

# A Cognitive-Behavioural Approach to Feminist Studies

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## 1. Introduction

Feminist studies have sought to provide us with a critical analysis of international law. In particular, they have aimed to show how existing structures, processes, and methodologies of international law marginalise women by failing to take into account their lives and experiences. In many respects, this literature has argued for a need for women to be represented in the international legal community, including on judicial and arbitration panels, and for their different voices to be heard as an essential part of international law. In their writings, feminist scholars have eschewed doctrinal analysis of the law and rejected quantitative methodologies used in political sciences and law and economics literature. Instead, through a powerful critical and constructivist approach, they have questioned the underrepresentation of women in positions of power and influence and imagined what law would look like—what its focus and approach would be—if more women and other minority groups were involved and included in the making and the application of international law and legal rules. Today, the Third World Approaches to International Law (TWAIL) and feminist as well as other critical approaches have proliferated and become mainstream in international law, a testament to what powerful and well-evidenced critique of scholars can achieve.

In this chapter, I want to show how even without referring to cognitive studies, feminist theory has used many cognitive concepts to support its major claims about the lack of women and the male-dominated international law. In fact, there are several areas of overlap between feminist studies and cognitive approaches. Specifically, both disciplines depart from rational choice assumptions and highlight various cognitive biases. I specifically show how both feminist theory and cognitive studies seek to uncover stereotyping, salience, and status quo biases, as well as intergroup bias. Both are able to reveal structural inequality and systemic problems of subordination. Yet, they achieve this through different approaches: whilst feminist studies adopt a critical and constructivist approach, cognitive studies employ a range of in-person experiments, quantitative empirical studies, and computer modelling. Some of these methods have been shunned or rejected by feminist scholars, since in the past they had been used to perpetuate inequalities

and the status quo—a male-dominated world and neoliberal reliance on markets, deregulation, and away from redistribution, with little attention paid to the vulnerable. But methods have evolved during the last thirty years and multiple disciplines are increasingly adopting a more data-informed approach. In this context, this chapter engages in an experiment, an ‘as if’ exercise, in which I explore what we could understand and explain about the causes of neglect and oppression of women in traditional international law if we adopted the cognitive approach and its methods. In doing this, I do not wish to argue that feminist studies lack a methodology or that they require one. I merely wish to show how cognitive science can contribute to feminist studies specifically through structured empirical quantitative studies, controlled experiments, and computer modelling.

The chapter focuses on the idea which gave birth to feminist studies, namely that women are largely absent at international level, be it at the international judiciary, international organisations and diplomacy, or governmental decision-making level; and that this carries serious implications for the focus and approach of traditional international law. First, I show how cognitive modelling can allow us to understand *why* there is a lack of women at the international level and show how persistent this lack is. To understand the structures within the international college, I consider the role of individuals as structure makers and structure takers and aim to shed light on how our embeddedness in society and culture shapes our perceptions of reality and of each other. In this regard, behavioural and physiological sciences can illuminate why and how discrimination arises, to what extent the biases that drive it are unconscious, and how insidious they are.

Second, I examine the argument often made to support greater representation of women in international legal bodies, namely that women think differently than men (giving rise to the assumption that women bring a different voice to adjudication), and that therefore more women in positions of power would lead to different international decisions and in turn international law. This argument is examined through the results of large n-scale studies, which seem to suggest only limited differences between men and women and argue against ascribing cognitive differences to individuals based on gender. Bringing both parts together, the implication is that national societies and the culture of international community seem to matter more than differences in cognition between genders.<sup>1</sup>

My chapter therefore seeks to take an experimental look at feminist studies through the lens of cognitive studies. The chapter underlines the benefits of methodologies used by cognitive-behavioural studies for feminist theory, both in assessing the status quo and in testing out the solutions to it. Insights from these sciences can help us understand better why discrimination and structural inequality towards marginalised groups arises and endures. They can also help us illuminate

<sup>1</sup> See Chapter 10 by Mikael Rask Madsen and Salvatore Caserta in this volume.

the presumed and often hidden assumptions about gender in international law. By debunking some of these myths, we can then focus on the underlying problem and put forward better arguments to ensure equal representation of women on international (legal/judicial) bodies.

The chapter proceeds as follows: Section 2 introduces the intersection between feminist and cognitive studies, Section 3 shows how methods used in cognitive science can uncover the creation of a glass ceiling and show how insidious bias is, Section 4 uses cognitive science to debunk the myth of a different voice, and Section 5 concludes.

## 2. The Intersection between Feminist and Cognitive Studies

There are several areas of overlap between feminist studies and cognitive approaches. Specifically, both areas depart from rational choice assumptions and highlight various cognitive biases. In this section, I specifically show how both feminist theory and cognitive studies seek to uncover different biases, such as stereotyping, salience, status quo bias, and intergroup bias. In particular, I want to show how even without explicitly referring to cognitive studies, feminist theory has used many cognitive concepts to support its major claims about the lack of women and the male-dominated international law.

### 2.1. Feminist approaches to international law

Feminist studies of international law use critical analysis to show how the 'structures, processes, and methodologies of international law marginalize women by failing to take account of their lives or experiences.'<sup>2</sup> The approach takes as its central concern the position of women, placing them at the core of inquiry with a specific aim to redress their structural inequality and oppression in political, social, and economic systems. In this regard, feminist studies seek to do several things: first, uncover and highlight the lack of women (or their very low participation) in senior positions in international institutions (from international judiciaries to international organisations, such as the fact there has never been a woman United Nations (UN) secretary general, and the underrepresentation of women in other international law-making bodies like the International Law Commission); second, understand how the social constructs of male and female roles lead to different experiences for men and women and then consider how

<sup>2</sup> Christine Chinkin, 'Feminism, Approach to International Law' (October 2010) in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e701>> accessed 7 August 2023.

international law should reflect and address these in substances and process of the law. In this regard, feminist studies emphasise that traditional international law may appear gender neutral, but in fact its content reflects (and regulates) a male-dominated world of geo-politics, with a particular focus on sovereignty, war and peace, trade, human rights, and international organisations. It fails to take into account specific concerns of women, such as slavery, human trafficking, gender-based crimes, and so on. In addition to uncovering the invisibility of women and the biases and silences of international law and international legal order, feminist legal theory openly seeks to put forward an agenda for the advancement and empowerment of women.

Of course, these are only three main branches of feminist scholarship. Many other scholars have applied the feminist approach to a broad array of topics outside of representation and women's lived experiences. Ratna Kapur and Vasuki Nesiah have analysed postcolonial feminist approaches,<sup>3</sup> Anne Orford studied gendered narratives of humanitarian intervention,<sup>4</sup> Gina Heathcote has looked at the law of force and structural bias feminism,<sup>5</sup> Yoriko Otomo examined state sovereignty from a feminist psychoanalytical perspective,<sup>6</sup> Emily Jones has looked at environmental law and military technologies, and many others.<sup>7</sup> In all of these, feminist studies have been used to critique normative and institutional structures of international law, finding them deeply unequal and committed to masculine (and imperial) power and thus 'in need of significant reconstruction'.<sup>8</sup> More recently, the debate has also tackled the issue of 'the received male/female duality', examining potential possibilities 'that more fluid conceptions of gender and sexuality open for analyzing the law's enduring exclusionary effects'.<sup>9</sup>

## 2.2. Cognitive studies and human biases

Traditional approaches to law, so-called rational choice theory, assume that people are rational and know what they want and are thus able to rank different choices according to the utility they derive from them.<sup>10</sup> But as early as in the mid-1950s,

<sup>3</sup> Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Elgar 2018).

