governance', in G. Caglar, E. Prügl and S. Zwingel, *Feminist Strategies in International Governance* (2013), 1, at 7: 'The history of feminist activism in the League of Nations is only beginning to be written, but such activism was significant.'

[105]K. Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting', in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (2005), 47, at 47, 49.

[106]See generally M. Chammalas, *Introduction to Feminist Legal Theory* (2013); J. Conaghan (ed.), *Feminist Legal Studies: Critical Concepts in Law* (2009), vols. I–IV; N. Levitt and R. R. M. Verchick, *Feminist Legal Theory: A Primer* (2006); K. Bartlett and R. Kennedy (eds.), *Feminist Legal Theory: Readings in Law and Gender* (1991).

[107]See Chimni, *supra* note 104, at 359.

[108]H. Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law', in *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (2011), 17, at 17.

[109]See Charlesworth, Chinkin and Wright, *supra* note 77.

[110]See, e.g., ibid., at 613–45.

[111]Ibid., at 644.

[112]Ibid.

[113]Ibid., at 626.

[114]F. Aoláin, 'Gendering the International Court of Justice', *Just Security*, 2 November 2021, available at www.justsecurity.org/78839/gendering-the-international-court-of-justice/.

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binaries of international law'.[115] Thus, increased female representations to the Court are a *sine qua non* for a legitimate, equitable, and effective international legal system. It may be argued, as Fionnuala Ní Aoláin has done in the context of judicial appointments, that international litigation practices 'function as an extension of the institutionalized culture being accessed'.[116] Beyond any question of intent, international legal organisations are designed to preserve the institutional status quo, evidenced most clearly by the ICJ Bar.[117] These processes are not neutral; rather, they reflect larger institutional and political choices of which gender forms an inherent part.[118] The invisibility of women in international fora—including in international courtrooms—challenges the perceived neutrality of international law, revealing how its universalist claims often mask the privileging of male experiences and perspectives.[119] This analysis undertakes to mitigate the feminist legal critique by arguing for the systematic incorporation of women's experiences, needs, and voices in the creation, interpretation, and application of international legal norms.[120]

The 'Feminist Judgments in International Law' rewriting project is an interesting case in point of how international law can be done differently when women are placed front and centre.[121] In this experiment, Loveday Hodson and Troy Lavers widen the aperture of the judicial focus.[122] The reimagined judgments resist the abstract and often depersonalised version of 'the facts' that the original judgments presented. The decisions rely on a greater range of materials than originally considered and take notice of silences and absences in the court record. People, rather than states, form the centre of the story.[123] To name but two examples: in the rewritten *Lotus* case, the imagined women judges found that Turkey's exercise of jurisdiction did not violate international law, holding instead that the 'Bozkurt Principle' decentres state sovereignty and establishes international co-operation as a hallmark of international society.[124] And, in *Germany* v. *Italy*, the rewritten judgment pays close attention to the power dynamics and hierarchies at play, and foregrounds the rights of the victims who claimed compensation.[125] The process, rather than the outcomes per se, reveals

[115]R. Alwis, 'Holding the Taliban Accountable for Gender Persecution: The Search for New Accountability Paradigms under International Human Rights Law, International Criminal Law and Women, Peace, and Security', (2024) 25(2) German Law Journal 289, at 290; See H. Charlesworth and C. Chinkin, 'The Boundaries of International Law: A Feminist Analysis', (2000).

[116]Ibid.

[117]Used here simply to refer to those lawyers who act as counsel in cases before the ICJ. See E. Sthoeger and M. Wood, 'The International Bar', in C. Romano et al., (eds.), *The Oxford Handbook of International Adjudication* (2014), 639.

[118]Ibid.

[119]The prolonged male control of political institutions at both national and international levels leads to men's issues being regarded as universal human concerns, while issues affecting women are marginalised into a separate, limited category. See Charlesworth, Chinkin and Wright, *supra* note 77, at 625. This has led Catherine MacKinnon to write that 'man is the measure of all things': C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987), at 34. The established nature of international law and politics would shift if their institutions were genuinely inclusive of all people, expanding their scope to address issues traditionally considered 'domestic'. See Charlesworth, Chinkin and Wright, ibid., at 625. Hence, international feminists emphasise the significance of gender mainstreaming as a key strategy to making international law more representative and equitable.

