

CHAPTER 10

JUSTICE THROUGH GENDER BALANCE IN THE UNITED NATIONS: AN URGENT MATTER OF CONSISTENCY

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*The most difficult thing is the decision
to act, the rest is merely tenacity.*

Amelia Earhart (1899-1937)

*Gender equality is the unfinished
business of our time.
And so, the time is now to change it.*

António Guterres, UN Secretary-General¹

1. OBJECTIVE AND INITIAL CONSIDERATIONS

The following analysis and proposals are intended to take advantage of the existing UN institutional and regulatory structure. We are not envisaging unfeasible, utopian or politically unworkable changes, but rather imagining how a more equitable reality from a gender perspective can be achieved with the tools available. According to Telò,² the 75th anniversary of the United Nations is not the moment for “a grandiose declaration, or a call for fundamental changes which mostly go unmet; but for concrete reform proposals, dynamic and innovative, even if largely within the current Treaty framework”.

The reform of the United Nations, and the gender challenges it poses, is an extraordinarily broad topic which goes beyond the limit of these pages. In the Introduction to this book, the gender dimension is presented as relevant to “a more legitimate global multilateral governance”, including “both enhanced input and output legitimacy as well as accountability and fair representation”.³ In this chapter, we suggest ways for advancing in this direction.

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1 SG/SM/18928-OBV/1775-WOM/2132, 8 March 2018.

2 See Mario Telò's Introduction to this book.

3 Ibid.

Women's participation is indeed strongly connected to legitimacy and governance, but it is also a human rights concern which touches upon the right to equality. That is why the deficiency of gender balance in human rights organs and bodies, and in international tribunals, is especially visible, and in a certain sense is paradoxical because the organisation which promotes certain norms and values among its member states should not assume fewer obligations to satisfy them internally. Furthermore, overcoming the under-representation of women is also something which can have an impact on the interpretation and application of international law and human rights in general, as well as a potential multiplier effect in the system as a whole. For this reason, the adoption of concrete measures i) would, in addition to providing extremely high visibility to the United Nations' commitment to gender equality (a commitment that was significantly strengthened with thn these areas must be a priority focus of attention and represent an exemplary change in the UN. The effects of taking action in this direction would be immediate in terms of legitimation, and in the longer run in terms of governance.

To date, the issue of gender in the UN has been addressed conjointly with the conceptual elaboration of the debates on the role of women. Initially, the main line of argumentation was the notion of equality and non-discrimination. Subsequently, the action focused on the demand for equal representation or gender balance, together with the concept of positive measures. More recently, focus has shifted to the introduction of a gender perspective in all policies through gender mainstreaming.⁴ All these developments have sought to transform the situation of women in the contemporary world and society itself. However, it is necessary to go further. Normalising the presence of women in the positions of greatest legal impact (international courts of all kinds and human rights bodies and mechanismse arrival of Secretary-General António Guterres), provide a way to multiply the impact of gender mainstreaming across different areas of law, and start to make up for women's decades of absence from legal discourse.

2. GENDER AT THE UN IN PERSPECTIVE

The UN's journey in relation to women, first, and gender mainstreaming, later, has been a long one. The Economic and Social Council (ECOSOC) began this story as early as 1946, although the General Assembly (GA), the Security Council (SC) and

4 Booth, C. and Bennett, C. (2002) 'Gender mainstreaming in the European Union towards a new conception and practice of equal opportunities?', *The European Journal of Women's Studies*, 9(4), pp. 430–446. Available at: <https://doi.org/10.1177/13505068020090040401>.

the Secretariat have become involved too, especially from the year 2000 onwards. Discourse and action have been projected both within and outside the UN. It is essential to give the greatest visibility to the achievements so far.

In 1946, ECOSOC created the Commission on the Status of Women (CSW) to promote the rights of women in the political, social, economic and educational fields.⁵ This Commission promoted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted and opened for signature and ratification, or accession, by the GA.⁶ Until today, CEDAW remains the most relevant piece of positive law in the field, and is binding for 189 states. The rest of the subsequent normative developments in relation to gender justice have taken place almost exclusively through soft law, or non-binding legal instruments.

