

ACHIEVING GENDER PARITY ON INTERNATIONAL JUDICIAL AND MONITORING BODIES

ANALYSIS OF INTERNATIONAL HUMAN
RIGHTS LAWS AND STANDARDS
RELEVANT TO THE GQUAL CAMPAIGN

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EXECUTIVE SUMMARY

Women are underrepresented in virtually every international body responsible for adjudicating, monitoring, and developing international law. As of February 2017, three of the 15 judges on the International Court of Justice are women; the International Tribunal for the Law of the Sea has 21 judges, only one of whom is a woman; and the International Criminal Tribunal for the Former Yugoslavia has no permanent women judges.¹ Additionally, women comprise no more than 30% of the aggregate of the members of the United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee against Torture.² States are ultimately responsible for this state of affairs. This working paper analyzes the extent to which international human rights law and standards support the GQUAL Campaign's call for States to pledge to achieve gender parity on international courts and monitoring bodies.

States establish the nominating or voting procedures that apply to any particular international body. Procedures may be specified in the treaty that establishes the international body, or outlined in resolutions or other documents to which States assent. Nominations for appointment to international bodies may initiate with self-nominations or require States to present candidates. In the case of the latter, the decisions on how and who to nominate are adopted at the national level in accordance with procedures and criteria that each State adopts. At the international level, screening procedures may narrow the number of candidates and may include States casting ballots. States vote to select successful candidates, regardless of whether the State has nominated a candidate. Thus, there are a number of opportunities for States to shape the pool of applicants, the composition of any short list, and the final composition of the international body. Because States have a

¹ See *The Judges*, U.N. INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about/chambers/judges> (last visited Feb. 8, 2017); *Members*, INT'L TRIBUNAL FOR THE LAW OF THE SEAS, <https://www.itlos.org/en/the-tribunal/members/> (last visited Feb. 8, 2017); *Current Members*, INT'L CT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Feb. 8, 2017).

² THE GQUAL DECLARATION (2015), <http://www.gqualcampaign.org/wp-content/uploads/2015/09/TEMP.pdf>.

fundamental role in establishing the procedures and controlling the final outcome, the GQUAL Campaign calls on States to address underrepresentation by adopting measures to rectify the gender imbalance on international judicial and monitoring bodies.³

Hosted by the Center for Justice and International Law, the GQUAL Campaign asks States publicly to pledge to nominate and vote on candidates for these international bodies with the aim to promote gender parity.⁴ To implement this commitment, the Campaign advocates that States and international organizations and bodies “develop mechanisms, guidelines and standards at the national and international level to promote the equal representation of women.”⁵ To date, more than 1,000 individuals have signed the Declaration, including high-level government officials, current and former members of the international tribunals and bodies, and prominent civil society members.

The Campaign is rooted in well-established and widely accepted provisions of international law. Article 8 of the Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”) establishes the right of women to represent their governments at the international level, on equal terms with men and without discrimination, and to participate in the work of international organizations.⁶ The CEDAW Committee has interpreted Article 8 to apply to regional as well as to international bodies.⁷ Consistent with long-standing interpretations of States’

³ The GQUAL Campaign monitors membership in international tribunals, regional courts, regional human rights tribunals, international commissions, hybrid tribunals, UN treaty monitoring bodies, and UN special procedures. *The Current Composition of International Tribunals and Monitoring Bodies*, GQUAL CAMPAIGN (Feb. 25, 2017), <http://www.gqualcampaign.org/1626-2/>.

⁴ *The Gqual Declaration*, GQUAL CAMPAIGN, <http://www.gqualcampaign.org/about-gqual/the-gqual-declaration/> (last visited Feb. 8, 2017) (affirming “that in every country, the Executive branch and Foreign Ministry publicly pledge to guarantee parity when presenting and voting for candidates for international tribunals and bodies, human rights bodies, Special Procedures, and diplomatic or other positions in regional and international organizations”).

⁵ *Id.*

⁶ Convention on the Elimination of All Forms of Discrimination against Women art. 8, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (asserting 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”).

⁷ SARAH WITTKOPP, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, A COMMENTARY 224 (Marsha A. Freeman et al. eds., 2013).

obligations to prohibit discrimination, Article 8 requires States not only to refrain from discrimination but also to adopt affirmative measures to eradicate barriers that effectively discriminate against women.⁸ While Article 8 may be the most directly applicable international obligation supporting the GQUAL Declaration, it is not the only one.

To gain a fuller understanding of the international legal basis for gender parity outside of the CEDAW framework, this working paper identifies and analyzes complementary international human rights law standards pertinent to the GQUAL Declaration found in the UN Charter, selected international human rights treaties, UN resolutions, and policy statements.⁹ This working paper serves as a companion to a separate analysis of the application of CEDAW to the Campaign,¹⁰ strengthening the international human rights legal basis for the GQUAL Declaration. The specific contributions of this working paper are to:

- 1. Clarify the relevance of the international principle of non-discrimination to gender parity on international courts and tribunals.**

The prohibition of discrimination appears throughout international human rights law. Multiple instruments provide that individuals are entitled to human rights without distinction or discrimination on the basis of certain protected categories, including sex. Non-discrimination law and principles, therefore, prohibit States from adopting discriminatory laws. These norms also require States to eliminate obstacles that result in discriminatory outcomes, such as gender disparity. Past remedial measures States have undertaken to address de facto discrimination mirror the kinds of measures States may need to undertake to address gender inequality on international judicial and monitoring

⁸ Comm. on the Elimination of All Forms of Discrimination against Women, *General Recommendation No. 23: Political and Public Life*, ¶¶ 38, 43, 50, U.N. Doc. A/RES/52/38/Rev.1 (1997) [hereinafter *General Recommendation No. 23*].

⁹ This working paper confines its analysis to international norms and does not include jurisprudence from the regional mechanisms.

¹⁰ This working paper focuses on international law outside of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). For an in-depth analysis of CEDAW, please see the working paper prepared by Claudia Martin, Co-Director, Academy on Human Rights & Humanitarian Law, American University Washington College of Law, *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*.

bodies through selection procedures for candidates. As selection procedures are within the exclusive control of States, they fall within the non-discrimination obligations States have assumed under international law. It is less clear the extent to which the general anti-discrimination obligations in the UN Charter and international human rights treaties (other than CEDAW) apply to States' voting outcomes as these decisions are an exercise of collective State action. However, States could agree to procedures and affirmative measures that would ensure parity in election of women candidates.

2. Analyze the relevant, substantive, non-discrimination norms to gender parity on international courts and tribunals.

Three international human rights non-discrimination norms are most directly applicable to the GQUAL Campaign: the right of access to decision-making; the right of access to equal opportunity in employment; and the right of access to justice. These norms support the participation of women on international bodies and reflect State commitment to gender equality.

- **The right of access to decision-making**, while treaty-based, largely has been developed through international resolutions and policy including UN General Assembly Resolution 66/120, the Beijing Platform, the Millennium Development Goals, and the Sustainable Development Goals, as well as Security Council resolutions on women, peace, and security. These instruments reflect the commitment of States to promote women's equal access to decision-making across public entities, including the judiciary. Additionally, recent treaties creating international courts and monitoring bodies have included provisions for gender balance among the judges and monitors of these international institutions. Lastly, Article 25 of the International Covenant on Civil and Political Rights establishes the right to equal participation in public life. Interpreted in light of international instruments, Article 25 mandates State action to ensure gender parity in State-controlled appointment processes for international judicial and treaty monitoring bodies.

- **The right of access to equal opportunity in employment** similarly applies to the international positions relevant to the GQUAL Campaign. Employment as defined in the International Covenant on Economic, Social and Cultural Rights and protected by the non-discrimination provisions of that treaty extends to positions on international judicial and monitoring bodies. In addition, under a broad reading of Article 8 of the UN Charter, a provision that ensures equal access to participation in the UN system, States are bound to consider gender equality in appointing individuals to international bodies. The Commission on the Status of Women and the Economic and Social Council have promoted this interpretation of Article 8. Additionally, international jurisprudence supports States adopting affirmative measures pursuant to Article 8 to promote gender parity on international courts and treaty monitoring bodies.
- **The right of access to justice**, lastly, is a fundamental right codified in human rights treaties. While generally interpreted as a due process right, interpretations of the Convention on the Rights of Persons with Disabilities identify a structural right of access to justice such that denial of qualified individuals with disabilities the opportunity to serve as judges is violation of their rights to access to justice. The Beijing Platform also calls on States to ensure women have equal access to serve in judicial capacities.

Gender parity on international courts and monitoring bodies is firmly grounded in international commitments to gender equality and codified universal human rights guarantees. The absence of women in equal numbers with men as international judges and members of human rights monitoring bodies is a grave issue. Gender disparities in international institutions undermine the international commitment to equality and non-discrimination. Further, the lack of gender parity erodes the legitimacy of international legal institutions and their mandates to uphold these universal values. This working paper contributes to the effort to address this gap by drawing attention to the scope of international human rights law and standards that can be marshalled to ground the GQUAL Declaration in international law and accepted best practices.

CHARACTERISTICS OF THE PRINCIPLE AND RELEVANT DEFINITIONS OF THE INTERNATIONAL PROHIBITION AGAINST DISCRIMINATION

An analysis of the international law norms relevant to gender parity must begin with a discussion of the foundational principle of non-discrimination. This section begins by describing characteristics of non-discrimination in international law, including how its meaning has evolved through interpretation. It then introduces working definitions of key terms to this analysis: “gender” and “parity.”

A. CHARACTERISTICS OF THE NON-DISCRIMINATION PRINCIPLE

The prohibition of discrimination appears throughout international human rights law because it is essential to the conception of human dignity. The Charter of the United Nations (“UN Charter”), the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) each provides that individuals are entitled to human rights without distinction or discrimination on the basis of certain protected categories, including sex.¹¹ The UN Charter, binding on all Member States, also includes an “unequivocal legal obligation” for States to respect human rights without distinction on the basis of sex, which the authoritative commentary on the Charter characterizes as an *ius cogens* norm.¹²

¹¹ U.N. Charter art. 55(c) (stating that “[t]he United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”); Universal Declaration of Human Rights art. 2, G.A. Res. 217 (III) A, U.N. Doc. A/810 at 72 (Dec. 10, 1948) (stating that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (stating that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (stating that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

¹² 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1574 (Bruno Simma et al. eds., 3d ed. 2012); see also U.N. Charter art. 55(c) (stating in relevant part that “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote...universal

1. Sex-Based Non-Discrimination Principle

In addition to a general principle of non-discrimination enshrined in the International Bill of Human Rights,¹³ several human rights treaties and instruments include specific prohibitions against sex-based discrimination.¹⁴ The right of men and women to equal enjoyment of all human rights is “one of the fundamental principles recognized by international law”¹⁵ and “a right in and of itself.”¹⁶ As noted by one authoritative commentator, ending discrimination against women “from a legal as well as factual standpoint is one of the priorities of the human rights work of the United Nations.”¹⁷

2. Evolution of the Non-Discrimination Principle

General and sex-specific non-discrimination principles prohibit States from adopting discriminatory laws. These norms also require States to eliminate obstacles that result

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”).

¹³ The International Bill of Human Rights is the collective name for the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, U.N. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (last visited Apr. 15, 2017).

¹⁴ See CEDAW, *supra* note 6, at art. 2 (stating that “States Parties condemn discrimination against women in all its forms [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”); Convention on the Rights of the Child art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 (stating that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 1(1), Dec. 18, 1990, 2220 U.N.T.S. 93 (stating that “[t]he present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”); International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities art. 3(b), G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, 65, U.N. Doc. A/61/49 (Dec. 13, 2006) [hereinafter CRPD] (naming “non-discrimination” a principle of the Convention); *id.* at art. 6 (stating that “States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention”).

¹⁵ See Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, ¶ 1, U.N. Doc. E/C.12/2005/3 (Aug. 11, 2005) [hereinafter *General Comment No. 16*].

¹⁶ U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, FROM EXCLUSION TO EQUALITY, REALIZING THE RIGHTS OF PERSONS WITH DISABILITIES: HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL 17 (2007), <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>.

