

# UNITED NATIONS EMPLOYMENT LAW AND THE CAUSES FOR ITS FAILED SENIOR FEMALE APPOINTMENTS RECORD

Ilias Bantekas\*

## Introduction

The United Nations is one of the world's significant employers, with a multinational workforce stretching across all continents. Its ever-changing needs and the plethora of urgent and long-term circumstances it is mandated to address require constant recruitment at both junior and senior levels. The task of recruitment and promotions within the Organization is entrusted to and exercised by the Secretariat and as will become evident in the course of this article, the Secretary-General has been invested with a seminal exclusive authority, which he can unilaterally exercise in respect of senior appointments. This authority is complementary to the institutional employment law of the United Nations, which is circumscribed by its Charter, relevant General Assembly resolutions and the Secretariat's own Staff Rules and Regulations. The Secretariat has during the last two decades made a concerted effort to enhance the position of its female workforce through a system of quotas and policies aimed at securing a 50/50 equilibrium between men and women, both in terms of appointments and promotions.

This article seeks to discuss these developments in light of the UN's institutional employment law, but more importantly assess why these normative initiatives have failed to increase the presence of women at the senior levels of the Organization.<sup>1</sup> We examine in particular the practice of States with regard to their nominations for senior posts in international organizations and determine whether the lack of open and fair competitions constitutes an impediment to the nomination of female candidates. Practice suggests that when it comes to nominations for international posts, States somehow feel free to disregard their laws relating to appointments to equivalent domestic posts, where indeed such laws exist, particularly in the field of judicial appointments.<sup>2</sup> When such nominations are received by the Secretariat a powerful interplay of politics<sup>3</sup> and interpersonal relations further distorts the human resources orientation of the UN. To a very large degree we find these policies to have failed female appointments in the most senior echelons of the Organization, particularly women from the developing world, far

---

\* Professor of Public International Law, Brunel University, School of Law.

<sup>1</sup> According to the UN's Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), women currently comprise 37.2 percent in the professional and higher categories with appointments of one year or more. However, at the Under Secretary-General level women comprise only 17.5 percent with a notable decrease in recent years, while at the Assistant Secretary-General level the proportion of women to men is 22.2 percent. At the D level the average is slightly higher at about 28 percent. Available at: <<http://www.un.org/womenwatch/osagi/fpgenderbalancestats.htm>>.

<sup>2</sup> See generally S J Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, (2002) 10 *Feminist Legal Studies* 257, for a perspective on gender considerations relating to ECJ appointments.

<sup>3</sup> See E Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, (2007) 61 *International Organisations* 669.

more than their developed world counterparts. For obvious reasons, one should necessarily take into consideration the exigencies of UN field operations, which in all likelihood fail to give rise to positive discrimination obligations to accommodate gender particularities. Given that the UN's institutional culture plays a very significant part in this failure, we propose a radical reappraisal of the Organization's employment policies and rules with a view to achieving its stated goal of gender parity.

## **The Law Applicable to UN Employment Relations**

The employment relations of international organizations are principally governed by their founding constitutional treaty, as well as their Headquarters Agreement with the host State.<sup>4</sup> In reality, HQ agreements do not aspire to govern the organisation's employment relations, but only its legal status on the territory of the host State. However, there is no rule of international law that limits the parties in discussing employment matters in the their respective HQ agreement.<sup>5</sup> In the vast majority of cases the regulation of the organisation's institutional employment relations in the HQ agreement will be through a negative inference, if any. The constitutive treaty will most commonly provide general guidelines and principles, but will not elaborate much on the modalities of employment and the status of personnel, nor will it dictate matters relating to salaries, promotions, secondments, appointments, resolution of grievances, etc. These matters are too specific to be considered in a founding treaty and it is usually the Secretariat or the Assembly that puts in place the appropriate mechanisms, drafts staff rules and regulations, establishes administrative tribunals, hires personnel and generally caters for all matters relating to employment relations and human resources management. Equally, the various organs of the international organization, each within its designated sphere of competence, may well adopt a resolution that is only binding within the confines of the organization, by which it aims to resolve or clarify an employment issue.<sup>6</sup> There is thus a layered hierarchy within international organizations that definitively governs both its substantive as well as its procedural employment law and which is binding internally for each member of the organization and the legal person of the organization itself.<sup>7</sup>

---

<sup>4</sup> In accordance with Art III(7)(d) of the 1947 UN-USA Headquarters Agreement, 11 U.N.T.S. 11, all UN Rules and Regulations override the application of any US federal or State laws in respect of the internal regulation of the organisation. This provision certainly has a significant bearing on the applicable law in employment matters, which is left exclusively to the UN's institutional law.

<sup>5</sup> Arts 17, 23 and 25 of the HQ Agreement between Switzerland and the Global Fund for AIDS, TB and Malaria.

<sup>6</sup> UNAT has consistently held that UN General Assembly resolutions are, as far as staff members to whom they apply are concerned, conditions of employment to be taken into account by the Tribunal. See *Harris et al v UN Secretary-General*, UNAT Case No 68, Judgment No 67 (10 Dec 1956), para 5; *Belchamber v UN Secretary-General*, UNAT Case No 225, Judgment No 236 (20 Oct 1978); *Powell v UN Secretary-General*, UNAT Case No 234, Judgment No 237 (13 Feb 1979), para XII.

<sup>7</sup> See *Aglion v UN Secretary-General*, UNAT Case No 58, Judgment No 56 (15 Dec 1954), para 14, where UNAT held that the UN's Staff Rules and Regulations and the judgments of its administrative tribunal constitute binding internal law vis-à-vis the Organisation and its employees.

This observation seems to suggest that the law applicable to international organizations is solely international law, as well as the organization's institutional law. What place, if any, is there for domestic employment law? Even prior to the establishment of the United Nations, it was recognized that it was only the institutional law of international organizations that governed their employment relations and not the law of the host State, or the law of the State of the employee's nationality.<sup>8</sup> This is by no means an inherent element in the sphere of competence of international organizations, but is instead the result of serious policy considerations; for if the organization was to be an independent legal person from the person of its member States, and its employees free from the influence of any State, and moreover free to undertake their functions without being constrained by the law of the host State, which includes not having to settle their employment disputes in local courts, the organization would need to be able to dispose independently of its employment relations.<sup>9</sup> On the other hand, one could plausibly argue that it would certainly save an organization such as the UN significant administrative and financial resources had it decided to insert a clause in its contracts of employment empowering the courts of New York, or other local courts, to settle all disputes in accordance with the labor law of New York and subject to its Staff Rules and Regulations and the UN Charter. In this manner there would be no need to remove the employees' tax exemptions, privileges and immunities, save so far as this was specifically warranted by New York's employment legislation. The choice not to submit to this arrangement is certainly a calculated one. For one thing, a significant element pertaining to the organization's powers would be removed from its ambit and ceded to the un-checked and un-controllable power of local courts, which may potentially render litigation expenses very costly. Moreover, in a super-litigious jurisdiction such as the USA the unpredictability of the amounts of compensatory judgments is far too big a risk to undertake. Thus, ceding jurisdiction to local courts has the potential of undermining the organization by eroding its assets. Secondly, the submission to local laws and courts serves only to undermine the immunities and privileges of the organization and of its personnel because the applicable law would no longer be international, but domestic law, at least as far as the sphere of employment relations is concerned.<sup>10</sup> Given the founding treaty's broad language, there would in actual fact be no international law to challenge or override local law as a practical matter of *lex specialis*. Finally, if employment relations were governed by the laws of the host State, then the organization would be unable to hire the personnel it desired, or assign to them required functions, particularly where said persons and functions were contrary to the laws or policies of the host State. In a string of early UNAT cases, the Secretary-General had proceeded to terminate temporary-

---

<sup>8</sup> *International Institute of Agriculture v Profili* (1935), 5 A.D. 415.