<sup>4</sup> Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003).

<sup>5</sup> Gina Heathcote, *The Law on the Use of Force: A Feminist Analysis* (Routledge 2011).

<sup>6</sup> Yoriko Otomo, 'Her Proper Name: A Revisionist Account of International Law' (2014) 2 *London Review of International Law* 149.

<sup>7</sup> Hilary Charlesworth, Gina Heathcote, and Emily Jones, 'Feminist Scholarship on International Law in the 1990s and Today: An Inter-Generational Conversation' (2019) 27 *Feminist Legal Studies* 79.

<sup>8</sup> Diane Otto, 'Feminist Approaches to International Law' (*Obo*) <[www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0055.xml](http://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0055.xml)> accessed 7 August 2023.

<sup>9</sup> *ibid.*

<sup>10</sup> Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (OUP 2018) 7. For a summary and defence of rational choice theory, see the founding father of law and economics, Richard Posner, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 *Stanford Law Review* 1551.

Herbert Simon introduced the concept of bounded rationality. Bounded rationality recognises that we have limited cognitive capacities. As such, we do not always behave in a fully rational manner.<sup>11</sup> According to Simon, our bounded rationality shows through when a problem is sufficiently difficult,<sup>12</sup> leading us to choose solutions that are merely satisfying as opposed to optimal.<sup>13</sup> It was in the early 1970s that Kahneman and Tversky pushed the boundaries of bounded rationality further by showing that even simple problems can induce suboptimal choices.<sup>14</sup> They argued that in addition to making 'good enough' decisions, people predominantly rely on simple, intuitive, rule-of-thumb decision-making. When making decisions, Kahneman and Tversky showed that people rely on a limited number of mental shortcuts (ie heuristics) which reduce the complex tasks of assessing probabilities and predicting values to simpler judgemental operations.<sup>15</sup> In general, these shortcuts are quite useful: since they come about automatically, they allow people to allocate their mental energy elsewhere. However, Kahneman and Tversky showed that the use of heuristics may also lead to severe and systematic errors, known as cognitive biases.<sup>16</sup>

Cognitive studies focus on exposing these biases and how they affect our decision-making. According to Hastie and Rasinski, cognitive biases can be categorised into three broad classes of systematic errors in judgement: sins of imprecision, sins of commission, and sins of omission.<sup>17</sup> The first group relates to the discrepancy between criteria we are supposed to apply and the reality of human judgement. Studies have shown that as individuals we rarely alter our own subjective probability judgements in response to new, diagnostic information. Instead, we remain (over)confident in the accuracy of our own assessment, making shortcuts that overestimate the likelihood of an event or its frequency not by investigating statistics but based on how many similar instances are brought to mind (availability heuristic),<sup>18</sup> or focusing on items that are more prominent or emotionally striking and ignoring those that are unremarkable (salience bias) and believing that multiple events can co-occur at the same time (conjunction fallacy). Similarly, we adjust our decisions depending on how outcomes are framed.

<sup>11</sup> Herbert Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *The Quarterly Journal of Economics* 99.

<sup>12</sup> Herbert Simon, *The Sciences of the Artificial* (3rd edn, vol 1, The MIT Press 1996).

<sup>13</sup> Simon (n 11).

<sup>14</sup> Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.* Note that in the literature the terms 'bias' and 'errors' in cognitive processing are used interchangeably; however, certain scholars dispute that bias is necessarily an error to rational/normal/valid behaviour. They specifically question whether valid behaviour/normal/rational behaviour exists and therefore reject the terminology of 'error'. Arie W Kruglanski and Icek Ajzen, 'Bias and Error in Human Judgment' (1983) 13 *European Journal of Social Psychology* 1.

<sup>17</sup> Reid Hastie and Kenneth A Rasinski, 'The Concept of Accuracy in Social Judgment' in Daniel Bar-Tal and Arie W Kruglanski (eds), *The Social Psychology of Knowledge* (CUP 1988) 193.

<sup>18</sup> Tversky and Kahneman (n 14).

Kahneman and Tversky have shown that we have a clear preference for uncertain loss (compared to certain loss) but also a preference for certain gain (compared to uncertain gain). How things are framed or 'labelled' therefore shapes our perception of them and how we react to them. In the context of prospect theory, we are risk-seeking when outcomes are framed as losses but risk-averse when outcomes are framed as gains.<sup>19</sup>

The second group of biases—the 'sins of commission'—note that although we are required to treat certain information as irrelevant for judgement (such as the race of a victim or the attractiveness of a defendant), we nevertheless take it into account and use it to affect our assessment of guilt or innocence or other decision-making processes. Similarly, we remain over-reliant on information that is or ought to be irrelevant to our judgements, including, for example, the belief that past investments justify further expenditures (sunk cost fallacy), or we rely on reference points as 'anchors' (anchoring effect). We also tend to interpret, favour, or recall information in a manner that confirms our beliefs or values and thus expresses preference when none should be had (confirmation bias).<sup>20</sup>

The third group—the 'sins of omission'—reveals that biases can also have the opposite effect. In certain situations, we fail to use information that is relevant to inform our judgements, for example by sticking to the status quo and perceiving any change from this baseline as a loss (status quo bias) or we underemphasise situational and environmental explanations for an individual's observed behaviour whilst over-emphasising personality-based explanations (correspondence bias).

These shortcuts that we make in our decision-making most typically involve stereotyping, drawing distinctions between groups on the basis of their group membership. Once we belong to a social group, we tend to differentiate ourselves by group membership and use our biases to help us maintain a favourable image of ourselves and attribute positive traits to our friends and our reference group. It is the formation of such an 'ingroup' that leads to discrimination. Once we identify as part of an ingroup, we see other members of the ingroup as 'trustworthy, cooperative, peaceful, and honest' and we provide each other with preferential treatment. In contrast, members of the 'outgroup' are believed to be 'untrustworthy, competitive, quarrelsome, and dishonest'.<sup>21</sup> In this context, although intended to merely provide positive favouritism towards ingroup members, our behaviour is

<sup>19</sup> Jack S Levy, 'Prospect Theory and International Relations: Theoretical Applications and Analytical Problems' (1992) 13 *Political Psychology* 283; James Davis (ed), *Psychology, Strategy and Conflict* (Routledge 2013) 5.

<sup>20</sup> See Anne van Aaken and Moshe Hirsch's Introduction to this volume; Raymond S Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 *Review of General Psychology* 175.

