

# Diversity and Decision-Making in International Judicial Institutions: the United Nations Human Rights Committee as a Case Study

Vera Shikhelman\*

## ABSTRACT

The lack of diversity in the background of the decision-makers in international judicial and quasi-judicial institutions has been widely criticized in recent years. It has been argued that the background of the decision-makers is too homogeneous and not representative of the international community as a whole. However, there is little empirical evidence on whether the background of the decision-makers actually influences their decision-making processes in the international context. This article uses the United Nations Human Rights Committee as a case study for testing empirically the influence of geographical origin, gender, domestic legal system, and professional background on decisions.

The article finds certain voting patterns that are associated with geographical origin, domestic legal systems, professional background, and possibly gender. This is especially true in cases where the Committee Members' State's interests are at stake, since the most significant voting pattern was found for Committee Members from Western States voting in favor of States from their regions in immigration cases. However, it is safe to say that on most issues the background of the Committee Members did not have significant influence on their voting patterns. Beyond the practical implications of diversity on the decision-making process, this article also uses the United Nations Human Rights Committee as a case study to demonstrate the importance of diversity to the legitimacy of international institutions.

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## INTRODUCTION

Discussion about the significance and practical implications of the diversity of decision-makers is not unique to the international legal system. Long before diversity was discussed in the context of international judicial institutions, national jurisdictions around the globe grappled with the issue. For instance, in the American context, there have been many debates about the lack of racial, ethnic, and religious diversity in the judiciary and the problems that arise from such a situation.<sup>1</sup> One of the main arguments raised in different jurisdictions in

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1. For general literature discussing diversity in courts, see Sheldon Goldman, *Why We Have a Catholic-Majority Court: The Politics of Appointing Catholics to the Federal Courts*, 4 U. ST. THOMAS L.J. 193, 202 (2006) (discussing the “Catholic seat” on the US Supreme Court); Barbara L. Graham, *Towards an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2005) (discussing the lack of racial and ethnic diversity in US courts and its implications on the legitimacy of those courts); Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 years*, 29 JUST. SYS. J. 47 (2008); Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 127 (2006) (discussing the role of religion in nominating judges); Mark S. Hurwitz, & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*,

favor of the diversity of judges is that no person is a “clean slate,” and the decisions of people are influenced by their backgrounds.<sup>2</sup> Many see the international legal system as fragile, since its implementation very much depends on the cooperation and goodwill of the member States.<sup>3</sup> Therefore, issues of diversity and equal representation in international courts and quasi-judicial institutions (to which I will refer together as “judicial institutions”) are seen as of special importance by scholars, States, and the international community. Some argue that diversity is important both because it influences the process of decision-making and because it promotes the legitimacy of the international institutions.<sup>4</sup> Following this, in the statutes of many international judicial institutions there are so called “diversity clauses” that determine the backgrounds from which the decision-makers should come. Currently, the most common diversity criteria are geographical origin, gender, legal system of the country of origin, and

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3 ST. POL. & POL’Y Q. 329, 329 (2003) (“[T]he [American] legal profession and the judiciary have been historically dominated by white males.”); Mark S. Hurwitz & Drew N. Lanier, *Women and Minorities on State and Federal Appellate Benches*, 85 JUDICATURE 84 (2001) (assessing empirically the representation of minorities on federal appellate courts, arguing that “political minorities have made substantive progress in attaining the bench over the past 15 years, although clearly there remains room for improvement.”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (arguing that diversity of the judiciary is important because of different perspectives that minority judges bring to courts); THOMAS KARFUNKEL & THOMAS W. RYLEY, THE JEWISH SEAT: ANTI-SEMITISM AND THE APPOINTMENT OF JEWS TO THE SUPREME COURT 144–46 (1978) (discussing the “Jewish seat” on the US Supreme Court); Kate Malleon, *Diversity in the Judiciary: The Case for Positive Action*, 36 J.L. & SOC’Y 376, 377 (2009) (discussing positive action in nominating judges from diverse backgrounds). For discussion of diversity in jurisdictions outside the United States, see Abhinav Chandrachud, *Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making?*, 38 BROOK. J. INT’L L. 487, 490–502 (2013) (discussing diversity of the judiciary in different jurisdictions); Peter J. Van Koppen, *The Dutch Supreme Court and Parliament: Political Decisionmaking Versus Nonpolitical Appointments*, 24 L. & SOC’Y REV. 745 (1990) (discussing diversity in the Dutch courts); Kate Malleon, *The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 39 (Kate Malleon & Peter H. Russell eds., 2006) (discussing diversity in English courts); Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 241, 250 (Kate Malleon & Peter H. Russell eds., 2006) (discussing diversity in Israeli courts).

2. See Leigh Swigart & Daniel Terris, *Who are International Judges?*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 619, 620 (Cesare P.R. Romano, Karen J. Alter & Chrisanthi Avgerou eds., 2014) (discussing how some judges argue that they are influenced by the collective culture of the court, and put away their personal experiences); LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 65–99 (2013) (providing an introduction to the empirical studies of judicial behavior). For an extended discussion of the effect of diversity on judicial decision-making see *infra* Part I.

3. For general discussion about the legal nature of international law and various theories regarding the implementation of international law by States, see, for example, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); ANDREW T. G. HAROLD, HOW INTERNATIONAL LAW WORKS—A RATIONAL CHOICE THEORY (2008); Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

4. For discussion about the normative and sociological legitimacy of international courts see *infra* Part I.

professional background.<sup>5</sup> In recent years, diversity criteria have been gaining increased attention in the international community amid claims that decision-makers in international judicial institutions are too homogeneous and not representative of the international community as a whole. Scholars and diplomats argue that international institutions cannot be called “international” nor considered legitimate if they are not truly diverse.<sup>6</sup>

The most recent example demonstrating the interrelationship between diversity, decision-making, and legitimacy in the international sphere is the African backlash against the International Criminal Court (ICC). Many African countries see the court as a new form of Western colonialism, given that all the cases heard before the court have been against African defendants.<sup>7</sup> In an attempt to promote the legitimacy of the ICC, the international community decided to appoint more African judges and a chief prosecutor from Africa (a Gambian national).<sup>8</sup> However, that was insufficient, and eventually three African countries, including Gambia, announced their intention to leave the ICC.<sup>9</sup>

The question of how and whether the background of the decision-maker influences his or her decision-making in the international legal context has been largely understudied empirically. This article aims to fill this gap in the legal literature. It uses the United Nations Human Rights Committee (HRC) as a case study and explores empirically the ways in which the diversity of decision-makers in international judicial institutions can influence the decision-making process. The HRC is of special interest to researchers it is a quasi-judicial institution that in many regards resembles a world court of human rights. The HRC itself is composed of eighteen experts nominated by States who are parties to the International Covenant on Civil and Political Rights (ICCPR).<sup>10</sup> Individuals may

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5. RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS AND POLITICS 24 (2010) [hereinafter MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES]; Ruth Mackenzie, *The Selection of International Judges*, in INTERNATIONAL ADJUDICATION 737, 743–47 (Cesare PR Romano, Karen J. Alter & Yuval Shany eds., 2014) [hereinafter Mackenzie, *Selection of International Judges*]; see also Swigart & Terris, *supra* note 2.

6. For a discussion about the normative the sociological legitimacy of international courts, see *infra* Part I.

7. Harmen van der Wilt, *Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States*, 9 J. INT’L CRIM. JUST. 1043 (2011); *African Union Accuses ICC of ‘Hunting’ Africans*, BBC (May 27, 2013), <http://www.bbc.com/news/world-africa-22681894>; see also Chandrachud, *supra* note 1, at 511–13; Farouk Chothia, *Africa’s Fatou Bensouda is New ICC Chief Prosecutor*, BBC (Dec. 12, 2011), <http://www.bbc.com/news/world-africa-16029121>; Sominy Sengupta, *As 3 African Nations Vow to Exit, International Court Faces Its Own Trial*, N.Y. TIMES (Oct. 26, 2016), [https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html?\\_r=0](https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html?_r=0).

8. Gaëlle Le Roux, *Gambia’s Fatou Bensouda Poised to Lead ICC*, FRANCE24 (Dec. 5, 2011) <http://www.france24.com/en/20111205-african-woman-icc-chief-prosecutor-profile-bensouda-moreno-ocampo-hague>; Farouk Chothia, *Africa’s Fatou Bensouda Is New ICC Chief Prosecutor*, BBC (Dec. 12, 2011), <http://www.bbc.com/news/world-africa-16029121>.

9. *Gambia Announces Withdrawal from International Criminal Court*, REUTERS (Oct. 26, 2016), <http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0>.

10. International Covenant on Civil and Political Rights, art. 28(1), Dec. 16, 1966, 999 U.N.T.S. 180 [hereinafter ICCPR].

bring communications to the HRC against 115 States for alleged violations of their human rights. The procedure itself is adversarial and quasi-judicial.<sup>11</sup> If the HRC finds that a State has indeed violated a right guaranteed by the ICCPR, it may grant the individual a remedy against the member State. When making decisions on individual communications, the role of Committee Members (CMs) resembles the role of judges.<sup>12</sup>

Whereas previous empirical literature has focused on judicial behavior in regional courts or on specific aspects of judicial behavior in international courts (mainly political influences on judges),<sup>13</sup> this article is the first to provide a wider and more comprehensive empirical picture of judicial decision-making in an international setting. Moreover, whereas previous articles have focused mainly on courts, this is the first article to discuss decision-making in an international quasi-judicial institution.

The article asks to what extent, if at all, the backgrounds of CMs influence the decision-making process of the HRC. As mentioned above, the article focuses on the following aspects of the CMs' backgrounds: geographical origin, gender, domestic legal system, and professional background. In order to answer the research question, I hand-coded an original dataset of the decisions of the HRC under the First Optional Protocol to the ICCPR (OP).<sup>14</sup> The dataset includes the votes of all CMs in each and every decision on the merits of the HRC (between the years 1997–2013), as well as the backgrounds of the CMs.

In line with the well-established literature on judicial behavior in the national context, the article takes into account that the background of the CM can influence different aspects of the decision-making process. Accordingly, the article uses three dependent variables. On the level of the individual CM, the article looks both into how the CM voted in a given case, and whether he or she chose to write an individual opinion in the case. On the level of the HRC itself, the article examines whether the presence of CMs from certain backgrounds increases the probability that the HRC as a whole decides in a certain way—for instance, whether a higher percentage of CMs from democratic countries increases the probability that the HRC votes in favor of applicants and against States. Also, in line with the previous literature, the article differentiates general voting patterns from specific voting patterns on subject matters in which the background of the

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11. YOGESH TYAGI, THE UN HUMAN RIGHTS COMMITTEE 547–50 (2011) (discussing in which ways the decisions of the HRC differ from regular judicial decisions).