[120]A central theme in feminist legal critique, extensively explored by Charlesworth and Chinkin, is the artificial division between the public and private spheres. This dichotomy has historically marginalised issues considered to be within the 'private' domain—such as domestic violence, reproductive rights, and family law—from the purview of international law, which traditionally focuses on 'public' issues like war, diplomacy, and state sovereignty. This division, they argue, inherently devalues the experiences and concerns of women, and demonstrates how gender biases are woven into the fabric of international legal discourse. Thus, their critique underscores the dual impact of feminist analysis: it brings to light substantive issues that may otherwise be overlooked and argues for a shift in the mode of inquiry itself. See generally Charlesworth and Chinkin, *supra* note 115.

[121]L. Hodson and T. Lavers, *Feminist Judgments in International Law* (2019).

[122]Ibid.

[123]H. Charlesworth, 'Prefiguring Feminist Judgment in International Law', in ibid., at 486.

[124]C. Chinkin et al., 'Bozkurt Case, aka the Lotus Case (France v Turkey): Ships that Go Bump in the Night', in Hodson and Lavers, *supra* note 121, at 27.

[125]Z. Aliozi, B. Schramm and E. Krivenko, 'Germany v Italy', in ibid., at 117.

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something of why gender representation matters in the adjudicatory exercise—it is not much of a stretch to suggest that it matters not only in the judicial function, but in the advocacy as well.

The judgment rewriting project is a constructive form of activism in its assumption that feminist approaches can already shape the legal system. It encourages consideration of the gendered impact of policies and decisions. The rewritten judgments illustrate that legal principles may impinge differently on men and women. Yet, despite the growing acknowledgment of gender issues as relevant to international law and the importance of inclusivity as a guiding principle, this study illustrates that the inclusion of women in the adjudicatory process remains limited.[126] And despite inspiring feminist engagement with international legal practice, in actuality, feminist critiques have arguably struggled to make the intended impact on mainstream international law.[127] A coordinated effort by the international legal community to integrate female perspectives is necessary to translate theory into practice.

5.2 The international promise

While embracing the critical insights of feminist legal theory, this article advocates for a symbiotic approach. It acknowledges the importance of incorporating feminist analyses into the international legal system, not by dismantling existing structures but by infusing them with new life. While the former can greatly enrich the latter by reframing its sociology, it cannot replace it.[128] It is important to stress that integration does not detract from the feminist agenda, nor does it assign feminism a secondary place; the outlook can be both internationalist and feminist.

The relationship between feminist critique and international law is often seen through a lens of contention; it demonstrates the ways in which international law, notwithstanding its aspirations for universality, can inadvertently perpetuate inequalities.[129] However, international law also provides a framework for addressing and rectifying these very inequalities. Principles of equity non-discrimination, and human rights embedded in the international legal structure provide foundational support for feminist critiques, offering avenues to challenge and reshape legal norms to be more inclusive and just.[130] Conversely, feminist critiques contribute significantly to the strength and resilience of the international legal system. By shedding light on neglected issues and perspectives, feminist analyses enrich legal discourse and ensure that international law evolves in response to the changing dynamics of global society.[131] This contribution is not merely additive but transformative, encouraging a more comprehensive and nuanced understanding of justice that transcends traditional boundaries. Thus, this article engages in a dualist inquiry; it challenges the feminist critique of international law for underestimating the adaptability and inclusiveness of the legal framework and, in parallel, scrutinises the international legal system for not fully embracing the reconfigurative potential of feminist perspectives. It posits that there is considerably more room within the international legal system for feminist insights than is commonly acknowledged.[132] The relationship between feminist critiques and international law is not inherently adversarial but symbiotic, capable of mutual reinforcement if guided by the right impetuses. The stated goal of amplifying women's voices before the ICJ is calculated to meet this end.

[126]See Charlesworth, *supra* note 108, at 17.

[127]See Hodson and Lavers, *supra* note 121, at 7.

[128]Idea inspired by discussion of 'socialist feminism' in Chimni, *supra* note 104, at 439.