<sup>21</sup> Marilyn Brewer, *Intergroup Relations* (2nd edn, Open UP 2003, repr 2009) 51; Susan T Fiske, *Intergroup Biases: A Focus on Stereotype Content* (2015) 3 *Current Opinion in Behavioural Sciences* 45, 54.

accompanied by a number of biases that sustain and reinforce discriminatory behaviour and potentially lead to 'outgroup' negativity.<sup>22</sup>

### 2.3. A cognitive lens on feminist studies

First, like cognitive studies, feminist scholars seek to expose the silences and biases of international law. In *The Boundaries of International Law*, Chinkin and Charlesworth speak of the biased 'vocabulary of international law'.<sup>23</sup> Although the terminology may appear neutral, they note the gendered nature of the basic concepts of international law; for example, the paired dichotomies of intervention–non-intervention; sovereign–domestic jurisdiction; protector–protected; objective–subjective; action–passivity; public–private; and combatant–non-combatant. This 'gendered coding of binary oppositions' suggests that *stereotyping* is in operation, namely that dichotomies are used to assign traits to different categories (eg women and men). In particular, as feminists show, the respective first term is associated with 'more highly valued male characteristics or identity' and dictates the 'law's priorities and values to be protected'.<sup>24</sup> In contrast, the second term is assigned to women, who are seen as passive, weak, domestic, private, non-powerful, protected, non-combatant, and so on.

But these dichotomies are not merely about stereotyping inherent in international law and the manner in which international legal scholarship constructs gender. As Chinkin shows, they are also about keeping the status quo intact. On the distinction between the public and private, she notes that the 'public realm of the workplace, the law, economics, politics, and intellectual life are regarded as the natural and proper province of men and the private world of the home as that of women'.<sup>25</sup> This division is not coincidental or merely descriptive: instead, the distinction has a 'normative' dimension as well—'greater legal and social significance is accorded to the public world than to the private ... The distinction drawn between the public and the private vindicates and makes natural the division of labour and the allocation of rewards between the sexes'.<sup>26</sup> Chinkin's argument effectively underlines what cognitive studies would consider the *status quo bias*: that international legal rules through their content, processes, and silences seek to maintain a specific visual distinction between sexes, a hierarchical picture that plays a performative role, including by keeping women in their traditional

<sup>22</sup> Brewer (n 21) 65–68, 21. See also John F Dovidio and Samuel L Gaertner, 'Stereotypes and Evaluative Intergroup Bias' in Diane M Mackie and David L Hamilton (eds), *Affect, Cognition and Stereotyping: Interactive Processes in Group Perception* (Elsevier Science 1993) 167, 175.

<sup>23</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester UP 2000) xvii, 337.

<sup>24</sup> Chinkin (n 2).

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*



roles—for example, maintaining the division of labour, areas, and knowledge in a manner that favour the male and support the dominance of men; and *salience bias*: presenting international law as a legal system that privileges certain issues as more worthy of attention and neglects and ignores others considered of little importance. In addition to uncovering *stereotyping*, feminist studies therefore also criticise the male *default* and *status quo*.

Third, like cognitive studies, feminist theory emphasises the structural nature of bias against women and, in particular, the perpetual absence and exclusion of women from international legal institutions, the sidelining of women's experiences in shaping and applying international law rules, and the lack of (any) engagement with feminist scholarship from traditional international legal scholars.<sup>27</sup> This ignorance and blindness stems from what cognitive sciences label as *intergroup bias*; that is, bias in favour of ingroups at the expense of outgroups. Intergroup relations literature reveals the significant effects of social identity on individuals' cognitive processes and behaviour. Since as humans we seek to belong to social groups, we tend to distinguish ourselves through group membership<sup>28</sup> and tend to 'evaluate one's own membership group more favourably than a nonmembership group.'<sup>29</sup> Empirical studies have persuasively demonstrated that once people identify with a particular social group, they are likely to provide ingroup members preferable treatment.<sup>30</sup> Intergroup bias can therefore include discriminatory behaviour, prejudicial attitude, or stereotyping through cognition.<sup>31</sup> This bias can explain several aspects that feminist theories seeks to uncover: the absence of women in international institutions (eg if women are considered and excluded as the outgroup, they will not be heard, and it is unlikely or less likely that men as the ingroup would promote them or accepted into their group); the stereotyping of specific issues as 'female' issues (eg sexual violence, trafficking, home and family life, and the silence of the discipline in this context); the ignorance of feminist studies by

<sup>27</sup> Emily Jones, *Feminist Theory and International Law* (1st edn, Routledge 2023); Emily Jones, 'Posthuman Feminism and Global Constitutionalism: Environmental Reflections' [2022] *Global Constitutionalism* 1; Hilary Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law' in Sari Kuovo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Oxford 2014) 17; Charlesworth, Heathcote, and Jones (n 7) 29–93; Hilary Charlesworth, 'Feminist Critiques of International Law and Their Critics' (1995) 13 *Third World Legal Studies* 1.

<sup>28</sup> Brewer (n 21) 20. See also Jan Stets and others, 'Getting Identity Right' (2020) 37 *Advances in Group Processes* 191.

<sup>29</sup> Miles Hewstone, Mark Rubin, and Hazel Willis, 'Intergroup Bias' (2002) 53 *Annual Review of Psychology* 575.

<sup>30</sup> Walter Stephan and Cookie W Stephan, *Intergroup Relations* (Routledge 1996) 92–93; Brewer (n 21) 43 et seq.

<sup>31</sup> David Wilder and Andrew F Simon, 'Affect as a Cause of Intergroup Bias' in Rupert Brown and Samuel L Gaertner (eds), *Blackwell Handbook of Social Psychology: Intergroup Processes* (Blackwell 2003) 153; Diane M Mackie and Eliot R Smith, 'Intergroup Relations: Insights from a Theoretically Integrative Approach' (1998) 105 *Psychological Review* 499.



mainstream scholarship (eg if traditional international law scholarship is viewed as the ingroup, then scholars criticising their approach as biased or discriminatory would automatically be treated as the outgroup), and so on.

Although this section suggests there are important links between feminist scholarship and cognitive studies, feminist scholars have been reluctant to engage with cognitive approaches. In addition, rather than questioning structural inequalities, cognitive studies usually tend to be limited to uncovering weaker forms of bias and mild prejudice (such as cognitive shortcuts and errors). Whilst cognitive-psychological studies may seek to understand the causes of these heuristics, they usually stop short of seeking out solutions or question the structure as such.<sup>32</sup> In this regard, feminist scholarship is much more ambitious, refusing to accept the status quo or the intergroup bias as a given and challenging the current gaps and silences in international law as well as reshaping the structures of international legal order. As other chapters have noted, this results in tensions between cognitive science and feminist and other critical approaches (such as TWAIL).<sup>33</sup>

### 3. Using Cognitive Science to Show the Pervasiveness of Bias

Feminist studies, especially those tracking the underrepresentation of women on judicial benches and arbitration panels, note the consistent lack of women in these fora over time. In spite of the great need to ensure diversity, these studies note that time and time again women lose out in elections to men; and that efforts to increase the percentage of females on the bench are often only temporarily reflected in the judicial panels. Psychological and behavioural studies can help us explain why this is the case and uncover how effective measures like quotas can promote female representation in international law. These are especially interesting since certain courts—like the European Court of Human Rights—require state parties to nominate at least one female out of three proposed candidates to the Council of Europe.<sup>34</sup> By looking at studies that have explored such solutions, we can see how effective such measures are likely to be in redressing gender bias inherent in the international legal sphere.

<sup>32</sup> There are some exceptions to this. Patricia G Devine and others, 'A Gender Bias Habit-Breaking Intervention Led to Increased Hiring of Female Faculty in STEM Departments' (2017) 73 *Journal of Experimental Social Psychology* 211; Molly Carnes and others, 'The Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial' (2015) 90 *Academic Medicine* 221.