12. Cecilia Medina, *The Role of International Tribunals: Law-Making or Creative Interpretation?*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 649, 657 (Dinah Shelton ed., 2013).

13. Empirical studies have been conducted mainly on the following international tribunals: the International Court of Justice (ICJ), the *ad hoc* international criminal tribunals (the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR)), and the International Criminal Court (ICC). For detailed discussion of the empirical literature on international judicial institutions, see *infra* Part I.b.

14. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol*].

CM might be of special importance. For instance, women CMs are expected to vote differently from their male colleagues in gender sensitive cases.

The article finds certain voting patterns associated with geographical origin, domestic legal systems, professional background, and possibly gender. This is especially true in cases where the CMs want to protect the interests of their home States. For instance, the most significant voting pattern was found for CMs from Western countries voting in favor of countries (mostly from their regions) in immigration cases. It is assumed that all the States from Western countries might share an interest in limiting immigration to their territory. However, it is safe to say that on many issues the article did not find that the background of the CMs had a significant influence on their voting patterns.

Finally, the article uses the HRC to demonstrate that diversity can be important in order to establish the institution's normative and sociological legitimacy in the international community. It argues that there should be a distinction between two sorts of diversity criteria. The first sort are diversity criteria that the international community views as important and representing certain values (such as geography and gender). The second sort are diversity criteria that are instrumental and that should be relevant only if there is empirical evidence that they influence the behavior of the decision-maker (like professional background and legal system).

This research contributes to our understanding of diversity, decision-making, and legitimacy in international judicial institutions, and sheds light on the various reasons to support diversity. The article proceeds as follows. Part I introduces the general debate about the importance of diversity in international judicial institutions and the relevant empirical literature. Part II introduces the HRC and the issues of diversity within it. Parts III and IV, the main parts of the article, perform an empirical analysis of the votes of CMs. Part V discusses what inferences might be drawn from the results presented.

## I.

### DIVERSITY IN INTERNATIONAL INSTITUTIONS

The agreement on the criteria according to which decision-makers are appointed to international judicial institutions is regarded as an important part of the agreement to establish the institutions.<sup>15</sup> Therefore, in almost all the treaties and statutes establishing international judicial institutions, a “diversity clause” can be found. In the context of international courts, there is a distinction between “full representation courts” and “selective representation courts.”<sup>16</sup> Full representation

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15. See MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 26.

16. *Id.* at 7 (“[A] key distinction arose (which still affects judicial selection processes today) between ‘full representation’ courts, where each state has a judge of its nationality on the court permanently, and ‘selective representation’ courts, where there are fewer seats than the number of states that are parties to the court’s statute. In the latter type of court, a choice has to be made between candidates from different states, thus giving rise to a greater degree of competition in which political influences, amongst other factors, can and do hold sway.”).

courts are those in which each member State nominates its own representative to the court. These courts are mainly found in the European regional system, and include the European Court of Human Rights (ECtHR)<sup>17</sup> and the European Court of Justice (ECJ).<sup>18</sup> Other courts, especially those in which full representation is impractical, are known as selective representation courts. Such courts include the International Court of Justice (ICJ),<sup>19</sup> the ICC,<sup>20</sup> and the International Tribunal for the Law of the Sea.<sup>21</sup> In these courts, States must agree on a limited number of judges, and therefore their foundational statutes include diversity clauses to ensure that the composition of the court will not be monolithic.

Currently, almost all of the statutes establishing international judicial institutions have provisions regarding the diversity of the decision-makers.<sup>22</sup> For instance, Article 9 of the Statute of the ICJ States that, “At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”<sup>23</sup> Over time, awareness of the significance of diversity in judicial institutions has risen, and therefore one of the new major international courts, the ICC, has an exceptionally detailed provision regarding diversity of the judiciary. Article 36 of the Statute of the ICC (the “Rome Statute”) indicates that there should be diversity in professional background, representation of the principal legal systems, equitable geographical representation, and gender balance.<sup>24</sup> Also, in order to promote diversity, most international judicial institutions have a provision that prohibits two or more individuals of the same nationality from being appointed at the same time.<sup>25</sup>

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17. Statute of the European Court of Human Rights art. 20 (“[T]he Court shall consist of a number of judges equal to that of the High Contracting Parties.”).

18. Even though there is no explicit provision about full representations in the ECJ, in practice, every member State has a judge on the court. *See* SIMON HIX & BJORN HOYLAND, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 80 (3rd ed. 2011)).

19. Statute of the International Court of Justice art. 3(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (“[T]he Court shall consist of fifteen members, no two of whom may be nationals of the same State”).

20. *See* Rome Statute of the International Criminal Court art. 36(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome statute] (“[S]ubject to the provisions of paragraph 2, there shall be 18 judges of the Court.”).

21. Statute of the International Tribunal for the Law of the Sea art. 2(1), Annex VI to the United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397 (entered into force Dec. 10, 1982) (“[T]he Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea”).

22. *See* MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES*, *supra* note 5, at 9.

23. *See* ICJ Statute, *supra* note 19, art. 9.

24. *See* Rome Statute, *supra* note 20.

25. *See, e.g.*, ICJ Statute, *supra* note 19, art. 4(2); Statute of the Inter-American Court on Human Rights art. 3(1), O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98; Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights art. 11(2), Jan. 25, 2004, <http://www.africa->

Therefore, in planning the composition of an international court, there is an attempt to reach a balance and to look beyond the qualification of each and every individual.<sup>26</sup>

#### A. *The Importance of Diversity in International Judicial Institutions*

There are two lines of arguments in favor of diversity in international institutions in general and judicial institutions in particular – function and legitimacy.<sup>27</sup> This Section will briefly elaborate on these two arguments and raise potential counterarguments.

According to the functional argument, international judicial institutions should be diverse because the background of the decision-maker influences both the way he or she votes and the way the institution makes decisions.<sup>28</sup> The background of the decision-maker can influence the judicial decision-making process in several ways. First, the background of the individual influences the way that he or she votes.<sup>29</sup> Additionally, through separate opinions (both concurrences and dissents) the decision-maker can bring into the jurisprudence certain ideas

union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf; Statute of the International Tribunal for the Law of the Sea art. 3(1), Annex VI to the United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397 (entered into force Dec. 10, 1982) [hereinafter ITLS Statute].

26. John Hedigan, *The Election of Judges to the European Court of Human Rights, in* PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW 239, 239 (Marcelo G. Kohen ed., 2007).

27. See generally Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 467, 429–30 (2015) (arguing that “[a] diversity can affect the perceived legitimacy of a state’s dispute resolution system and the quality of judicial decisions, diversity levels in the national bench and bar have been an area of transnational concern”); Kurt Gaubatz & Matthew MacArthur, *How International is “International” Law?*, 22 MICH. J. INT’L L. 239, 247 (2001) (“We argue here that looking at the diffusion of practitioners also matters because it sheds light on the diffusion of ideas and norms in international law in particular and international relations more generally; the bias in who practices international law reveals an underlying limitation in the internalization of international legal norms among a large number of states in the international system.”); Ifill, *supra* note 1, at 405 (“[T]he lack of racial diversity on our nation’s courts threatens both the quality and legitimacy of judicial decision-making.”).

28. Ifill, *supra* note 1, at 453–55 (discussing how a racial perspective matters to the decision-making process of the court); Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. DISP. RESOL. 43 (2015) (using the Canadian judicial systems as a case study for the importance of diversity in decision making).

29. For of studies discussing how the background of the judge affects his or her personal voting, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 77–89 (2013); Carlos Berdojo, *It’s the Journey, Not the Destination: Judicial Preferences and the Decision-Making Process*, 51 U. LOUISVILLE L. REV. 271 (2012); Ifill, *supra* note 1, at 453; Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (discussing, among others, how gender influences the votes of the judge); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (discussing how the background of the judge can affect racial bias). *But see* Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185 (2009) (arguing that judges are professional enough so that their background does not influence the way they decide cases).

and voices that are not usually heard.<sup>30</sup> Judges with different backgrounds also contribute unique perspectives to the deliberation between the members of a panel, and thus can influence the decision of the panel as a whole.<sup>31</sup> The background of the decision-maker can influence either the way that the decision-maker (or the panel) votes generally or in specific types of cases.<sup>32</sup> Additionally, diversity can help correct biases that other judges have.<sup>33</sup>

The second argument in favor of diversity is that it establishes the legitimacy of an international judicial institution.<sup>34</sup> The legitimacy of international judicial institutions is of special importance (as compared to national courts) for two main reasons.<sup>35</sup> First, international institutions exercise governmental power over people from all over the world.<sup>36</sup> Second, the international system lacks effective

30. See Mahoney, *supra* note 28, at 52–53 (discussing cases of individual opinions written by female judges in Canadian courts); Fred J. Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998–2006)*, ANCIILLA IURIS 32 (2008) (discussing separate opinions in the context of the European Court of Human Rights). For discussion about the politics and considerations behind writing individual opinions, see also Marsha S. Berzon, *Dissent, “Dissentals,” and Decision Making*, 100 CALIF. L. REV. 1479 (2012); Paul J. Wahlbeck, James F. Spriggs II & Forrest Maltzman, *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 AM. POL. RES. 488 (1999); Meredith K. Lewis, *Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Disputes*, 48 STAN. J. INT’L L. 1 (2014) (discussing the advantages of allowing dissents in international courts in general, and in the WTO in particular); Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decision Making on a Multi-Member Court*, 100 CALIF. L. REV. 1445 (2012) (discussing the general considerations of a judge when is it right to write a separate opinion).

31. See NINA-LOUISA AROLD, *THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 79 (2007) (conducting interviews with judges from the ECtHR where some of the interviewees suggested that Eastern European judges bring a different perception of human rights to the discussions on the court); Chandrachud, *supra* note 1, at 491 (discussing how judges from African States may have influenced other judges on the ICC to vote against criminal defendants from African States); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the US Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON & ORG. 299 (2004) (discussing how women and minority judges influence the decision-making of the panel in US Federal Courts of Appeal); Ifill, *supra* note 1, at 455 (discussing the racial perspective that judges of color bring to discussions in US courts); Peresie, *supra* note 29, at 1761–62 (discussing how women judges influenced the decisions of their male colleagues in Title VII cases).

32. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (discussing how the votes of judges differ according to their race in racial harassment cases); Ifill, *supra* note 1, at 453 (citing research according to which white and black judges respond differently to discrimination claims); Peresie, *supra* note 29, at 1768 (finding that in Title VII sex discrimination and sexual harassment cases a significant correlation exists between gender and individual federal appellate judges’ decisions); Nancy Scherer, *Blacks on the Bench*, 119 POL. SCI. Q. 655 (2004) (finding that African-American judges vote differently in search and seizure cases).

33. Berzon, *supra* note 30, at 1483–86 (suggesting that group decision making through adversarial collaboration may reduce errors caused by trait and cognitive bias).

34. See, e.g., Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 140 (2009) [hereinafter Grossman, *Legitimacy*].

35. See generally Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61 (2013) [hereinafter Grossman, *Normative Legitimacy*].

36. See Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405 (2006).

tools for enforcing the judgments of its judicial institutions.<sup>37</sup> It also seems that given the somewhat political character of international law, legitimacy of the procedure is of special importance to the legitimacy of international institutions, and not only to the outcome.<sup>38</sup>

The literature divides the discussion on the legitimacy of international institutions into two types—normative legitimacy and sociological legitimacy.<sup>39</sup> *Normative* legitimacy, as defined by Buchanan and Keohane, is the assertion that “an institution has a right to rule.”<sup>40</sup> International judicial institutions are seen as important players in creating legal norms. According to Article 38(1)(d) of the Statute of the ICJ, international courts do not only settle the specific dispute before them, but they also create binding norms of international law.<sup>41</sup> Moreover, even diplomatic institutions, such as the United Nations Security Council, and administrative agencies, such as the World Health Organization, influence the shaping of international legal norms.<sup>42</sup> Therefore, *all* those potentially affected by the policy should be adequately represented in the decision-making process in the relevant international institutions.<sup>43</sup> Even if the decision of the institution is just, to be normatively legitimate it should also be made by decision-makers who

37. See Grossman, *Normative Legitimacy*, *supra* note 35, at 63 (“[B]ecause no world legislature exists to counterbalance the decisions of international courts, and no worldwide police force enforces them, international courts’ legitimacy is all the more essential to their success.”); Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 11 CHI. J. INT’L L. 115 (2011); see generally Koh, *supra* note 3.

38. See Grossman, *Normative Legitimacy*, *supra* note 35, at 67, 104 (discussing the importance of the procedural participation of all stakeholders to the legitimacy of international courts); see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596 (1999) (discussing the importance of a democratic procedure and decision-making process to the legitimacy of international law in general, and specifically to international environmental law); Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 23 EUR. J. INT’L L. 7, 32 (2012) (“The classic way to democratic legitimation of public authority is that of electing those in office . . . . The condition reflects how (judicial) socialization bears on legal interpretation. Often disputing parties who do not have a judge of their nationality on the bench may choose a judge *ad hoc*.”); Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341 (2011) (discussing the importance of judicial independence and diversity to the legitimacy of international courts).

39. Bodansky, *supra* note 38, at 601; Grossman *Normative Legitimacy*, *supra* note 35, at 63.

40. Buchanan & Keohane, *supra* note 36, at 407. See also Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479 (2013).

41. For a general discussion on the role of judicial precedents in international courts, see Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 75 (2009); MOHAMED SHAHABUDDIN, PRECEDENT IN THE WORLD COURT 91 (2007); Bogdandy & Venzke 2012, *supra* note 38, at 19 (discussing precedent in international law in light of the legitimacy of legal institutions); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 43 VA. J. INT’L L. 631, 639 (2005) (discussing the importance and inevitability of judicial lawmaking in international law, as well as its boundaries).

42. See generally JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW (2016).

43. Grossman, *Normative Legitimacy*, *supra* note 35, at 104.

represent the people under the jurisdiction of the institution.<sup>44</sup> Some scholars have pointed out that there is a democratic deficit regarding the authority of international institutions, and that diversity of representation could somewhat help to bridge it.<sup>45</sup>

The second sort of legitimacy is *sociological* legitimacy, defined by Buchanan and Keohane as an institution that “is widely believed to have the right to rule.”<sup>46</sup> Scholars have argued that a diverse and representative institution may increase public support.<sup>47</sup> Several officials in the international legal system have also noted a correlation between the composition of international judicial institutions and public confidence in them.<sup>48</sup>

In contrast, the common critique of courts’ diversity in the national context is that it stands in opposition to appointing a candidate according to his or her merit.<sup>49</sup> Current literature has suggested several answers to this problem, some of which might be very relevant to the international system as well. The first one is that “merit” is not “an objective standard neutrally applied,” but that rather reflects certain standards set by the powerful members of society.<sup>50</sup> In the context of international law, it can be argued that the standards of “merit” are set by powerful Western States, and therefore potential nominees from non-Western States are *a priori* in a position of inferiority.<sup>51</sup> Moreover, especially in international law, powerful States have a political advantage in nominating representatives to international judicial institutions. For instance, it is customary that the five permanent members of the Security Council (the “P5”) have a judge on the major international courts, including, first and foremost, the International Court of Justice.<sup>52</sup> Therefore, diversity provisions can help less powerful States to promote

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44. *Id.* at 67.

45. Bodansky, *supra* note 38, at 613; Malleon, *supra* note 1, at 376; Shany, *supra* note 41, at 89–90.

46. Buchanan & Keohane, *supra* note 36, at 407.

47. *See* Bodansky, *supra* note 38, at 613; Chandrachud, *supra* note 1, at 491 (arguing that more African judges on the International Criminal Court can increase the legitimacy of the Court in Africa); Barbara L. Graham, *Toward and Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004); Ifill, *supra* note 1, at 405; Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90 (2010) (arguing that representation of African-Americans in courts increased their legitimacy among African-Americans); *but see* Alan Hyde, *The Concept of Legitimation in Sociology of Law*, 1983 WIS. L. REV. 379 (1983) (arguing that there is no empirical evidence to the concept of legitimacy).

48. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 26 (“The material gathered highlights the fact that those involved in the international courts see a correlation between the composition of the courts and issues of public confidence, judicial competence and independence. Perceptions as to the quality and background of the judges and the broader representativeness of the bench clearly impact upon perceptions of the legitimacy of the courts.”).

49. Chandrachud, *supra* note 1, at 493; Malleon, *supra* note 1, at 381; *see also* Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT’L L. 339 (2016) [hereinafter Grossman, *Shattering the Glass Ceiling*].

50. Malleon, *supra* note 1, at 381.

51. *See also* Chandrachud, *supra* note 1, at 493.

52. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES *supra* note 5, at 18; Chandrachud,

their candidates, even if they are not as “meritorious” as those nominated by powerful States.

*B. What are We Seeking to Diversify?*

The next question is what exact characteristics of the decision-makers the international legal system is seeking to “diversify.” According to the literature, there are four characteristics that in recent years have been seen as most important—geography, gender, legal systems, and professional background.<sup>53</sup> I will now briefly elaborate on each of these.

The first and perhaps most important characteristic is *geography*—from where the nominee comes. Geography is traditionally seen as the characteristic that States care most about, even if it is not always explicitly written in the statute of the institution.<sup>54</sup> However, in practice, international judicial institutions usually do not have equal geographical representation over different regions.<sup>55</sup> Very commonly, the Western countries are overrepresented, probably due to their political power, while Asian and Eastern European countries are underrepresented. Recently there has been a trend of appointing more judges from African countries, especially to the ICC.<sup>56</sup> Due to the great importance that States attribute to regional diversity, in some institutions the member States have negotiated unofficial regional quotas.<sup>57</sup>

It is suggested that different geographical (or geopolitical) regions might be interested in appointing different types of representatives. For instance, it has been argued that regions with new democracies are more likely to appoint more activist judges in order to safeguard democracy in those regions.<sup>58</sup> Also, for various reasons, judges might want to vote in line with the legal culture of their regions. For example, given that Western States tend to have more progressive views on LGBT rights, judges from those States are more likely to support applicants on LGBT rights.<sup>59</sup> Another example might be African decision-makers and minority

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*supra* note 1, at 488.

53. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES *supra* note 5, at 32–60; see Mackenzie, *Selection of International Judges*, *supra* note 5, at 743–47; Swigart & Terris, *supra* note 2.

54. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 26; see generally DANIEL TERRIS ET AL., THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES (2007).

55. TERRIS ET AL., *supra* note 54, at 17 (finding that as of January 2006, almost two-thirds of the international judges came from European countries: United Kingdom with the largest number of nationals (nine judges), followed by France, Italy and Germany; on the other hand, Asia, in which half of the population of the world lives, had only sixteen judges on international courts and tribunals (eight percent)).

56. Swigart & Terris, *supra* note 2, at 623; Chandrachud, *supra* note 1, at 488, 495.

57. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 744.

58. Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT’L L. 387, 392 (2009).

59. However, it might also work the opposite way—the ruling of an international court on a relatively controversial subject such as LGBT rights, might trigger change in all member States of the

rights. Since the African Charter is very active in promoting the rights of groups (and not only individuals),<sup>60</sup> individuals from that region might be more likely to vote in favor of applicants who claim that the State violated their rights as a part of a minority group.

Moreover, as mentioned, geographical regions play an important part in electing decision-makers to judicial institutions.<sup>61</sup> If we assume that a decision-maker has an interest in being re-elected, she might vote in line with the interests of her region on matters of special concern to that region.<sup>62</sup> Therefore, decision-makers might be more willing to protect the interests of their regions in cases in which the subject matter is, for example, immigration, or trade.<sup>63</sup> On these two issues the stakes for different regions are very high, and therefore decision-makers might feel pressure to vote according to the interests of regions that nominated them.

Finally, as mentioned above, the personal experiences of decision-makers might influence their voting patterns on some issues. In this regard, individuals who come from countries and regions with a long history of authoritarian regimes might be much more sensitive to protecting human rights in general, and political rights in particular.<sup>64</sup> For instance, the judges of the Inter-American Court of Human Rights, together with members of the Inter-American Commission, have played a very important role in defining enforced disappearance as a human rights violation.<sup>65</sup>

Previous empirical research on the ICJ finds that international judges tend to vote in favor of their countries of origin and countries that are geopolitically similar.<sup>66</sup> Additionally, Voeten finds in his research on the ECtHR that judges from Eastern European countries tend to vote *against* their home countries and

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court. See Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

60. See, e.g., Christof Heyns, *The African Regional Human Rights System: The African Charter* 108 PENN. ST. L. REV. 679, 686–93 (2004). For instance, the African Charter promotes collective rights and duties that are not found in the ICCPR or in the other regional instruments (for example, article 27(1) to the African Charter states that “[E]very individual shall have duties towards his family and society . . .”).