<sup>9</sup> Art 100 of the UN Charter reads as follows:

- a) In the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their positions as international officials responsible only to the Organization.
- b) Each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

<sup>10</sup> See particularly the 1946 Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S 15.

indefinite contracts without renewing them as fixed term contracts and without giving any reasons or adequate notice to the plaintiffs. UNAT affirmed that the power of the Secretary-General to terminate these contracts in such a manner was limited by the UN Charter, General Assembly resolutions, the UN's Staff Rules and Regulations and other institutional instruments.<sup>11</sup> Amerasinghe asserts that the employees in question were nationals of the host State and that the Secretary-General terminated their contracts because they failed to act in conformity with US law.<sup>12</sup>

The Staff Rules and Regulations,<sup>13</sup> therefore, of the United Nations are of the utmost importance in regulating employment matters. They and the UN Charter, however, are not the only applicable source of law. We have already referred to the binding nature of UNAT judgments (although the Secretary-General may ultimately decide in theory not to follow them), but the same is true in respect of the contractual undertakings between the UN and its employees.<sup>14</sup> Given that unlike other international organizations where employment relations are governed by statutory provisions,<sup>15</sup> in the UN these are governed also by the specific terms of the contract of employment.<sup>16</sup> The terms of the contract, however, do not override the statutory provisions in the UN's institutional law that relate to employment, but are instead subject to its terms and conditions. The UNAT in the *Kaplan* case made it clear that:

... relations between staff members and the UN involve various elements and are not solely contractual in nature... In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements: All matters being contractual which affect the personal status of each member – e.g. nature of his contract, salary, grade; all matters being statutory which affect in general the organization of the international civil service and the need for its proper functioning – e.g. general rules that have no personal reference.<sup>17</sup>

Under UN Staff Regulation 4.1 the appointment of personnel is subject to the acceptance of a letter of appointment, a contractual undertaking, since it requires consideration on the part of the employee, but which is expressly subject to the organization's Staff Rules and Regulations.<sup>18</sup> The significance of this observation is that whereas the purely

---

<sup>11</sup> *Howrani and 4 Others v UN Secretary-General*, UNAT Cases Nos 17-21, Judgment No 4 (25 Aug 1951); in *Keeney v UN Secretary-General*, UNAT Case No 18, Judgment No 6 (4 Sep 1951), UNAT held that although the statements of cause assigned by the Secretary-General for the termination of the contract constituted adequate reasons for termination, nonetheless, procedural due process was wholly lacking.

<sup>12</sup> C F Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge UP, 2005), p 278.

<sup>13</sup> The authority to promulgate Staff Regulations was delegated to the General Assembly on the basis of Art 101 of the UN Charter. The first Regulations were set up by GA Res 590(VI) 2 Feb 1952. The current set of Regulations were adopted in 2000 and are contained in UN Doc ST/SGB/2000/7 (23 Feb 2000).

<sup>14</sup> The situation is rather complex in the UN system, due to the lack of a standard contractual form, which has led to a different set of Staff Rules being applicable only to particular types of employment contracts. The UN Secretariat has recently called for unification of all contracts under a single set of Regulations. See UN Doc A/61/255 (9 Aug 2006), paras 223ff.

<sup>15</sup> Particularly the EC and the OECD. See Amerasinghe, *supra* note 12, p 281.

<sup>16</sup> *Effect of Awards of Compensation made by the UN Administrative Tribunal*, Advisory Opinion (1954) ICJ Rep 47, at p 53.

<sup>17</sup> *Kaplan v UN Secretary-General*, UNAT Case No 27, Judgment No 19 (21 Aug 1953), para 3.

<sup>18</sup> UN Staff Regulation 4.1, which refers to Annex II(a)(i) of the same Regulations.

contractual elements cannot be amended without the agreement of the two parties, the statutory elements may always be altered at any time unilaterally by the General Assembly and these changes are binding on all staff.<sup>19</sup>

In deciphering the meaning of, and in giving effect to the UN's Staff Rules and Regulations, the UNAT has incorporated as applicable law elements of international law; particularly general principles of law, such as equity and justice,<sup>20</sup> estoppel,<sup>21</sup> fairness<sup>22</sup> and others. It seems prudent to include within this plethora of sources also general international law, but any rules to this effect can only be applicable where they have been incorporated in the expressed internal law of the United Nations. Thus, not every international treaty or customary rule is binding on the employment relationship of the UN with its employees, but only those that have been expressly incorporated in the organization by resolution of a principal organ or a subsidiary body thereto.<sup>23</sup>

A fundamental question arises as a result of our aforementioned observation that the regulation of all UN employment relations is governed by contract, subject to the institutional employment law of the United Nations. Can the UN decide to discriminate both in the recruitment process, as well as in respect of its applications for promotion in terms of sex, if by doing so it would not be in violation of the UN Charter, despite violating other human rights treaties and the laws of a great number of States? A response to this question will be provided in the next section.

### **The United Nations' Authority to Discriminate In the Context of its Institutional Employment Law**

Although the main focus of this article is on the UN's policies with regard to the employment of women in its higher policy-making and judicial echelons, the policies of an organization at its senior levels is correlated to that at its lower levels. The primary legal basis for this discussion is Article 8 of the UN Charter, which states that: "the UN shall place no restrictions on the eligibility of women to participate in any capacity and under conditions of equality in its principal and subsidiary organs". Given the significant workplace gender imbalances prevalent in the aftermath of the creation of the UN, the wording of Article 8 begs the question whether it is an objective that the Organization ought to pursue as a matter of mandate, or whether it is simply an undertaking of fairness

---

<sup>19</sup> *Kaplan*, supra note 17, para 3.

<sup>20</sup> *Vassiliou v UN Secretary-General*, UNAT Case No 262, Judgment No 275 (5 Oct 1981), although it was found not to have been breached in the circumstances of the case.

<sup>21</sup> *Smith v UN Secretary-General*, UNAT Case No 242, Judgment No 249 (8 Oct 1979), where the applicant claimed that the UN was estopped from terminating her contract as a result of collective work-stoppages (essentially a strike), because the organisation had not terminated other contracts in respect of similar action in the two years prior to her work-stoppage. While UNAT rejected her claim, it did consider the principle of estoppel applicable with regard to UN employment disputes.

<sup>22</sup> *Kleckner v UN Secretary-General*, UNAT Case No 518, Judgment No 483 (25 May 1990); *Chileshe v UN Secretary-General*, UNAT Case No 770, Judgment No 690 (21 July 1995).

<sup>23</sup> *Champoury v UN Secretary-General*, UNAT Case No 73, Judgment No 76 (17 Aug 1959), para VIII.

and even-handedness in the UN's employment procedures. A textual reading certainly seems to point to the latter construction, but the dynamic interpretation of Article 8, coupled with progressive legislation worldwide addressing gender disparity in employment matters, has radically altered the UN's institutional viewpoint on its obligations arising from this provision.

Although UNAT has had a chance to address sex discrimination in the late 1970s,<sup>24</sup> it was not until the late 1980s that the Secretariat started to adopt a more proactive stance with respect to the Organization's gender disparity all the way from its junior professional posts (P-1 and P-2) up until its senior D-1 and above positions. We shall not attempt here to narrate the entire history of all those measures, but it suffices to say that on 19 February 1987 the UN's Appointments and Promotions Board issued a set of Guidelines that elaborated and set out a policy of affirmative action in respect of appointments and promotions for women. Among the measures taken in the Guidelines was a so-called "seniority calculation technique" which in the case of women candidates served to average their years in service with a view to increasing their chances of promotion. It was very significant that UNAT held that these affirmative action Guidelines did not constitute sex discrimination in favor of women because the technique could not be employed to promote females whose relative qualifications or merit were lower than male colleagues, thus affirming that the Guidelines did not breach Article 101(3) of the UN Charter.<sup>25</sup> Moreover, the Guidelines were found not to have breached Article 8 of the UN Charter.<sup>26</sup> Since then a string of similar guidelines have been issued, particularly with respect to those departments in the UN system where gender parity is very low. Thus, in the *Grinblat* case, a similar set of affirmative action Guidelines were adopted by the Secretary-General<sup>27</sup> and challenged by a male applicant on the basis that they required promotion of female candidates with equal qualifications solely on the basis of gender.<sup>28</sup> The Appointments and Promotions Board had proceeded to interpret the Guidelines as requiring the disqualification of all men from the post in question. The UNAT held that while the imposition of corrective measures in addressing gender parity was legitimate and consistent with the relevant provisions of the UN Charter, the outright disqualification of men was not.<sup>29</sup>

It is clear that these affirmative action policies of the UN, both by the Secretary-General,<sup>30</sup> as well as the General Assembly are not aimed at appointing or promoting women over men generally, but only under circumstances where the applicants for the

---

<sup>24</sup> *Mahmoud v UN Secretary-General*, UNAT Case No 255, Judgment No 279 (7 Oct 1981). The claim of sex discrimination was considered but ultimately rejected on solid grounds in the opinion of this author.