¹⁷ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 76 (2d rev. ed. 2005).

in discriminatory outcomes.¹⁸ Although in human rights instruments the norm against discrimination facially appears to be a negative prohibition of discrimination, it has been interpreted to require positive obligations to provide substantive equality. Through the general comments of human rights treaty bodies, the conception of non-discrimination enshrined in international law prohibits both *de jure* and *de facto* discrimination.¹⁹ Thus, to achieve equality, States may need to take affirmative measures that ensure equality in fact, not just in law.²⁰ As one scholar has stated, substantive equality “transcends equal treatment, recognizing that treating people alike despite pre-existing disadvantage or discrimination can simply perpetuate inequality.”²¹ Commentators have also observed that substantive equality “tries to identify patterns of oppression and subordination [] to transform social patterns of discrimination....”²²

3. Relevance of the Non-Discrimination Principle to Gender Parity on International Judicial and Monitoring Bodies

In light of the fact that the principle of non-discrimination may require affirmative measures, it is reasonable to assume that including gender parity as a criterion for candidate selection also is covered by the principle. Further, past remedial measures States have undertaken to address *de facto* discrimination mirror the kinds of measures States may need to undertake to address gender inequality on international judicial and monitoring bodies. Those measures have included protective legislation, including

¹⁸ See, e.g., Human Rights Comm., *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶¶ 2-3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (describing Article 3 of the ICCPR’s conception of equal enjoyment as requiring “the removal of obstacles to the equal enjoyment of such rights” and States to take “positive measures in all areas so as to achieve the effective and equal empowerment of women”); NOWAK, *supra* note 17, at 631 (stating that, in cases of structural discrimination, the protection provided by Article 26 of the ICCPR also includes “temporary special measures (privileges) aimed at accelerating the attainment of *de facto* equality”).

¹⁹ Human Rights Comm., *General Comment No. 18: Non-Discrimination*, ¶ 12, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989) [hereinafter *General Comment No. 18*]; see also *General Comment No. 16, supra* note 15, ¶ 7 (stating that the “[g]uarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality”); Comm. on the Rights of Persons with Disabilities, *General Comment No. 3: Article 6: Women and Girls with Disabilities*, ¶ 20, U.N. Doc. CRPD/C/GC/3 (Sept. 2, 2016) [hereinafter *General Comment No. 3*] (explaining that the CRPD also requires States to take measures to overcome *de jure* and *de facto* inequality, including quotas and legal reform when needed).

²⁰ NOWAK, *supra* note 17, at 631; see also *R. D. Stalla Costa v. Uruguay*, Communication No. 198/1985 (Hum. Rts. Comm. 1987) (finding a law giving preference in employment to civil servants who had been dismissed during the dictatorship for ideological reasons to be a restitution measure and a proper remedy that could not constitute discrimination against other applicants under Article 26 of the ICCPR).

²¹ SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED* 178 (2008).

²² See Beverly Baines & Ruth Rubio-Marin, *Introduction* to *CONSTITUTING WOMEN: THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 13-14 (Beverly Baines & Ruth Rubio-Marin eds., 2004) (introducing different conceptions of equality).

“temporary special measures (privileges) aimed at accelerating the attainment of de facto equality,”²³ or other measures of “affirmative action.”²⁴

This kind of remediation supports the notion that equality requires “leveling-up,” or working “towards improving the quality and levels of service of groups that lag behind.”²⁵ Therefore, the non-discrimination principle mandates voluntary State action to address inequality between men and women on international judicial and monitoring bodies. Dismantling structural barriers requires affirmative steps to improve the representation of women on these bodies through the procedures that govern the selection process. As is discussed below,²⁶ it is less clear the extent to which the general anti-discrimination obligations in the UN Charter and international human rights treaties outside of CEDAW apply to States’ voting outcomes. However, States could agree to procedures and affirmative measures that would ensure parity in appointment and election of women candidates.

B. DEFINITIONS RELEVANT TO ANALYSIS OF GENDER-PARITY NORMS

1. Gender

Though many of the treaties refer to “sex-based” discrimination, rather than “gender-based” discrimination, this working paper adopts the term “gender-based” discrimination and, in particular, interprets gender more expansively than merely delineating between the two sexes.²⁷ Rather, this analysis adopts the definition provided by the UN High Commissioner for Refugees, which states:

²³ NOWAK, *supra* note 17, at 631 (stating that “[i]n the event of *traditional, structural discrimination*, protection against discrimination also includes temporary special measures (privileges) aimed at accelerating the attainment of *de facto* equality, as provided for e.g., in art. 4 of CEDAW”).

²⁴ *Id.* (noting that drafters of the International Covenant on Civil and Political Rights made many references to “such measures of affirmative action”); see also *R. D. Stalla Costa*, Communication No 198/1985, ¶ 1.

²⁵ Sandra Fredman & Beth Goldblatt, *Gender Equality and Human Rights* 11 (U.N. Women, Discussion Paper No. 4, 2015) (produced for the U.N. Women flagship report PROGRESS OF THE WORLD’S WOMEN 2015-2016 and quoting Catarina de Albuquerque, *Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, transmitted by the Secretary General to the General Assembly, ¶ 29, U.N. Doc. A/67/270 (Aug. 8, 2012)).

²⁶ See *infra* pages 12-16.

²⁷ *Cf.*, e.g., Rome Statute of the International Criminal Court art. 7(3), July 17, 1998, 2187 U.N.T.S. 90 (1998) [hereinafter *The Rome Statute*] (stating that “[f]or the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”).

The term “gender” refers to “the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes are socially constructed and are learned through socialization processes. . . . [G]ender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.”²⁸

Accordingly, because gender is culturally created, measures to eliminate discrimination against “women” in appointment on international courts and monitoring bodies must define that term to include individuals whose gender identity is female. This inclusive, culturally-based definition of gender is consistent with UN practice. It is also consistent with the GQUAL Campaign’s goal to leverage attention to the under-representation of women to garner international attention to the full range of barriers and discrimination that excludes other groups from equal participation on international tribunals and monitoring bodies.²⁹

2. Parity

The Working Group on the Issue of Discrimination Against Women in Law and in Practice has described parity “as the ultimate measure of equality.”³⁰ The Commission on the Status of Women (“CSW”) defines gender parity to mean that no less than 50 percent of a given body consists of one gender.³¹ The principle of access to equal representation embodies the same concept.³² Therefore, this working paper uses parity

²⁸ U.N. HIGH COMM’R FOR REFUGES, HANDBOOK FOR THE PROTECTION OF WOMEN AND GIRLS 12 (2008), <http://www.unhcr.org/47cfa9fe2.html>. (citing the concepts and definitions of the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI)).

²⁹ FAQs, GQUAL CAMPAIGN, <http://www.gqualcampaign.org/faqs/> (last visited Feb. 8, 2017).

³⁰ Human Rights Council, Rep. of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, ¶ 19, U.N. Doc. A/HRC/23/50 (Apr. 19, 2013) [hereinafter Working Group Report on Discrimination Against Women in Law and Practice]. The Human Rights Council established the Working Group for a period of three years and it consists of five independent experts on the issue of discrimination against women. The Human Rights Council has twice extended the Working Group by an additional three years. For more information on the Working Group’s mandate, see *Working Group on the Issue of Discrimination Against Women in Law and in Practice*, <http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx> (last visited Nov. 13, 2016).

³¹ 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 12, at 426.

³² DANIELLE B. GOLDBERG, EQUAL REPRESENTATION OF WOMEN THROUGH THE LENS OF LEADERSHIP AND ORGANIZATIONAL CULTURE (2015), http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/egm%202015%20report_final.pdf?vs=4744 (stating that “[o]nly with equal representation of women at all levels can gender equality be fully

and equal representation interchangeably.

The concept of gender parity or equal representation has been incorporated into the UN system through “gender mainstreaming.” Gender mainstreaming is a broader concept than formal equal representation. It “requires a gender dimension to be integrated into the design, implementation, monitoring and evaluation of all policies and institutions so that women and men are able to benefit equally and inequality is not perpetuated.”³³

Gender mainstreaming incorporates substantive equality and calls for the integration of the equal status of men and women into the practices of States and the United Nations.³⁴ The Vienna Declaration, for example, discusses the need to incorporate gender mainstreaming into UN system-wide activity and asks that these “issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms,” but it does not specify who should be implementing gender mainstreaming.³⁵ The Beijing Platform also asserts that “governments...should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men.”³⁶ These examples draw attention to the dissemination of gender mainstreaming practices throughout the UN system. The proliferation of gender mainstreaming strategies and other positive measures to achieve equal representation of women demonstrates that equality through parity is not simply an individual right but

embedded within an organization’s culture, and the proven benefits of women’s equal participation realized”).

³³ Christine Chinkin, *Women, Rights of, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 27 (2010).

³⁴ *Id.* ¶ 27-28; World Conference on Human Rights, *Vienna Declaration and Programme of Action*, pt. II, ¶¶ 37, 42, U.N. Doc. A/CONF.157/23 (June 25, 1993) [hereinafter *Vienna Declaration & Programme of Action*].

³⁵ *Vienna Declaration & Programme of Action*, *supra* note 34, at pt. II, ¶ 37 (stating that “[t]he equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity”).

³⁶ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 79, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 15, 1995) [hereinafter *Beijing Declaration & Platform for Action*]. There has been further action on gender mainstreaming by the UN Human Rights Council, which has incorporated gender mainstreaming into the mandates of two Special Rapporteurs. See Human Rights Council Res. 10/23, A/HRC/RES/10/23, ¶ 8(e) (Sept. 29, 2016) (urging the Special Rapporteur “to integrate a gender and disabilities perspective into his and her work”); Human Rights Council Res. 26/20, A/HRC/RES/26/20, ¶ 2(h) (July 14, 2014) (asking the Special Rapporteur “to integrate a gender perspective throughout the work of the mandate and to address multiple, intersecting and aggravated forms of discrimination faced by persons with disabilities”).

is integral to a just and fair system of international and domestic governance.

THE SCOPE OF STATE OBLIGATIONS REGARDING NOMINATION AND VOTING TO ACHIEVE GENDER PARITY

International commitment to ending discrimination against women is reflected across human rights treaties and in State practice. Nevertheless, aside from CEDAW, international law regarding State obligations to ensure gender parity on international courts and monitoring bodies is less straightforward. Although State obligations under human rights treaties “establish common international rules, reflecting shared values, that all parties undertake to observe, each in its own sphere,”³⁷ the “spheres” within which States uphold their obligations with regard to gender parity are separate as well as collective. Aspects of the appointment process, such as recruitment and nominating, lie within the exclusive control of the States acting in their individual capacities, while others, such as voting, occur in the context of collective control. Thus, the following discussion considers the applicability of international obligations at each stage of the appointment process.³⁸

³⁷ Alain Pellet (Special Rapporteur on Reservation to Treaties), *Second Rep. on Reservations to Treaties*, ¶ 84, U.N. Doc. A/CN.4/477/Add.1 (June 13, 1996) (stating that “the main peculiarity of such [human rights] treaties is that their object is not to strike a balance between the rights and advantages which the States parties mutually grant to one another, but to establish common international rules, reflecting shared values, that all parties undertake to observe, each in its own sphere”); Int’l Law Comm’n, Rep. on the Work of Its Forty-Ninth Session, U.N. Doc. A/52/10, at 47 (1997) (stating that “the Special Rapporteur [Pellet] emphasized... a treaty was rarely entirely normative or entirely synallagmatic: in most cases, including human rights, a treaty contained both contractual clauses recognizing reciprocal rights and obligations and ‘normative’ clauses;” stating furthermore that “a normative treaty was simply a treaty in which the normative provisions predominated in quantitative terms”); Human Rights Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (stating that “[w]hile article 2 [of the ICCPR] is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations”); see also *id.* ¶ 8 (May 26, 2004) (stating that it is possible for a State’s failure to uphold its obligations under a human rights treaty to give rise to a violation of those rights, not only in instances where a specific individual has been harmed, but also “as a result of States Parties’ permitting or failing to take appropriate measure or to exercise due diligence to prevent...or redress the harm caused by such acts”).

³⁸ As such, this Working Paper is concerned with the nature of State obligations under human rights treaties and *not* the justiciability of individual claims for specific instances of State violations of human rights treaty obligations. With regard to the nomination process, an individual claimant would face jurisdictional challenges to assert violation of her right to be constituted as part of the pool of qualified candidates. Nevertheless, the State has obligations to constitute a pool of qualified candidates through a process that ensures equality.

A. STATE OBLIGATIONS REGARDING APPOINTMENTS: UNITED NATIONS VS. EXCLUSIVE CONTROL

State obligations are determined, in part, by the type of position and the stage of the selection process. The UN System, independent of State involvement, carries out the hiring procedures for UN staff employees, while positions on international judicial and monitoring bodies require State action. For the latter, in general, the first stage is the nomination of individuals, which takes place exclusively at the national level and within the domestic jurisdiction of a State. The second stage is State voting on the nominees, which occurs within the international organization.