61. See MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 101.

62. See Erik Voeten, *International Judicial Behavior*, in INTERNATIONAL ADJUDICATION 550, 552–53 (Cesare PR Romano, Karen J. Alter & Yuval Shany eds., 2014); Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 420 (2008) [hereinafter Voeten 2008].

63. Developing and developed countries might have different, or even opposite, views and interests on these issues. See Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009).

64. David C. Baluarte, *Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative For Victims' Representatives*, 27 AM. U. INT'L L. REV. 263, 320 (2012) (discussion how the Inter-American system played an important role in promoting human rights in the region).

65. *Id.*

66. See generally, Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2004).

countries with socialist heritages more than other judges do.<sup>67</sup> Also, Arold suggested that in the ECtHR context, Eastern European judges are more protective of social and economic rights than are Western European judges.<sup>68</sup> Finally, Chandrachud found that the more African judges sit on the ICC, the more likely the ICC is to vote against African defendants who committed crimes in Africa.<sup>69</sup>

Another characteristic of diversity is *gender*. Women are very often underrepresented in international judicial institutions.<sup>70</sup> According to data collected by Grossman, in most international courts women did not comprise more than twenty-five percent of the total bench in 2015.<sup>71</sup> For instance, the Inter-American Court of Human Rights had only one woman out of seven judges, and the International Court of Justice had three women out of fifteen judges.<sup>72</sup> A notable outlier in this regard is the International Criminal Court, in which seven out of eighteen judges (thirty-nine percent) were women.<sup>73</sup> In international arbitration the situation is not better: According to a survey of attendees at a congress of international arbitration, only 17.6% of the arbitrators were women.<sup>74</sup> In recent years there has been ongoing attention given to the underrepresentation of women in international judicial institutions, and therefore some steps have been taken to attempt to solve this problem. Different international courts have tried to tackle this problem in different ways. For instance, the Statute of the ICC clearly states in its diversity clause that in the selection of judges, there is a need for a “fair representation of female and male judges.”<sup>75</sup> A similar provision also exists in the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights.<sup>76</sup> The European Treaty of Human Rights does not have a diversity clause, but there is an official parliamentary policy to increase the proportion of women in the

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67. Erik Voeten, *International Judicial Independence*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 421, 427, 429 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

68. AROLD, *supra* note 31, at 70, 79.

69. Chandrachud, *supra* note 1, at 514–15.

70. TERRIS ET AL., *supra* note 54, at 18–19; Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 *CHI. J. INT’L L.* 647, 656 (2012) [hereinafter Grossman, *Do Women Judges Matter?*]; Mackenzie, *Selection of International Judges*, *supra* note 5, at 745; MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES*, *supra* note 5, at 47; Swigart & Terris, *supra* note 2, at 624. *See also* Nienke Grossman, *Achieving Sex-Representative International Court Benches*, 119 *AM. J. INT’L L.* 82 (2016) (discussing the main barriers to women’s appointment to international courts and possible solutions).

71. Grossman, *Shattering the Glass Ceiling*, *supra* note 49, at 350.

72. *Id.* at 343, 364.

73. *Id.* at 349–50.

74. Franck, *supra* note 27, at 452.

75. Rome Statute, *supra* note 20, art. 36(8)(a)(iii).

76. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights art. 12(2), June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (“[D]ue consideration shall be given to adequate gender representation in nomination process.”).

ECtHR.<sup>77</sup> Other influential courts, such as the ICJ, have no statutory guidance or official policy regarding the nomination of women.<sup>78</sup>

The question of whether women decision-makers actually vote differently than their male colleagues is almost unexplored in the international context. The basic assumption is that in some cases men and women may have different points of view that can influence their judicial decisions.<sup>79</sup> However, studies that have been conducted on this question in national courts suggest that women tend to vote differently only in very specific cases, mainly on issues that are of special relevance to women.<sup>80</sup> Evidence of different voting patterns of women in international judicial institutions is very scarce (because of the small number of women in international courts, among other reasons). King and Greening conducted one of the first studies in the field about the International Criminal Tribunal for the Former Yugoslavia.<sup>81</sup> This study demonstrated that female judges sanctioned defendants who assaulted women more severely; however, in general, there was no evidence that women voted differently to men.<sup>82</sup> For instance, Navanethem Pillay, the only female judge in the Akayesu case before the International Criminal Court for Rwanda, took the initiative to question witnesses about sexual violence.<sup>83</sup> Pillay herself said that “rape has been classified as a war crime for decades, but it was never successfully prosecuted until women started

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77. Candidates for the European Court of Human Rights, Resolution 1366 (2004); Candidates for the European Court of Human Rights, Resolution 1627 (2008); Resolution 1841 (2011). See Grossman, *Shattering the Glass Ceiling*, *supra* note 49, at 41–44; John Hedigan, *The Election of Judges to the European Court of Human Rights*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW 246 (Marcelo G. Kohen eds., 2007).

78. Grossman, *Shattering the Glass Ceiling*, *supra* note 49, at 382.

79. Grossman, *Do Women Judges Matter?*, *supra* note 70, at 656.

80. See L. Boyd et al., *Untangling the Casual Effects of Sex on Judging*, 54 AM. J. POL. SCI. 403 (2010) (finding that women vote differently only in sex discrimination cases); Paul Collins et al., *Gender, Critical Mass, and Judicial Decision Making* 32 J.L. & POL’Y 260 (2010) (finding that the most significant differences between men and women were in criminal cases); Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131–32 (1993) (finding that the votes of women circuit court judges in employment discrimination and search and seizure cases differ from those of their male counterparts); Peresie, *supra* note 29, at 1768–69 (finding that women tend to vote more in favor of plaintiffs in Title VII cases); Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 432–37 (1994) (finding no difference between male and female judges in obscenity or criminal search and seizure cases. However, in employment discrimination cases, female judges were significantly more liberal than their male colleagues). For a general discussion about women judges see generally Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 J.L. & SOC’Y 490, 509–19 (2008) (arguing that although there was no empirical evidence that women judges bring a different voice, the presence of women judges enhances the legitimacy of the courts); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 919 (1995) (discussing normative reasons to appoint female judges).

81. Kimi L. King & Megan Greening, *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 SOC. SCI. Q. 1049 (2007).

82. *Id.* at 1061–66.

83. Grossman, *Do Women Judges Matter?*, *supra* note 70, at 656–57;

to play a role in the International Criminal Tribunals.”<sup>84</sup> Finally, Meernik and his colleagues did not find a connection between gender, general sentencing, and verdict on the ICTY.<sup>85</sup> In line with the research on national legal systems, there are no good reasons to believe that women and men vote differently in general, but there might be different voting patterns on gender-sensitive issues.

The third characteristic of diversity is the *legal system* from which the decision-maker comes. This diversity criterion is a relatively common one in statutes of international courts, and exists, among others, in Article 9 of the Statute of the ICJ. Article 9 refers to: “the main forms of civilization and of the principal legal systems of the world.”<sup>86</sup> The common and traditional understanding is that those clauses refer mainly to the difference between common law and civil law legal systems.<sup>87</sup> The idea behind requiring representation of different legal systems is the benefit of having various legal points of view on a certain subject.<sup>88</sup> It is also seen as very helpful when national procedural matters are examined in the international court (for example, due process cases in human rights tribunals).<sup>89</sup>

However, the interpretation of the term “different legal systems” can also be taken in a broader sense, especially since this term is sometimes written together with the requirement for representation of “different forms of civilizations.”<sup>90</sup> One possible interpretation might be that different political and legal regimes appoint different judges and expect them to behave in different ways. For instance, some regimes might expect judges to be more activist, interpreting broadly the jurisdiction of the courts and legal provisions, while others might prefer less

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84. Navanethem Pillay, *Equal Justice for Women: A Personal Journey*, 50 ARIZ. L. REV. 657, 666 (2008); see also TERRIS ET AL., *supra* note 54, at 44–45.

85. James Meernik et al., *Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors*, 86 SOC. SCI. Q. 683, 696, 699 (2005).

86. ICJ Statute, *supra* note 19, art. 9. Similar provisions regarding legal systems also exist in other courts. See Rome Statute, *supra* note 20, art. 36(8)(a)(i); I\_TLS Statute, *supra* note 25, art. 2(2).

87. Georges Abi-Saab, *Ensuring the Best Bench: Ways of Selecting Judges*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 165, 169 (Connie Peck & Roy S. Lee eds., 1997).

88. See Mackenzie, *supra* note 53, at 743–44; see also William Teteley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677 (2000) (discussing the theoretical and practical differences between the common law and civil law legal systems).

89. See MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 40–43; see also William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 974–75 (2004) (discussing how international tribunals became a platform for blending legal procedures and traditions).

90. See, e.g., ICJ Statute, *supra* note 19, art. 9 (“At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”); ICCPR, *supra* note 10, art. 32(1) (“[I]n the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.”); It is somewhat unclear what the term “civilization” means in the context of diversity statutes. See ANDREAS ZIMMERMANN ET AL., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 306–15 (2012); see also Abi-Saab, *supra* note 87, at 170–71.

activist judges. Moravcsik argued that potentially unstable democracies are more likely to advocate binding human rights regimes.<sup>91</sup> Voeten showed that judges from the new Eastern European democracies are more activist than their colleagues, but he did not find a connection between a State being a transitional democracy and the activism score of its judges.<sup>92</sup> It should be noted, however, that a study by Bruinsma argued that judges elected to the ECHR by the new member States of Central and Eastern Europe deliver significantly fewer separate opinions than judges elected by the old member States.<sup>93</sup> This might indicate that different legal systems and political regimes do have different interests in appointing judges to the court.

The last diversity criterion is diversity in the *professional background* of the decision-makers.<sup>94</sup> For instance, the ICJ Statute grants the member States certain guidance regarding the professional background of international judges, stating that they should “possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”<sup>95</sup> Abi-Saab argues that this provision not only introduces certain guidelines to States, but also seeks to diversify the professional background of the judges, acknowledging that it is important to have both judges with a background in municipal law and judges with background in international

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91. See generally Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217 (2000).