<sup>25</sup> *Fayache v UN Secretary-General*, UNAT Case No 531, Judgment No 507 (27 Feb 1991), para VII.

<sup>26</sup> *Id.*, para VIII.

<sup>27</sup> UN S-G Bulletin on Improvement of the Status of Women in the Secretariat, UN Doc ST/SGB/237 (18 March 1991).

<sup>28</sup> *Grinblat v UN Secretary-General*, UNAT Case No 731, Judgment No 671 (4 Nov 1994).

<sup>29</sup> *Id.*, para IX. See also *Anderson Bieler v UN Secretary-General*, UNAT Case No 837, Judgment No 765 (26 July 1996), paras IV ff.

<sup>30</sup> UN S-G Administrative Instructions, UN Doc ST/AI/382 (3 March 1993), replaced by ST/AI/412 (5 Jan 1996) and as later replaced, entitled "Special Measures for the Achievement of Gender Equality".

same job possess “substantially the same qualifications”,<sup>31</sup> on the basis of the designated criteria of Article 101(3) of the UN Charter; i.e. efficiency, competence and integrity. Since the early 1990s the Assembly has set goals to address gender disparity in the Organization, starting with elevating the presence of women to 35 percent<sup>32</sup> and then gradually setting itself a target of 50/50 with respect to gender distribution in posts subject to geographic representation.<sup>33</sup> Equally, it has called for the admission or promotion of more women in the senior echelons,<sup>34</sup> but this is the subject of attention in a following section. Moreover, it has set up advisory and monitoring bodies to advance gender equality in the United Nations, particularly through the appointment of a Steering Committee for the Improvement of the Status of Women in the Secretariat,<sup>35</sup> as well as the establishment of the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI).<sup>36</sup> The UN is therefore no stranger to institutional positive discrimination in favour of women as a matter of policy.

It may be prudent at this juncture to briefly assess the positive discrimination policies of other intergovernmental organizations and States in relation to gender. It will become obvious that despite the existence of a rudimentary trend, the rules in each system are essentially context-specific. Article 141(4) of the EC Treaty allows States to adopt positive action rules “in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”. In practice, litigation over the scope of positive action has been confined to Article 2(4) of the EC’s Equal Payment Directive,<sup>37</sup> for which the ECJ has ruled out an effect that is tantamount to compulsory positive action.<sup>38</sup> The ECJ has made it clear that positive action will always be an exception to formal equality and that for a measure to be accepted as one of positive action it must be premised on clear and unambiguous criteria, address specific career inequalities and help women to conduct their professional life on a more equal footing with men.<sup>39</sup> This does not mean that positive action is not desirable; on the contrary, it is deemed an essential component of policy action as long as it complies with the principle of proportionality.<sup>40</sup> In the context of the European Convention of Human Rights (ECHR), its general provision on non-discrimination,

---

<sup>31</sup> *Grinblat*, supra note 28, para XI ff.

<sup>32</sup> GA Res 46/100 (16 Dec 1991).

<sup>33</sup> GA Res 51/67 (12 Dec 1996); GA Res 55/258 (27 June 2001), s XIV(2). In GA Res 59/277 (15 March 2005), the Assembly noted with regret that progress towards its 50/50 gender distribution targets in the senior levels of appointments was very slow, para VI(1).

<sup>34</sup> GA Res 57/305 (1 May 2003), paras 39-41; GA Res 59/277, id, at s VI(2).

<sup>35</sup> S-G Bulletin, UN Doc ST/SGB/1999/9 (24 June 1999).

<sup>36</sup> See GA Res 43/224 (21 Dec 1988), which established the Focal Point for Women, which through the Office of the Special Adviser is mandated to monitor and report on the status of women in the UN system.

<sup>37</sup> Directive 2002/73 EC of 23 Sep 2002, amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion and Working Conditions. OJ L 269 (5 Oct 2002).

<sup>38</sup> *Bilka-Kaufhaus GmbH v Weber von Hartz*, Case C-170/84 [1986] ECR 1607.

<sup>39</sup> *Griesmar v Minister for Economic Affairs, Finance and Industry and Minister for the Civil Service, State Reform and Decentralisation*, Case No C-366/99 [2001] ECR I-9383; *Abdoulaye and Others v Regie Nationale des Usines Renault SA*, Case C-218/98, [1999] ECR I-5723. See also M de Vos, *Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC* (EC Commission, 2007), p 19.

<sup>40</sup> *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, Case C-476/99, [2002] ECR I-2891, para 39.

Article 14, has not given rise to significant litigation given that the European Court of Human Rights (ECtHR) views the provision as giving rise generally to formal equality. Nonetheless, the ECtHR has highlighted the position that different situations must be treated differently, thus endorsing positive action under such circumstances.<sup>41</sup> The ECtHR was not, however, prepared to go as far as accommodating gypsy demands that their caravan sites be offered special treatment,<sup>42</sup> apparently because of potential policy implications. On the other hand, the jurisprudence of the UN Human Rights Committee clearly favours not only positive discrimination policies as such,<sup>43</sup> but moreover endorses compulsory positive action through Article 26 of the International Covenant on Civil and Political Rights (ICCPR).<sup>44</sup> Not surprisingly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has had an easy task in fully endorsing positive action in respect of Article 4(1) of CEDAW, which obliges States parties to adopt so-called “temporary special measures” in order to establish de facto equality between men and women. Although these are not compulsory *per se* on member States, the CEDAW Committee has noted that temporary special measures must be adopted where they are necessary and appropriate to accelerate the achievement of overall equality.<sup>45</sup> Discerning general principles is no easy matter and we have not even attempted to determine domestic policies, which differ among various subject matters within the same State (e.g. university admission and equality in employment). Nonetheless, it is clear that despite numerous limitations, positive discrimination is generally applicable in addressing gender imbalances in employment relations.<sup>46</sup>

One issue that will be addressed in a following section is whether in fact the UN sustains or reinforces a system of institutional sex discrimination, not obviously by virtue of policy given its aforementioned efforts, but through other political processes and procedures. As a matter of obligation, however, and besides the dictates of its own institutional law, can the UN discriminate in the domain of its exclusive employment relations in contravention of general international law? For one thing, we determined that UN internal law overrides the law of the host State, with one notable exception, which has gone unnoticed. Section 19 of the UN-USA HQ Agreement stipulates that no racial or religious discrimination may be employed by the UN, a provision which presumably the UN is bound to observe also with respect to its employment relations. The provision is, however, silent on the issue of gender and is thus inapplicable in the present context. Secondly, we have equally established UNAT’s confirmation to the effect that general principles of law are binding on the Organization’s employment policies and contractual undertakings. Hence, a breach of said principles will incur the liability of the UN vis-à-vis the injured party. The fundamental question is whether and to what degree the UN’s institutional law is superseded by the labor rights provisions incorporated in international

---

<sup>41</sup> *Thlimmenos v Greece*, (2001) 31 E.H.R.R. 411.

<sup>42</sup> See *Beard v UK*, (2001) 33 E.H.R.R. 442; *Coster v UK*, (2001) 33 E.H.R.R. 20.

<sup>43</sup> General Comment No 4, UN Doc HRI/GEN/1/Rev.1 (1994), paras 2-3.

<sup>44</sup> 999 U.N.T.S. 171. See General Comment No 18, UN Doc HRI/GEN/1/Rev 1 (1994).

<sup>45</sup> General Comment No 25, UN Doc CEDAW/C/2004/I/WP.1/Rev 1 (2004), para 24.