<sup>33</sup> See Chapter 4 by Shiri Krebs in this volume.

<sup>34</sup> Parliamentary Assembly of the Council of Europe, 'Committee on the Election of Judges' <<https://pace.coe.int/en/pages/committee-30/AS-CDH>> accessed 9 April 2024.

### 3.1. Modelling bias and the glass ceiling

Recently, studies in psychology have shown that even small preferences for men (rather than women) in an organisational setting can create and maintain gender disparities and lead to the creation of a glass ceiling. Through a computer simulation Du, Nordell, and Joseph explored how interpersonal discrimination affects the dynamics within the organisation and how from the bottom up such small gender biases (either expressed by providing women fewer opportunities for being involved on projects or by assessing their work slightly less generously than men's) can lead to great gender disparities in the corporate hierarchy and block women and other marginalised groups from achieving top positions within the organisation.<sup>35</sup> The study looked at situations where women's successes are valued at 2 per cent less than men's in a single situation,<sup>36</sup> or women are provided with 2 per cent less credit than men,<sup>37</sup> or are penalised for exhibiting non-feminine behaviour such as self-promotion;<sup>38</sup> similarly if they receive 2 per cent fewer opportunities for work or growth than men. In these cases, even the small effect of the bias translated into a considerably lower rate of promotability for women. Even more importantly, when these interpersonal discrimination biases were repeated over and over again and reinforced at every level of the organisational hierarchy (ie every time that men were being given a preference for opportunities or promotion over women), the effect of the bias was amplified and with repeat iterations created a glass ceiling, where at higher levels of the hierarchy women were no longer visible. For example, being given an opportunity to work on a project meant that the individuals had the opportunity to succeed and show their skills, which in turn led to more opportunities for work and for promotion. If, at each turn, women were disadvantaged by only 2 per cent, over time this meant that it was not the depth of bias that worked to their detriment but rather its repeat iteration and the frequency with which that preference was given to men through the hierarchical

<sup>35</sup> Richard F Martell, David M Lane, and Cynthia Emrich, 'Male-Female Differences: A Computer Simulation' (1996) 51 *American Psychologist* 157.

<sup>36</sup> Corinne A Moss-Racusin and others, 'Science Faculty's Subtle Gender Biases Favor Male Students' (2012) 109 *Proceedings of the National Academy of Sciences* 16474; Emilio J Castilla, 'Gender, Race, and Meritocracy in Organizational Careers' (2008) 113 *American Journal of Sociology* 1479; Chieh-Chen Bowen, Janet K Swim and Rick R Jacobs, 'Evaluating Gender Biases on Actual Job Performance of Real People: A Meta-Analysis 1' (2000) 30 *Journal of Applied Social Psychology* 2194; Janet Swim and others, 'Joan McKay versus John McKay: Do Gender Stereotypes Bias Evaluations?' (1989) 105 *Psychological Bulletin* 409; Janet K Swim and Lawrence J Sanna, 'He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures' (1996) 22 *Personality and Social Psychology Bulletin* 507; Alice H Eagly, Mona G Makhijani, and Bruce G Klonsky, 'Gender and the Evaluation of Leaders: A Meta-Analysis' (1992) 111 *Psychological Bulletin* 3.

<sup>37</sup> Heather Sarsons and others, 'Gender Differences in Recognition for Group Work' (2021) 129 *Journal of Political Economy* 101.

<sup>38</sup> Richard F Martell, Cynthia G Emrich, and James Robison-Cox, 'From Bias to Exclusion: A Multilevel Emergent Theory of Gender Segregation in Organizations' (2012) 32 *Research in Organizational Behavior* 137.

structure within the organisation that led to the creation of pervasive disparities in the corporate hierarchy. Differences in promotion opportunities significantly altered career trajectories but only for a small number of individuals who benefited immensely, whilst others—mostly women—were losing out consistently. The more levels of hierarchy existed within the organisation, the greater the resulting bias at the end. Those women who were found at the top level of the hierarchy had a greater track record of successes than their male counterparts, showing that women had to work much harder and show more successes than men to achieve the same level in the hierarchy.

From international legal perspective, this study is especially important because it suggests that even in hierarchies and societies where discrimination is not visible, several forces—such as more opportunities for growth or success—could be leading to underrepresentation of women in international judicial and quasi-judicial panels, international organisations, and international legal college more generally. First, the study shows how even a small preference for men tends to have a great impact on the composition of bodies, panels, and organisations. In international law, this preference can be seen frequently: when states nominate candidates to judicial positions, they often propose men or when required to nominate multiple candidates, they often put men at the top of their lists. In the European Court of Human Rights (ECtHR), where states send a list of three candidates, one of which needs to be a woman, states only rarely put women at the top of the list or propose an all-women list. When the voting takes place afterwards, the Council of Europe members give precedence to those candidates that are ranked first.<sup>39</sup> As a consequence, only 30–35 per cent of judges at the ECtHR are women and there are still cases that are adjudicated in men-only panels.<sup>40</sup> Unless gender is made a priority, the salience bias will push towards male appointments.

The problem is even more visible before a more traditional international law body, like the International Court of Justice, where judges' tenure lasts longer than at the ECtHR. There, the number of women has only recently raised to four out of fifteen judges and whilst these appointments have been celebrated, they are still very few and far between. In addition, counsel appearing before the Court are mainly men. Recently, legal teams have started including female members, but these are usually at the junior end.<sup>41</sup> Although certain changes can be noticed, the lack of opportunities for women mean that there are fewer chances to show one's skills and fewer opportunities for success, which in turn reduces the potential

<sup>39</sup> This was the case until the Council of Europe started to be more heavily involved in the judicial selection process. Now, the ordering is alphabetical, though preferences of states may trickle through in other ways.

<sup>40</sup> Stéphanie Hennette Vauchez, 'More Women—But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights' (2015) 26 *EJIL* 195.

<sup>41</sup> Iben Vagle, 'The (Un)Changing Face of ICJ Advocacy' (5 December 2023) *EJIL:Talk!* <[www.ejilalk.org/the-unchanging-face-of-icj-advocacy](http://www.ejilalk.org/the-unchanging-face-of-icj-advocacy)> accessed 1 February 2024.

to be appointed to a panel next time around. The PITAD Investment Law and Arbitration Database shows this more clearly, with the majority of the investment arbitrators being male.<sup>42</sup> Only two female arbitrators stand out—consistently appearing in arbitration panels and in terms of numbers outperforming all their male colleagues in frequency of appointments.<sup>43</sup> Beyond these two exceptional females, a small group of white men are consistently claiming appointments, blocking any chances of diverse appointments. Of course, the vicious circle is determined by states and investors who choose arbitrators. In this regard, social networks are important, but the salience bias pushes states to opt for those arbitrators that have served before and/or for those that tend to favour one or the other party, and so on. It is this group that benefits most from the opportunities and is able to achieve more success, thus guaranteeing future appointments. A close group of arbitrators therefore controls this area and has created a glass ceiling that seems almost impossible to break.