92. See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT’L ORG. 669, 689 (2007). [hereinafter Voeten 2007].

93. Bruinsma, *supra* note 30, at 32.

94. For research on how professional background influences the decisions of judges in the US system, see Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEG. STUD. 257 (1995) (finding no significant evidence that former judges and prosecutors vote differently); Brudney et al., *Judicial Hostility Towards Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999) (finding that judges from private practice representing management are more likely to support union claims); Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137 (2012) (criticizing, among others, the findings that Supreme Court Justices are appointed mainly from academia and appellate judging); Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (finding that judges with prior judicial experience are more likely to support claims of race discrimination); Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903 (2003) (discussing prior empirical literature on the professional background of judges and decision-making, and criticizing the tendency to appoint candidates with prior judicial experience to the US Supreme Court); Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 69 (2001) (finding that judges with experience in representing management are less likely to publish opinions); Monique Renee et al., *Evolution of Judicial Careers in the Federal Courts, 1789-2008*, 93 JUDICATURE 62 (2009) (empirically assessing whether currently there is a trend to appoint nominees to federal courts with prior judicial experience); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001) (finding that judges without private practice experience rely less on regulations or pronouncements as their primary interpretive approach).

95. ICJ Statute, *supra* note 19, art. 2.

law, so that there is a dialogue between the State level and the international level.<sup>96</sup> Over time, the requirement of diversity in professional backgrounds has become important in the context of the international criminal courts. Therefore, the statutes of the ICTY and ICTR State that “due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.”<sup>97</sup> The experience of these two *ad hoc* criminal tribunals showed that judges should come with theoretical knowledge from academia, and with *de facto* experience managing criminal trials.<sup>98</sup> Following this, the statute of the ICC created two different lists of candidates—those with expertise in criminal law, and those with expertise in international law.<sup>99</sup> Finally, in the context of the WTO, panel members are expected to have a “wide spectrum of experience.”<sup>100</sup>

In practice, most of the international judges come from academia, the diplomatic corps and other civil servants, and the national judiciary.<sup>101</sup> Traditionally, many international judges have been nominated from academia, and conventional wisdom is that they tend to be more independent.<sup>102</sup> In contrast, some deem the nomination of diplomats as problematic, since diplomats might be too political and not as impartial as judges are expected to be.<sup>103</sup> Moreover, diplomats do not always have legal training. This is problematic because, according to an interviewee cited by Mackenzie et al., diplomats often see “the law as negotiable, not as a parameter you have to take as it is.”<sup>104</sup> Studies by Voeten<sup>105</sup> and by Terris et al.<sup>106</sup> demonstrate that judges who were diplomats prior to their nomination show more respect for the *raison d’etat*. On the other hand, professional judgments induce more compliance by member States.<sup>107</sup> In his research on the ECtHR, Bruinsma also shows that professional background might have an influence on the decision making of judges. For instance, in interviews he conducted with ECtHR judges, Bruinsma found that it was more likely for judges coming from academia to write separate opinions, and less likely for former practitioners to do so.<sup>108</sup> Although diversity in the professional

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96. Abi-Saab, *supra* note 87, at 172.

97. S.C. Res. 827, U.N. Doc. S/RES/827, art. 13 (May 25, 1993) (ICTY Statute); S.C. Res. 955, art. 12 (Nov. 8, 1994) (ICTR Statute).

98. See Swigart & Terris, *supra* note 2, at 629.

99. Rome Statute, *supra* note 20, art. 36(5).

100. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 8(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

101. TERRIS ET AL., *supra* note 54, at 20.

102. MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES, *supra* note 5, at 52.

103. *Id.* at 58–59.

104. *Id.* at 58.

105. Voeten 2008, *supra* note 62, at 696.

106. TERRIS ET AL., *supra* note 54, at 64.

107. Voeten 2008, *supra* note 62, at 430.

108. Bruinsma, *supra* note 30, at 36–37.

backgrounds of judges is important, it should also be noted that sometimes it is hard to classify judges by career, since many of the individuals appointed to international courts have had very long careers working in several legal capacities.<sup>109</sup>

In conclusion, the four most commonly discussed criteria for diversity in international judicial institutions are geography, gender, legal system, and professional background. There are some studies on national and international institutions that, together with anecdotal evidence, find that those differences might influence the way a judge votes. However, none of those studies empirically explored all four characteristics of diversity in an international (as opposed to a regional) judicial institution.

Next, the article will introduce the relevant discussions about diversity in the HRC, and how it can influence the way that CMs make decisions.

## II.

### THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

#### A. General Background

The International Covenant on Civil and Political Rights (ICCPR)<sup>110</sup> codifies the civil and political rights recognized in the Universal Declaration of Human Rights.<sup>111</sup> The ICCPR guarantees a wide range of the most basic rights to people from all over the world. Currently, 169 countries are parties to the ICCPR,<sup>112</sup> making it the most widely ratified legally binding document granting civil and political rights. The ICCPR protects rights such as the right to life,<sup>113</sup> freedom from torture,<sup>114</sup> freedom of religion,<sup>115</sup> gender equality,<sup>116</sup> judicial due process,<sup>117</sup> and equal protection of the law.<sup>118</sup>

Since there are many difficulties in enforcing a treaty that guarantees the rights of an individual against a State, the ICCPR drafting committee decided to establish a committee that would interpret the treaty and monitor its implementation in the member States.<sup>119</sup> Thus, the HRC was established under Article IV of the ICCPR. The HRC is composed of eighteen CMs that come from

109. Swigart & Terris, *supra* note 2, at 626.

110. ICCPR, *supra* note 10.

111. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

112. ICCPR, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en) (last visited Feb. 8, 2017).

113. ICCPR, *supra* note 10, art. 6.

114. *Id.* art. 7

115. *Id.* art. 18

116. *Id.* arts. 3, 23

117. *Id.* art. 14

118. *Id.* art. 26

119. *Id.* art. 254

States that are members of the ICCPR.<sup>120</sup> Although the CMs are nominated only by their State of nationality, according to the ICCPR they serve in their personal capacity.<sup>121</sup>

Many regard the nomination and appointment of CMs to the HRC as political and as not always reflecting the qualification of the candidate.<sup>122</sup> Although the ICCPR expressly States that CMs serve in their personal capacity and should not represent the interests of their respective States,<sup>123</sup> they can be nominated only by their States of nationality.<sup>124</sup> Also, in the process of the election of CMs at the international level, the UN regional groups play an important part in promoting their candidates.<sup>125</sup>

As part of their role in supervising the implementation of the ICCPR in the member States, the HRC has three main roles. The first role is to review periodical reports of countries regarding “the measures they have adopted to give effect to the rights recognized” in the ICCPR, as well as “the progress made in the enjoyment of those rights.”<sup>126</sup> The second role is to publish general comments on the ICCPR so as to provide general guidance to the States on their obligations under the ICCPR.<sup>127</sup> The third main role of the HRC, which is also the focus of this article, is to adopt decisions (that are also called “views”) on individual communications.<sup>128</sup> In this function, the HRC acts as a quasi-judicial tribunal.

Article 1 of the First Optional Protocol to the ICCPR (OP) permits an individual to file a communication for a violation of a right guaranteed to him by the ICCPR. Although the OP is considered a separate treaty, only States that are

120. *Id.* art. 28.

121. *Id.* arts. 28(3) (“[T]he members of the Committee shall be elected and shall serve in their personal capacity”), 29(2) (“[E]ach State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.”).

122. James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 9 (Philip Alston & James Crawford eds., 2000); see also A. Clapham, *UN Human Rights Reporting Procedures: An NGO Perspective*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 188 (Philip Alston & James Crawford eds., 2000). For a more detailed account of the nomination process to the HRC, see Vera Shikelman, *Geopolitics and Culture in the United Nations Human Rights Committee*, 28 *EUR. J. INT’L L.* 845 (2017).

123. ICCPR, *supra* note 10, art. 28(3).

124. *Id.* art. 29(2).

125. Crawford, *supra* note 122, at 9.

126. See ICCPR, *supra* note 10, art. 40; Rules of Procedure of the Human Rights Committee, Rule 66, ICCPR, CCPR/C/3/Rev.10 (Jan. 11, 2012) [hereinafter Rules of Procedure].

127. The HRC interpreted its authority to issue General Comments from ICCPR article 40(4), which provides that the HRC may transmit “such general comments as it may consider appropriate.” See Office of the U.N. High Comm’r for Human Rights, Civil and Political Rights, *The Human Rights Committee Fact Sheet* 24, UNITED NATIONS (last visited Feb. 8, 2017); <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>; Office of the U.N. High Comm’r for Human Rights, *Human Rights Treaty Bodies—General Comments*, UNITED NATIONS (last visited Feb. 8, 2017). <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>.

128. Optional Protocol, *supra* note 14, art. 23.

parties to the ICCPR are allowed to join it.<sup>129</sup> Currently, out of the 169 countries who are parties to the ICCPR, 115 are parties to the OP.<sup>130</sup> The role of the individual communications is to provide a remedy in case of a specific violation, as well as to give guidance to member States regarding the proper implementation of the ICCPR.

In the individual communications procedure, the applicant files a communication that includes the facts of the case and legal arguments. This triggers an adversarial procedure; following that, the member State has a chance to provide an answer in its defense.<sup>131</sup> After reading the written submissions by both sides, the HRC issues one of the following three decisions—inadmissible, violation (of one or more of the treaty articles), or no violation by the State. The HRC also indicates the remedies that the State should undertake in order to compensate the individual for the violation of the human right (if it indeed occurred). In recent years, the HRC has ordered various remedies, such as adequate compensation,<sup>132</sup> public apology,<sup>133</sup> commutation of the death sentence,<sup>134</sup> retrial,<sup>135</sup> effective investigation,<sup>136</sup> and prosecution of individuals who allegedly violated human rights of the applicant.<sup>137</sup>

Since the individual communications procedure is quasi-judicial, it is the only procedure in which CMs are allowed to write separate opinions.<sup>138</sup> Therefore, we can best study how the background of the CM influences his or her voting pattern through these decisions, as opposed to the general comments and periodical reviews on States.

The main problem with the individual communications mechanism is that the normative status of this mechanism is unclear, and therefore States are not eager to implement the decisions in the communications. Originally, the decisions under the OP were not supposed to be legally binding on the member States. Rather, they were intended to serve a similar function to advisory opinions in other international tribunals.<sup>139</sup> However, over time the HRC has promoted the idea that its views should *de facto* be binding on the State parties, and States have become much more open to decisions against them.<sup>140</sup> In General Comment 33

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129. *Id.* art. 1.

130. *See generally* Optional Protocol, *supra* note 14.

131. *Id.* art. 4.