<sup>46</sup> See Report on Prevention of Discrimination: The Concept and Practice of Affirmative Action, UN Doc E/CN.4/Sub.2/2002/21 (17 June 2002), paras 101-114.



human rights treaties, particularly the ICCPR,<sup>47</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>48</sup> as well as specialized ILO conventions.<sup>49</sup> The simple answer is that since agreements are binding on the parties thereto, the UN can only incur treaty obligations from agreements to which it is a party. The ICCPR is not open to international organizations in any event.<sup>50</sup> Moreover, the ICCPR cannot become binding on the UN by virtue of the fact that the vast majority of its member States are signatories, because of the UN's distinct legal personality from that of its members. To leave it at that would no doubt make a mockery of the entire UN system, which was the principal force for a period of three decades behind the promulgation and final adoption of the ICCPR. Equally, to assume that the UN should interpret its institutional law in accordance with the ICCPR because the Secretary-General acts as depository and facilitates the Covenant's judicial and other functions, is without legal merit. What stand to legal merit, however, are the affirmations in the preamble that the rights prescribed therein flow from, and are consistent, with human dignity and are moreover an elaboration of the more general principles found in the UN Charter itself. As a result, the Organization may validly employ the relevant provisions of the ICCPR in order to construe the UN Charter in respect of its employment relations. To the extent, nonetheless, that the relevant principles in the ICCPR do not constitute general principles of law, they do not bind the UN, but may validly – but only - be used as interpretative tools for deciphering the UN Charter.<sup>51</sup> The same is true with respect to the ICESCR, but it is doubtful how many provisions in the ILO conventions can satisfy at all times the aforementioned criteria.

One should also address to some degree the more general cultural issue that necessarily permeates this discussion; that is, why should the UN adhere to a culture of gender equality at a time when many of its members refuse to do so as a matter of their domestic policy? The answer to this question lies in the nature of the UN as a self-contained institutional system that is predicated on equality of employment and opportunities in its constitutional instrument, as well as in its later institutional policies. The UN's institutional law is not based on the subtotal of the relevant domestic legal attitudes of its member States and as a result it is able to organize its internal affairs in ways that may turn out to be fundamentally opposed to the laws of some of its members. Thus, as a matter of policy, the UN has pursued an agenda of equal employment opportunities and gender mainstreaming both within the Organisation, but has also propagated it to its members through international gender conferences.<sup>52</sup> This gender mainstreaming policy

---

<sup>47</sup> Particularly in respect of Arts 26 (equality before the law and a positive duty against discrimination) and 3 (equality of rights between men and women).

<sup>48</sup> 993 U.N.T.S 3, particularly Arts 3 and 7, the combination of which ensures equal opportunities in the workplace irrespective of sex.

<sup>49</sup> Particularly, ILO Convention No 111 on Discrimination (Employment and Occupation) 1958; ILO Convention No 100 on Equal Remuneration of 1951; ILO Convention No 156 on Workers with Family Responsibilities of 1981 and; ILO Convention No 183 on Maternity Protection of 2000.

<sup>50</sup> ICCPR, Art 48(1).

<sup>51</sup> See *Stepczynski v UN Secretary-General*, UNAT Case No 66, Judgment No 64 (1 Sep 1956), paras 19-21, in which UNAT made use of Art 13 of the 1907 Hague Convention No V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

<sup>52</sup> See Fourth World Conference on Women and the Beijing Declaration and Report on Platform for Action, UN Doc A/CONF.177/20 (17 Oct 1995). Paragraph 36 of the Declaration highlights the need for a strong

has been translated and incorporated into the United Nations as a matter of internal law. In any event, to the best knowledge of this author, no UN member State has objected to the institutional gender policies of the Organisation; resistance is only visible to attempts to export such policies to member States. At another level, if one were to view the UN as an autonomous system that is independent from its external environment and its complexities, i.e. the legal systems of its member States, the UN would be able to code and interpret its external environment and its complexities through an internal selection process. As a result, the UN develops its own autopoietic internal processes that are by no means determined by factors external to this system.<sup>53</sup> In this light, it is not paradoxical at all for the institutional law of the UN to be wholly antithetical to the law of some or many of its constituent members.

Overall, therefore, the opinion of this author is that although the UN's institutional law supersedes the law of the host State and the relevant provisions of international treaties to which the UN is not a party, the Organization may discriminate on the basis of sex, but only with a view to promoting gender parity, where this is lacking. Conversely, the UN may not discriminate other than through the implementation of affirmative action policies, as a matter of general principles of law and as a means of consistent interpretation of the human rights provisions contained in UN Charter and addressed to the Organization. As will become evident in following sections, one must necessarily adopt a realistic stance as to the Organisation's factual capacity, particularly in the context of difficult field operations, to sustain gender policies.

### **Female Access to Senior Positions in the UN System and the Exclusive Authority of the Secretary-General**

The UN's Administrative Instruction (AI) on Special Measures for the Achievement of Gender Equality, promoted as a matter of institutional law, among others, the flexible interpretation of the principle of cumulative seniority in terms of female promotions, with a view to meeting its 50/50 targets.<sup>54</sup> These and other measures highlighted above have not contributed toward gender parity, nor achieved any results in the realization of the 50/50 target. A year after the promulgation of AI 412 by the Secretary General in 1996,<sup>55</sup> the Secretariat had a chance within the space of a year to assess the results of the measures contained in the AI. The Report noted that in 1997 a total of thirty-eight promotions were made, as compared with one hundred and ninety six in 1996. It emphasized in delight, however, that the percentage of promotions of women at D-1 level

---

commitment on the part of governments, international organisations and institutions at all levels in order to eradicate discrimination and advance the status of women.

<sup>53</sup> See N Luhmann, *Law as a Social System* (Oxford UP, 2004, translated by K A Ziegert), particularly chps 1 and 2.

<sup>54</sup> UN Doc ST/AI/1999/9 (21 Sep 1999), para 1.6. Cumulative seniority is calculated as the average of the years of the staff member accrued in her current professional grade and in her immediately preceding grade.

<sup>55</sup> Supra note 30.

and above had increased considerably.<sup>56</sup> In his latest accessible report, the Secretary-General pointed out that the representation of women in the professional and higher grades “remained almost static with negligible improvement and in some cases even a decrease”.<sup>57</sup> In fact, appointments at the D-1 level stood at 25.3 percent, a decrease of 6.95 percent.<sup>58</sup> Equally, appointments to Under Secretary-General (USG) posts witnessed a decrease of 1.28 percent, but there was an increase of 4.01 percent and 2.88 percent at the D-2 and Assistant Secretary-General levels respectively.<sup>59</sup> Overall, the percentage of appointments of women to professional and senior roles between 30 June 2004 to 30 June 2006 rose by 0.06 percent.<sup>60</sup> Given that the disparity at these senior positions at any given time averages, at best, at a ratio of about 30/70, marginal increases of this proportion are a drop in the UN’s ocean!

The relevant UN reports provide a number of reasons as to why the level of female appointments at senior management level remains very low, such as family commitments, unequal access to informal parallel networks, which is a prerogative of men, etc. What is not mentioned in these reports is the male-dominated employment culture of the UN, which traces its origins in the Organisation’s field and negotiating missions, which were traditionally the exclusive battleground for men. Given, therefore, that many career diplomats and field veterans that currently serve in the Secretariat have originated from such backgrounds, it is difficult for them to work under female bosses. This, in turn, makes mutual working relationships difficult and certainly very stressful and unpleasant for women at senior levels, particularly where such problems are endemic and are not properly addressed by the Organisation. Even so, the vast majority of senior posts which are attractive for female candidates are not within field operations. If these reasons explain the lack of adequate gender representation at the senior grades level, then why is it that the measures adopted since the mid-1990s to address gender disparity have actually paid off between the levels of P-1 to P-4?<sup>61</sup> It seems to this author that none of the relevant reports attempts to touch, let alone address this issue, but the reason for such abstinence is crystal clear. Neither the UN Charter, nor the UN’s Staff Regulations elaborate on the modalities and appointment procedures with regard to senior level posts. Article 101(1) of the UN Charter merely states that the Secretary-General is authorized to recruit, under regulations established by the Assembly, all Secretariat Staff. This provision makes no distinction between senior and junior level postings. One would have thought that this general Charter injunction would have received ample consideration and elaboration in the Organization’s Regulations, but this is hardly the case. In fact, the office of the Secretary-General seems to have assumed this function as to appointments as an authority rather than a process to which his Office is involved by reiterating the wording of Article 101(1) of the Charter in the Staff Regulations.<sup>62</sup> Yet, while special

---

<sup>56</sup> S-G Report on Advancement of Women in the Secretariat, UN Doc A/52/408 (30 Sep 1997), para 17.