CEDAW provides for a specific mechanism of control over states parties (the Committee on the Elimination of Discrimination against Women), which was extended to the reception of individual complaints through the 1999 Protocol (currently ratified by 114 states). The CEDAW Committee is the international human rights monitoring body with the highest representation of women: 22 women and a single man. This should also be the subject of reflection, considering that it confirms the norm that the representation of women is highest in bodies dealing with women, children or the family. This embodies an undesirable gender bias: neither the discrimination against women nor children's issues are the exclusive domain of women. A parity composition (desirable in all the committees, and not only in that of CEDAW), would contribute to overcoming such stereotypes and duly highlight the need for men and women to be involved in the redefinition of gender dynamics, further allowing space for the important debate around the new masculinity.⁷

5 E/RES/8 (II) of 21 June 1946, not including norms related to gender balance in its own composition.

6 A/RES/34/180, of 18 December 1970.

7 Sometimes the argument is made that since men have for the longest time been hugely over-represented, having an over-representation of women should not be seen as contradicting equality. While certainly plausible, the soundness of this argument depends, to some extent, on the rationale on which parity is sustained. If the dominant logic is one of *temporary* special measures with a *corrective/compensatory* purpose only, then the over-representation of women, subject to past and present discrimination, should not be seen as problematic at least until that discrimination is overcome. If, however, parity is seen as advancing a new understanding of democratic legitimacy seeking the disestablishment of traditional gender roles (and thus the redefinition of femininity in ways that make it normatively compatible with authority and masculinity in ways that make it normatively compatible with care), as well as a *corrective substantive equality* measure, then perfect parity for both sexes in every domain of decision-making as a *permanent* ambition might more conducive. In this case, however, agendas pushing for parity in the public domain should be accompanied by agendas seeking parity in the private sphere as well. On the competing rationales for parity and special measures see Rodríguez-Ruiz, B. and Rubio-Marín, R. (2008) 'Constitutional justifications for parity democracy', *Alabama Law Review*, 60(5), 2009, pp. 1167-1190.

ECOSOC's CSW was also the promoter of the four major conferences convened on women by the United Nations. The first took place at the request of the GA in commemoration of the International Women's Year⁸ in Mexico City (1975). The second was the World Conference of the United Nations' Decade for Women, held in Copenhagen in 1980, the achievements of which were reviewed at the third conference, held in Nairobi in 1985. From the first conference, wide governmental and non-governmental participation was a common feature. In all of them, documents of objectives and possible measures to achieve the advancement of the status of women were adopted. But it was the 1995 Beijing Conference which marked a distinctive turning point. A Declaration and Platform for Action were adopted, the follow-up of which was commissioned to the CSW by ECOSOC.⁹ The Beijing Declaration recognised the central role which women should play in leadership, conflict resolution and the promotion of lasting peace, going beyond the perspective of non-discrimination.

Indeed, the Beijing Platform for Action established the principle of equal participation of women and gender balance of women and men in decision-making for the first time. It thus came to epitomise a true breakthrough in its attempt to foreground women's inclusion in decision-making and empowerment as a democratic requirement, explicitly endorsing affirmative action and substantive or de facto equality not only as legitimate but also as necessary remedies, linking women's access to decision-making to the notion of justice as well as democracy (Strategic Objective G1: 181). In doing so, the Platform built on the expansion in CEDAW of the identified domains of public participation and decision-making from which women were said to be problematically excluded, in ways which better exposed the sexed separation between the public and private spheres. The Platform recognised that action should be taken to enable women to access all those avenues to power and authority which had traditionally been closed to them, in the domain of the state (including, for the first time, a reference to the judiciary) (Strategic Objective G1: 190a) but also in civil society, explicitly mentioning political parties, employer organisations, trade unions, research and academic institutions, as well as executive and managerial positions in corporations and institutions (Strategic Objective G1: 184 and 191a).

The involvement of the GA in the realisation of the Beijing objectives, and in the policies for the advancement of women at the global level in general, was decisive. Indeed, at its 23rd special session in 2000 – 'Women 2000: gender equality, development and peace for the twenty-first century' – the GA decided to carry out a five-year evaluation of the Beijing Platform for Action. It also approved a political declaration and an outcomes document ('Further actions

8 A/RES/310 (XVII).

9 E/RES/1996/6.

and initiatives to implement the Beijing Declaration and Platform for Action'). From then on, every five-year evaluation (2005, 2010 and 2015) would be led by the CSW. From 2000 the Beijing process converged with the adoption of the United Nations' Millennium Development Goals (MDGs) within the GA. In relation to gender, MDG 3 was set for 2015 "to promote gender equality and empower women". The revision and renewal of these MDGs in 2015, with the adoption of the Sustainable Development Goals (SDGs), saw gender equality set as SDG 5. Now the 2030 Agenda calls for women's full and effective participation, as well as equal opportunities in all areas of political, economic and public life decision-making.