132. Shchetko v. Belarus, ICCPR CCPR/C/87/D/1009/2001 (Aug. 8, 2006).

133. Lecraft v. Spain, ICCPR CCPR/C/96/D/1493/2006 (July 30, 2009).

134. Chisanga v. Zambia, ICCPR CCPR/C/85/D/1132/2002 (Nov. 3, 2005).

135. Kurbonov v. Tajikistan, ICCPR CCPR/C/86/D/1208/2003 (Mar. 16, 2006).

136. Medjnoune v. Algeria, ICCPR CCPR/C/87/D/1297/2004 (Aug. 9, 2006).

137. Madoui v. Algeria, CCPR/C/94/D/1495/2006 (Dec. 1, 2008).

138. Rules of Procedure, *supra* note 126, r. 104.

139. SUZANNE EGAN, THE UN HUMAN RIGHTS TREATY SYSTEM: LAW AND PROCEDURE 262 (2011). For earlier discussions on the legal status of the decisions of the HRC, see DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 54 (1991).

140. TYAGI, *supra* note 11, at 587–92 (2011); Henry J. Steiner, *Individual Claims in a World of*

issued by the HRC in 2008,<sup>141</sup> the HRC pointed out that its decisions are arrived at in a “judicial spirit,” and that the decisions are of a determinative character.<sup>142</sup> Moreover, the General Comment States that, “[T]he views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument,”<sup>143</sup> and it reminds the countries that they have an obligation to act in good faith to fulfill their obligations under the OP and the ICCPR.<sup>144</sup>

Regardless of the measures the HRC takes to ensure implementation of its decisions, many States refuse to recognize its decisions on individual communications as binding, and the status of implementation appears unsatisfactory. In a 2011 study by Open Society Initiative based on the reports of the HRC itself, it was found that only 12.27% of the HRC decisions had been fully implemented.<sup>145</sup> This is a relatively low figure compared to other national and even international tribunals.<sup>146</sup>

### B. Diversity in the HRC

The main provisions regarding the diversity of CMs are found in Articles 28(2) and 31 of the ICCPR. The articles read as follows:

*Article 28.* 2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

[. . .]

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*Massive Violations: What Roles for the Human Rights Committee?*, in PHILIP ALSTON AND JAMES CRAWFORD, *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 15, 28 (2000)

141. ICCPR, General Comment 33—The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33 (Nov. 5, 2008) [hereinafter General Comment 33].

142. *Id.* ¶ 11.

143. *Id.* ¶ 13.

144. *Id.* ¶ 14; see also EGAN, *supra* note 139, at 262–63.

145. OPEN SOCIETY JUSTICE INITIATIVE, *FROM JUDGMENT TO JUSTICE—IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISION* 119 (last visited Feb. 8, 2017), <https://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf> [hereinafter *FROM JUDGMENT TO JUSTICE*] (defining “satisfactory” Responses as “the willingness of the State party to implement the Committee’s recommendations or to offer the complainant an appropriate remedy”); see also Yuval Shany, *The Effectiveness of the Human Rights Committee and the Treaty Body Reform* (Hebrew Univ. Jerusalem Int’l L. Forum, Working Paper No. 02-13, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2223298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223298).

146. Compliance with judgments of the International Court of Justice is around sixty-eight percent. See Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1315 (2004). For data on implementation of judgments in the European Court of Human Rights and the Inter-American Court of Human Rights, see generally *FROM JUDGMENT TO JUSTICE*, *supra* note 145.

*Article 31.* 1. The Committee may not include more than one national of the same State. 2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Therefore, the ICCPR itself requires diversity mainly in geography and legal systems (it is somewhat unclear what exactly is meant by “different forms of civilization” and how that differs from geographical distribution). Also, it is unclear whether Article 28(2) actually seeks to diversify the professional experience of the HRC members, although it does mention that it is preferable for some CMs to have legal experience. In practice, unlike members of other UN treaty bodies, almost all of the members of the HRC have a legal education.<sup>147</sup> However, nothing is mentioned about diversity within the legal profession itself. Finally, gender representation does not appear in the relevant articles.

Over the years the most important criteria of nomination to the HRC has probably been the geographical origin of the nominee.<sup>148</sup> The UN has five regional voting groups—African, Asian-Pacific (Asian), Eastern European, Latin American and Caribbean (GRULAC or Latin), and Western European and Others (WEOG or Western).<sup>149</sup> The elections are seen as political, and every regional group tries to lobby for its candidates to be elected to as many UN bodies as possible, including the HRC.<sup>150</sup> As in many other international institutions, Western CMs have served on the HRC disproportionately more than CMs from other regions. There is no apparent evidence that diversity criteria such as gender, former occupation, or even legal systems (the latter being officially mentioned in the ICCPR) are seriously taken into account when States nominate and elect candidates.

The problem of lack of diversity of CMs has been addressed by the UN several times. Two resolutions on this subject were adopted. The UN Economic and Social Council adopted the first resolution in 2001,<sup>151</sup> and the UN General Assembly adopted the second resolution in 2009.<sup>152</sup> The main concern of those resolutions was the geographical distribution of CMs, and the 2009 resolution was even titled “[P]romotion of equitable geographical distribution in the membership of the human rights treaty bodies.”<sup>153</sup> However, the 2009 resolution also addresses

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147. Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 917 (2009).

148. See Crawford, *supra* note 122, at 9 (discussing the political nature of nominations to the HRC).

149. This group also includes Canada, New Zealand, Australia and Israel. The United States of America is not a member of any regional group, but attends meetings of the Western Group as an observer and is considered to be a member of that group for electoral purposes. See United Nations Department for General Assembly and Conference Management, United Nations Regional Groups of Member States, <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Feb. 8, 2017).

150. TYAGI, *supra* note 11, at 88–89; Crawford, *supra* note 122, at 9.

151. Economic and Social Council Res. 2001/275 (July 24, 2001).

152. G.A. Res. 64/173, U.N. Doc. A/RES/64/173 (Dec. 18, 2009).

153. *Id.*

the importance of gender balance and the representation of the principal legal systems. Regarding the professional background of the CMs, the resolution does not specifically say it should be diverse, but quotes Article 28(2): CMs should have recognized competence in the field of human rights, and of the usefulness of having several CMs with legal experience.<sup>154</sup>

The 2009 resolution speaks about the importance of diversity, and, although not stating it straightforwardly, it hints at both the functional and the legitimacy arguments in favor of diversity. In the resolution, the General Assembly reaffirms the “importance of the goal of universal ratification of the United Nations human rights instruments,” and reiterates “the importance of the effective functioning of treaty bodies established pursuant to United Nations human rights instruments for the full and effective implementation of those instruments.”<sup>155</sup> It also mentions the significance of “national and regional particularities.”<sup>156</sup> In her 2012 report on strengthening the UN Treaty Bodies, the High Commissioner for Human Rights referred generally to the lack of diversity in the treaty bodies, writing that “[there is a] need to carefully review the qualifications of each candidate, and select the best candidates giving consideration to gender, geography, professional fields and legal systems in determining the final composition.”<sup>157</sup> Although recommended both by the resolution and by the report, no official system of regional quotas has been introduced.

The official reasoning of the General Assembly resolution, as well as the language of other official documents, speaks of the importance of diversity for the general good. However, given that States are most insistent on equal regional representation, a very important question to be raised is whether those benefiting most from the diversity are not the States themselves, who expect certain “personal” benefits from the fact that the CMs share a background with them. In my previous research on the HRC,<sup>158</sup> I presented empirical evidence that CMs tend to vote in favor of States that are similar geopolitically to their State of origin. The strongest statistical results were found for voting in favor of a State from the same regional group. Similarly, as mentioned above, research about the ICJ and the ECtHR has also found certain biases based on similarities, especially for voting in favor of the State of origin.

Before going to the empirical part of the article, it is interesting to present two examples in which the background of a CM could have influenced his or her decision and the dialogue between the CMs. In the case of *Hoyos v. Spain*, the applicant argued that Spain violated her right for equality as guaranteed by Article 26 of the ICCPR, because according to Spanish legislation only men could inherit

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154. *Id.* at 1.

155. *Id.*

156. *Id.*

157. NAVANETHEM PILLAY (U.N. HIGH COMM’R OF HUMAN RIGHTS), STRENGTHENING THE UNITED NATIONS HUMAN RIGHTS TREATY BODY SYSTEM 78 (2012).

158. See Shikhelman, *supra* note 122.

nobility titles.<sup>159</sup> The HRC decided that it had no jurisdiction to review the case, and it was declared inadmissible.<sup>160</sup> Ruth Wedgwood, one of the two women CMs who sat on the Committee at the time, chose to write a separate opinion.<sup>161</sup> Wedgwood pointed out that the Spanish legislation discriminated against women and violated international human rights norms.<sup>162</sup> She also wrote that the scope of the Committee's decision should be narrowed in this case, and due regard should be given to the fact that the nobility title itself is devoid of material or financial content.<sup>163</sup>

Another interesting example concerns immigration. In the case of *Shakeel v. Canada*, Canada refused to grant asylum to a Pakistani Christian priest.<sup>164</sup> The applicant claimed that he was persecuted in Pakistan for his faith, but the Canadian authorities did not find his story to be credible and decided to deport him back to Pakistan.<sup>165</sup> The applicant argued before the HRC that his deportation to Pakistan would constitute a breach of his right to life (Article 6), right not to be tortured (Article 7) and right to the security of person (Article 9).<sup>166</sup> The majority of CMs found that if the applicant were to be deported to Canada, his rights under Articles 6 and 7 would be violated.<sup>167</sup> However, seven CMs contested this decision, five of whom came from countries within the Western regional group.<sup>168</sup> The dissenting CMs pointed out that the HRC should “accord deference to fact-based assessments by national immigration authorities as to whether removed individuals would face a real risk of a serious human rights violation upon removal,” since “it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases.”<sup>169</sup> Because in this case the author of the communication was unable to prove any irregularities in the decision of Canadian authorities, or to show that the procedure was unreasonable or arbitrary, the dissenting CMs argued that the HRC should not have found a violation of the ICCPR in the given case.<sup>170</sup>

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159. *Hoyos Martinez de Irujo v. Spain*, Comm. 1008/2001, U.N. Doc. A/59/40, Vol. II, at 472 (HRC Mar. 30, 2004), [http://www.worldcourts.com/hrc/eng/decisions/2004.03.30\\_Hoyos\\_y\\_Martinez\\_de\\_Irujo\\_v\\_Spain.htm](http://www.worldcourts.com/hrc/eng/decisions/2004.03.30_Hoyos_y_Martinez_de_Irujo_v_Spain.htm).

160. *Id.* ¶ 7.

161. *Id.* at Annex.

162. *Id.*

163. *Id.* It should be noted that two men CMs also wrote separate opinions in the case.