While there is a general process to be appointed to these bodies, organization-specific standards exist. Various tribunals and monitoring bodies stipulate certain qualifications when nominating and electing an individual, including expertise and professional standing.³⁹ All the voting procedures for courts call for a secret ballot to choose among the candidates nominated.⁴⁰ The treaties establishing international tribunals contain a compromise between guaranteeing the independence of the judges and making the judges' appointment dependent upon the consent of Member States.⁴¹

The focus of the GQUAL Campaign raises questions about the scope of relevant treaty obligations, international policies, and norms. While human rights treaties confer anti-discrimination protections to individuals under the jurisdiction or control of a State Party, jurisprudence suggests that these treaty obligations extend to the GQUAL Campaign, as the relevant standard is whether the State has control over the appointment. In *HvdP v. The Netherlands*, a Dutch national was hired to work for the European Patent Office

³⁹ For example, article 36 of the Rome Statute of the International Criminal Court has a unique provision for two types of expertise. Under Article 36(3)(a), all judges must be persons of high moral character, impartiality and integrity and must possess the qualifications in their respective States for appointment to the highest judicial offices. The Rome Statute, *supra* note 27, at art. 36(3)(a). Other tribunals also call for high moral character. In Article 2 of the International Tribunal for the Law of the Sea, it is suggested for judges to be of the "highest reputation for fairness and integrity." United Nations Convention on the Law of the Sea annex VI, art. 2., Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982); *see also*, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 21(1), Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights arts. 34, 52, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights art. 31, June 27, 1981, 1520 U.N.T.S. 217; Statute of the International Tribunal, art. 13, U.N. Doc. S/25704 (1993); The Rome Statute, *supra* note 27, at art. 36.

⁴⁰ Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 27, 34 (2003).

⁴¹ *Id.* at 27, 35.

(“EPO”), an international organization in Germany.⁴² After the employee accepted the appointment, he realized that he had been appointed to a lower level position than his skills warranted while many German employees occupied higher level positions.⁴³ HvdP filed a complaint under ICCPR Article 25(c) alleging that the hiring practices of the EPO violated his right to access a public service position on equal terms.⁴⁴ The Human Rights Committee, the treaty monitoring body of the ICCPR, dismissed the complaint for lack of jurisdiction.⁴⁵ Crucially, the Human Rights Committee concluded that the grievances concerning the recruitment policies of an international body that staffs its organization independent of State involvement do not come within the jurisdiction of any State party to the ICCPR.⁴⁶

This decision suggests that States’ human rights treaty obligations do not apply in situations in which States do not have jurisdiction over and are not directly involved in the appointment process. The GQUAL Campaign, however, targets bodies in which States have a different degree of control over the appointment process. Here, since States *nominate* and *appoint* individuals and thus can shape the selection process, human rights treaty obligations *do* apply. Therefore, the legal question central to the GQUAL Declaration centers on whether and how relevant human rights treaties and norms apply to State action with regard to constituting international bodies.

B. STATE OBLIGATIONS FOR AFFIRMATIVE MEASURES REGARDING APPOINTMENT DECISIONS UNDER EXCLUSIVE AND COLLECTIVE CONTROL

States’ duties under human rights treaties relevant to the GQUAL Campaign, aside from CEDAW, to end discrimination against women arguably require States to take appropriate and affirmative measures to ensure equal representation of women on international courts and monitoring bodies.⁴⁷ In the context of ensuring enjoyment of human rights domestically, human rights treaties require States to take appropriate measures. The argument that these same obligations extend to appointments on

⁴² HvdP v. The Netherlands, Communication No. 217/1986, ¶ 2.1 (Hum. Rts. Comm. 1990).

⁴³ *Id.*

⁴⁴ *Id.* ¶ 2.3.

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 3.2 (explaining that “[t]he author’s grievances, however, concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto. Accordingly, the author has no claim under the Optional Protocol”).

⁴⁷ See *infra* pages 16-43.

international bodies controlled by State action is supported by international jurisprudence.

In a second case from the Human Rights Committee, the treaty body found that States may be held to their obligations under human rights treaties even when they are acting to comply with their commitments as a Member State to the United Nations.⁴⁸ In *Sayadi and Vinck v. Belgium*, the Human Rights Committee found Belgium in violation of its obligations under Article 17 of the ICCPR for providing information about two Belgian citizens to the UN Sanctions Committee before the conclusion of the Belgian criminal investigation of the individuals for terrorism.⁴⁹ Article 17 requires States to take measures to protect an individual against “arbitrary or unlawful interference with his or her privacy, family, home or correspondence,” and against “unlawful attacks on his honor and reputation.”⁵⁰ As the sanctions list was easily available on the Internet and grouped the complainants with others, including Usama Bin Laden and members of Al-Qaida, the Committee found that the premature inclusion of the names of the two Belgians on the list “led to an interference in their private life and to unlawful attacks on their honour and reputation.”⁵¹ Therefore, Belgium was found in violation of Article 17 of the ICCPR for communicating the personal information to the Sanctions Committee ahead of the two citizens being found guilty of terrorism in the criminal proceedings.⁵²

States’ human rights treaty obligations thus apply to those aspects of the appointment process that are within the jurisdiction and exclusive control of the State. *Sayadi* offers support for the proposition that human rights obligations extend to instances in which States comply with their collective commitments. If States continue to be bound by human rights obligations when fulfilling their obligations as Member States, when States participate in voting for individuals to be appointed to international bodies, they should not vote in a way that violates their international treaty obligations.

One limitation of relying on human right treaties as a source of State obligation, however, is that there is not universal ratification of all relevant treaties for the GQUAL

⁴⁸ See *Sayadi & Vinck v. Belgium*, Communication No. 1472/2006, ¶¶ 10.12-10.13 (Hum. Rts. Comm. 2008).

⁴⁹ See *id.*

⁵⁰ ICCPR, *supra* note 11, at art. 17.

⁵¹ See *Sayadi & Vinck*, Comm. No. 1472/2006, ¶¶ 10.12-10.13.

⁵² See *id.*

Campaign. Though the primary treaties utilized in the following analysis—the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), and the Convention on the Rights of Persons with Disabilities (“CRPD”)—are widely ratified, the record is not perfect.⁵³ Therefore, this working paper discusses international instruments, including treaties, that may be used to advocate for State action to achieve gender parity on international courts and tribunals as a matter of law and consistent with international consensus and best practice on this issue. A review of these specific norms follows.

RELEVANT, NON-CEDAW, GENDER-BASED NON-DISCRIMINATION NORMS

This working paper analyzes relevant international instruments from two standpoints: (1) as generating non-binding guidance and (2) as generating legal obligations. First, this analysis looks to international human rights treaties outside of CEDAW, UN-promulgated standards, best practices, and other human rights instruments to identify international understandings of the content of norms relevant to gender parity on international judicial and monitoring bodies. Second, this working paper examines the extent to which treaties generate binding State obligations to promote gender parity and how relevant non-binding international instruments may be evidence of acceptance of these obligations as well as serve as interpretative sources for their content. Review of international human rights instruments reveal three norms directly applicable to the GQUAL Campaign: the right of access to decision-making; the right of access to equal opportunity in employment; and the right of access to justice. These norms support the participation of women on international bodies and reflect State commitment to gender equality.

⁵³ *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org/> (last visited May 24, 2017). The ICCPR has 169 State Parties and 6 signatories, with 22 States that have taken no action. The ICESCR has 165 State Parties and 4 signatories, with 27 States that have taken no action. The most ratified human rights treaty, the CRPD, has 172 State Parties, 15 signatories, and 11 States that have taken no action. The least ratified human rights treaty, the CED, has 54 State Parties, 50 signatories, and 93 States that have taken no action. *Id.*

A. THE RIGHT OF ACCESS TO DECISION-MAKING

Turning to the content of relevant human rights norms, this analysis now focuses on the right of access to decision-making, which is contained in three human rights treaties. This norm, largely developed outside the jurisprudence of these treaties, protects the right of women to equal participation in decision-making positions within all levels of government as well as international bodies. Even though its development through binding law is scant, the extensive State discussion and consensus regarding its importance illuminates how States interpret their treaty obligations and adopt practices and policies to achieve gender parity on international courts and monitoring bodies.

This analysis of the right begins with a discussion of the scope of the term “decision-making,” including UN definitions of the term in the context of women. It reviews how hard and soft law instruments have articulated this norm. In doing so, this analysis takes into account that these interpretations of States’ duties with respect to guaranteeing equal access to decision-making take place in the context of State obligations and practices vis-à-vis national institutions. These interpretations thus serve as guidance for State practice at the international level, as research has yet to identify the application of State obligations to equal access to decision-making in the context of nominating and voting to appoint women to international judicial and monitoring bodies, aside from CEDAW. Next, this section examines the right of access to decision-making in two key areas: (1) women, peace, and security; and (2) economic development. These areas reflect robust development of the norm of access to decision-making and provide a rich template for analyzing its interpretation. This section concludes by examining the application of the right of access to decision-making to gender parity on international judicial and monitoring bodies.

1. Defining the Scope of the Term “Decision-Making”

Although there is not a universal definition of the term decision-making, the ICCPR and CEDAW make clear that access to decision-making includes the right to participate in political and public life.⁵⁴ The ICCPR codifies in Article 25 the right to “the equal

⁵⁴ See ICCPR, *supra* note 11, at art. 25 (stating that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by

participation in public life of all citizens,” including public service, without discrimination.⁵⁵ Other international instruments have defined participation in political and public life broadly to encompass the right to take part in government, public administration, civil society, and the judiciary.⁵⁶ The United Nations provides specific

secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country”); CEDAW, *supra* note 6, at art. 7 (asserting that “States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country”); *General Recommendation No. 23*, *supra* note 8, ¶ 5 (stating that “the obligation specified in article 7 extends to all areas of public and political life” and that “the political and public life of a country ... refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers;” stating furthermore that “the term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels”); *id.* ¶ 17 (asserting that “in order to achieve broad representation in public life, women must have full equality in the exercise of political and economic power; they must be fully and equally involved in decision-making at all levels, both nationally and internationally”); *id.* ¶ 26 (stating that “States parties have a responsibility, where it is within their control...to appoint women to senior decision-making roles”).

⁵⁵ See ICCPR, *supra* note 11, at art. 25; see also *General Comment No. 18*, *supra* note 19, ¶ 1 (stating that “[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights” and that thus, article 2 “obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); *id.* ¶ 3 (asserting the need “for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2”).