### 3.2. The complex dynamics of societal norms and the culture of the international legal community

The second aspect in which Du, Nordell, and Joseph's study can help illuminate the underrepresentation of women in the international legal college is that it reveals how biases develop through interaction of community culture and wider societal norms. As another chapter in this volume explains, socio-cultural factors affect how humans acquire and process information.<sup>44</sup> In particular, cognitive sociologists show that individuals in different cultures have different attention patterns and perceive reality in different ways.<sup>45</sup> Socio-cultural structures thus often underlie individuals' cognitive processes, though they vary and different social groups are likely to show different cognitive-cultural patterns.<sup>46</sup>

<sup>42</sup> Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *Journal of International Economic Law* 301.

<sup>43</sup> Susan Franck, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 *Columbia Journal of Transnational Law* 429; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 *EJIL* 387; Shashank P Kumar and Cecily Rose, 'A Study of Lawyers Appearing before the International Court of Justice, 1999–2012' (2014) 25 *EJIL* 893.

<sup>44</sup> See Chapter 9 by Moshe Hirsch in this volume, citing Karen Cerulo, 'Representation and Integration: An Introduction' in Karen Cerulo (ed), *Culture in Mind: Toward a Sociology of Culture and Cognition* (Routledge 2002) 113; Eviatar Zerubavel, 'Cognitive Sociology: Between the Personal and the Universal Mind' in Wayne H Brekhus and Gabe Ignatow (eds), *The Oxford Handbook of Cognitive Sociology* (OUP 2019) 31, 37–38.

<sup>45</sup> Karen A Cerulo, Vanina Leschziner, and Hana Shepherd, 'Rethinking Culture and Cognition' (2021) 47 *Annual Review of Sociology* 63, 64.

<sup>46</sup> Hirsch (n 44). For a criticism of the reductionist view assuming that law is only a mirror of society, see, eg, David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001) 12, 15.

In their model, Du, Nordell, and Joseph focus not only on personal preferences but also note that corporations—like societies—are complex social systems, where social norms and stereotypes diffuse over time through individuals and levels within the organisation, and back and forth between organisation and broader society.<sup>47</sup> For example, they note that individuals tend to be harsher on women who do not display the culturally prescribed behaviour stereotypical of their perceived gender, or they tend to see them as less risk-taking.<sup>48</sup> In addition, family leave and flexible working time play significant roles in limiting the upward mobility of women in the workplace.<sup>49</sup> These stereotypical views are pervasive and place emphasis on innate or learned differences between men and women, implying immutability and permanence, although in fact there is often very little basis for them.

However, the interactions between these perceptions and different structures and hierarchical levels create feedback processes. These are difficult to explain through simple empirical analysis and so instead we need complex social system approaches to understand how individual-level differences or biases are influenced by overarching cultural norms, and how these propagate from lower levels to the top levels of an organisational structure.<sup>50</sup> By modelling separately and together the operation of organisational and societal norms at meso and macro level, how they interact and create feedback loops, and how they reproduce gender disparities in the long term, Du, Nordell, and Joseph show how prevalent bias is within society at large.

In this regard, the study is also better able to explain previous studies, which showed that intergroup bias is insidious in this context. For example, studies of the Israeli army, law students, and blue-collar work groups showed that a greater proportion of men results in more bias against women.<sup>51</sup> As more men appear in organisations or communities, especially if in higher positions, gender disparities increase. Scholars have shown that this only works one way: in the few settings

<sup>47</sup> Yuhao Du, Jessica Nordell, and Kenneth Joseph, 'Insidious Nonetheless: How Small Effects and Hierarchical Norms Create and Maintain Gender Disparities in Organizations' (2022) 8 *Socius* 23780231221117888.

<sup>48</sup> Renate Schubert and others, 'Gender Specific Attitudes towards Risk and Ambiguity: An Experimental Investigation', Technical Report [2000] Economics Working Paper Series; Ernesto Reuben, Paola Sapienza, and Luigi Zingales, 'Taste for Competition and the Gender Gap among Young Business Professionals', Technical Report [2015], National Bureau of Economic Research; Linda Babcock and Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton UP 2004).

<sup>49</sup> Joan Williams and Nancy Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated against on the Job' (2003) 26 *Harvard Women's Law Journal* 77; Becky Pettit and Jennifer Hook, 'The Structure of Women's Employment in Comparative Perspective' (2005) 84 *Social Forces* 779; Claudia Goldin and Lawrence F Katz, 'A Most Egalitarian Profession: Pharmacy and the Evolution of a Family-Friendly Occupation' (2016) 34 *Journal of Labor Economics* 705; Julia B Bear, 'Forget the "Mommy Track": Temporal Flexibility Increases Promotion Aspirations for Women and Reduces Gender Gaps' (2021) 45 *Psychology of Women Quarterly* 294.

<sup>50</sup> Benjamin Ewert, Kathrin Loer, and Eva Thomann, 'Beyond Nudge: Advancing the State-of-the-Art of Behavioural Public Policy and Administration' (2021) 49 *Policy and Politics* 3.

<sup>51</sup> Asya Pazy and Israella Oron, 'Sex Proportion and Performance Evaluation among High-Ranking Military Officers' (2001) 22 *Journal of Organizational Behavior* 689.

where women dominated higher levels of the corporate hierarchy, there was little evidence that men were disadvantaged in promotion. Whilst women's lack of representation in certain occupations exacerbates disadvantage, men—especially heterosexual white men, when in short supply—enjoy a 'glass escalator, where they are put on a fast track to advanced positions'<sup>52</sup> and 'their evaluation is not affected by their proportion.'<sup>53</sup>

These descriptions speak of overrepresentation of men in different settings and are similar to what one notices in the international legal college.<sup>54</sup> Du and others' study can thus help us understand that the absence of women in the international legal community is, on one hand, a result of intergroup bias, where men as the ingroup favour other men. On the other hand, however, the glass ceiling is also a result of a complex dynamic social system, where personal biases stemming from wider societal stereotypes (or how we think women should behave) influence how women are perceived. These wider cultural and societal norms directly influence the power dynamics in international law—including international law appointments and promotions—and in turn who gets to sit on international courts and tribunals. When states propose candidates, stereotypes of what role women should play may direct nominations to international fora. Even if today's international law community seeks to establish a more diverse and inclusive culture, the fact that individual member states have not espoused the same values and that national societies remain gender-biased will continue to push the feedback loops towards gender disparities. When thinking about *why* women are underrepresented and have been silenced in international law, we cannot disregard the pervasiveness of the influence of the surrounding society and culture. Specifically, we cannot look for causes of discrimination only at the international level (eg as intergroup bias), but also have to turn our attention to domestic level, from where proposals for nominations come (and also from where stereotypes are likely to stem).

### 3.3. Effectiveness of quotas

Du and others' study shows the insidiousness of bias and raises the question of a glass ceiling and specifically how difficult it is to redress inequalities and discrimination within a closed group, where broader societal values (and biases) may be pushing towards a small preference for one gender. One of the 'fixes' that the study tests are gender quotas; that is, the requirement to achieve a specific number or representation of women in an organisation. The arguments for a quota of women

<sup>52</sup> Michelle J Budig, 'Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator?' (2002) 49 *Social Problems* 258; Adia Harvey Wingfield, 'Racializing the Glass Escalator: Reconsidering Men's Experiences with Women's Work' (2009) 23 *Gender and Society* 5.

<sup>53</sup> Pazy and Oron (n 51).