164. *Shakeel v. Canada*, Comm. 1881/2009, U.N. Doc. CCPR/C/108/D/1881/2009 (ICCPR June 24, 2013).

165. *Id.* ¶¶ 2.1–2.10.

166. *Id.* ¶ 3.4.

167. *Id.* ¶ 9.

168. CMs Mr. Yuval Shany, Mr. Cornelis Flinterman, Mr. Walter Kälin, Sir Nigel Rodley, Ms. Anja Seibert-Fohr, Mr. Yuji Iwasawa and Mr. Konstantine Vardzelashvili dissented.

169. *Shakeel v. Canada* Comm., *supra* note **Error! Bookmark not defined.**, dissenting opinion ¶ 2.

170. *Id.* ¶ 6.

## III.

## HYPOTHESES AND HYPOTHESES TESTING

A. *Data and Hypotheses*

This article uses data that I collected from all 571 decisions on the merits issued by the HRC between 1997 and 2013 (sessions 59–109). I did not include older decisions because until the 59th session the HRC did not indicate the CMs who participated in the discussion on the communication.<sup>171</sup> The texts of the decisions came from the Bayefsky database,<sup>172</sup> and I supplemented the texts with the UN Treaty Body Database (for decisions published after July 27, 2012).<sup>173</sup> Each observation in the database is a vote of a CM in a specific decision (N= 8,390).

As mentioned in the introduction, the main empirical question the article aims to answer is how geography, legal system, professional background, and gender influence the decision-making process in the HRC. Hypotheses about the voting patterns are divided into two groups—the first set of hypotheses looks into whether *in general* CMs vote differently based on their characteristics. In the other set of hypotheses, there is no reason to believe that the characteristics of the CM influence their general voting pattern, but rather that their background might influence voting patterns on *specific issues*. Also, there are several aspects in which diversity can influence the decision-making process of a panel: by directly influencing the voting pattern of a single CM, by giving a CM an opportunity to write a separate opinion, or by influencing the decision of the panel as a whole.

In order to capture all three possible dimensions, this article uses three dependent variables. The first is “vote in favor.” This is a dummy variable that is coded as “1” if the CM voted in favor of the State (*i.e.*, that there was no violation of the covenant), and “0” otherwise. The second is “separate opinion,” which is coded as “1” if the CM wrote a separate opinion (both dissenting and concurring) in the communication, and “0” otherwise. The third is “decision,” which is coded as “1” if the decision on the committee *as a whole* was in favor of the State, and “0” otherwise.

I first introduce the hypotheses that address general voting patterns, and then the hypotheses that consider voting patterns on specific subject matters. The general voting pattern hypotheses are as follows:

*Geography.* CMs from different geographic regions vote differently. In line with the previous research on the subject, CMs from regions that have many new

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171. According to Rule 37 of the Rules of Procedure, twelve CMs constitute a forum. Therefore, most of the decisions of the HRC on the communications are not made by all the CMs.

172. *The United Nations Human Rights Treaties*, BAYEFSKY, <http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/opt/0/node/5/type/all> (last visited Feb. 8, 2017).

173. U.N. OFFICE OF THE HIGH COMM’R ON HUMAN RIGHTS, *Treaty Bodies Search*, UNITED NATIONS, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en) (last visited Feb. 8, 2017).

democracies are more likely to vote against States and in favor of applicants. Therefore, I hypothesize that CMs from the Eastern European and the Latin American regional groups are more likely to vote against States. According to the same reasoning, judges from Eastern European and Latin American countries are more likely to be activists and write separate opinions. To test this hypothesis, I use the classification of the five regional UN voting groups<sup>174</sup>—African, Asian, Eastern European, Latin American, and Western European and Others.<sup>175</sup>

*Legal Systems.* CMs from common law States might be more likely to vote against States, since traditionally common law courts and judges tend to be more activist and less entrenched in the State bureaucracy. Also, since in many common law countries there is a long tradition of writing separate opinions, it is more likely that a CM from a common law country would write a separate opinion.<sup>176</sup> Finally, if we use the broader definition of legal systems, we might also expect that States that score strongly in judicial independence are more likely to appoint CMs that vote against States and write separate opinions. However, in accordance with the literature, it is also expected that States which are on the “middle of the scale” are more likely to appoint activist CMs than other States.

*Professional Background.* The professional background of the CM might influence the way he or she votes. I hypothesize that CMs who worked for the government prior to their election would tend to vote more in favor of States. On the other hand, CMs who worked in the judiciary or in academia prior to their election would tend to vote more against States. Also, CMs who came from academia and who were former judges would tend to write more separate opinions.

The hypotheses regarding the voting patterns on specific subject matters are:

*Geography.* I hypothesize that CMs coming from different geographical regions might be more sensitive to certain human rights issues, dependent on the history, culture, and human rights problems in their regions. I test the following hypotheses: (1) CMs from the Western group of States are likely to vote in favor of States and write more separate opinions in immigration and asylum cases. This is because most of these cases (85.19%) are against their regional group; (2) CMs from the Western group of States would be more willing to vote against States and write more separate opinions on cases of alleged violations of LGBT rights, because this region is considered to be more progressive on these issues; (3) CMs from the Latin American and Eastern European regions are more likely to vote against States and write more separate opinions in cases of political rights, since their regions have a history of political persecutions and enforced disappearances;

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174. *U.N. Regional Groups of Member States*, U.N. DEP'T FOR GEN. ASSEMBLY & CONF. MGMT., <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last visited Feb. 8, 2017).

175. This group also includes Canada, New Zealand, Australia and Israel. The United States of America is not a member of any regional group, but attends meetings of the Western Group as an observer and is considered to be a member of that group for electoral purposes.

176. TERRIS ET AL., *supra* note **Error! Bookmark not defined.**, at 248–51.

and (4) CMs from the African region are more likely to vote in favor of applicants in cases of minority rights.

*Gender.* According to prior research, there is no reason to assume that women vote in a different way than men in general. However, women might be more sensitive to violations of women's rights. Therefore, I hypothesize that women are more likely to vote against States and write more separate opinions in cases of women's rights.

*Legal Systems.* Different legal systems can have different views on procedural matters before the courts, and give different weight to various procedural violations. Therefore, I hypothesize that CMs from common law countries would vote differently in cases where the right to due process before the courts was allegedly violated (Article 14 to the ICCPR).

Appendix 1 summarizes variables used in the article, and Appendix 2 summarizes the hypotheses and the variables used to test them.

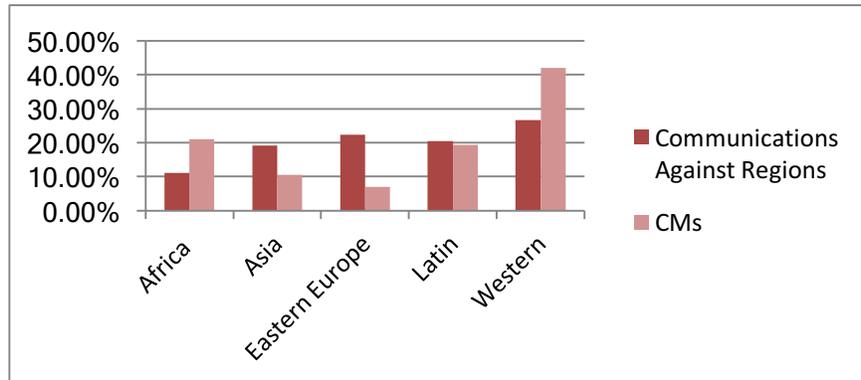
### B. Descriptive Statistics

Before continuing to the Part on inferential statistics, I offer some descriptive statistics regarding the diversity of geography, gender, legal systems, and professional background of CMs. I provide this information only for the sessions relevant to the period of the research (sessions 59–109). During this period, fifty-seven CMs served on the HRC.

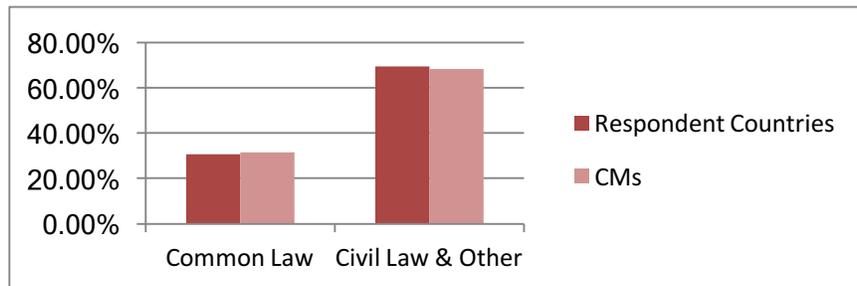
For the period relevant to the study, the regional distribution of the CMs is as follows: Western (42.11%), African (21.05%), Latin (19.3%), Asian (10.53%), and Eastern European (7.02%).<sup>177</sup> However, when we examine the distribution of the communications by regions, the distribution is different: Western (26.62%), Eastern European (22.42%), Latin (20.49%), Asian (19.26%), and African (11.21%). Therefore, there is not necessarily a connection between the number of communications filed against a region and the number of CMs from that region who serve on the HRC. For instance, while the number of communications against Eastern European countries was second only to the number of communications against Western countries, Eastern Europe was the group least represented on the HRC. We can also see that like in other international judicial institutions, there is a tendency to appoint more CMs from the African region. (see Figure 1).

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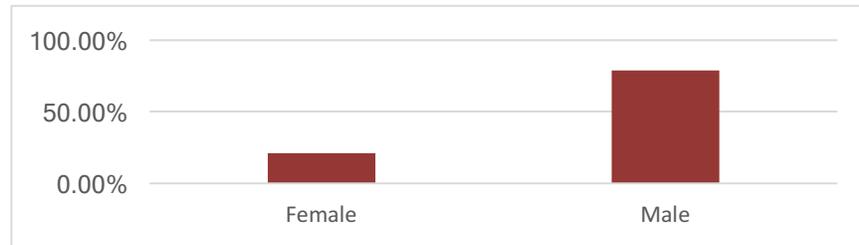
177. This data includes both communications that were decided on the merits and communications that were decided only on admissibility grounds.

**Figure 1. Geography.**

Regarding the legal systems of the countries against which the communications were filed, the distribution is much more balanced— 30.65% of the communications filed to the HRC came from common law countries, while 31.58% of the CMs came from these countries.