<sup>57</sup> UN Doc A/61/318 (7 Sep 2006), p 1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, para 42.

<sup>60</sup> *Id.*, para 41.

<sup>61</sup> See *id.*, para 13, in which it is stated that with respect to the application of the measures within UNICEF, a reported 44 percent of persons heading field offices are women, while the overall proportion of women in the professional grades was 44 percent.

<sup>62</sup> See UN Staff Regulation 4.1.

procedures govern the appointment and promotion at junior staff levels, the Secretary-General has assumed upon his Office unilateral authority to appoint persons at the senior levels. Nothing else is mentioned in the Staff Regulations on the procedures for senior appointments, save for Regulation 4.5, from which it cannot be discerned with any degree of accuracy whether the appointment to Under and Assistant Secretary-General falls within the exclusive competence of the Secretary-General. In practice, however, the Secretariat has interpreted Regulation 4.4 in this manner and has not established any procedures for appointments to senior positions.

This seemingly arbitrary assumption of authority may be explained on practical grounds – and in fact may be justified as such - but given the Secretariat’s persistent concerns with gender disparity in the Organization’s higher echelons, its failure to address its own appointments process is at best highly conspicuous and unhealthy. A few practical matters should at this juncture be brought to light. Firstly, the appointment to a senior post in the UN system, even without a salary, is a significant and enviable achievement, because the appointee will have a chance to create informal networks that will assist him or her in future paid employment (or ad hoc consultancies) in the UN or other international organization, as well as enhance that person’s professional profile more generally. These posts are understandably extremely competitive and it is not far-fetched to argue that many a qualified candidate would even pay for posts of this nature, since they can open other doors in the future. It is for this reason that the General Assembly has expressed its disappointment on a number of occasions, particularly with respect to the International Criminal Tribunal for Yugoslavia (ICTY), on account of exceptions made by the Secretariat in permitting the appointment of seconded personnel, in cases where this was strictly prohibited.<sup>63</sup> Secondly, senior appointments are by their very nature political appointments. Candidates for these positions are senior government officials, including members of cabinets and parliament, senior judges, academics and others that are closely aligned with the governments that submit their candidacy to the Organization. Unlike other posts, candidates for the senior posts do not personally apply, but are proposed by their governments, which most often must give hard diplomatic struggles in order to secure their appointment. A candidacy of this nature typically commences by convincing the relevant government to give its unequivocal backing, then followed by diplomatic efforts and political bargaining within and outside the UN, depending on the post. Subsequently the candidate will go through a series of formal and informal interviews with concerned governments, particularly for judicial and similar appointments, and if the candidate manages to satisfy the political requirements of said entities, he or she will then possess sufficient backing within the UN itself, in which case the Secretary-General will only serve to ratify that person’s appointment. In respect of

---

<sup>63</sup> See GA Res 53/221 (23 April 1999), s V(9). It is well known that as a result of the intern’s familiarity with the relevant project manager, he or she will be the prime candidate for a full time post in that department, while there or immediately following the termination of the internship. In order to avoid distortions of this nature, the Secretariat issued an AI on the UN Internship Programme, UN Doc ST/AI/2000/9 (19 Sep 2000), s 4(3) of which states that interns shall be eligible to apply, or be appointed to, any post in the Secretariat for a period of six months following the end of their internship. An amendment was later adopted to s 4(3), according to which the six month requirement was extended to positions at the professional level and above carrying international recruitment status in the Secretariat. UN Doc ST/AI/2005/11 (31 Aug 2005).

particular senior posts, such a long process might be unnecessary where the situation is urgent and lists of candidates have already been sieved through the UN's political filter in anticipation of such postings. A typical example is the appointment of special envoys or fact-finding experts.<sup>64</sup> As a result of these observations it is obvious that a powerful, behind-the-scenes, interplay of politics and personal relations is in existence, in which neither the Secretariat nor the candidate's government agents have the exclusive upper hand. One of the key problems underlying the systemic failings of employment relations in the United Nations has to do with the fact that its internal justice system is "outmoded, dysfunctional, ineffective and lacks independence". In fact, no separation of powers has been found to exist and the Secretary-General has until now been acting as legislator, judge and enforcer of employment relations. This was the conclusion reached by an independent Redesign Panel on the UN System of Administration of Justice. The Panel proposed the streamlining of procedures with a view to effective dispute resolution mechanisms, staffed by independent and professional persons, more decentralized to encompass field staff. Moreover, it was proposed that the Joint Appeals Boards and the Joint Disciplinary Committees be replaced with a new decentralized Dispute Tribunal composed of independent judges with power to issue binding decisions. As a result, UNAT would become an appellate court for UN internal justice matters.<sup>65</sup> The findings and recommendations of the Report were ultimately endorsed by the General Assembly and a rehauling of the UN's internal justice system was mandated with a view to its restructuring by early 2009.<sup>66</sup> It is anticipated that these new mechanisms will contribute significantly to speedier and more effective gender-related disparity disputes, but they will do nothing for senior female applicants aspiring to join the Organisation.

As things stand, the Secretary-General's discretionary authority is not unlimited and the matter has at various times given strong concerns to the Assembly. In particular, the Assembly has been caustic about the Secretariat's practice of failing to publicly announce all its senior vacancies, thus undermining the UN Charter's equal opportunities provisions.<sup>67</sup> More importantly, the Assembly made it clear that the "discretionary power of the Secretary-General of appointment and promotion outside the established procedures should be limited to his executive office and the Under Secretary-General and Assistant Secretary-General levels, as well as special envoys at all levels".<sup>68</sup> Even so, the Secretary-General's administrative and managerial discretionary powers "should be in conformity with the relevant provisions of the UN Charter and the staff, financial and program planning regulations and mandates given by the General Assembly".<sup>69</sup> The

---

<sup>64</sup> See, for example, C M Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AJIL 784. In GA Res 47/120(B) (10 Feb 1993), s III(2)-(3), the Assembly requested the Secretary-General to continue the use of experts for fact-finding missions, selected on a wide geographical basis and in accordance with the highest standards of efficiency, competence and integrity and invited States to submit names of candidates. The Assembly did not fail to mention that appointments were in the discretion of the Secretary-General.

<sup>65</sup> Report on the Redesign Panel on the UN System of Administration of Justice, UN Doc A/61/205 (28 July 2006).

<sup>66</sup> GA Res 61/261 (30 April 2007).

<sup>67</sup> GA Res 51/226 (25 April 1997), s II(5).

<sup>68</sup> *Id.*

<sup>69</sup> GA Res 53/221 (23 April 1999), s IV(5).

arbitrary exercise of this discretionary authority has to some degree been documented within the UN by other bodies, other than the Assembly. In a 2000 Report issued by the UN's Joint Investigations Unit, it transpired that the Secretariat was not true to its mandate for wide geographical representation, nor, indeed, its duty towards greater numbers of female appointments to senior posts.<sup>70</sup> The Report, moreover, revealed that the performance appraisal system (PAS) that was put in place to evaluate the performance of staff members up to, and including, the Under Secretary-General level had been selectively applied to senior staff, and a good number had even gone unappraised.<sup>71</sup> In return, the Secretary-General, in order to alleviate the Assembly's concerns as to the arbitrary employment of his discretionary powers in respect of senior appointments has tried to convey the impression that he is in fact assisted and consulted by an informal group of independent advisors, as and when required.<sup>72</sup> The expected outcome of these procedures include a search for the widest possible spectrum of views on the best available candidates, as well as a desire to benefit from consultations with UN member States on these appointments.<sup>73</sup> Despite the failings of the system at all levels and the Secretariat's dismal performance in remedying its gender imbalances, the Secretary-General in one of his last reports, although making some otherwise acute observations, simply reiterated gender and geographical disparity at the senior level of appointments without mentioning, let alone criticize, his discretionary authority and the need for a transparent mechanism. This seems to be a taboo issue in the United Nations Secretariat, but one that certainly serves its various protagonists very well.