⁵⁶ See THE UNITED NATIONS AND DECISION-MAKING: THE ROLE OF WOMEN 54 (Davidson Nicol & Margaret Croke eds., 1978) (describing decision-making “as a process in which all levels of a bureaucracy—from the lowest to the highest— as each plays a part in the initiation, interpretation and implementation of decisions involved in the elaborating and carrying out of established policies and programmes”); UN Women, Draft UN-Women Strategic Plan, 2014-2017: Making this the Century for Women and Gender Equality, ¶ 43, U.N. Doc. UNW/2013/CRP.3 (June 2013) [hereinafter Draft UN-Women Strategic Plan] (asserting “that decision-making bodies” include “governments, parliaments, councils and political parties, as well as women’s participation and influence in other areas of civic engagement”); Working Group Report on Discrimination Against Women in Law and Practice, *supra* note 30, ¶ 37 (stating that “the participation of women in public and political institutions is crucial for their equality in citizenship and for empowering them to have an impact on and integrate a gender perspective into policy and decision-making”); *id.* (stressing that the “effective political participation of women requires not only admission to political institutions but also integration into their decision-making forums” and recommending States to “monitor progress at all levels of decision-making across the whole spectrum of institutions of public and political life”); U.N. Secretary-General, *Review and Appraisal of the Implementation of the Beijing Declaration and Platform for Action and the Outcomes of the Twenty-Third Special Session of the General Assembly*, ¶ 390, U.N. Doc. E/CN.6/2015/3 (Dec. 15, 2014) [hereinafter Review and Appraisal] (recommending that States “tackle the key structural constraints that are holding back progress for women and girls,” including “women’s significant underrepresentation in decision-making at all levels in the public and private sphere”); *id.* (asserting that women are “rarely well represented in local government, in public administration, [and] in the judiciary, as leaders of political parties, trade unions and civil society organizations, [or] as community leaders or in leadership positions in the private sector”); Women and Political Participation, G.A. Res. 66/130, ¶ 6(c) (Mar. 19, 2012) [hereinafter Resolution on Women and Political Participation] (encouraging “political parties to remove all barriers that directly or indirectly discriminate against the participation of women, to develop

definitions of decision-making in the context of women's equality.⁵⁷ Article 7 of CEDAW,⁵⁸ for example, articulates that women's right to equal participation in political and public life includes the right to be eligible for election; to participate in the formulation and implementation of government policy; to hold public office and perform public functions; and to participate in non-governmental organizations concerned with public and political life.⁵⁹ Moreover, UN General Assembly Resolution 66/130 concerning women and decision-making urges States to appoint women to posts within all levels of government, including "bodies responsible for designing constitutional, electoral, political or institutional reforms."⁶⁰ In fact, Resolution 66/130 asserts that women's equal participation "at all levels of decision-making is essential to the achievement of equality, sustainable development, peace and democracy."⁶¹ As part of its draft for the UN Women Strategic Plan, 2014-2017, the Executive Board of the United Nations Entity for Gender Equality and the Empowerment of Women also asserts that women in decision-making refers to "representation and participation of women in national and local decision-making bodies," including governments,

their capacity to analyse issues from a gender perspective, and to adopt policies...to promote the ability of women to participate fully at all levels of decision-making within those political parties[,]...to implement appropriate measures within governmental bodies and public sector institutions to eliminate direct or indirect barriers to and enhance women's participation in all levels of political decision-making[,] to accelerate the implementation of strategies, as appropriate, that promote gender balance in political decision-making, and take all appropriate measures to encourage political parties to ensure that women have a fair and equal opportunity to compete for all elective public positions"); *id.* ¶ 4 (encouraging States "to commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary"); WOMEN IN POLITICS AND DECISION-MAKING IN THE LATE TWENTIETH CENTURY: A UNITED NATIONS STUDY 61, 76 (United Nations Ctr. for Soc. Dev. and Humanitarian Affairs ed., 1992) [hereinafter WOMEN IN POLITICS AND DECISION-MAKING] (stating that "ministerial and senior-level decision-making positions" include "women whose ministerial or government positions entailed responsibility for making and executing policy"); *id.* at 76 (highlighting "the urgent need" for more female lawyers in decision-making positions "as massive social legislation and greater literacy and awareness of their rights was encouraging many more women to seek justice [with] the court"); *id.* (asserting that "the presence of women judges could be very important in assuring women's access" to the courts).

⁵⁷ See Resolution on Women and Political Participation, *supra* note 56, ¶¶ 4-9; Draft UN-Women Strategic Plan, *supra* note 56, ¶ 43; CEDAW, *supra* note 6, at art. 7.

⁵⁸ Although CEDAW is outside the scope of this paper, here CEDAW is used briefly as it provides a fuller definition of the term decision-making.

⁵⁹ CEDAW, *supra* note 6, at art. 7 (asserting that "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country").

⁶⁰ Resolution on Women and Political Participation, *supra* note 56, ¶ 8.

⁶¹ *Id.* at 2.

parliaments, councils, political parties, and other areas of civic engagement.⁶²

Notably, as the United Nations specifically incorporates judicial and governmental positions in international understanding of the right to participate in political and public life, the scope of decision-making is broadly conceived and incorporates judicial and other key positions within government.⁶³ General Recommendation No. 23 of CEDAW, for instance, refers to participation in political and public life as including the exercise of legislative, judicial, executive, and administrative powers.⁶⁴ Moreover, Resolution 66/130 regarding women and decision-making encourages States to increase women’s participation “in governmental bodies and committees, as well as in public administrative entities, and in the judiciary.”⁶⁵ The Division for Social Policy and Development, the ECOSOC unit responsible for coordinating social policy within the United Nations, also regards justice ministries and the court system—including members of the judiciary—as decision-making entities.⁶⁶ The Commission on the Status of Women in its 2014 review and appraisal of the implementation of the Beijing Platform asserts that women are underrepresented in all areas of decision-making, including the judiciary.⁶⁷

2. Treaty-Based Interpretations and Practices that Support the Right of Access to Decision-Making

While international law and norms clearly establish that States should ensure equal access to women in domestic judicial bodies and policy-making entities, aside from

⁶² Draft UN-Women Strategic Plan, *supra* note 56, ¶ 43.

⁶³ See *General Recommendation No. 23*, *supra* note 8, ¶ 5; Working Group Report on Discrimination Against Women in Law and Practice, *supra* note 30, ¶ 37; WOMEN IN POLITICS AND DECISION-MAKING, *supra* note 56, at 61, 76.

⁶⁴ *General Recommendation No. 23*, *supra* note 8, ¶ 5 (stating that “the obligation specified in article 7 extends to all areas of public and political life” and that “the political and public life of a country...refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers”); *id.* (asserting that the term decision-making “covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels”).

⁶⁵ Resolution on Women and Political Participation, *supra* note 56, ¶ 9 (encouraging “States to commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, inter alia and as appropriate, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions”).

⁶⁶ WOMEN IN POLITICS AND DECISION-MAKING, *supra* note 56, at 61, 76.

⁶⁷ Review and Appraisal, *supra* note 56, ¶ 206 (stating that while data “have not been systematically collected on a range of other indicators, including women’s participation in local government, in public administration, in the judiciary...some limited snapshots are available, all of which indicate that women are rarely well represented”).

CEDAW, international law and practice are less clear that States have undertaken these same commitments with respect to international judicial and monitoring bodies.⁶⁸ Article 8 of the UN Charter provides that the United Nations shall place no restrictions on the eligibility of men and women to participate in its “principal and subsidiary organs.”⁶⁹ However, it is unclear whether and to what extent Article 8 supports the right of access to decision-making in the context of international judicial and monitoring bodies, or of it pertains only to employment within the United Nations.⁷⁰ Nevertheless, States have adopted specific agreements that obligate them to ensure gender representation in particular international courts and monitoring bodies,⁷¹ and have revised procedures to promote gender equality within the UN treaty body system more generally. These commitments appear to be rooted in the right of access to decision-making. The Rome Statute for the International Criminal Court (“ICC”) and some of the most recent human rights treaties illustrate State practice in this regard.

a. The Rome Statute

The drafting history of the statute for the ICC indicates that States relied on the principle of equal access to decision-making in the appointment of judges for the court. Article 36.8(a) of the Rome Statute of the ICC provides that States “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

⁶⁸ See CEDAW, *supra* note 6, at art. 8 (stating 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”).

⁶⁹ U.N. Charter art. 8 (asserting that “[t]he United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs”).

⁷⁰ See NOWAK, *supra* note 17, at 76; see also *HvdP v. The Netherlands*, Comm. No. 217/1986, ¶ 71 (Hum. Rts. Comm. 1990).

⁷¹ See The Rome Statute, *supra* note 27, at art. 36.8(a) (stating that “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.”); International Convention for the Protection of All Persons from Enforced Disappearance art. 26, G.A. Res. A/61/177 (Dec. 20, 2006) [hereinafter CED] (stating that “[d]ue account shall be taken of the usefulness of the participation in the work of the Committee of persons having relevant legal experience and of balanced gender representation”); CRPD, *supra* note 14, at art. 34 (asserting that “the members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities”); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, Feb. 4, 2003, 2375 U.N.T.S. 237 [hereinafter OPCAT] (stating that in the composition of the Committee “consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination”).

representation; and (iii) A fair representation of female and male judges.”⁷²

This provision was controversial throughout the drafting. The language of gender representation first appeared in the 1996 Preparatory Committee where the United States offered the following provision: “[i]n compiling the nominations, the Nominating Committee should bear in mind that the representation of the principal legal systems of the world should be assured and should aim for overall balanced representation of geographic regions [and cultures] and representation of women as well as men [gender balance] [gender diversity].”⁷³ Denmark, Finland, Malawi, New Zealand, Norway, and Sweden also supported gender equity and even offered the stronger language of “gender balance.”⁷⁴

State representatives’ debates of the provision produced eventual consensus toward stronger measures to ensure representation of women on the bench as called for by the principle of equal access to decision-making. A number of delegations opposed any reference to representation of women or the term “balance” because of a concern that it implied a 50-50 quota system.⁷⁵ Delegations in support of “gender balance” drew on General Assembly Resolution 51/69, the follow-up to the Fourth World Conference on Women in Beijing (also referred to as the Beijing Conference), which urged governments and intergovernmental organizations to aim for *gender balance* when nominating or promoting candidates for judicial and other positions in all relevant international bodies.⁷⁶ Commentators since have advanced the more progressive interpretation of the provision, opining that States should “try to elect male and female judges in a 50/50 proportion.”⁷⁷ This history suggests that provisions that include explicit

⁷² The Rome Statute, *supra* note 27, at art. 36.8(a).

⁷³ THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 324 (M. Cherif Bassiouni & William A. Schabas eds., 2d rev. ed. 2016).

⁷⁴ *Id.* at 328.

⁷⁵ Cate Steins, *Gender Issues*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 376-77 (Roy S. Lee ed., 1999) (this included almost all MENA countries and China).

⁷⁶ *Id.*; Resolution on Follow-Up to the Fourth World Conference on Women and Full Implementation of the Beijing Declaration and Platform for Action, U.N. Doc. A/RES/51/69 (Oct. 2, 1997). Delegations supporting stronger language explained that the term “balance” in the proposed statute referred to the promotion of gender balance, and was not intended to impose a strict quota for female representation. For example, the State representative of Slovakia reportedly offered in the discussion of the provision that the term “fair representation” meant that States “should strive towards ‘as balanced a representation of female and male judges as possible’” but did not contemplate a quota system. Steins, *supra* note 76, at 379 n.71.

⁷⁷ THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 255 (Paola Gaeta et al. eds.,

consideration of gender in the appointment of international judges are important, as these support the principle of access to equal representation and may, over time, evolve to a practice of gender parity in appointments.

b. Human rights mechanisms

The most recent UN human rights treaties contain provisions that include considering gender in constituting membership in their monitoring committees.⁷⁸ States agreed in drafting the Convention on Enforced Disappearances, the Convention on the Rights of Persons with Disabilities, and the Optional Protocol to the Convention against Torture to include treaty provisions to take balanced gender representation into account when constituting the membership of the monitoring committees.⁷⁹

Additionally, States have promoted new procedures to improve gender representation throughout the international human rights treaty system. Adopted in 2014, General Assembly Resolution 68/268 concerning the effective functioning of the human rights treaty body system requests the Office of the United Nations High Commissioner for Human Rights to include “in the documentation prepared for elections of members of human rights treaty bodies at meetings of States” information on the current situation concerning gender balance in the composition of the treaty bodies.⁸⁰ The resolution urges States to consider “balanced gender representation” in the selection of treaty body experts⁸¹ and exhorts the Secretary General to support States “in building the

2002) (explaining that if we assume “that women and men each comprise approximately half of the world, the only fair representation would be for half the judges to be men and half to be women, or thereabouts”).

⁷⁸ See CED, *supra* note 71, at art. 26 (stating that “[d]ue account shall be taken of the usefulness of the participation in the work of the Committee of persons having relevant legal experience and of balanced gender representation”); CRPD, *supra* note 14, at art. 34 (asserting that “the members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities”); OPCAT, *supra* note 71, at art. 5 (stating that in the composition of the Committee “consideration shall also be given to balanced gender representation on the basis of the principles of equality and non-discrimination”).

⁷⁹ See CED, *supra* note 71, at art. 26; CRPD, *supra* note 14, at art. 34; OPCAT, *supra* note 71, at art. 5.

⁸⁰ Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System, G.A. Res. 68/268, ¶ 12 (Apr. 21, 2014) (noting that the Office of the United Nations High Commissioner for Human Rights should “include in the documentation prepared for elections of members of human rights treaty bodies at meetings of States parties an information note on the current situation with respect to the composition of the treaty body, reflecting the balance in terms of geographical distribution and gender representation, professional background and different legal systems, as well as the tenure of current members”).

⁸¹ *Id.* ¶ 13 (urging “States parties, in the election of treaty body experts, to give due consideration, as stipulated in the relevant human rights instruments, to equitable geographical distribution, the

capacity to implement their treaty obligations” by developing a “roster of experts on treaty body reporting” that reflects, among other requirements, gender representation.⁸² Such measures support the goal of gender parity in the absence of specific treaty provisions requiring that gender be a consideration in the composition of treaty monitoring bodies.