[129]See Hodson and Lavers, *supra* note 121, at 14. This concern extends across critical schools of international legal theory including, notably, TWAIL scholarship—again Anthea Roberts is informative here: see Roberts, *supra* note 5.

[130]See, e.g., 'The International Bill of Rights': the Universal Declaration of Human Rigs; the International Covenant of Civil and Political Rights; the International Covenant of Social, Cultural, and Economic Rights.

[131]See Charlesworth, Chinkin and Wright, *supra* note 77, at 625.

[132]See Hodson and Lavers, *supra* note 121, at 21.

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Domestic legal systems, with deep-rooted traditions and entrenched practices, typically reflect the historical imbalances and biases of the societies they govern.[133] These systems can be slow to evolve, and often lag behind societal trends and the progressive values they espouse. In contrast, the relatively nascent stage of modern international law presents a canvas less marred by the rigidities of the past.[134] The post-war international legal system is still in its formative years, presenting a rare opportunity to steer its trajectory and shape its future framework. This pivotal moment in the development of the international order opens the door to integrate female and diverse voices, thereby enriching the perspectives that guide legal principles and practices. This is not to say that international law is devoid of challenges; it operates within the confines of traditional legal processes, which are deemed limiting in the eyes of many feminist scholars.[135] The centrality of the state in international law has, in their view, resulted in a structure that mirrors its patriarchal properties.[136] The international legal system may nevertheless be more open to feminist intervention than other areas of law. The distinction between law and politics, which is necessary for maintaining law's neutrality and objectivity domestically, does not apply with equal force internationally.[137] Moreover, the conception of law as a coercive device does not translate in the international sphere where the process is consensual and the object is peaceful coexistence.[138] Lastly, the insistence on diversity by TWAIL scholars may well have prepared the philosophical foundation for feminist critiques.[139]

The international legal order, thus, is a project where innovation and creativity are not only possible but actively encouraged. Its unique characteristics instil international law with the power to redefine norms, challenge existing stratifications, and establish a new order that reflects the egalitarian ideals of the twenty-first century. It is this potential that makes international law an exciting field, ripe for the contributions of representative voices and perspectives. By actively seeking to avoid the replication of disparities and biases entrenched in national systems, the international community can pave the way for a more equitable and just legal order. The challenge—and indeed the opportunity—ahead lies in reimagining international law in a way that leverages its transformative potential.[140] It calls for a departure from conventional approaches that marginalise certain groups.[141] This transformation would not only address existing inequalities but also pre-empt the transposition of domestic disparities into the international order. For a limited time, the ICJ remains well-positioned to defy such expectations, and representative submissions to the Court serve as a practical manifestation thereof. Thence, international law will be prepared to meet present-day challenges with forward-looking resolution.

5.3 From 'talking to ourselves' to talking to each other

The complexity and interdependence of global issues necessitate a multifaceted approach to international law, one that incorporates insights and perspectives from across the spectrum of human experience. As this study has gone to great lengths to substantiate, by broadening the dialogue to include individuals and communities that have been left out of the conversation,

[133]See Charlesworth, Chinkin and Wright, *supra* note 77, at 613.

[134]The law of nations, of course, has historical bearings.

[135]See Douglas et al., *supra* note 103.

[136]See Hodson and Lavers, *supra* note 121, at 14.

[137]See Charlesworth, Chinkin and Wright, *supra* note 77, at 644.

[138]Ibid.

[139]Ibid.

[140]See generally Hodson and Lavers, *supra* note 121. N. Torbisco-Casals, 'Why Fighting Structural Inequalities Requires Institutionalizing Difference: A Response to Nienke Grossman', (2016) 110 *AJIL Unbound* 92.

[141]For a discussion see, e.g., R. Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International Post-Colonial Feminist Legal Politics', (2002) 15 *Harvard Human Rights Journal*; J. Bond, 'International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations', (2003) 52 *Emory Law Journal* 71.

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international law can come to embody its own ideals.[142] If representative counsel advocates matter to the stature of international courts, serious consideration must be given to what practical measures will increase representations by qualified female candidates. The big disparities and little progress identified in this study prompt an examination of the barriers that hinder women's participation in international litigation. What, if anything, about the selection process for international counsel makes women less likely to obtain these roles?