One should not hurriedly reach the conclusion that the absence of women from senior positions is attributable solely to institutional deficiencies. The UN is unable to provide child-care facilities for mothers in the field and child benefit grants are generally available when the child reaches a compulsory school age. In other fields, the Organisation has improved its gender mainstreaming practice by providing the opportunity of flexible working arrangements,<sup>74</sup> working away from the office,<sup>75</sup> part-time work,<sup>76</sup> family leave<sup>77</sup> and maternity leave.<sup>78</sup> The functions and exigencies of the UN in many field operations is certainly a disincentive for many prospective female candidates, particularly those with dependent children. It may very well be the case that in such circumstances even the UN's best intentions in respect of gender mainstreaming will yield no results. However, the very fact that only few women serve, or are willing to

---

<sup>70</sup> JIU, *Senior-Level Appointments in the United Nations, its Programmes and Funds*, UN Doc JIU/REP/2000/3 (2000), p 5.

<sup>71</sup> *Id.*, p 6.

<sup>72</sup> S-G Report on *Renewing the United Nations: A Program for Reform*, UN Doc A/51/950 (14 July 1997), para 233.

<sup>73</sup> S-G Report on *United Nations Reform: Measures and Proposals*. Note by the Secretariat, UN Doc A/52/584 (1998), para 37.

<sup>74</sup> S-G Bulletin on *Flexible Working Arrangements*, UN Doc ST/SGB/2003/4 (24 Jan 2003); S-G Report, *Improvement of the Status of Women in the United Nations*, UN Doc A/61/318 (7 Sep 2006), para 74.

<sup>75</sup> S-G Bulletin, *id.*, option 4.

<sup>76</sup> S-G Administrative Instruction (AI) on *Part-Time Employment*, UN Doc ST/AI/291/Rev 1 (18 July 1984),

<sup>77</sup> S-G AI on *Family Leave, Maternity Leave and Parental Leave*, UN Doc ST/AI/2005/2 (6 May 2005); Staff Rules 105.2(a)(iii)(b) and 205.3(a)(iii).

<sup>78</sup> *Id.*, ST/AI/2005/2, para II, ss 6-8.

serve, in such operations does not mean that the Organisation should not strive to make additional efforts to accommodate them. The ambit of the UN's gender policies is not confined to the Secretariat or similar missions, but are applicable to the remotest field mission. One must, however, adopt a realistic stance as regards the modalities of field operations and should not expect the UN to maintain a child-care facility for one or two children or provide for flexible working hours in the midst of a battle zone.

Having examined the institutional law and policy of the United Nations in respect of appointments and promotions, we have managed to discern only a general discrepancy in respect of gender. This discrepancy, however, tells us nothing about the relationship between gender and geographical distribution, which is central to this discussion because it is principally women from developing States that are most precluded from appointment to senior posts. As a result, gender mainstreaming within the Organisation would achieve little if it was not moreover directed to address the element of geography.

### **The Link between Geographical and Gender Disparity and Why it Matters**

Candidates from so-called under-represented countries, particularly from Africa, large parts of Asia, South America and Eastern Europe, are significantly disadvantaged as regards employment opportunities in the UN, at both the senior and lower levels. This lack of geographical representation, which should otherwise be central to the Organization's recruitment policy, is attributed among others to a lack of sufficient outreach, lack of clear managerial focus at junior-level recruitment, short deadlines,<sup>79</sup> lack of transparency and many others.<sup>80</sup> The keen observer will not fail to notice that these are causes that are attributable to managerial processes and the need for their improvement, but they do not reflect on the role played by interpersonal relations. For one thing, the United Nations suffers from the same inherent institutional maladies as do all organizations, whether public or private. Physical persons are the soul of organizational structures, tending naturally to form intra-alliances and informal networks at both the personal, the governmental and the inter-governmental level. While these personal relationships are not necessarily malignant, the Secretariat is in large part unable to comprehensively address these systemic inefficiencies, partly because of the large spread of the UN and its constant staffing needs, resulting in greater delegation and thus lack of better and central oversight, and partly because the Secretariat is itself part of the problem on account of the customary political character of senior appointments, including of course the Secretariat's staff and the Secretary-General himself. The Assembly has on occasion, sometimes subtly, others bluntly, reminded the Secretariat that no senior post within the UN system should be viewed as "belonging" to any particular State, and that accordingly no succession of nationals of the same State should

---

<sup>79</sup> Nonetheless, the Secretariat in a recent proposal requested from the Assembly that it reduce the time required for advertising a vacancy from 60 to 45 days. See UN Doc A/59/253 (2005).

<sup>80</sup> See S-G Report, Measures to Address the Imbalance in the Geographical Distribution of the Staff in the Office of the UN High Commissioner for Human Rights, UN Doc A/61/823 (28 March 2007); S-G Report, Investing in People, UN Doc A/61/255 (9 Aug 2006), para 47.

be allowed as of right.<sup>81</sup> What all this points to is an institutional culture that has deep roots in the Organization, where although gender is addressed through adequate procedures at the lower professional levels, despite this festering culture, it is certainly not addressed at the senior levels because of the lack of any transparent mechanism.

We shall see in the next section that although a number of women, albeit few, have been appointed to senior positions, these were in their majority either from developed nations or had received the strong governmental backing of a developing State. This author is hardly criticizing these appointments, but whereas women from developed countries have far greater access to mid-level and senior posts, as opposed to their developing country counterparts, the relevant statistics will eventually show that gender disparity is eroding, albeit marginally, and fail to associate this increase with the failure of geographical distribution.<sup>82</sup> Were the two factors to be assessed in tandem, they would clearly demonstrate that women in the developed world have little access to the United Nations on account of their socio-economic conditions therein and are unlikely to apply in the same numbers for junior to mid-level posts as are women from the developed world.<sup>83</sup> In a further twist to enhance statistical findings, the Secretariat has construed the principle of geographic representation as referring to regions or groups, rather than countries. In this manner, the lack of female appointments from under-represented countries may be statistically alleviated if women from other countries are grouped together. The Assembly has deplored this practice.<sup>84</sup> The UN's Office of Human Resources (OHR), should therefore focus not only generally on under-represented developing States, but make special provision for women therein, as a special category.

If the UN's aspirations towards gender and geographical parity, as well as its desire to recruit personnel of the highest caliber, are not merely of a hortatory nature, the Organization must adopt and enforce exceptional, yet transparent processes. Given our previous statement on the political background of nominations for senior posts, a grave imbalance may be discerned between female (and male to some degree) candidates from developed and developing countries. Most developing countries lack general democratic governance and democratic mechanisms, even where they purport to practice constitutionalism and profess to free and open elections. Moreover, in the vast majority of these countries the representation of women in the higher echelons of government, the judiciary and academia will be significantly low and in any event dominated by clan, tribal and privileged considerations. Indeed, to make matters worse, in some countries there will be legislation in place that excludes women from the higher echelons of government and the judiciary altogether,<sup>85</sup> whereas in others there will be calls by male

---

<sup>81</sup> GA Res 53/221 (23 April 1999), s IX(6).

<sup>82</sup> This link has only been made in passing, and then only in very broad and hortatory language, by the Secretary-General in his "Investing in People" Report, *supra* note 80, paras 49-50.

<sup>83</sup> The Assembly in Res 59/266 (15 March 2005), s VI(3), noted that in posts subject to the system of desirable ranges, 26 women from developing countries were recruited between 1 July 2003 and 30 June 2004, among the 86 women appointed during that period.

<sup>84</sup> See GA Res 59/266, *id.*, s IV(7).