3. Soft Law Interpretation of the Right of Access to Decision-Making

UN bodies have promulgated international instruments that have expanded the contours of the norm of equal access to decision-making. These highlight the importance of the commitment of States to women’s participation in decision-making processes.⁸³ In particular, the Beijing Platform, General Assembly Resolution 66/130, and the first thematic report of the Working Group on the issue of discrimination against women in law and in practice offer evidence of the international consensus recognizing the right of equality in access to decision-making and the standards and practices for States to follow to ensure it. As noted above, States have relied on some of these documents in codifying equal access to international courts and monitoring bodies.

representation of the different forms of civilization and the principal legal systems, balanced gender representation and the participation of experts with disabilities in the membership of the human rights treaty bodies”).

⁸² *Id.* ¶ 17(c) (requesting the Secretary-General, through the Office of the High Commissioner, “to support States parties in building the capacity to implement their treaty obligations and to provide in this regard advisory services, technical assistance and capacity-building...by developing a roster of experts on treaty body reporting, reflecting geographical distribution and gender representation, professional background and different legal systems”).

⁸³ See *Vienna Declaration & Programme of Action*, *supra* note 34, at pt. II, ¶ 43 (urging “[g]overnments and regional and international organizations to facilitate the access of women to decision-making posts and their greater participation in the decision-making process”); *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 181 (asserting that “[w]ithout the active participation of women and the incorporation of women’s perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved”); Resolution on Women and Political Participation, *supra* note 56, at 2 (reaffirming “that the active participation of women, on equal terms with men, at all levels of decision-making is essential to the achievement of equality, sustainable development, peace and democracy”); Third World Conference on Women, *Nairobi Forward-looking Strategies: Introduction*, ¶ 13, U.N. Doc. A/CONF.116/28/Rev. (July 26, 1985) [hereinafter *Nairobi Forward-looking Strategies*] (calling upon governments to ensure that “peace is promoted by equality of the sexes, economic equality and the universal enjoyment of basic human rights and fundamental freedoms” which requires “that women be enabled to exercise their right to participate on an equal footing with men in all spheres of the political, economic and social life of their respective countries, particularly in the decision-making process”); *id.* ¶ 32 (stating that “to promote their interests affectively, women must be able to enjoy their right to take part in national and international decision-making processes”); *id.* ¶ 79 (urging States to “take all appropriate measures to ensure to women, on equal terms with men and without discrimination, the opportunity to represent their Government at all levels on delegations to subregional, regional and international meetings”).

The Beijing Platform, the culmination of a series of UN initiatives,⁸⁴ was adopted by all the participating States at the 1995 Fourth World Conference on Women in Beijing and remains one of the most comprehensive policy frameworks concerning women's rights.⁸⁵ Like the previous World Conferences, the Beijing Conference highlighted "the lack of empowerment and the multitude of human rights violations experienced by women and girls and the need for comprehensive laws and policies" to achieve gender equality.⁸⁶ The ensuing Beijing Platform not only reflects such concerns, but also urges States to adopt specific measures "that redress women's disadvantages and transform the institutions and structures that reinforce and reproduce unequal power relations between men and women."⁸⁷ The document serves as a source of guidance for States, and the United Nations continues to reaffirm its importance and relevance.⁸⁸

The principal goal of the Beijing Platform is the empowerment of women. This ambition is in "full conformity with the purposes and principles of the UN Charter and international law."⁸⁹ Specifically, the Beijing Platform highlights the need to remove all obstacles to women's participation in decision-making.⁹⁰ According to the Beijing Platform, access to decision-making encompasses State obligations to: (1) build a "critical mass" of women in key decision-making roles; (2) strengthen the mechanisms that monitor women's

⁸⁴ Emilie Hafner-Burton & Mark A. Pollack, *Mainstreaming Gender in Global Governance* 11 (Robert Schuman Ctr. for Advanced Studies, No. 2001/46, 2001) (stating that the Beijing Platform was the culmination of a series of UN activities on women's rights: UN declared 1975 International Women's Year, and the following decade —1976-1985 — the UN Decade for Women); UN Women, *The Four Global Women's Conferences 1975 - 1995: Historical Perspective* (May 2000), <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> (asserting that the Beijing Platform built on a series of World Conferences regarding women's rights that were organized by the Commission on the Status of Women and held in Mexico City in 1975, Copenhagen in 1980, and Nairobi in 1985).

⁸⁵ *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 1.

⁸⁶ Review and Appraisal, *supra* note 56, ¶ 12 (stating that the Beijing Conference "brought to the fore the lack of empowerment and the multitude of human rights violations experienced by women and girls and the need for comprehensive laws and policies, as well as for the transformation of institutions, both formal...and informal...in order to achieve gender equality and the full realization of the human rights of women and girls").

⁸⁷ *Id.* ¶ 21.

⁸⁸ See Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action, G.A. Res. S-23/3, ¶ 66(a) (Nov. 16, 2012) (encouraging States to ensure "women's equal access to and full participation on a basis of equality with men in all areas and at all levels of public life, especially in decision- and policy-making positions, in political parties and political activities, in all government ministries and at key policy-making institutions, as well as in local development bodies and authorities" in order to achieve the goals of the Beijing Declaration).

⁸⁹ *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 9.

⁹⁰ *Id.* ¶ 1 (stating that it "is an agenda for women's empowerment. It aims at accelerating the implementation of the *Nairobi Forward-looking Strategies for the Advancement of Women* and at removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making").

access to senior decision-making positions; and (3) review the criteria for recruitment, appointment, and promotion to senior positions of women to decision-making entities.⁹¹ In particular, the Beijing Platform encourages States to achieve gender balance in “governmental bodies and committees, as well as in public administrative entities, and in the judiciary,” including setting targets and taking positive measures to include women in “all governmental and public administration positions.”⁹² While the Beijing Platform primarily is aimed at State actions at the domestic level, it also directs the United Nations to implement the Platform for Action throughout its organs.⁹³ The Platform also directs international treaty bodies to promote women’s rights within the work of their mandates, but does not delineate specific actions necessary by States to promote gender parity within these international bodies.⁹⁴ However, such action is consistent with the spirit and goals of the Platform.

More recently, the 2012 General Assembly Resolution 66/130 concerning women and decision-making not only reaffirms the Beijing Platform, but also urges States to “promote and protect the human rights of women” regarding: (1) their participation in the formulation and implementation of government policy, and (2) their rights to hold public office and perform public functions at all levels of government.⁹⁵ Resolution 66/130 originated in the General Assembly’s 66th Session, a session that specifically included the advancement of women as part of its agenda.⁹⁶ The goal of Resolution 66/130 is to

⁹¹ *Id.* ¶ 192 (asserting that States should “(a) Take positive action to build a critical mass of women leaders, executives and managers in strategic decision-making positions; (b) Create or strengthen, as appropriate, mechanisms to monitor women’s access to senior levels of decision-making; (c) Review the criteria for recruitment and appointment to advisory and decision-making bodies and promotion to senior positions to ensure that such criteria are relevant and do not discriminate against women”).

⁹² *Id.* ¶ 190 (urging States to “commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, *inter alia*, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions”).

⁹³ *Id.* ¶ 306 (asserting that the “Platform for Action needs to be implemented through the work of all of the bodies and organizations of the United Nations system”).

⁹⁴ *Id.* ¶ 325 (stating that “within their mandate, other treaty bodies should also take due account of the implementation of the Platform for Action and ensure the integration of the equal status and human rights of women in their work”).

⁹⁵ Resolution on Women and Political Participation, *supra* note 56, ¶ 3 (calling upon “all States to enhance the political participation of women, to accelerate the achievement of equality between men and women”); *id.* ¶ 3(g) (asserting that States should “promote and protect the human rights of women” regarding their participation “in the formulation of government policy and the implementation thereof, holding public office and performing public functions at all levels of government”).

⁹⁶ See General Committee, First Rep. of the Organization of the Sixty-Sixth Regular Session of the General Assembly, Adoption of the Agenda and Allocation of Items, ¶ (72)(A)(28), U.N. Doc. A/66/250 (Sept. 16,

ensure that States take positive measures “to eliminate discrimination against women in the political and public life of the country.”⁹⁷ Resolution 66/130 also calls upon States to “enhance the political participation of women [and] accelerate the achievement of equality between men and women.”⁹⁸ In particular, Resolution 66/130 calls upon States to “promote awareness and recognition of the importance of women’s participation in the political process at the community, local, national and *international* levels.”⁹⁹

Similarly, the first thematic report of the Working Group on the issue of discrimination against women in law and in practice asserts that women’s participation in public and political institutions is essential to incorporate a gender perspective into decision-making.¹⁰⁰ The Human Rights Council established the Working Group pursuant to General Assembly Resolution 15/23, which calls for States to eliminate discrimination against women, including discrimination in the areas of political, social, and economic decision-making.¹⁰¹ Accordingly, in its first thematic report, the Working Group identifies critical issues that States should address to achieve gender equality in political and public life.¹⁰² In particular, the Working Group report observes that women’s participation in decision-making “requires that women be integrated into positions with decision-making power across the spectrum of issues dealt with by the institutions to which they

2011).

⁹⁷ Resolution on Women and Political Participation, *supra* note 56, at 1.

⁹⁸ *Id.* ¶ 3.

⁹⁹ *Id.* ¶ 6(d); see also United Nations Decade for Women, G.A. Res. 31/136, ¶ 3 (Dec. 16, 1976) [hereinafter UN Decade for Women Resolution] (encouraging States to take positive measures to ensure equal participation of women in political life and policy-making “at local, national, regional and international levels”).

¹⁰⁰ Working Group Report on Discrimination Against Women in Law and Practice, *supra* note 30, ¶ 37 (asserting that “the participation of women in public and political institutions is crucial for their equality in citizenship and for empowering them to have an impact on and integrate a gender perspective into policy and decision-making”).

¹⁰¹ Human Rights Council Res. 15/23, U.N. Doc. A/HRC/RES/15/23, ¶ 9 (Oct. 8, 2010) (calling upon “States to ensure full representation and full and equal participation of women in political, social and economic decision-making as an essential condition for gender equality and the empowerment of women and girls and a critical factor in the eradication of poverty”).

¹⁰² Working Group Report on Discrimination Against Women in Law and Practice, *supra* note 30, ¶ 29 (asserting that the General Assembly “declared the ‘essential elements of democracy’ to consist of respect for human rights and fundamental freedoms, *inter alia*, freedom of association and peaceful assembly and of expression and opinion; the right to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be a candidate in free elections by universal and equal suffrage; a pluralistic system of political parties and organizations; respect for the rule of law; the separation of powers; the independence of the judiciary; transparency and accountability in public administration; and free, independent and pluralistic media”); *id.* at 30 (stating that “these essential elements of democracy are a necessary condition for women’s substantive equality in public and political life”).

have been elected or appointed.”¹⁰³

4. The Right of Access to Decision-Making in the Areas of Women, Peace, and Security and Economic Development

UN soft law has been particularly prolific regarding the norm of access to decision-making in the areas of: (1) women, peace, and security, and (2) economic development, each of which is reviewed here.¹⁰⁴ The high level of activity regarding women’s access to decision making in these areas provides content to how States have defined this norm. This record indicates increasing international recognition of the norm, and thus may be marshalled as persuasive authority that States should act consistent with these commitments to achieve women’s equal representation on international courts and monitoring bodies. The following section begins by discussing women’s participation at all levels of decision-making processes in the prevention, management, and resolution of conflict. The section concludes by analyzing the role of the Millennium Development Goals (“MDGs”) and the Sustainable Development Goals (“SDGs”) in promoting women’s participation in decision-making in the critical area of economic development.

a. Women, peace, and security

In terms of women, peace, and security, the United Nations encourages States to ensure women’s participation in decision-making in all conflict-resolution processes.¹⁰⁵ The 1985 Nairobi Forward-looking Strategies set down concrete goals to achieve the advancement of women from 1986 to the year 2000, including the full and equal participation of women in decision-making concerning peace and security.¹⁰⁶

¹⁰³ *Id.* ¶ 41.

¹⁰⁴ See e.g., S.C. Res. 1325, at 1-2 (Oct. 31, 2000); S.C. Res. 1889, at 2-4 (Oct. 5, 2009); *Nairobi Forward-looking Strategies*, *supra* note 83, ¶¶ 13, 238, 243; *Beijing Declaration & Platform for Action*, *supra* note 36, ¶¶ 135, 142(a); Review and Appraisal, *supra* note 56, ¶ 390; G.A. Res. 65/1, ¶¶ 54, 72(f) (Oct. 19, 2010).