The year 2000 also marks the moment at which the SC joined the gender agenda with the adoption of a key resolution on women, peace and security (Resolution 1325),¹⁰ which has sparked prolific literature. Under the terms of the resolution, the SC assumes a commitment to render visible the effects of conflict on women and girls, and also underscores the vital role of women in conflict prevention and resolution, and in the construction and the consolidation of peace. Resolution 1325 triggered the adoption of national action plans to comply with it, and its ten complementary resolutions,¹¹ with an increasing focus on the sexual violence suffered by women and now also men in conflict situations.¹² In relation to institutional participation, Resolution 1325 "[u]rges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict" and "[u]rges the Secretary-General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in this regard calls on Member States to provide candidates to the Secretary-General, for inclusion in a regularly updated centralized roster "(paras. 1 and 3).¹³

In the framework of the institutional reform started in 2005, after a number of years in which the GA dealt with the situation of women in the UN (1998-2011), and after the unanimously adopted A/RES/55/69 resolution on the 'Improvement of the status of women in

10 S/RES/1325 (2000).

11 S/RES/1820 (2008), S/RES/1888 (2009); S/RES/1889 (2009), S/RES/1960 (2010), S/RES/2016 (2013), S/RES/2122 (2013), S/RES/2242 (2015), S/RES/2267 (2019), S/RES/2493 (2019) and S/RES/2538/2020.

12 One certainly wonders whether it is time to go beyond this very important but also narrow focus on sexual violence to the detriment of the many other ways in which armed conflict produces harm that is gendered and has a disparate impact on women and girls.

13 With S/RES/2242 (2015), the SC created an Informal Experts Group on Women, Peace and Security (IEG). Since 2016, it has provided a space for regular consultations between SC experts and the United Nations on urgent concerns regarding women, peace, and security in country-specific situations. It is, however, intended not so much as a mechanism to tackle women's equality but as a gender-alert policy reflection group providing the SC with gender analysis which it can use in making more effective decisions on sustainable peace and security.

the United Nations system', the GA created UN Women in 2010.¹⁴ This is defined as the UN entity dedicated to promoting gender equality and the empowerment of women. One of its active areas is women, peace and security, although without a direct and express reference to participation in legal mechanisms for the settlement of disputes. In terms of leadership and political participation, UN Women's work is focused on promoting the adoption of new laws and the introduction of constitutional reforms to guarantee women's equal access to political spheres as voters, candidates, elected representatives and public officials. The issue has also occupied the CEDAW Committee, which, through its recommendations, has gradually been embracing the normative standard of parity representation in an increasing number of domains in its discussion with member states.¹⁵

Since 1994, internal actions have also been carried out in relation to gender equality and the organisational structure of the UN, under the mandate of the secretary-generals (SG) Javier Pérez de Cuéllar, Boutros Boutros-Ghali, Kofi Annan, and Ban Ki-moon. An initial step was taken through the creation of the UN Focal Point for Women under the assistant secretary-general for human resources management (1994), today included in the UN Women structure. Successive reports of the SG to the CSW (ECOSOC) between 2004 and 2008 elaborated on the question,¹⁶ although there was no major improvement concerning the UN structure (OSAGI and OFPW 2010).¹⁷ A major shift has taken place since Secretary-General António Guterres arrived in office, however, with a commitment to achieving gender parity in the senior leadership levels of the UN by 2021 and across the organisation at all levels by 2028. A strategy – with a parity target at 47-53 – has been adopted, which is delivering impressive results, thus showing the difference that political will can make.¹⁸

14 A/RES/64/289, 'System-wide coherence', paras. 49-88, by way of statutes of the entity.

15 Rubio-Marín, R. (2018) 'Women's participation in the public domain under Human Rights Law: Towards a participatory equality paradigm shift?' in Rubio-Marín, R. and Kymlicka, W. (eds.) *Gender Parity and Multicultural Feminism: Towards a new synthesis*. Oxford: Oxford University Press, pp. 66-96.

16 A/53/376, 14 September 1998; A/54/405, 27 September 1999; A/55/399, 19 September 2000; A/56/472, 15 October 2001; A/57/447, 2 October 2002; A/58/374, 17 September 2003; A/59/357, 20 September 2004; A/61/318, 7 September 2006; A/63/364, 18 September 2008; A/65/334, 9 September 2010; A/67/347, 4 September 2012.

17 OSAGI and OFPW (2010) 'Gender balance strategy for the United Nations Secretariat: A strategic action plan'. Available at: http://www.un.org/womenwatch/osagi/ianwge/NEW%20Gender%20Balance%20Strategy_march%202010_Anex%206.pdf

18 https://www.un.org/gender/sites/www.un.org.gender/files/gender_parity_strategy_october_2017.pdf. It is impressive that the first target was achieved two years ahead of schedule, with parity in full time under-secretary-generals (USGs) and assistant secretary-generals (ASGs), as well as in UN resident coordinators, achieved for the first time in 75 years, in addition to the highest number of women in leadership in peacekeeping missions ever. See <https://www.un.org/sg/en/content/sg/statement/2020-02-27/secretary-generals-remarks-the-new-school-women-and-power-scroll-down-for-french-version> and <https://www.un.org/sg/en/content/sg/speeches/2020-03-06/remarks-group-of-friends-gender-parity>. A 20-year old staff administrative instruction on temporary special measures has also just been renewed on 6 August 2020 (see ST/AI/2020/5, Administrative instruction, 'Temporary special measures for the achievement of gender parity', superseding the instruction of 21 September 1999, SG/AI/1999/9).