<sup>54</sup> Puig (n 43).

have also been debated in international law.<sup>55</sup> As mentioned earlier, the ECtHR has a requirement that one of the three candidates proposed to the Court from each member state has to be a woman. Similar requirements for the presence of women can be implied or are increasingly expected elsewhere.<sup>56</sup> The question Du and others' study explores is whether these quotas work and whether they redress the gender bias and prevent the development of a glass ceiling.

The study tested whether the requirement to promote women until 70 per cent representation is achieved inside the organisation would redress the gender bias. The results of the model show that regardless of the time period the quota measure was introduced for, once the quotas were no longer applied, the dynamics returned to normal and gender disparities arose again. This was due to the operation of the same dynamics—the personal/societal bias based on stereotypes, which gave men more opportunities for growth and promotion, and over time completely nullified any progress made by the quota measure. The study shows that the impact of a quota requirement is only temporary and that gender disparities will return to normal over time unless the societal and cultural norms within the community also change. The conclusion therefore is that in addition to adopting specific measures to increase the number of women in international legal college, the culture of the local community has to be strong enough to overpower macro-level gender norms (societal norms about whether women fit within certain roles, whether they should be in those roles, etc—ie societal norms which affect and create interpersonal bias). Until then, the glass ceiling in international law will continue to exist.

Du and others' model extends our understanding of how the glass ceiling arises and why it can be resistant to change. By synthesising existing psychological and structural theories of discrimination into a mathematical model, the study has quantified how complex systems can produce and maintain inequality. The modelling shows how pervasive bias is—how it trickles from lower (domestic) levels to higher (international) levels, and how a specific community—international legal college—is not immune to the prevailing cultural and societal stereotypes. In many ways, the model shows how minimal preferences at the level of an individual can have an impact at the systemic level and can effectively exclude one group (women) from decision-making processes and thus create long-term structural inequality. The terms used by feminist studies such as 'oppression' and 'discrimination' seem more than apt. Cognitive studies help to (1) pinpoint the variables that lead to discrimination—individual preferences (which can lead to conscious or unconscious bias), societal influence (eg stereotyping and expectations of women); (2) understand the processes and feedback loops that arise from these, such as the bottom-up influence of domestic on international levels

<sup>55</sup> Jessica Kim and Kathleen M Fallon, 'Making Women Visible: How Gender Quotas Shape Global Attitudes toward Women in Politics' (2023) 19 *Politics and Gender* 981.

<sup>56</sup> Vagle (n 41).



and then the intergroup relationships that give preference to ingroup members, leading to structural inequality; and (3) understand the resistance of these existing structures to any temporary interventions, such as quotas. In the end, the model reveals that the solution to status quo are *permanent* quotas in favour of the discriminated group.

#### 4. Using Cognitive Science to Debunk the Myth of a Different Voice

There are two arguments made for a higher representation of women on international judicial benches. First, the equal representation argument, which essentially posits that women and men should be equally represented on international bodies. Under this argument, it is clear that states are under an obligation to ensure that both men and women are given equal opportunities to participate. It also claims that the legitimacy of international courts and tribunals can be adversely affected by sex-underrepresentative benches. As many have claimed, the ‘time is ripe to achieve sex-representative international court benches.’<sup>57</sup>

The second argument is more outcome motivated. Many argue that women bring a different experience and a different voice to a judicial panel, and that this has implications for the content and focus of international law. This argument is made across different areas of scholarship: by some feminist scholars, in general international literature, as well as in other law scholarship.<sup>58</sup> In the next sections, I explain how the argument about women’s ‘different voice’ is really an argument about cognition—the assumption that women and men think differently and therefore approach adjudication (and or treaty making) differently. I then query whether the evidence supports such a view and conclude by arguing that the ‘different voice’ argument is a damaging myth that imposes too many requirements on women as ‘women’ on judicial panels and perpetuates stereotypes. Bringing together both cognitive insights and feminist studies, I conclude that the second argument about a ‘different voice’ should be abandoned, but that the first argument for equal representation remains valid and should stand on its own.

<sup>57</sup> Nienke Grossman, ‘Achieving Sex-Representative International Court Benches’ (2016) 110 *AJIL* 82.

<sup>58</sup> Nienke Grossman, ‘Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?’ (2011) 12 *Chicago Journal of International Law* 647; Patricia Wald, ‘Women on International Courts: Some Lessons Learned’ (2011) 11 *International Criminal Law Review* 401, 403; Josephine Jarpa Dawuni, ‘African Women Judges on International Courts: Symbolic or Substantive Gains’ (2018) 47 *University of Baltimore Law Review* 199, 232–34, 243–44; Fionnuala Ní Aoláin, ‘More Women—But Which Women? A Reply to Stéphanie Hennevaux’ (2015) 26 *EJIL* 229.

#### 4.1. Stereotypical views of women's cognition and contribution

The scholarly literature suggests that women judges bring a different perspective to the law than their male counterparts.<sup>59</sup> Carol Gilligan argues that women and men resolve moral problems differently. She says that women define themselves through their connections with others and perceive morality in terms of these interconnections, whilst men tend to define themselves in terms of individual achievement and autonomy and stratify morality based on a hierarchy.<sup>60</sup> Specifically, she argues that women are more likely to view the resolution of conflicts as a problem of care and responsibility, leading to the creation of a care-based feminine jurisprudence, as opposed to the more rights-centred approach characteristic of men that leads to clear winners and losers.<sup>61</sup> Some authors speak of 'emotional differences' and underline the previously mentioned stereotypes of risk-taking; others underline that the male perspective tends to emphasise separation, individual rights, and abstract rules, whilst women's experience affects perspectives on the law itself and legal processes.<sup>62</sup> Other scholars argue that women seek different outcomes from legal processes than their male colleagues and that they attach different weights to the factual aspects of identical situations.<sup>63</sup> In this regard, women due to their differing socialisation and life experiences are said to gather information, seek interpretations, uphold values, and determine case outcomes in a different way than men.<sup>64</sup> Thus gender influences should be found in all legal contexts and areas of law.<sup>65</sup>

Additionally, Gilligan argues that women are outsiders in male-dominated professions, causing women to have greater empathy for individuals and groups outside the mainstream.<sup>66</sup> It is argued that this is especially the case in the context of cases directly involving women-related policy issues: sexual harassment, sexual violence, and discrimination claims. In essence, the message is that female judges are prone to protect other women as representatives of their class, though some of

<sup>59</sup> Susan L Miller and Shana L Maier, 'Moving beyond Numbers: What Female Judges Say about Different Judicial Voices' (2008) 29 *Journal of Women, Politics and Policy* 527, 529.

<sup>60</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (reprint edn, Harvard UP 2016). However, note that this may be culturally dependent: Geert Hofstede, 'Dimensionalizing Cultures: The Hofstede Model in Context' (2011) 2 *Online Readings in Psychology and Culture* <<https://scholarworks.gvsu.edu/orpc/vol2/iss1/8>> accessed 10 April 2024.

<sup>61</sup> Fiona Kay and Elizabeth Gorman, 'Women in the Legal Profession' (2008) 4 *Annual Review of Law and Social Science* 299, 321; Ann C Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373.

<sup>62</sup> Gilligan (n 60).

<sup>63</sup> Phyllis Coontz, 'Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?' (2000) 18 *Gender Issues* 59, 71.

<sup>64</sup> Suzanna Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 *Virginia Law Review* 543, 583.