¹⁰⁵ See S.C. Res. 1325, *supra* note 104, at 1 (asserting “the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution”); S.C. Res. 1889, *supra* note 104, at 1 (stating “the need for the full, equal and effective participation of women at all stages of peace processes given their vital role in the prevention and resolution of conflict and peacebuilding”); *Nairobi Forward-looking Strategies*, *supra* note 83, ¶ 238 (asserting that “governments should take measures to encourage the full and effective participation of women in negotiations on international peace and security”).

¹⁰⁶ *Nairobi Forward-looking Strategies*, *supra* note 83, ¶ 13 (stating that the enjoyment of peace “by all requires that women be enabled to exercise their right to participate on an equal footing with men in all spheres of the political, economic and social life of their respective countries, particularly in the decision-

Specifically, the Nairobi Forward-looking Strategies assert that “since women are one of the most vulnerable groups in the regions affected by armed conflicts, special attention has to be drawn to the need to eliminate obstacles to the fulfillment of the objectives of equality, development and peace and the principles of the Charter of the United Nations.”¹⁰⁷ The 1995 Beijing Platform also recognizes the particular burdens of conflict on women and girls.¹⁰⁸ The Platform encourages States to promote the equal participation of women “in all forums and peace activities at all levels, particularly at the decision-making level. . . .”¹⁰⁹

The UN Security Council adopted Resolution 1325 on women, peace, and security in 2000, which builds on the Nairobi Forward-looking Strategies, the Beijing Platform, and a series of Security Council resolutions on children and armed conflict, the protection of civilians in armed conflict, and the prevention of armed conflict.¹¹⁰ Resolution 1325 was the product of a sustained initiative launched by non-governmental organizations (“NGOs”) and women advocates within the United Nations,¹¹¹ and thus may be a model for the GQUAL campaign. The push for the resolution originated at a 1998 meeting of the UN Commission on the Status of Women concerning the provisions of the Beijing Platform devoted to women and armed conflict.¹¹² A network of NGOs¹¹³ decided to advocate for a Security Council resolution concerning “women, peace and security.”¹¹⁴

making process”).

¹⁰⁷ *Id.* ¶ 243.

¹⁰⁸ *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 135 (noting that “while entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex”).

¹⁰⁹ *Id.* ¶ 142(a).

¹¹⁰ See S.C. Res. 1261, ¶ 1 (Aug. 30, 1999) (stating “its grave concern at the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development”); S.C. Res. 1265, ¶ 13 (Sept. 17, 1999) (noting “the importance of including in the mandates of peacemaking, peacekeeping and peace-building operations special protection and assistance provisions for groups requiring particular attention, including women and children”); S.C. Res. 1296, ¶ 9 (Apr. 19, 2000) (stating “its grave concern at the harmful and widespread impact of armed conflict on civilians, including the particular impact that armed conflict has on women” and “the importance of fully addressing their special protection and assistance needs in the mandates of peacemaking, peacekeeping and peace-building operations”); S.C. Res. 1314, ¶ 16(e) (Aug. 11, 2000) (urging States to “integrate a gender perspective into all policies, programmes and projects” concerning children and armed conflict initiatives).

¹¹¹ Carol Cohn, *Mainstreaming Gender in UN Security Policy: A Path to Political Transformation?* (Consortium on Gender, Security, and Human Rights No. 204/2004, 2004).

¹¹² *Id.*

¹¹³ The group included organizations like the Women’s International League for Peace and Freedom; Amnesty International; International Alert; Hague Appeal for Peace; Women’s Commission for Refugee Women and Children; and Women’s Caucus for Gender Justice, among others.

¹¹⁴ Cohn, *supra* note 111.

The efforts of the NGO coalition and the Commission on the Status of Women led the president of the Security Council to call for the Security Council to review “the intersections between gender, peace and security.”¹¹⁵ The NGOs used the momentum of this speech and formed the NGO Working Group on Women, Peace and Security to advocate for a Security Council resolution.¹¹⁶ Resolution 1325 also received the support of forty States and UN officials like former Secretary-General Kofi Annan.¹¹⁷ It passed in 2000, after extensive lobbying by the NGO Working Group on Women, Peace and Security, the United Nations Development Fund for Women, and the government of Namibia.¹¹⁸

As the first Security Council resolution to acknowledge and address the unique impact of conflict on women, Resolution 1325 reaffirms the importance of women in the prevention and resolution of conflict and stresses the importance of their full and equal participation as active agents in the prevention and resolution of conflicts, peace-building, and peacekeeping initiatives.¹¹⁹ In particular, Resolution 1325 highlights the impact of gender-based violence on women in armed conflicts situations and the need to incorporate women in conflict resolution to achieve durable peace.¹²⁰ In the context of decision-making, Resolutions 1325 categorically calls for States to incorporate women at all decision-making levels and at all stages of peace and security initiatives.¹²¹

¹¹⁵ *Id.*

¹¹⁶ Carol Cohn, Helen Kinsella & Sheri Gibbings, *Women, Peace and Security Resolution 1325*, 6 INT’L FEMINIST J. POL. 130 (2004).

¹¹⁷ See statements made by then Secretary-General Kofi Annan, Special Adviser to the Secretary-General on Gender Issues and the Advancement of Women Angela King, and Executive Director of UNIFEM Noeleen Heyzer. Statements by representatives of Member States were, in order of presentation: Jamaica, United States of America, Tunisia, Argentina, China, United Kingdom of Great Britain and Northern Ireland, Bangladesh, Russian Federation, Netherlands, Canada, France, Malaysia, Ukraine, Mozambique, Egypt, Democratic Republic of the Congo, South Africa, Liechtenstein, Singapore, Pakistan, Japan, Cyprus, Republic of Korea, India, New Zealand, Zimbabwe, Indonesia, United Republic of Tanzania, Australia, Croatia, Belarus, Ethiopia, Malawi, Guatemala, United Arab Emirates, Norway, Rwanda, Botswana, Nepal and Namibia.

¹¹⁸ Cohn, Kinsella & Gibbings, *supra* note 116.

¹¹⁹ S.C. Res. 1325, *supra* note 104, at 1 (stating “the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution”).

¹²⁰ *Id.* (stating “that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements, and recognizing the consequent impact this has on durable peace and reconciliation”).

¹²¹ *Id.* at 2 (asserting “that an understanding of the impact of armed conflict on women and girls, [and] effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security,” stating

As a follow-up to Resolution 1325, the Security Council also adopted Resolution 1889 in 2009, which calls for further strengthening women’s participation in peace processes.¹²² Specifically, Resolution 1889 expresses “deep concern about the under-representation of women at all stages of peace processes... and stresses the need to ensure that women are appropriately appointed at decision-making levels, as high level mediators, and within the composition of the mediators’ teams.”¹²³ These Security Council documents build on the efforts surrounding the Beijing Platform and demonstrate the international salience of the norm of women’s access to decision-making.

b. Millennium development goals

Through the Millennium Development Goals (“MDGs”) and the succeeding Sustainable Development Goals (“SDGs”), the United Nations calls upon States to incorporate women in decision-making positions in the field of economic development. All UN Member States signed the Millennium Declaration, which called for States to achieve the MDGs by the target date of 2015.¹²⁴ While the MDGs are non-binding political commitments, a report of the UN Office of the High Commissioner for Human Rights asserts that there are “significant complementarities between the MDGs and human rights obligations” which lend legal authority to the MDGs.¹²⁵

In terms of women’s rights, Millennium Development Goal No. 3—promoting gender equality and empowerment of women—expressly encourages States to include women in decision-making processes.¹²⁶ In fact, the General Assembly urges States to take positive measures to improve women’s participation in political decision-making

that States should “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 urging States to provide female candidates “to the Secretary-General, for inclusion in a regularly updated centralized roster” for conflict resolution positions).

¹²² S.C. Res. 1889, *supra* note 104, at 3 (urging States and “international and regional organisations to take further measures to improve women’s participation during all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding, including by enhancing their engagement in political and economic decision-making at early stages of recovery processes”).

¹²³ *Id.* at 2.

¹²⁴ Millennium Declaration, G.A. Res. 55/L.2 (Sept. 8, 2000).

¹²⁵ U.N. OFFICE OF THE HIGH COMM’R OF HUMAN RIGHTS, THE MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS (2015), http://www.un-kampagne.de/fileadmin/downloads/news3/final_human_rights_and_mdgs_brochure.pdf.

¹²⁶ See G.A. Res. 65/1, *supra* note 104, ¶ 54 (asserting that States should “ensure the equal access of women and girls to education, basic services, health care, economic opportunities and decision-making at all levels”).

initiatives, including investing in women’s leadership, creating an “even playing field” for women in government, and encouraging the equal participation of women in peacebuilding and conflict-resolution initiatives.¹²⁷ The General Assembly also recognizes that “gender equality, the empowerment of women, women’s full enjoyment of all human rights and the eradication of poverty are essential to economic and social development, including the achievement of all the Millennium Development Goals.”¹²⁸

c. Sustainable development goals

The Sustainable Development Goals of the 2030 Agenda for Sustainable Development—adopted in 2015 by the General Assembly at the UN Summit—officially came into force in 2016.¹²⁹ The SDGs not only build upon the achievements of the MDGs, but also aim to expand them.¹³⁰ In particular, the SDGs seek to “realize the human rights of all and to achieve gender equality and the empowerment of all women and girls.”¹³¹ While the SDGs do not create legally binding obligations, the General Assembly asserts that the SDGs are “accepted by all countries and [are] applicable to all.”¹³² Additionally, States are expected to take ownership and establish a framework for the achievement of the goals.¹³³

As in the case of the MDGs, the United Nations also elaborates on the concepts of women’s empowerment and equality in the context of the SDGs.¹³⁴ The 2016 Report of the Secretary-General regarding the Progress towards the Sustainable Development Goals asserts that “gender equality remains a persistent challenge for countries

¹²⁷ *Id.* ¶ 72(f) (stating that the General Assembly should commit to “improve the numbers and active participation of women in all political and economic decision-making processes, including by investing in women’s leadership in local decision-making structures and processes, encouraging appropriate legislative action and creating an even playing field for men and women in political and Government institutions”).

¹²⁸ *Id.* ¶ 12.

¹²⁹ 2030 Agenda for Sustainable Development, G.A. Res. 70/1 (Oct. 21, 2015).

¹³⁰ *Id.* at 1 (stating that the Sustainable Development Goals “seek to build on the Millennium Development Goals and complete what they did not achieve”).

¹³¹ *Id.*

¹³² *Id.* ¶ 5.

¹³³ *Id.* ¶ 5(c) (asserting that States should “adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels” in relation to Goal No. 5).

¹³⁴ See Review and Appraisal, *supra* note 56, ¶ 390 (stating that the implementation of all the goals of the Beijing Declaration is “essential to sustainable development”); Econ. & Soc. Council, Rep. of the CSW on Its Fifty-Third Session, at 9, U.N. Doc. E/2009/27 (Mar. 30, 2009) (urging States to incorporate women in decision-making regarding “sustainable resource management and the development of policies and initiatives for sustainable development”).

worldwide and the lack of such equality is a major obstacle to sustainable development.”¹³⁵ The Special Rapporteur on violence against women as well as the 2030 Agenda for Sustainable Development state that the implementation of all the SDGs requires “systematic gender mainstreaming in all targets and indicators.”¹³⁶

In regards to access to decision-making, SDG No. 5—to achieve gender equality and empower all women and girls—urges States to include women in decision-making positions.¹³⁷ Furthermore, the 2030 Agenda for Sustainable Development asserts that women must enjoy equal access to education, “economic resources and political participation as well as equal opportunities with men and boys for employment, leadership and decision-making at all levels.”¹³⁸ Similarly, the 2014 report of the Open Working Group of the General Assembly on Sustainable Development Goals recognizes the significance of ensuring women’s participation and “equal opportunities for leadership at all levels of decision-making in political, economic and public life.”¹³⁹

5. Application of the Right of Access to Decision-Making to Gender Parity in International Representation

Generally, these non-binding international articulations of the norm of equality in decision-making encourage States to adopt measures that promote women’s participation in decision-making at the national level. In some instances, these documents urge States to promote women’s access to decision-making at the international level.¹⁴⁰ For instance, Resolution 66/130 urges States to “promote

¹³⁵ Econ. & Soc. Council, Rep. of the Secretary-General on the Progress Towards the Sustainable Development Goals, ¶ 39, U.N. Doc. E/2016/75 (July 5, 2016).