Furthermore, on 12 March 2019, a high-level Conference on Women in Power was organised by the GA, at which a call for action was adopted to “create an environment where gender equality is respected, and inclusion is part of the organizational culture in all spheres of society”. On 27 April 2020, within the framework of the UN Covid-19 Response, the Women Rise for All initiative was launched, made up of women leaders and convened by United Nations’ Deputy Secretary-General Amina Mohammed as a global advocacy effort to support the UN roadmap for social and economic recovery from Covid-19.

In short, the gender agenda of the different organs of the United Nations has greatly proliferated, especially since the beginning of the 21st century. There are nevertheless still significant deficits in terms of equality and participation in the UN’s structure at the highest levels, and specifically in relation to human rights (HR) and international justice – the area on which we will focus. These deficits hinder, or at least impoverish, a true gender mainstreaming. Out of concern for this situation, the Advisory Committee of the Human Rights Council (HRC) has launched a study on ‘Current levels of representation of women in human rights organs and mechanisms’. Analysing the contributions published thus far, the scarce number coming from states, NGOs in the sector, and academics is striking. In parallel, coordination among all the structures and bodies of the UN that are concerned with gender equality and gender mainstreaming should be strengthened: informal collaboration exists, but it would be optimised if protocols and institutional channels were adopted to enhance dialogue between the HRC Advisory Committee, CEDAW, the SC Informal Experts Group on Women, Peace and Security (IEG), the ECOSOC CSW and the UN Focal Point for Women and UN Departmental Gender Focal Points (UN Women). Their contributions to detecting barriers and formulating proposals to advance women’s empowerment and gender sensitive policies would multiply the impact of any measure taken.

3. ROOM FOR IMPROVEMENT

The number of women in human rights working groups, special rapporteur positions, and treaty bodies to which the supervision, guarantee and control of human rights obligations is entrusted, as well as the number of women in international tribunals, is another barometer for the gender situation in the UN and in the member states. A balanced composition of all of them would have a visible impact and

contribute to the enrichment and further spread of gender mainstreaming in the numerous policies and regulations which are directly and indirectly affected by the activity of such bodies.¹⁹

The composition of the HR treaty bodies, working groups and mechanisms, and the ratio between male and female special rapporteurs, have achieved a certain gender balance in recent years (with an average of 45 per cent of women).²⁰ This fact must be systematically celebrated and underlined. However, significant thematic imbalances persist in matters connected to family-related topics, such as housing, women and children, as occurs in CEDAW (91 per cent women) and the Committee on the Rights of the Child (CRC) (56 per cent). International courts and the International Law Commission (ILC) itself present the lowest rates of incorporation of women, both in their historical data and their current composition, and they lack the habit of offering sex-segregated data.²¹ Yet some changes would not require great revolutions. Suffice the example of the lost opportunity with the recent renewal of the International Residual Mechanism for Criminal Tribunals (IRMCT). Originally, in 2012, this had only four women (16 per cent) among its 25 members. The term renewals have taken place between 2012 and 2020 with a certain degree of automatism, except in seven cases of death or withdrawal to occupy other positions. All of them were male judges, with only two being replaced by women, coming to six female judges, 24 per cent of the total. If the seven renewals of this period had been used to appoint women judges, the gendered composition could have become much more balanced with 11 female judges and 14 male judges (44 per cent women). Without even questioning the quasi-automatic renewal with which the