Grossman critiques the assumption that merit alone drives international judicial appointments, noting that even countries with many practicing female lawyers fail to nominate enough female candidates.[143] She punctures the 'quality of the candidate pool' argument by pointing to the unevenness and occasional regression in the representation of women judges on international courts despite progressive domestic trends—the same may be said for women advocates.[144] Feminist theories commit judicial advocates to exploring absences, silences, and differences for a richer international jurisprudence.[145] There is a long tradition of feminists responding creatively to the discipline's narrow confines by reaching beyond them.[146] To bridge the gap between feminist critiques and the international legal system, the combined efforts of stakeholders involved in the creation, interpretation, and enforcement of international law are needed.

Increasing women's participation in the presentation of cases is both an 'outcome of such work and a potential catalyst for ongoing transformation'.[147] If they are to have a chance of changing the rules of the game, prefigurative ideas must not only inspire, but also relate to existing institutions in some way.[148] There is a need to suspend belief in the inevitability of current structures and to experiment with putting bold ideas into practice.[149] The path forward requires a willingness to think outside the box and to challenge the status quo, where the insights of feminist critiques are not seen as external challenges but as integral to the growth and development of international law. Both the proponents of feminist legal theory and the architects of the international legal order are encouraged to engage in a constructive dialogue and collaborative effort. This approach not only acknowledges the diverse realities of the world's populations, but also leverages this diversity as a strength. It is time to move on from 'talking to ourselves'[150] to talking to each other.

6. Conclusion

International legal practice is marked by disparities that shape the creation and interpretation of the law. One reason for this asymmetry is that participation in the formation of international law, including through judicial channels, is reserved for a select few. The findings of this study support the widely held belief that representations to the ICJ are dominated by men in academia. This exclusivity is not, however, based on formal requirements like academic qualifications or bar exams. Instead, factors such as affiliation with professional networks and previous experience

[142]See Charlesworth, Chinkin and Wright, *supra* note 77, at 635.

[143]N. Grossman, 'Achieving Sex-Representative International Court Benches', (2016) 110 *American Journal of International Law* 82, at 85.

[144]Ibid.

[145]B. Ackerly and J. True, 'Reflexivity in Practice: Power and Ethics in Feminist Research on International Relations', (2008) 10(4) International Studies Review 693, at 694.

[146]See, e.g., C. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', (2001) 95(2) *American Journal of International Law* 335; T. Dolgopol, 'The Judgment of the Tokyo Women's Tribunal', (2003) 28(5) *Alternative Law Journal* 242; R. Sakamoto, 'The Women's International War Crimes Tribunal On Japan's Military Sexual Slavery: A Legal and Feminist Approach to the "Comfort Women" Issue', (2001) 3(1) *New Zealand Journal of Asian Studies* 49.

[147]See Hodson, *supra* note 64, at 930.

[148]See Charlesworth, *supra* note 123, at 480.

[149]Ibid.

[150]See Charlesworth, *supra* note 108.

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before the Court inform the composition of legal teams.[151] Significantly, they may also inform the decision-making processes inside the courtroom.

International advocacy practices are an underdeveloped and underexplored area of study.[152] Despite the prominent role counsel play in shaping international litigation, remarkably little attention has been paid to exploring the nuances of their positions and the challenges of their homogeneity.[153] This study has sought to contribute to a body of literature on the profession of international law that unites its practitioners, the institutions they work in, and the impact they collectively wield on the global stage.

[151]See Kumar and Rose, *supra* note 1, at 915.

[152]Future research could compare the composition of legal teams across courts and tribunals to determine whether there are any variations by subject matter or dispute resolution fora. Further studies could undertake a proportional, rather than absolute, gender analysis, weighing the total number of eligible professionals vis-à-vis actual representation. This analysis could be contrasted with the gender composition of assistants and advisers fulfilling supportive roles in international proceedings. It would also be interesting to see whether the gender disparity in foreign ministries reflects the composition of their legal teams.

[153]In contrast to, say, efforts to diversify the ICJ bench. See generally Grossman, *supra* note 143.

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