<sup>85</sup> Many, but not all, countries adhering to Islam will be guided by the following principles on the basis of which women will be excluded from judicial or ruling posts. "Men are in charge over women, because Allah has made one of them excel over another, and because men have expended their wealth over them."



figures to ban women from being appointed to such positions.<sup>86</sup> Given that it is these same governments that will advocate in favor of their chosen candidates in respect of senior UN posts, by accepting these candidates simply under the pretense of satisfying geographical representation, the Organization is responsible for a grave injustice against the true under-represented people. Women from the developing world are, therefore, doubly disadvantaged. Such secrecy and lack of transparency in respect of judicial appointments is not, however, an attribute of only developing countries, it must be said,<sup>87</sup> and CEDAW at one point even criticized Sweden with regard to the low level of representation of women in the higher echelons of its foreign office, particularly ambassadorial posts, as well as its overall low representation in the judiciary.<sup>88</sup> It is crucial, as a result, for the Secretariat to radically revise its appointments strategy by premising geographical representation on the basis of a transparent and competitive process, not on political nominations. The United Kingdom, recently advertised and held an open competition for the candidature of a judicial post in respect of the International Criminal Court (ICC).<sup>89</sup> The competition was hosted by the Foreign and Commonwealth Office (FCO) and the Lord Chancellor, from the outcome of which the incumbent judge, Justice Fulford, was ultimately nominated.<sup>90</sup> However, this was purely an ad hoc arrangement and does not constitute official policy. This author fully understands the political ramifications of such a policy in the context of the United Nations and the vociferous reactions of developing States, but it seems the only realistic solution for effectively overturning both gender disparity and geographical under-representation.<sup>91</sup>

---

*Qur'an* 4:34. Equally, according to *Qur'an* 1:282 a male's testimony is equal to that of two women. From the following verse, scholars have inferred that women are not as competent as men in fulfilling the requirements for particular posts. "Two men shall serve as witnesses; if not two men, then a man and two women whose testimony is acceptable to all. Thus, if one woman becomes biased, the other will remind her". Furthermore, Abu Bakar has been credited for narrating: "During the battle of Al-Jamal, Allah benefited me with a Word (I heard from the Prophet). When the Prophet heard the news that the people of Persia had made the daughter of *Khosrau* their Queen (ruler), he said, "Never will succeed such a nation that makes a woman its ruler." Cited by A Albuckhari, *Aljame Alsaheeh (Saheeh Albukhari)*, vol. 9, chp 88, number 219 (Almaktab Al Asriyah Publishers, 2002). As a result of these *Qur'anic* injunctions, *hadith* and teachings, Art 5 of the Basic Law of Saudi Arabia [Royal Decree A/90, dated 27/08/1412 H. 1992] provides that the authority to rule passes to the sons of the founding King and to their male descendants. Moreover, Art 3 of the Implementing Rules of the Saudi Arbitration Act provides that arbitrators can only be Muslim males. Royal Decree No. M/7/2021, of 08/09/1405 H (1985), reprinted in Umm Alqura Gazette, Issue No. 3069 of 10/10/1405 H (1985). The author acknowledges the assistance of Dr Abdulrahman Baamir for this information.

<sup>86</sup> "Egyptian Judge Says Women Judges Un-Islamic", Khaleej Times Online (3 March 2007), in which the President of the Syndicate of Egyptian Judges stated that the presence of women as judges violates the *Shari'a*, because they would have to spend time alone with men, among others.

<sup>87</sup> See R Davis, G Williams, Critique and Comment: Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia, [2003] Melbourne University Law Review 32.

<sup>88</sup> CEDAW Concluding Observations on the Swedish Report, UN Doc A/56/38 (20 July 2001), paras 346, 348.

<sup>89</sup> The ICC itself openly advertised in the Economist in respect of the post of Registrar.

<sup>90</sup> See <[http://www.fco.gov.uk/resources/en/press-release/2003/10/fco\\_npr\\_310702\\_iccjudgeukcand](http://www.fco.gov.uk/resources/en/press-release/2003/10/fco_npr_310702_iccjudgeukcand)>.

<sup>91</sup> Despite the obvious political overtones of ECHR judicial nominations and appointments, each government must submit the names of three candidates, with the option of ranking them. These candidatures are then assessed by the Council of Europe's Parliamentary Assembly, which proceeds to vote on the lists provided. See Art 22, European Convention for the Protection of Human Rights and Fundamental Freedoms.

Having examined the representation of women in the senior levels of the UN's administrative hierarchy, it is appropriate to assess their inclusion in the UN's judicial institutions. Much like appointments to other senior positions, judicial appointments are in a category of their own that require multiple layers of political bargaining between contesting States and where the person of the judge is a factor taken very seriously by the appointees because of his or her independent status.

## **The Law and Politics of International Judicial Appointments**

For most legal academics, particularly international lawyers, an appointment to an international judicial or quasi-judicial post constitutes a very significant personal achievement. Gender apathy has played a large part in leaving women largely outside these judicial institutions, particularly during the Cold War years. Appointment to such positions within the UN system is still subject to the relevant provisions of the UN Charter and the UN's Staff Regulations, despite the obvious requirement of independence and the non-permanent character of these jobs. An exhaustive analysis of the employment situation in all UN tribunals is outside the scope of this article, but the practice of the most prominent ones will be duly discussed and some brief comparisons with tribunals outside the UN system will be made.

Two ingredients would truly facilitate the admission of women to international judgeships; a) fair, open, independent and competitive nominations at the national level, and; b) gender parity considerations at the final selection process and through the relevant rules of the judicial institution. Although the trend seems to be changing, some of the older institutions, such as the ICCPR's Human Rights Committee, do not require any gender quotas or equivalent considerations in the composition of the Committee, nor any obligations at the domestic level to conduct an open competition in order for member States to select their nominees. The only requirement is that consideration be given to equitable geographical distribution and representation of the different forms of civilization and of the principal legal systems.<sup>92</sup> As to the judges' personal traits, they must be persons of high moral character and of recognized competence in the field of human rights.<sup>93</sup> Other than that, the parties are free to nominate whomever they wish and to subsequently agree collectively on the successful appointees. The same is true with respect to the Statute of the International Tribunal for the Law of the Sea (ITLOS),<sup>94</sup> Article 2 of which caters only for equitable geographical considerations. The Statute of the International Court of Justice (ICJ) constitutes a minor improvement to the aforementioned, despite the fact that it does not incorporate a gender-related provision. Article 4(1) of the Statute provides that national nominees shall come from a list drafted by each national group in the Permanent Court of Arbitration. Each national group is

---

<sup>92</sup> ICCPR, Art 31(2).

<sup>93</sup> ICCPR, Art 28(2).

<sup>94</sup> Annex VI of the 1982 UN Convention on the Law of the Sea (UNCLOS) provides the ITLOS Statute, 1833 U.N.T.S 3.

recommended to consult its highest courts, law schools and other scholars in order to compile its list of nominees, according to Article 6 of the Statute. Unlike the Human Rights Committee and ITLOS, judicial appointments in the ICJ need not reflect an equitable geographical distribution, but only represent the main forms of civilization and the principal legal systems of the world.<sup>95</sup> The lack of gender considerations in the appointments of judges is also evident in the case of the UN's ad hoc tribunals for Yugoslavia (ICTY) and that of Rwanda (ICTR), albeit Articles 12 *ter* and 13 *ter* of the ICTY and ICTR Statutes respectively provide that with respect to *ad litem* judge nominations, account should be taken of the importance of fair representation of female and male candidates.<sup>96</sup> Neither does the Statute of the International Law Commission (ILC) protect and support the presence of females, but like its other counterparts it does provide for the representation of regional groupings and of the main forms of civilization.<sup>97</sup>

The list can go on, but certain conclusions are unmistakable. Representation based on geographical and principal legal system considerations has substituted, and in fact overruled, the need for gender considerations.<sup>98</sup> The end of the Cold War has not remedied this situation. Moreover, politics outweigh the need for an open national competition and it is also true that the final selection is equally political, as it is member States or the political organs of the United Nations that ultimately decide on the relevant judicial appointments. The argument that the rules are of considerable vintage and drafted in a bygone era, but which nonetheless raise insurmountable problems to revise is a tenable argument. Nonetheless, if despite the letter of the rules the Secretariat and member States were willing to import gender considerations in the appointments procedure of said judicial and quasi-judicial institutions, this would have been reflected in practice and in the numbers of female judges. The empirical evidence suggests otherwise. Since the inception of the ICJ, more than sixty years ago, there has only been one female judge on its bench. Equally, during the same time in the ILC, only two female commissioners have been appointed, and then only recently. While the situation in the ICTY and ICTR is certainly an improvement, the overall ratio between men and women on the bench remains very low. As far as the Secretariat's position on this gaping gender disparity is concerned and its subsequent absolute failure to meet its 50/50 targets, four possible inferences may be made: a) the first is that it is politically out-muscled by the interests of State parties; b) secondly, that national nominations encompassing women are low compared to that of their male colleagues, c) thirdly, the UN is content to achieve its targets at the junior to mid-level postings because there is less political friction involved, and; d) fourthly, the enforcement of an affirmative action gender-related procedure where this is excluded in the relevant instruments runs contrary to the wishes of the parties and cannot be imposed. Moreover, and closely related to the last argument, one may counter that the UN's institutional employment law is inapplicable vis-à-vis these posts. The first

---

<sup>95</sup> ICJ Statute, Art 9.