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- 19 Grossman, N. (2011) 'Sex representation on the bench and the legitimacy of International Criminal Courts', *International Criminal Law Review*, 11, pp. 643-653. Available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Submissions/WomenTheTableReport.pdf>; Malleson, K. (2003) 'Justifying gender equality on the bench: why difference won't do', *Feminist Legal Studies*, 11(1), pp. 1-24.
- 20 GQUAL (2015) 'Composición actual de Tribunales Internacionales y Organismos de Monitoreo', 14 September. Available at: <http://www.gqualcampaign.org/composicion-de-tribunales-internacionales-y-cuerpos-de-monitoreo/>; OHCHR, 'Gender composition of Treaty Bodies on 1 January 2019'. Available at: https://www.ohchr.org/Documents/HRBodies/TB/Gender_representation.docx.
- 21 Grossman, N. (2016) 'Achieving sex-representative court benches', *American Journal of International Law*, 110, pp. 82-95; Grossman, N. (2016) 'Shattering the glass ceiling in international adjudication', *Virginia Journal of International Law*, 110, pp. 195-221; Pillai, P. (2018) 'Women in International Law: A vanishing act?', *Opinio Juris*, 3, December. Available at: <https://opiniojuris.org/2018/12/03/women-in-international-law-a-vanishing-act/>; Gascón Marcén, A. (2020) 'La mujer como miembro de tribunales internacionales', in Ruiz Resa, J.D. *Las mujeres y las profesiones jurídicas*. Madrid: Dykinson; Petit De Gabriel, E.W. (2020) 'Mujer y tribunales internacionales: el difícil camino hasta la toga', in Ruiz Resa, J.D. *Las mujeres y las profesiones jurídicas*. Madrid: Dykinson. The first female candidates to the ILC were nominated in the 1961 and 1991 elections. The General Assembly elected the first two female members of the ILC in 2001; at present, there are four out of 34 members (11.7 per cent). Concerning international tribunals, women's participation ranges between 14.3 per cent (International Tribunal for the Law of the Sea and Inter-American Court of Human Rights) and 33-34 per cent (International Criminal Court and European Court of Human Rights). The International Court of Justice counts 20 per cent women and the International Residual Mechanism for Criminal Tribunals 24 per cent. By far and away, the best figures are scored by a regional court, i.e., the African Court on Human and People's Rights, reaching 54.5 per cent.

IRMCT seems to have operated to date, a possible point of contention in itself, the composition of the mechanism between 2015 and 2020 would have changed significantly if seven women judges had been appointed.²²

In general terms, the improvements which can be proposed, first of all address the type of procedure for the (s)election. The procedures differ depending on who makes the nomination (individual or governmental), and the final selection (state or international). In those cases in which the nomination is individual (such as, concretely, in the case of special procedures), the essential organisational responsibility and room for improvement lie in dissemination and transparency. Regarding outreach, it is very important that calls are disseminated through non-exclusively governmental channels. On the one hand, subscription services and alert systems for vacancies would be useful. On the other hand, the dissemination of opportunities could be institutionalised through stable collaboration (through an open call, for example, for an alliance) with NGOs working in the domain of gender; with professionals from sectors related to human rights law (HRL), international law (IL), and international humanitarian law (IHL) (such as Atlas or GQUAL or Women@thetable); or with IL associations, which usually integrate a high percentage of women, such as ICON or the Global Network for International Law. In relation to those positions for which the state must formulate a proposal or a selection, the transparency of the states in their internal processes, and of the organisation regarding the final procedure followed to formalise the election, can also be improved. In both cases, perhaps one of the key measures should be advertising, as a source of accountability and social legitimacy. The publicity of the procedures must reach the maximum possible level and involve the call and the criteria which will be applied to the selection, the applications or profiles of the candidates, and the reasoned and motivated decision adopted by the body in charge, together with the reports of advisory bodies which participate in the process. This is already the case, partially at least, for special procedures. The HRC Advisory Committee publishes the applicants' forms (which can be individual or supported by a state) for each vacancy, allowing the alleged merits and profile to be seen. The committee also publishes its evaluation report of the candidates.

This system used for the special procedures through self-application can and should be transposed to government nominated positions, including those of a jurisdictional nature. This is a step that has already been taken by the Council of Europe. In 2004, the Parliamentary Assembly launched a wake-up call on the need to publicise the national

22 Petit De Gabriel, E.W. (2020) '(Dis)Paridad en el Mecanismo Residual Internacional de los Tribunales Penales', *Aquiescencia*, 8 July. Available at: <https://aquiescencia.net/2020/07/08/disparidad-en-el-mecanismo-residual-internacional-de-los-tribunales-penales-por-eulalia-w-petit-de-gabriel/>.

procedure for nominating candidates²³ and the need for the then Ad hoc Sub-Committee on the Election of Judges²⁴ to publish the motivation for their selection and preference among the candidates proposed by the state²⁵ prior to the election in the Parliamentary Assembly. In 2012, the Committee of Ministers approved a set of ‘Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights’, specifically addressing the requirement for a public and disseminated prior call at the national level.²⁶