¹³⁶ Human Rights Council, Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, ¶ 38, U.N. Doc. A/HRC/32/42 (Apr. 19, 2016); 2030 Agenda for Sustainable Development, *supra* note 129, ¶ 20.

¹³⁷ See Review and Appraisal, *supra* note 56, ¶ 390 (asserting that the Sustainable Development Goals’ future agenda should address gender equality and “tackle the key structural constraints that are holding back progress for women,” which includes “women’s significant underrepresentation in decision-making at all levels”).

¹³⁸ 2030 Agenda for Sustainable Development, *supra* note 129, ¶ 20.

¹³⁹ Gen. Assembly, Rep. of the Open Working Group of the General Assembly on Sustainable Development Goals, ¶ 5.5, U.N. Doc. A/68/970 (Aug. 12, 2014).

¹⁴⁰ See Resolution on Women and Political Participation, *supra* note 56, at 3 (urging States to “promote awareness and recognition of the importance of women’s participation in the political process at the community, local, national and international levels”); UN Decade for Women Resolution, *supra* note 99, ¶ 3 (stating that governments should “take measures to ensure equal and effective participation of women in political, economic, social and cultural life and in policy-making at local, national, regional and international levels, thereby increasing their role in international co-operation and in the strengthening of peace”); Review and Appraisal, *supra* note 56, ¶ 225 (asserting that to implement the Beijing Platform a “comprehensive

awareness and recognition of the importance of women's participation in the political process at the community, local, national and international levels."¹⁴¹ However, these are broad exhortations which provide little indication of how States should act to achieve this norm in appointments of decision-makers in international institutions which require State votes.

International human rights treaties such as the CRPD and the CED, as well as adjudicatory bodies such as the ad hoc criminal tribunals and the ICC, have incorporated provisions grounded in access to decision-making to require States to take gender representation into account in appointing members of monitoring bodies or courts.¹⁴² These affirmative provisions are contained in recent treaties, indicating a trend toward State recognition of the utility of explicit, positive, provisions to ensure gender parity in international judicial and treaty monitoring bodies. At the same time, these specific treaty provisions raise whether a more general access to decision-making obligation, aside from CEDAW, exists in earlier human rights treaties or agreements establishing international judicial and monitoring bodies absent these specific terms. Such a general obligation could be effective in the absence of specific duties to consider gender representation.¹⁴³

Outside of CEDAW, Article 25 of the ICCPR establishes the right to equal participation in public life and thus supports arguments that Article 25 mandates State action to ensure gender parity in State-controlled appointment processes for international judicial and treaty monitoring bodies. Article 25, when interpreted in light of the articulations of equality in decision-making contained in the Beijing Platform, Resolutions 66/130 and 1325, the MDGs and the SDGs, suggest the existence of a norm which obligates States

approach is needed to increase women's participation in power and decision-making" as well as efforts "to increase women's agency and voice, starting from the household level, to community and local levels and to national, regional and global levels").

¹⁴¹ Resolution on Women and Political Participation, *supra* note 56, at 3.

¹⁴² See The Rome Statute, *supra* note 27, at art. 36.8(a); CED, *supra* note 71, at art. 26; CRPD, *supra* note 14, at art. 34; OPCAT, *supra* note 71, at art. 5; see also Statute of the International Criminal Tribunal for Rwanda art. 12ter(1)(b) (Jan. 31, 2010), Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art 13ter(1)(b) (Sept. 2009) (asserting that States shall nominate *ad litem* judges for taking into account "the importance of a fair representation of female and male candidates").

¹⁴³ In light of the unsettled interpretation of whether the anti-discrimination principle enshrined in Article 8 of the UN Charter applies to State-controlled appointment practices, see *infra* note 148 and accompanying text; relevant provisions of human rights treaties may serve as an important source of binding obligations in this regard.

to ensure equal representation of women in international bodies. Although commentators opine that this article does not apply directly to decision-making positions in international organizations in which States do not have direct authority in hiring,¹⁴⁴ where States *do* have direct control over appointments—such as international judicial and treaty monitoring bodies—Article 25 evidences a State obligation to act to recruit, nominate, and vote to ensure equal participation and thus parity representation of women in these international institutions. Article 25 provides additional legal support that the commitments in the GQUAL Declaration are required by international law.

B. THE RIGHT OF ACCESS TO EQUAL OPPORTUNITY IN EMPLOYMENT

Under international law, men and women have the right to equal opportunity in respect to employment and occupation, as well as promotion within employment.¹⁴⁵ The characterization of the international positions relevant to the GQUAL Campaign as employment—and therefore the applicability of this norm—depends largely on interpretation.

The UN System is bifurcated into staff positions and nominated positions, including the appointments on international bodies with which this working paper is concerned. The UN Charter provision regarding access to employment clearly applies to staff positions; however, its applicability to nominated positions on international judicial and monitoring bodies rests on how broadly the article is understood. Nevertheless, the following discussion begins with the interpretation and application of the Charter provision, as it guides State action when appointing individuals regardless of the classification of the positions as “employment.”

More directly applicable to the GQUAL Campaign is the treaty provisions of the ICESCR regarding the right to work. The Committee on Economic, Social and Cultural Rights (CESCR), the ICESCR’s treaty monitoring body, has broadly interpreted “work” and

¹⁴⁴ NOWAK, *supra* note 17, at 76; see also *HvdP v. The Netherlands*, Communication No. 217/1986, ¶ 71 (Hum. Rts. Comm. 1990).

¹⁴⁵ See ICESCR, *supra* note 11, at art. 6 (enumerating “the right to work”); *id.* at art. 7(c) (enumerating the “equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence”); Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111) arts. 2–3, June 25, 1958, 362 U.N.T.S. 31 [hereinafter Convention on Discrimination in Respect of Employment and Occupation] (requiring States to pursue policies and other positive obligations to ensure equality of opportunity in respect of employment and occupation).

employment to encompass “all forms of work, whether independent work or dependent wage-paid work.”¹⁴⁶ As the text of the ICESCR does not clarify whether work is limited to remunerated work, scholars further assert that work includes—“but may not be restricted to”—the opportunity to gain a living by work.¹⁴⁷ Thus, under a broad interpretation of the ICESCR, the international positions relevant to the GQUAL Campaign may be considered employment and subject to ICESCR provisions. These commitments offer additional, but qualified, support for women to be promoted to and serve on international bodies.

1. Access to Employment Within the UN System

Article 8 of the UN Charter provides that the “United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity” in its principal and subsidiary organs,¹⁴⁸ which include both international judicial and monitoring bodies.¹⁴⁹ This article has become “the basis of the international legal framework aiming at gender equality.”¹⁵⁰

According to the authoritative commentary on the UN Charter, because the content of Article 8 was not discussed thoroughly during the Charter drafting process, the language of certain clauses of the Article is “rather vague.”¹⁵¹ The wording leaves open the question whether the obligation of equal treatment of women applies to all posts within the UN System, including judicial, treaty-monitoring positions, and independent experts that require State nomination and/or voting, or whether the norm applies more narrowly to positions for which the United Nations, as opposed to States, administers hiring and promotion decisions.¹⁵²

¹⁴⁶ Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 18: Article 6 of the Covenant-The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, ¶ 6, U.N. Doc. E/C.12/GC/18 (2005).

¹⁴⁷ BEN SAUL, DAVID KINLEY & JAQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 281 (2014).

¹⁴⁸ U.N. Charter art. 8.

¹⁴⁹ 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 12, at 391, 409 (enumerating the principle and subsidiary organs included in art. 7 of the U.N. Charter).

¹⁵⁰ *Id.* at 417.

¹⁵¹ *Id.* at 418.

¹⁵² *Id.* at 421.

a. Competing interpretations of Article 8 of the UN Charter

Under a narrow interpretation of the term “United Nations,” Article 8 is only binding on the UN hiring practices of its staff and does not impose any obligation on States in their exercise of authority over the nominating and voting processes for appointed positions to international institutions.¹⁵³ Rather, as a norm applicable to the United Nations as an international institution, it only may serve as a model or “source of inspiration” for Member States.¹⁵⁴ The United Nations defines staff members in employment categories, which omits uncompensated positions, including independent experts who serve as UN mandate holders.¹⁵⁵ Using compensation as the criterion determining the application of Article 8 would make irrelevant whether the UN or States control the appointment procedures. However, the first volume of the UN Repertory of Practice—the official legislative history of UN organs—makes clear that at the time of the drafting of the UN Charter, the “prevailing view was that the purpose of Article 8 was strictly limited to the United Nations” and was not “concerned” with Member States.¹⁵⁶ Thus, control over appointment was determinative of whether an individual was covered by Article 8.

Nevertheless, this was not the *only* view offered at the time Article 8 was drafted. Since the founding of the United Nations, both the Commission on the Status of Women and the Economic and Social Council have promoted an expansive interpretation of Article 8 and have urged Member States to “consider women equally with men in appointing individuals to organs and agencies of the UN and to international bodies.”¹⁵⁷ Under this

¹⁵³ *Id.* at 419; see also *Mullan v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 162, at 387, 392, U.N. Doc. AT/DEC/114-66 (1974) (declaring that Article 8 is a rule creating a legal obligation on the UN organs).

¹⁵⁴ 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 12, at 419.

¹⁵⁵ See *Definition of Staff Categories*, U.N. SYSTEM CHIEF EXECUTIVES BOARD FOR COORDINATION, <http://www.unsceb.org/content/definition-staff-categories> (last visited June 1, 2017) (stating that staff positions include P- and D-level officers, UN Secretariat staff, national professional officers, and general service staff, with no mention of positions on judicial and monitoring bodies of the UN).

¹⁵⁶ 1 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS (1945-1954), at 238 (2005) (explaining the interpretation and application of Article 8 throughout the UN organs from 1945 to 1954); see also LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 105 (3d and rev. ed. 1969) (explaining that, at the time of drafting, Member States considering women equally with men in appointing delegations to the UN was a matter “to be decided by the governments themselves”).

¹⁵⁷ Econ. & Soc. Council, Rep. of the CSW on the Participation of Women in the Work of the United Nations, U.N. Doc. E/1316, at ch. IV, ¶ 20 (1949); see also Econ. & Soc. Council, Rep. of the Second Session of the CSW, U.N. Doc. E/1065, at Res. 154B (VII) (Aug. 20, 1948) (stating that “[t]he Economic and Social Council...resolves to recommend that Members:... (b) Consider women equally with men when appointing their delegations to organs and agencies of the United Nations and to international bodies and

broad interpretation, scholars posit that—as States are the founding members of the UN as well as its financiers—the term “United Nations” may alternatively “be interpreted expansively to obligate also Member States to consider men and women equally” in appointing individuals to UN positions.¹⁵⁸ Thus, an expansive understanding of Article 8 could conceive of this provision not narrowly as protection against discrimination in employment, but more broadly as a State obligation to ensure equal representation in appointed positions—a point that deserves further discussion.

For purposes of this analysis, however, considering Article 8 in the context of employment still points to a paucity of guidance regarding what kinds of action are required from the United Nations in its own employment practices to fulfill the right. Even under a restrictive interpretation, the equal rights enumerated in this Article would require equal access to the application processes for all international civil service positions.¹⁵⁹ Additionally, in the case of *Grinblat v. The Secretary General of the United Nations*, the Administrative Tribunal of the United Nations¹⁶⁰ goes further to state that “Article 8 permits the adoption of reasonable affirmative action measures” to promote more women within the United Nations.¹⁶¹

The issue before the Administrative Tribunal in *Grinblat* pertained to an applicant who claimed that his exclusion from a staff position’s short list and the inclusion of two women candidates was “motivated by prejudice against his gender.”¹⁶² Although the Tribunal concluded that the applicant’s rights were not fully respected due to his exclusion on the short list by the Appointment and Promotion Board (“APB”), this was based on the APB’s procedural mistake of taking affirmative action measures before all equally qualified candidates were considered for the short list and not on substantive discrimination.¹⁶³ The Tribunal thus asserted that Article 8 “would permit, as a reasonable measure, preferential treatment to women candidates where their

conferences”).

¹⁵⁸ 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 12, at 419.

¹⁵⁹ *Id.* at 420.

¹⁶⁰ The Administrative Tribunal of the United Nations is the independent organ competent to hear and pass judgment upon applications alleging non-observance of contracts of employment and other binding regulations of all staff working in the United Nations.