<sup>65</sup> Christina L Boyd, Lee Epstein, and Andrew D Martin, 'Untangling the Causal Effects of Sex on Judging' (2010) 54 *American Journal of Political Science* 389, 390.

<sup>66</sup> Gilligan (n 60).

the accounts add that in these cases women bring a different understanding and experience to the issue of differential treatment and minority protection.<sup>67</sup>

These accounts do foreground several things: first, they put forward the stereotypical view of women and the different voice that they are supposed to bring to the discussion. They speak of a different cognitive process that women undergo—their caring and cooperative role, the empathy and other emotions that are seen as ‘feminine’—and underline their impact for the areas of law specific to the female experience, such as discrimination and sexual harassment. It is important to underline that there is little empirical proof that women’s cognitive processes differ from men’s—whether rational or unconscious errors in decision-making are concerned.<sup>68</sup> In fact, medical scholars have found ‘that most gender differences are not large enough to support the assumption of sexual dimorphism in terms of brain anatomy, brain function, cognition, and behaviour’. Instead, ‘brain and cognitive features are modulated by environment, culture, and practice’ and in addition to hormone levels and so on interact with ‘current gender stereotypes’.<sup>69</sup>

In addition to reinforcing the stereotypes about women, these narratives therefore also create unrealistic (and baseless) expectations about what role women decision-makers should play once in their position.<sup>70</sup> In this regard, the description puts forward an almost instrumental view of women, as being there to represent other women, help explain experiences of other women, and make decisions in favour of other women. When women find themselves in those positions, they are therefore seen ‘as representative of their gender, rather than as expert lawyers’.<sup>71</sup> Of course, the question arises to what extent women justices can really be said to be characteristic of the ‘general’ female group from which they are drawn. The higher you go in your career, the more likely you are to break new legal ground, but the less characteristic you are of the general group of women. Prior empirical studies have found that women who are the most outspoken advocates for women’s issues are likely to occupy positions at the extreme liberal or conservative ends and thus

<sup>67</sup> Charles M Cameron and Craig P Cummings, *Diversity and Judicial Decision-Making on the U.S. Courts of Appeals* (30 March 2003) (unpublished manuscript, on file with author); Gerard S Gryski, Eleanor C Main, and William J Dixon, ‘Models of State High Court Decision Making in Sex Discrimination Cases’ (1986) 48 *Journal of Politics* 143; Jennifer L Peresie, ‘Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts’ (2005) 114 *Yale Law Journal* 1759.

<sup>68</sup> Lutz Jäncke, ‘Sex/Gender Differences in Cognition, Neurophysiology, and Neuroanatomy’ (2018) F1000Research, 7, F1000 Faculty Rev-805. <https://doi.org/10.12688/f1000research.13917.1>; Namrata Upadhayay and Sanjeev Guragain, ‘Comparison of Cognitive Functions between Male and Female Medical Students: A Pilot Study’ (2014) 8 *Journal of Clinical and Diagnostic Research* BC12.

<sup>69</sup> Jäncke (n 68).

<sup>70</sup> Juliana Santos de Carvalho and Justina Uriburu, ‘Problematising Diversity: The Change That International Lawyers (Do Not) Want for International Courts’ (2022) 10 *London Review of International Law* 391, 409, who speak of this as a ‘burden of the minority’.

<sup>71</sup> Liesbeth Lijnzaad, ‘The Smurfette Principle: Reflections about Gender and the Nomination of Women to the International Bench’ in Freya Baetens (ed), *Identity and Diversity on the International Bench: Who Is the Judge?* (OUP 2020) 29.

voice extreme dissenting views in criminal and economic cases.<sup>72</sup> It was not their gender that was key to their outspokenness but rather their political positions. Even in narratives that do not speak of representation, the expectation is that the minority candidate will show affinity or adjudicate with more sensitivity towards their own community.<sup>73</sup>

The instrumental and reductionist view of what role women (should) play in decision-making roles is reinforced by the *Smurfette* principle, namely the fact that when women sit on decision-making bodies, they will still generally constitute a minority. As Liesbeth Lijnzaad, judge at the International Tribunal for the Law of the Sea, argues, the image of one woman in a group of all men reinforces the image from popular visual culture about the role of *Smurfette*, 'the one woman' singled out as 'the only woman' in the room of men.<sup>74</sup> Whilst 'her presence suggests progress', it has little true impact.<sup>75</sup> Namely, when members of minority are treated as mere 'tokens', perceived to be there for no other reason than because of their group membership and identity, studies have shown that their behaviour mirrors the behaviour of the majority.<sup>76</sup> Effectively, individual minority members tend to adapt to the majority members in the group. In this regard, even if a 'different voice' exists, it is lost. The mere presence of women may therefore not 'be enough to have a discernable effect on the output of that environment'.<sup>77</sup> Instead, studies have shown that a critical mass is needed for minority members to exhibit different behaviour.<sup>78</sup> Once this critical mass is reached, the impact of a different voice from these minorities can be visible, as 'group interactions will change and substantive differences in the behaviour of the involved groups will begin to emerge'.<sup>79</sup>

## 4.2. Inconclusive evidence of a different voice

The expectations are reinforced by some domestic studies, which find that women at the US state Supreme Court level were more likely to produce pro-female decisions.<sup>80</sup> Similarly, a study of the Michigan State Supreme Court, examining a

<sup>72</sup> David W Allen and Diane E Wall, 'Role Orientations and Women State Supreme Court Justices' (1993) 77 *Judicature* 156.

<sup>73</sup> De Carvalho and Uriburu (n 70).

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> Paul M Collins Jr, Kenneth L Manning, and Robert A Carp, 'Gender, Critical Mass, and Judicial Decision Making' (2010) 32 *Law and Policy* 260.

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> Susan W Johnson and Donald R Songer, 'Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts' (2009) 30 *Justice System Journal* 265; Phyllis Coontz, 'Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?' (2000) 18 *Gender Issues* 59.

period of over thirteen years, found that 59 per cent of the time white Republican female judges abandoned their party to vote to support female litigants in divorce cases.<sup>81</sup> Others have found that in sex discrimination cases women judges were 10 per cent more likely to find for the party alleging discrimination.<sup>82</sup> Similarly, a study of state supreme courts noted that female justices had a higher likelihood of supporting the woman's side in cases related to property settlement on divorce, birth control, child support, sex discrimination, and sexual assault.<sup>83</sup> At the federal court of appeals level, female judges were more likely than their male counterparts to side with female plaintiffs in cases of employment discrimination.<sup>84</sup> A study of the Ontario Court of Appeal showed that women judges had a higher likelihood of ruling against male litigants in family law cases and defendants in criminal sexual assault cases.<sup>85</sup>

Yet, for every study that has shown that female judges vote differently than their male counterparts or side more often with female plaintiffs, there are studies that have found no evidence of the different voice. Kritzer and Uhlman and separately Gruhl find that in criminal cases there were no significant differences between women and men judges, but rather that male judges were more likely to give lesser sentences to female defendants.<sup>86</sup> In the only study in the European Union, Garoupa and others showed that the gender of the chamber (according to percentage of male judges) was not a driver of empirical results, though they note that the gender of the rapporteur may have been important.<sup>87</sup>

In the international legal context, in particular, only a few studies have looked at the impact of women judges on outcomes. The results of these studies have not been necessarily consistent. First, Erik Voeten studied the judgments of the ECtHR and found that consistent with the above literature, female judges were much

<sup>81</sup> Ewert, Loer, and Thomann (n 50). Elaine Martin and Barry Pyle, 'Gender, Race, and Partisanship on the Michigan Supreme Court' (2000) 63 *Alabama Law Review* 1205, 1225. Also Allen and Wall (n 72) 156 (finding in a sample of state supreme court women justices that they function as representatives of their gender in the pro-women decisions they make compared to men, as outsiders, and provide a different voice). Similar results were reported in Wisconsin and Minnesota. Elaine Martin and Barry Pyle, 'Gender and Racial Diversification of State Supreme Courts' (2002) 24 *Women and Politics* 35.