The second element which can be acted upon are the regulations governing elections or appointments. From the perspective of hard law, the norms for the creation of these bodies, tribunals and agencies and their statutes, do not generally include the gender representation criterion in their election and composition, although they usually take into account other representative criteria, such as equitable geographical distribution or the plurality of legal systems. The International Criminal Court is a notable exception. The 1998 Rome Statute includes gender balance – worded as “fair representation” – as a condition for member states to fulfil when appointing judges (Article 36.8.a)iii).²⁷ The African Court on Human and People’s Rights is another exception (Article 12.2 of its Statute).²⁸ The gender balance reached in both courts differs (respectively 33 per cent and 54.5 per cent female). The exceptional result in the African Court is in line with the strong commitment of the African Union (AU) to this cause, as the Statute of the Court entrusts the Assembly of the AU with the guarantee of equitable gender representation in the election of judges.²⁹

Modifying the rules of creation and regulation of courts and other human rights bodies to introduce this gender representation criterion, when it was not originally contemplated, is a complicated task. Instead, we argue that it can be introduced through

23 AS/Recommendation 1649(2004), paras. 17-19.

24 AS/Resolution 2002 (2014) replaced it with the Committee on the Election of Judges to the European Court of Human Rights, which met for the first time in Strasbourg on 27 January 2015. The regulation of this Committee can be seen in AS/Res 1842 (2011) adopted on 7 October 2011, as modified by Resolution 2002(2014).

25 AS/Res(2004)1366.

26 Adopted by the Committee of Ministers on 28 March 2012, CM(2012) 40-final, as amended on 26 November 2014 by CM/Del/Dec(2014)1213/1.5-app5.

27 “The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges”.

28 “Article 12: Nominations. 1. States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State. 2. Due consideration shall be given to adequate gender representation in the nomination process”.

29 Article 14, paragraph 53: “In the election of the Judges, the Assembly shall ensure that there is equitable gender representation”.

soft law standards, as has been done for the proposal and election of judges for the European Court of Human Rights (ECtHR), both in the international and national phases. Thus, gender balanced is now the rule for both the proposals for membership in the Committee for the Election of Judges of the Parliamentary Assembly³⁰ (since 2004) and the composition of the Advisory Panel of Experts on Candidates for Election of Judges, of the Committee of Ministers,³¹ chosen by this body on the proposal of the member states (since 2010). In the national phase and for the lists of three to be proposed by the governments of the member states, the Parliamentary Assembly highlighted the need for this balance from 2004,³² establishing in 2005 that national proposals should include at least one candidate of each gender.³³ The Committee of Ministers transposed it on its 'Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights' in 2012.³⁴ In 2014, after a 2008 ECtHR advisory opinion requested by the Committee of Ministers (first opinion ever delivered by the ECtHR ex Article 47 ECHR)³⁵ because of a list of only male candidates proposed by Malta, the Committee of Ministers included an exception for cases of quasi-absolute impossibility of satisfying the requirement.³⁶ Although the introduction of these criteria has improved the situation, it has not resolved all the shortcomings in the election system in relation to gender³⁷ because unfortunately, and not without some inconsistency, the Parliamentary Assembly is, in its final decision, not subject to the rules that guarantee the gender balance which it demands from the states.

Following the best of this model and overcoming its shortcomings, we advocate the creation of guidelines which, in addition to creating transparency, introduce demands on the nomination from a gender perspective, for national proposals and final decisions by

30 AS/Res (2004)1366, as modified by its Resolutions 1426 (2005), 1627 (2008) and 1841 (2011).

31 Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. Since 2010, national lists have been submitted to this Advisory Panel, prior to the election by the Parliamentary Assembly.

32 AS/Res 1366 (2004).

33 AS/Res 1426 (2005).

34 CM (2012)40-final.

35 ECtHR Advisory opinion, on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 February 2008.

36 CM(2012)40-final, as amended on 26 November 2014 by CM/Del/Dec(2014)1213/1.5-app5. The consolidated process of selection and its regulation can be found in SG-AS (2020) 03 rev 2, of 26 May 2020.

37 Hennette Vauchez, S. (2015) 'More women – But which women? The rule and the politics of gender balance at the European Court of Human Rights', *European Journal of International Law*, 26(1), pp. 195-221. Available at: <https://doi.org/10.1093/ejil/chv004>.

all involved. The bodies adopting the decisions, or the advisory bodies with which they support their decisions, would be in charge of approving the decisions. Their adoption and publicity would create a need for specific conduct and require justification in case of deviations. Transparency of the process and accountability would thereby be guaranteed.