¹⁶¹ *Grinblat v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 671, at XVII, XIX, U.N. Doc. AT/DEC/671 (1994).

¹⁶² *Id.* at 6.

¹⁶³ *Id.* at XIX.

qualifications are substantially equal to the qualifications of competing male candidates.”¹⁶⁴ Depending on whether Article 8, applies narrowly to UN staff positions, or broadly to include State-controlled appointments, the affirmative actions asserted in *Grinblat* will or will not apply to the appointment of individuals by Member States to international bodies within the United Nations. Even if not mandated by the Charter, *Grinblat* allows States to voluntarily adopt affirmative measures without violating Article 8.

b. Soft-law interpretations of equal access to employment at the international level

Because of Article 8’s ambiguities, UN standard setting has played an important role in the legal understanding of the norm.¹⁶⁵ A number of soft law documents, beginning with the Nairobi Forward-looking Strategies in 1985, have concretized the United Nation’s resolve for employment equality and have set out a comprehensive global agenda for achieving gender parity that requires State action.¹⁶⁶ Following the call by the Nairobi Forward-looking Strategies for governments to ensure on equal terms to women the opportunity to serve on international delegations and within the UN system, the Beijing Platform urges governments to take action to achieve gender parity in the nomination or appointment of individuals “to United Nations bodies, specialized agencies and other autonomous organizations of the United Nations system.”¹⁶⁷ Additionally, General Assembly Resolution 33/143 “calls upon Member States to assist the United Nations” in increasing the proportion of women employees “by nominating more women candidates” to positions.¹⁶⁸ And the authors of the Charter’s authoritative commentary assert that, to avoid a top-down process, UN efforts to advance women on the basis of Article 8 need additional support from all Member States, which includes submitting for appointment

¹⁶⁴ *Id.*

¹⁶⁵ 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 12, at 418.

¹⁶⁶ *Id.* at 425; *see also Nairobi Forward-looking Strategies*, *supra* note 83, ¶ 356 (stating that “[t]he United Nations system should take all necessary measures to achieve an equitable balance between women and men staff members”); *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 193 (directing the United Nations to “[i]mplement existing and adopt new employment policies and measures in order to achieve overall general equality” and to “[d]evelop mechanisms to nominate women candidates for appointment to senior posts in the United Nations, the specialized agencies and other organizations and bodies of the United Nations system”); *Vienna Declaration & Programme of Action*, *supra* note 34, at pt. II, ¶ 43 (urging “[g]overnments and regional and international organizations to facilitate the access of women to decision-making posts and their greater participation in the decision-making process”).

¹⁶⁷ *Nairobi Forward-looking Strategies*, *supra* note 83, ¶ 79; *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 190(j).

¹⁶⁸ G.A. Res. 33/143, ¶ 5 (Dec. 20, 1978).

and voting more women candidates to positions within the UN system.¹⁶⁹ Thus, on balance, the broad interpretation of Article 8—that Member States also must act to ensure gender parity in staff and politically-appointed positions—is supported by evolving State consensus in this regard.

2. Universal Access to Employment

In addition to the UN Charter, an even broader understanding of the norm of equal access to employment is found in the ICESCR.¹⁷⁰ When “the right to work” recognized in Article 6 of the ICESCR is read together with Article 2(2), which obligates States “to guarantee that the rights enunciated in the [] Covenant will be exercised without discrimination of any kind...as to sex,” it is clear that the ICESCR prohibits discrimination in regards to access to employment.¹⁷¹ As previously expounded, the Committee on Economic, Social and Cultural Rights (CESCR) as well as scholars have interpreted “work” broadly.¹⁷² Thus, the rights enumerated in the ICESCR may extend to uncompensated positions on international judicial and monitoring bodies.

According to its reporting guidelines, the CESCR is specifically concerned with States abolishing “distinctions, exclusions, restrictions, or preferences, be it in law or in administrative practice” made on the basis of sex “which have the effect of nullifying or impairing the recognition, enjoyment, or exercise of equality of opportunity” in employment.¹⁷³ Scholars have understood from these guidelines that equality of opportunity under Article 6 should be established for all individuals and groups within society,¹⁷⁴ which may include individuals serving on international bodies. Therefore, any restriction or action that unreasonably impairs the equal employment opportunities of members of a particular group would be “contrary to the provision” of the ICESCR.¹⁷⁵

¹⁶⁹ 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 12, at 443-44.

¹⁷⁰ See ICESCR, *supra* note 11, at arts. 6-7 (enumerating “the right to work” and the “equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence”).

¹⁷¹ MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 210 (1995).

¹⁷² See pages 35-41.

¹⁷³ Comm. on Econ., Soc. & Cultural Rights, Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 3-4, U.N. Doc. E/C.12/1991/1 (1991).

¹⁷⁴ CRAVEN, *supra* note 171, at 210.

¹⁷⁵ *Id.*; see also Richard Lewis Siegel, *The Right to Work: Core Minimum Obligations*, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 21, 37 (Audrey Chapman & Sage

In addition to equal access to employment under the right to work, Article 7 of the ICESCR obligates States to uphold the right to equal opportunity to be promoted in one's employment, "subject to no considerations other than those of seniority and competence."¹⁷⁶ Scholars have interpreted this anti-discrimination obligation to "extend to public and private conduct as well as action and inaction regarding...promotion...and patriarchal constraints on women's opportunities."¹⁷⁷ States' duties under the ICESCR, therefore, may be invoked in relation to State denial of the employment rights enumerated in Article 6 and 7.

Iterations of this norm within other treaties, aside from CEDAW, and soft law instruments also obligate and urge States to take affirmative steps to "eliminate occupational segregation" by encouraging the equal participation of women in all positions and types of employment, including highly-skilled jobs.¹⁷⁸ However, aside from the UN staff positions that fall under the Charter, research has not disclosed any interpretations or commentaries that explicitly articulate whether other judicial or monitoring positions on international bodies are included under the purview of these instruments.

Additionally, the obligations created by the treaties subject to this analysis contemplate State action regarding domestic employment contexts. Whether State obligations to promote the right to work extend to appointed positions at international judicial and treaty monitoring bodies is unclear. Jurisprudence is scant but supportive of this application. Even if not required by a treaty, the right of equal access to employment supports prudential arguments that States should be dismantling occupational segregation and furthering professional advancement of women by actively nominating and voting on women candidates to international courts and monitoring bodies.

Russell eds., 2002).

¹⁷⁶ ICESCR, *supra* note 11, at art. 7.

¹⁷⁷ Siegel, *supra* note 175, at 21, 37 (quoting ILO, EQUALITY IN EMPLOYMENT 25-38 (1996)).

¹⁷⁸ See Convention on Discrimination in Respect of Employment and Occupation, *supra* note 145, at arts. 2-3 (requiring States to pursue policies and other positive obligations to ensure equality of opportunity in respect to employment and occupation); *General Comment No. 3*, *supra* note 19, ¶ 27 (asserting that States "must adopt a twin track approach which systematically mainstreams the interests and rights of women with disabilities pertaining to employment"); *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 178(g) (asserting that States have an obligation to "eliminate occupational segregation" by encouraging the equal participation of women in highly skilled jobs and senior positions); *Nairobi Forward-looking Strategies*, *supra* note 83, ¶¶ 52-54 (calling upon governments to promote equal access to all positions and types of employment).

C. THE RIGHT OF ACCESS TO JUSTICE

Access to justice is a fundamental human right codified in the ICCPR and the CRPD, and is included in non-binding human rights instruments such as the Beijing Platform.¹⁷⁹ This right has been defined primarily as a due process right enjoyed by individuals as provided for in Article 14 of the ICCPR.¹⁸⁰ This article guarantees the due process rights of a litigant in court and, as the Human Rights Committee has explained, does not include a more general right to be appointed as a judge.¹⁸¹ Accordingly, as a due process right, access to justice is not applicable to State obligations regarding gender parity on international courts and tribunals.¹⁸²

However, some interpretations of Article 13(1) of the CRPD¹⁸³ have argued the treaty codifies a structural dimension of access to justice, which does implicate the rights of women to serve in the judicial system. Article 13(1) of the CRPD obligates States to “ensure effective access to justice for persons with disabilities on an equal basis with others.”¹⁸⁴ Scholars find the treaty to create affirmative duties on States to ensure that

¹⁷⁹ See ICCPR, *supra* note 11, at art. 14 (stating that “everyone shall be equal before the courts and tribunals” and “shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”); CRPD, *supra* note 14, at art. 13 (stating that “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others”); *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 232(m) (calling on States to “[e]nsure that women have the same right as men to be judges, advocates or other officers of the court”).

¹⁸⁰ ICCPR, *supra* note 11, at art. 14(1) (stating that “everyone shall be equal before the courts and tribunals” and “shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”).

¹⁸¹ *Kazantzis v. Cyprus*, Communication No. 972/2001, ¶ 6 (Hum. Rts. Comm. 2003) (stating that “the procedure of appointing judges, albeit subject to the right in article 25(c) to access to public service on general terms of equality as well as the right in article 2, paragraph 3, to an effective remedy, does not additionally come within the purview of a determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant”).

¹⁸² Any mention of gender equality within the Human Rights Committee’s General Comments for this article pertains to the determination of litigants’ rights and obligations in a suit at law, such as the ability to bring a cause of action regardless of one’s gender. See Human Rights Comm., *General Comment No. 32 on Article 14: The Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 65, U.N. Doc. CCPR/C/GC/32 (2007) (stating that “[p]rocedural laws or their application that make distinctions based on any of the criteria listed in article 2...or disregard the equal right of men and women, in accordance with article 3, to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that ‘all persons shall be equal before the courts and tribunals,’ but may also amount to discrimination”); *Ato del Avellanal v. Peru*, Communication No. 202/1986, ¶ 10.1-10.2 (Hum. Rts. Comm. 1986) (stating that “the application of article 168 of the Peruvian Civil Code to the [alleged victim] resulted in denying her equality before the courts and constituted discrimination on the ground of sex”).

¹⁸³ CRPD, *supra* note 14, at art. 13(1) (asserting that “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”).

¹⁸⁴ See ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW* 222 (2015).

persons with disabilities are effectively able to access and participate in the administration of justice.¹⁸⁵ Scholars assert that when States deny qualified individuals with disabilities the opportunity to participate as jurors, judges, and lawyers, “they do not have access to justice.”¹⁸⁶

While the CRPD is the only source of binding law for this dimension, there is support for this interpretation of a structural right of access to justice in the Beijing Platform.¹⁸⁷ The Platform does not link equal access to serve in the administration of justice explicitly to the right of access to justice as the CRPD does, but rather calls on States to “ensure that women have the same right as men to be judges, advocates, or other officers of the court” to ensure equality and non-discrimination under the law and in practice.¹⁸⁸ Though governments have the primary responsibility of implementing the Platform at the national level,¹⁸⁹ the absence of language limiting this call to action within domestic courts suggests that it applies more broadly to positions within international bodies.

CONCLUSION

The principle of non-discrimination and the three specific norms discussed in this working paper—the right of access to decision-making, the right of access to equal opportunity in employment, and the right of access to justice—reflect commitments to gender equality found in a number of hard and soft law instruments. While the right of access to justice is underdeveloped, the rights of equal access to decision-making and equal opportunity in employment provide the strongest support for the GQUAL Campaign among the primary human rights treaties analyzed in this working paper: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities. The relevant provisions of these human rights treaties and the international jurisprudence that provides content to these obligations evidence States’ duties to act

¹⁸⁵ Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Person with Disabilities, and the Legal System*, 17 ILSA J. INT’L & COMP. L. 281, 284 (2011).

¹⁸⁶ KANTER, *supra* note 184, at 222.

¹⁸⁷ See *Beijing Declaration & Platform for Action*, *supra* note 36, ¶ 232(m).

¹⁸⁸ *Id.* (asserting that actions to be taken by Governments include “[ensuring] that women have the same right as men to be judges, advocates or other officers of the court, as well as police officers and prison and detention officers, among other things”).

¹⁸⁹ *Id.* ¶ 293.

affirmatively to ensure gender parity. In addition, recent State practice indicates a trend toward including specific provisions on gender parity in international bodies in the treaties establishing such institutions. Further, the widespread consensus about the need to eliminate discrimination against women and ensure parity in international institutions offers a robust normative foundation. States repeatedly and in various contexts have committed to gender parity. The GQUAL Campaign calls upon States to honor these commitments in their nomination and election of women to international judicial and monitoring bodies.