<sup>82</sup> Boyd and others (n 65) 390.

<sup>83</sup> Allen and Wall (n 72) 165.

<sup>84</sup> Sean Farhang and Gregory Wawro, 'Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making' (2004) 20 *Journal of Law, Economics, and Organization* 299; Donald R Songer, Sue Davis, and Susan Haire, 'A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals' (1994) 56 *Journal of Politics* 425, 436.

<sup>85</sup> James Stribopoulos and Moin A Yahya, 'Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario' (2007) 45 *Osgood Hall Law Journal* 315, 319.

<sup>86</sup> Herbert M Kritzer and Thomas M Uhlman, 'Sisterhood in the Courtroom: Sex of Judge and Defendant as Factors in Criminal Case Disposition' (1977) 14 *Social Science Journal* 77; John Gruhl, Susan Welch, and Cassia Spohn, 'Women as Criminal Defendants: A Test for Paternalism' (1984) 37 *Western Political Quarterly* 456.

<sup>87</sup> Angela Huyue Zhang, Jingchen Liu, and Nuno Garoupa, 'Judging in Europe: Do Legal Traditions Matter?' (2018) 14 *Journal of Competition Law and Economics* 144.

more likely than their male counterparts to find in favour of a violation in discrimination cases filed by women but not on other issues.<sup>88</sup> However, female judges were on average more likely to find violations regardless of applicant gender, especially in physical integrity rights cases. This finding was also consistent with the literature on gender and international relations, which suggested that female decision-makers may be less willing to trade off physical integrity rights over security concerns. Beyond this, however, the results did not suggest a considerable difference in how men or women approached decision-making, or that they were more favourably disposed towards applicants. The proportion of female judges does not correlate significantly with a greater probability of a violation finding by the Court.<sup>89</sup>

My own research on damages has also found conflicting results. In general, the ECtHR tends to disregard victim characteristics in determining non-pecuniary damage and instead looks at the respondent state and the frequency with which it violates a given article of the Convention. Yet, taking into account the composition of the adjudication panel, the empirical analysis shows that female-majority panels disregard the violating state and instead focus on the victim and her characteristics. Specifically, they look at who the victim is, what their age may be and whether they are vulnerable, and how they may have contributed to the violation (or were blameless). These awards are generally higher than awards by male-majority panels.<sup>90</sup> Women-majority panels therefore appear to take a different approach to the assessment of pain and suffering in the context of damage setting, but the impact of this can be confusing and inconsistent. In certain cases, women judges were found to be harsher on women victims, whilst in others they were more generous towards them.

In sum, there is very little that can be conclusively discerned from these various empirical cognitive studies. The conclusions of the different studies are inconsistent and occasionally contradictory, and the effect of gender is difficult to isolate. Scholars have noted that education and training that judges of both genders undergo and the processes by which they obtain their jobs could potentially erase any pre-existing gender differences.<sup>91</sup> Often—especially on positions at the extreme liberal or conservative ends—it is easier to point to political leanings rather than gender as determinative of women's positions.

<sup>88</sup> Erik Voeten, 'Gender and Judging: Evidence from the European Court of Human Rights' (2021) 28 *Journal of European Public Policy* 1453.

<sup>89</sup> Beyond the composition of judicial panels, Voeten also found that women filed fewer applications before the Court than men and that they were disproportionately likely to file property rights cases, addressing longstanding inequities concerning pensions, divorce, inheritance, and housing.

<sup>90</sup> Veronika Fikfak, 'Bias on the Bench' (working paper).

<sup>91</sup> Lani Guinier, Michelle Fine, and Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* (Beacon Press 1997); John Gruhl, Cassia Spohn, and Susan Welch, 'Women as Policymakers: The Case of Trial Judges' (1981) 25 *American Journal of Political Science* 308; Barbara Palmer, 'Women in the American Judiciary' (2001) 23 *Women and Politics* 91.

## 5. Conclusion: Debunking the Myth

Since the distinct voice argument therefore appears elusive, perhaps it is time to move away from the myth of a ‘different voice’ as the argument for female presence in decision-making roles. As cognitive studies have shown, there are few biological differences between the two genders, and it is mostly stereotypes constructed by society and culture that direct our ‘different’ behaviour. Even then, the results are inconclusive and outcomes in individual cases are difficult to predict. Yet, if we continue to expect of women to think, behave, and decide differently, we reinforce and perpetuate a myth of a ‘different voice’, a stereotype that singles out women as different from men; essentialises, categorises them into one category, rather than allowing them to exist on multiple axes (seeing identity as monolithic and static); strips them of agency by requiring them to show affinity and act as representatives of their gender; and imposes on them the burden of expectations about changing the system from within and for the better of other women.<sup>92</sup> As Judith Butler argues, representation requires ‘a stable category’ to make groups visible.<sup>93</sup> Underlying women’s “shared experiences” to increase their visibility and legitimate them as political subjects worthy of representation may reinstate essentialising structures of power, the very structures from which feminist emancipation is sought.<sup>94</sup> By focusing on how women are different from men and how they are similar to each other, we run the risk of perpetuating stereotypes about groups and subsequent ingroup–outgroup bias. By reducing women to one single label, we reinforce and perpetuate a myth.

This applies a fortiori also to feminist studies. As put by those whose self-confessed confrontational reading of traditional and feminist scholarship emphasised their strong ‘walling practices’ (ie practices that divide and categorise), reinforcing ‘a liberal, elitist, and gender essentialist status quo of international law and its institutions’,<sup>95</sup> perhaps what is needed now is a radical reimagining of a future where more ‘diverse voices can engage with (or against) the international legal order.’<sup>96</sup> We should rather argue in favour of diversity along multiple axes and multiple categories of views and experiences. In this context, the fluidity and complexity of identities has to be recognised and taken into account, as well as reconciled with representational politics.<sup>97</sup> Cognitive studies—especially experimental and modelling practices—that can debunk certain myths as stereotypes appear crucial in this process of ‘taking down walls’ between groups as well as areas of international law.

<sup>92</sup> De Carvalho and Uriburu (n 70).

<sup>93</sup> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1st edn, Routledge 2006) 6–7.

<sup>94</sup> De Carvalho and Uriburu (n 70) 415.

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> Judith Baxter, ‘Positioning Language and Identity: Poststructuralist Perspectives’ in Sian Preece (ed), *The Routledge Handbook of Language and Identity* (Routledge 2016) 34; Jasbir K Puar, ‘“I Would Rather Be a Cyborg Than a Goddess”: Intersectionality, Assemblage, and Affective Politics’ (2012) 2 *philoSOPHIA* 49.