In this regard, the concrete proposals on how to approach gender balance are multiple.³⁸ However, even the best ideas can sometimes be subject to controversy, such as that spurred by the Norwegian proposal of a male candidate for the CEDAW Committee in 2018, after having made three proposals for male candidates in previous renewals of the Committee whose composition is 91 per cent female.³⁹ The determination of the universe with respect to which gender balance is examined, can become an epic battle. Must one expect gender balance taking into account the previous proposals of the same state (as was claimed in the Norwegian case)? Should gender balance be present in every list formulated? Should the total number of positions to be decided at a certain point in time be taken into account in seeking concrete results? Or should the current composition or past composition of the body be the most relevant feature (allowing for the under-represented sex to be privileged), especially if the aim is to compensate for past injustice or to promote changes in the praxis of the institution that may come about through a more gender balanced composition? Moreover, the logic of temporary special measures and that of permanent parity composition do not always coincide, as the former allows that the composition of bodies be predominantly feminine – for a time at least – to correct accumulated disadvantages, while the latter claims parity between the sexes with a vocation for permanence.⁴⁰

Regulation by means of soft law instruments raises the issue of the lack of enforceability before domestic courts, in cases in which candidates want to challenge the selection decision or the national proposal. This issue, together with that of the political act nature of the selection decision (and thus of its immunity to judicial review) has been raised, for example, before the Spanish Supreme Court in relation to the ‘Guidelines on the selection of candidates for the post of judge’ of the Committee of Ministers of the Council of Europe.⁴¹

38 Two interesting examples are the report on best practices presented by WOMEN@THETABLE to the HRC Advisory Committee (2019), and the list of specific suggestions in Kraft-Buchman, C., Chungong, M., Salmón, E.S., Vicente, A. (2019) ‘10 ways to improve gender equality at the UN’, *Inter-Parliamentary Union*, 19 November. Available at: <https://www.ipu.org/news/voices/2019-11/10-ways-improve-gender-equality-un>.

39 Bailliet, C.M. (2016) ‘A call for transparency in nominations to international committees and tribunals’, *INTLAWGRRLS*, 15 March. Available at: <https://ilg2.org/2016/03/15/a-call-for-transparency-in-nominations-to-international-committees-and-tribunals/>.

40 Rodríguez-Ruiz and Rubio-Marín ‘Constitutional justifications’.

41 STS 2139/2017, of 31.5.2017, ECLI:ES:TS:2017:2139.

For this reason, it is also necessary to work from a hard law perspective which reinforces the internal judicial control of state action in this area. The task could be linked to human rights norms related to gender equality as interpreted by the corresponding bodies.⁴² For the sake of brevity, and because it has been less frequently explored, we will focus here on the potential offered by the interpretation of Article 8 CEDAW, which should be interpreted as inclusive of international human rights tribunals and bodies⁴³ in a similar way to how Article 7 includes women's access to the national judiciaries.⁴⁴ Article 8 CEDAW provides that:

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.

Since 1988, the CEDAW Committee has tried to promote the adoption of positive measures regarding this obligation by states.⁴⁵ In 1997, it already stated that “[t]he inclusion of a critical mass of women in (...) the international criminal justice system will make a difference”.⁴⁶ And, consequently, among the recommendations formulated, it included the adoption of measures: “which should be identified, implemented and monitored for effectiveness including those designed to ensure a better gender balance in membership of all United Nations bodies, including the Main Committees of the General Assembly, the Economic and Social Council and expert bodies, including treaty bodies, and in appointments to independent working groups or as country or special rapporteurs” (para. 49). To this was added, as early as 1997, the requirement of transparency and information on legislative and other measures adopted at the national level, their application and their results (para. 50). In 2015, in GR No. 28 on the core obligations of states parties under Article 2 of the CEDAW, the CEDAW Committee recommends that, in relation to “[s]pecialized judicial/quasi-judi-

42 Dahdouh, M., Rodriguez Segui, V., Smith, V. and Zavala Herrera, M. (2017) 'Achieving gender parity on international judicial and monitoring analysis of international human rights laws and standards relevant to the GQUAL Campaign', IHRLC Working Paper Series No. 4, October, Berkeley International Human Rights Clinic, University of California. Available at: <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Working-Paper-4-Achieving-Gender-Parity-171002-3.pdf>.

43 Martin, C. (2015) 'Article 8 of the Convention to Eliminate All Forms of Discrimination against Women: A stepping stone in ensuring gender parity in international organs and tribunals', GQUAL. Available at: <http://www.gqualcampaign.org/wp-content/uploads/2015/09/Advocacy-Piece-1.pdf>.

44 General Recommendation (GR) No. 23: Political and public life, 1997, para. 31.

45 GR No. 8: Implementation of Article 8 of the Convention, 1988.

46 GR No. 23, 1997, para. 40.

cial systems and international/regional justice systems”, the “States parties: (a) Take all appropriate steps to ensure that all specialized judicial and quasi-judicial mechanisms are available and accessible to women and exercise their mandates under the same requirements as the regular courts” (para. 56).