<sup>96</sup> Amended on the basis of SC 1431 (14 Aug 2002).

<sup>97</sup> ILC Statute, Arts 8 and 9.

<sup>98</sup> See C Chinkin, S Wright, H Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, in D Buss, A Manji (eds.), *International Law: Modern Feminist Approaches* (Hart, 2005), pp 20-21, who rightly assert that the concept of equality has been overtaken by that of equity.

three are certainly plausible arguments, whereas the fourth is legally flawed since all personnel employed in international tribunals run by the United Nations, including the judges, are in the service of the United Nations and are subject to the full gamut of its institutional law.

It will be of some comfort to note that some exceptions do exist. For one thing, women are well represented in the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, as well as in the capacity of thematic Special Rapporteurs, mandated by the High Commission for Human Rights.<sup>99</sup> Chinkin et al attribute this phenomenon to the fact that women are viewed as being best suited to deal with “soft”, issues, as opposed to “hard” disputes, such as trade, maritime and others.<sup>100</sup> Irrespective of this assertion, there exists no empirical evidence to suggest that female judges decide cases different to men, particularly that they employ an ethics of care or that their judgments are somehow rooted in social context rather than legal abstraction, etc. If anything, the contrary has been revealed on the basis of available research.<sup>101</sup> There is equally no empirical evidence demonstrating that women judges are by their nature more prone to activism than their male counterparts. In a comprehensive study of all dissents of ECHR judges between 1955 until 2006 it was shown that a judge’s level of activism or conservatism is linked to the political ideology of the government that appointed him or her. As a result, aspiring EU member States preferred activist judicial appointments in order to highlight human rights commitments, as did governments disposed toward European integration.<sup>102</sup> Clearly, therefore, gender is immaterial to activism or to the way that a judge may perceive the factual elements of a case.

Returning to the few female appointments to the senior UN positions indicated above, to the extent that these are ad hoc and not institutional arrangements, means that they are subject to change in the life cycle of said judicial or thematic bodies. Thus, one need not necessarily be content. What is required is an imbedded institutionalised continuity, much in the same sense as Article 36 of the ICC Statute. Our concern in this study is on paragraphs 8(a)(iii) and 4(a), the latter of which requires fair representation of female and male judges, whereas the former obliges parties to formalise a national system for judicial nominations, either by employing the ICJ model, or by putting in motion the same procedure as that for appointment to their highest judicial posts.<sup>103</sup> In a questionnaire drafted and distributed by Amnesty International to all ICC member States in respect of their first judicial nominations,<sup>104</sup> only eight of the forty-five countries that nominated candidates responded. Amnesty’s research revealed that of the countries that did not

---

<sup>99</sup> See the data provided on the OSAGI website, available at: Available at: <<http://www.un.org/womenwatch/osagi/fpgenderbalancestats.htm>>.

<sup>100</sup> Id, p 21.

<sup>101</sup> Kenney, supra note 2, p 268.

<sup>102</sup> Voeten, supra note 3, pp 670-72.

<sup>103</sup> The ICC is not a specialised agency of the United Nations, or a subsidiary body thereto, despite the abundance of provisions in the ICC Statute, including the enhanced role of the Security therein. It has independent international legal personality and thus UN institutional employment law is inapplicable.

<sup>104</sup> AI, International Criminal Court: Checklist to Ensure the Nomination of the Highest Qualified Candidates for Judges, AI Index: IOR 40/023/2002 (Aug 2002).

respond to its questionnaire, many did not publicly advertise the process, failed to take adequate measures to inform highly qualified women, which resulted in only a quarter of nominees being women. Moreover, civil society was fully or partially excluded from the nomination process, “failing to take advantage of the important role that such groups can play in identifying qualified candidates, contributing to the drafting of an advertisement and criteria for selection and commenting on applicants”. Finally, Amnesty deplored the fact that the names of nominees were not publicly announced, thus preventing “comment on the scope of persons being considered, such as the absence of persons from certain ethnic groups or of women, at a time when this imbalance could be rectified, and preventing comment on the qualifications of particular persons under consideration at a time when it could affect the nomination”.<sup>105</sup> Those States that had opted for an open competition had either promulgated new legislation,<sup>106</sup> adapted their existing legislation on national judicial appointments to encompass the ICC,<sup>107</sup> or did so on an ad hoc basis, like the UK. The combination of a gender provision in the ICC Statute and a concerted effort on the part of committed States has led to eight women sitting on its bench.

The UN Secretariat has a lot to learn from these processes at the national level. There is no significant difference between the ICC and the judicial institutions under the aegis of the United Nations. Although the UN’s procedures are by now rigid, there is no denying that its administrative reform process has to start within its member States and not at the stage when nominations are received at the door of the Organization.

## **Conclusion**

We have determined the discrepancy between the UN’s institutional law of employment and that of the domestic law of other States (which in and of itself does not create any normative problems), as well as the theoretical inapplicability of international human rights standards as treaty obligations incumbent directly on the United Nations. Nonetheless, the rich jurisprudence of the UN Administrative Tribunal suggests that such standards and norms are in practice relevant to UN employment relations and to a very large degree binding on the UN in its relations with its employees. Beyond human rights treaties, the UN has pursued since the latter part of the 1980s a seemingly vigorous campaign towards eradicating gender imbalances in the Secretariat. Although the measures adopted have paid off at the P-1 and P-2 levels (the UN’s junior professional levels), they have yielded no results at the more senior levels of the Organization. This failure can be explained on many grounds related to the institutional structures of the Secretariat and the nominating practice of States, as well as the general politicised appointments culture at the senior levels. This politicised nature of senior appointments does not, however, feature in any of the reports of the Secretariat on its employment relations. The content of these reports is at best superficial, full of managerial jargon, but

---

<sup>105</sup> AI, International Criminal Court: Concerns at the Second Resumed First Session of the Assembly of States Parties (21 to 23 April 2003), AI Index: IOR 40/003/2003 (1 April 2003), p 19.

<sup>106</sup> Slovenia, for example, adopted a Law on Nominations of Candidates to Judges of International Courts/Tribunals, cited id, pp 29-30.

<sup>107</sup> Finnish Act on Judicial Appointments No 205/2000, id, pp 21-22.

without any assessment of the deep-rooted human resources problems of the United Nations. Certainly, in certain circumstances the lack of female candidates may be attributed to the particular exigencies of field posts which are hardly attractive for women candidates, particularly those with dependents, and in relation to which the UN cannot be expected to create accommodating conditions. Nonetheless, the majority of posts for which female candidates from developing countries are excluded do not involve field missions. The problem may be traced firstly at the stage of nomination, where member States employ political and informal networking criteria in the absence of a formalised and open competition that moreover lacks the active involvement of civil society. The existence of formalised and open competitions, coupled with a strict gender requirement, would certainly culminate in the short-listing of the highest quality nominees. Thereafter, were a gender quota, in conjunction with a geographical distribution dimension, to be established by the Secretariat and religiously adhered, nominating countries would be forced to also shortlist female candidates for top jobs. As a result, despite any political shortcomings and inter-State bargaining, the eventual appointments would be ensured of sufficient gender distribution from both the developed and the developing world. This author is not advocating that female candidates should be generally promoted on feminist or similar grounds; rather, the promotion of female candidates from the developing world to senior posts within the UN's administrative and judicial machineries helps to highlight and give a voice to the severely unrepresented masses of this world. The application of positive action by the UN through requiring a quota of female candidates at the national nomination stage would certainly have the effect of also enhancing women's rights in countries that do not generally adhere to them as a matter of both culture and law. There is no better way to challenge cultural beliefs and stereotypes without being viewed as interfering in the domestic affairs of other States.

The UN Secretariat needs to formalise this two-prong procedure and as far as its Regulations are concerned, even if the Secretary-General retains his exclusive authority to appoint persons at the most senior level, he should do so on the basis of an established and open procedure. Equally, every effort should be exerted at the extra-institutional level to convince States to adopt laws or fair procedures with respect to their nominations for senior international posts, including judgeships, encompassing an equal amount of men and women. Moreover, the UN should actively support the incorporation of relevant clauses in future conventions that set up international judicial or quasi-judicial bodies.