Perhaps the time has come to promote a new General Recommendation which interprets Article 8 CEDAW in a contemporary way, in the light of the aforementioned developments in the Council of Europe and all the achievements and debates on gender balance in relation to international justice, but also in the light of the CEDAW Committee’s own practice in its recommendations to states (under Articles 7 and 4.1 on temporary special measures), endorsing parity of representation at the national level. Additionally, in accordance with the obligations established in Article 2 CEDAW, state courts duly apply the principle of non-discrimination of the Convention and validate the legitimacy of positive measures to guarantee substantive equality (GR No. 28 on the core obligations of states parties under Article 2 of CEDAW, 2010, para. 33). This is why we suggest the need to train national judges and prosecutors on the scope of CEDAW’s obligations in relation to the selection and appointment processes for international courts and human rights mechanisms.

In short, it is necessary to clearly establish that CEDAW (Article 8) imposes obligations on the states parties in relation to the composition of international tribunals and human rights organisations; and that national courts can and should apply the obligations derived from CEDAW within their domain (Article 2) as a necessary reinforcement of, and complementary to, the soft law guidelines which might be adopted.

4. RECOMMENDATIONS

The path taken by the UN in relation to gender balance and gender mainstreaming is remarkable and must be acknowledged. It has promoted strategic changes and engaged member states through institutional and regulatory instruments, confronting the internal challenge of building a more gender-equitable international administration. However, there is still room for improvement.

General recommendation. The United Nations must address the need to balance the composition of the highest positions of legal responsibility, such as in international courts of all kinds and in human rights bodies and mechanisms. This would have extraordinary visibility as an expression of all the work carried out in this area and would also multiply the impact of the gender mainstreaming mandate. Furthermore, it is an imperative derived from the very notion of justice.

Recommendation on the visibility of achievements. A complete set of materials should be made available in various formats (for example, for children, young people, audio-accessible or academic) on the historical development of the UN engagement with women's rights and gender governance within the life of the organisation to render the path travelled visible. Whenever possible, a historical perspective on the gender dimension should be included in documentation on any topic. It would also be very useful to develop general and accessible gender-segregated databases. The 'World survey on the role of women in development' needs to be supplemented with data which reflect the UN's internal situation more generally, as significant advancements have been achieved since 2017, as a result of the current Secretary-General's commitment to gender parity, shown in the recently launched UN Gender Parity Dashboard accompanying his Strategy. Nevertheless, none of them include gender statistics in relation to the composition of bodies, organs and tribunals, or other similar quantifiable indicators. The European Institute for Gender Equality and its statistical analysis, as reflected in the Gender Equality Index, provides an example of good practice.

Recommendation on cooperation. Any impact study, or any normative, programmatic or institutional initiative in relation to gender, should involve and integrate the views of the different internal UN actors with competence on gender equality and gender mainstreaming. This includes the HRC Advisory Committee (Group on 'Gender issues at HR bodies'), the CEDAW, the Security Council Informal Experts Group on Women, Peace and Security (IEG), the ECOSOC CSW and the UN Focal Point for Women and UN

Departmental Gender Focal Points (UN Women), all of which are encouraged to explore further collaborative synergies following adequately established protocols to this end.

Recommendations on the dissemination of opportunities and outreach. The UN should have a vacancy subscription and alert system for court positions and human rights mechanisms which allow individual self-nominations (either separate or integrated into UNcareer). Alongside this, institutionalised alliances could be built with NGOs from the relevant sector and/or IL societies and related fields, thus expanding traditional government channels which often favour male networks. This would allow more women's groups to be reached and it would enable such organised groups to lobby at the state level for the sake of greater gender balance in the composition of courts and human rights bodies.

Recommendations on transparency. A culture of transparency should be promoted by publicising the procedures. This must cover all stages and levels of participation and decision-making, from the publication of the call and selection criteria, to the applications or profiles of the candidates, and the reasoned and motivated decision adopted by the body in charge, together with the reports of the advisory bodies which take part in the process.

Recommendations on new norms. It is worth harnessing the potential of soft law regulation, without underestimating its scope and impact. For this reason, we advocate the adoption of guidelines which incorporate gender balance requirements in the nomination for national proposals and final decisions. The bodies which must adopt the decisions, or their advisory bodies, would be in charge of approving the specific guidelines to make them suited to the specific procedures. These norms would result in new by-defaults and deviations would be exceptions which must be strictly justified. They would also guarantee the transparency of the process and accountability. As for hard law, we propose that the CEDAW Committee be encouraged to prepare a new General Recommendation on Article 8 CEDAW, clarifying that positions in international courts and human rights mechanisms are covered by the obligations of the Convention and subject to national judicial review.

All of these reforms are within reach and represent an urgent matter of consistency for the UN. Will Secretary-General Guterres' professed commitment to gender equality at UN75 provide the occasion which triggers them and further contribute, in this way too, to shaping our future together?