**Figure 2. Legal Systems.**

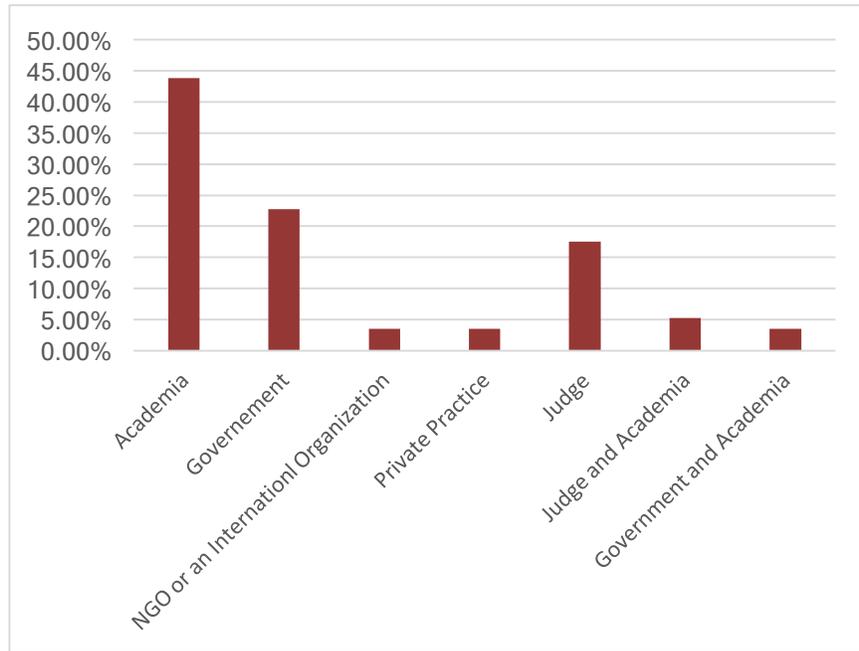
As for gender, it seems that historically women are very much underrepresented in the HRC, as they are in many other international tribunals. During the time period under research, only twelve women served on the HRC (21.05%), as compared to forty-five men (78.95%). However, it should be noted that recently the member States have become more aware of gender balance, and as of 2017, eight out of the eighteen CMs (44.44%) are women.

**Figure 3. Gender.**

As for the professional backgrounds of the CMs, the leading backgrounds were academia and government. Out of the fifty-seven CMs, thirty CMs (52.63%) had a prior career in academia before being nominated to the HRC (including both CMs with “pure” academic careers as well as CMs who also served as judges or government officials). The second most common professional background is working for the government.<sup>178</sup> Fifteen CMs (26.31%) held a position in the government or in politics before they were elected to the HRC (two of them held this position together with a position in academia). Given that the work of the CMs probably most closely resembles the work of a judge in a national court, it is to some degree surprising that only thirteen CMs (22.8%) served as judges prior to their appointment to the HRC.

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178. It should be noted that I included here CMs who had a political career prior to their election.

**Figure 4. Professional Background.**

### C. Results

The next step is to test the hypotheses using multivariate regression analysis. Doing so is important because it enables me to control simultaneously for multiple independent variables that could affect the dependent variable. In the following multivariate regressions, I control for the year in which the case was decided, and for how the majority voted in the decision<sup>179</sup> (I control for the latter variable only with “vote in favor” as a dependent variable). Since the dependent variables are binary, I use a logit regression. In all models presented below, the standard errors are robust and clustered for individual CMs.

Table 1 presents the results of the regressions with vote in favor as a dependent variable.

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179. This variable appears as “vote case” in Table 1.

**Table 1.**

	(1) Geography	(2) Legal System	(3) Judicial Independence	(4) Professional Background	(5) Case Specific
Eastern European	0.0932 (0.285)				
Latin	-1.153*** (0.277)				
Western					-0.411 (0.614)
Legal system		-0.352 (0.337)			0.0430 (0.520)
Judicial Independence			-0.838 (0.605)		
Judicial Independence Sqr			0.515* (0.263)		
Academia				0.128 (0.272)	
Judge				0.234 (0.353)	
Government				-0.670** (0.304)	
Western X Immigration					1.049** (0.483)
Women X Women's rights					-1.093 (0.714)
Latin Eastern X Political					-0.344 (0.436)
LGBT X Western					-1.574** (0.782)
African X Minorities					-1.746 (1.216)
Legal system X Due process					-0.127 (0.350)
Women					0.477 (0.365)
Gender					-0.213 (0.555)
LGBT					0.546 (0.685)

Immigration					0.431 (0.349)
Latin Eastern					-1.187** (0.590)
Political					-0.958*** (0.297)
African					-0.804 (0.574)
Minorities					0.680* (0.355)
Due process					-0.00488 (0.268)
Year decide	0.0276 (0.0289)	0.0283 (0.0315)	0.0329 (0.0301)	0.0278 (0.0328)	0.0415 (0.0310)
Majority Vote	7.133*** (0.265)	7.044*** (0.270)	7.061*** (0.263)	7.074*** (0.265)	7.147*** (0.265)
Observations	8,390	8,390	8,317	8,390	8,390

Robust standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

**Table 2** presents the results of the regressions with separate opinion as a dependent variable.

**Table 2.**

	(1) Geography	(2) Legal System	(3) Judicial Independence	(4) Professional Background	(5) Case Specific
Eastern Europe	-0.938*** (0.334)				
Latin	0.131 (0.351)				
Legal system		-0.146 (0.237)			-0.0666 (0.265)
Judicial independence			0.472 (0.466)		
Judicial independence Sqr			-0.0687 (0.237)		
Academia				0.0547 (0.250)	
Judge				-0.128 (0.256)	
Government				-0.544* (0.310)	

Women X Women's rights	0.918 (0.838)				
Western X immigration	0.928*** (0.272)				
Latin Eastern X political	0.811** (0.378)				
LGBT X Western	-0.667 (0.855)				
African X Minorities	0.456 (0.441)				
Legal system X Due process	0.0497 (0.241)				
Women	-0.630 (0.536)				
Gender	-0.116 (0.355)				
LGBT	0.402 (0.582)				
Immigration	0.256 (0.208)				
Latin Eastern	-0.381 (0.458)				
Western	-0.147 (0.327)				
African	-1.018*** (0.393)				
Political	-0.237 (0.171)				
Minorities	0.715*** (0.269)				
Due process	-0.178 (0.195)				
Legal system	-0.0691 (0.253)				
Year decide	-0.0326 (0.0231)	-0.0310 (0.0247)	-0.0275 (0.0236)	-0.0327 (0.0236)	-0.0284 (0.0207)
Observations	8,390	8,390	8,317	8,390	8,390

Robust standard errors in parentheses \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

The first model corresponds to the general regional hypothesis, according to which CMs from the Eastern European and Latin American regions are less likely to vote in favor of States. According to this model, CMs from Latin American countries tend to vote more against States on a very high significance level ( $p < .01$ ). However, contrary to my hypothesis, CMs from the Eastern European group do not seem to have any statistically significant voting pattern. As to writing

separate opinions, CMs from Eastern European (and African) countries tend to write significantly fewer individual opinions than their colleagues from other regional groups ( $p < .01$ ).

The second and third models correspond to the hypothesis that CMs from different legal systems vote differently. In the second model the coefficient of the legal system variable is negative, meaning that CMs from non-common law countries are less likely to vote in favor of countries than CMs from common law countries. Although the coefficient does not reach a statistically significant level, this is a surprising finding, since according to my hypothesis, CMs from common law countries are more likely to vote against countries. This might be partially explained by the fact that CMs from the Latin American group of countries belong to the non-common law countries group, and they tend to vote against States. In the specification with separate opinions as the dependent variable, the coefficient is negative, meaning CMs from non-common law countries are less likely to write a separate opinion than CMs from common law countries, but it does not reach statistical significance.

The third model uses both the regular judicial independence score as well as the square of the judicial independence score. The idea behind using the square of the judicial independence score as a dependent variable is that according to some theories, developing democracies struggling with judicial independence are more likely to nominate activist judges. As I hypothesized, there seems to be, in general, a positive correlation between judicial independence and the probability that a CM votes against a State. However, the coefficient of the squared judicial independence score is positive and statistically significant, meaning that for the highest judicial independence scores this tendency becomes less significant ( $p < .1$ ). In the specification with separate opinions as the independent variable, neither of the coefficients reached statistical significance.

The fourth model corresponds to the hypothesis regarding the professional backgrounds of the CMs. I hypothesized that CMs that worked for the government prior to their election would tend to vote more in favor of States, and CMs who worked in the judiciary or in academia prior to their election would tend to vote more against States. Both in the specification with “vote in favor” as a dependent variable, and in the specification with “separate opinion” as the dependent variable, the only coefficient that reaches statistical significance is for CMs who came from government service. In the specification with “separate opinion” as the dependent variable, the only coefficient that reaches statistical significance is that for CMs who came from government service. Contrary to the hypothesis, those CMs tend to vote more *against* States, on a statistically significant level, than CMs with other professional backgrounds ( $p < .05$ ). In the “separate opinion” specification, the coefficient for government background is negative and statistically significant ( $p < .1$ ), meaning these CMs are less likely to write separate opinions.

The fifth model corresponds to specific hypotheses, according to which characteristics of CMs influence voting patterns on specific subject matters. In the specification with “vote in favor” as a dependent variable, the independent

variables that reach statistical significance are the interaction variables of a Western CMs on immigration cases, and Western CMs on LGBT rights cases. The coefficient of the first variable is positive and significant ( $p < .05$ ), meaning Western CMs are more likely to vote in favor of States on immigration issues than other CMs. The coefficient of the second variable is negative and significant ( $p < .05$ ), meaning that CMs from Western countries are more likely to vote in favor of the applicant in cases of alleged LGBT rights violations. The interaction coefficient of women with cases on women's rights is positive, and although very close, does not reach statistical significance. In the specifications with separate opinions as the dependent variable, the coefficients that reach statistical significance are the interaction coefficient of Western CMs on immigration cases ( $p < .01$ ), and the interaction coefficient of CMs from Eastern European and Latin American countries in political cases ( $p < .05$ ). Therefore, in those cases CMs are more likely to write separate opinions. Neither of the coefficients regarding African CMs voting (or writing a separate opinion) in minority rights cases reach statistical significance.

In addition to the hypotheses tested above, I also decided to examine whether CMs with a certain background might change the decision in the case itself, beyond their personal voting patterns. This was following the suggestion that the influence of a decision-maker might not be reflected only in the way that he himself votes, but also in the dynamics between the decision-makers themselves, thus influencing the final outcome. To test this hypothesis, I chose as the independent variables the percentage of judges from the Eastern European and Latin American groups, the percentage of CMs from non-common law States, the average judicial independence score of the countries from which CMs come, the percentage of CMs with government backgrounds, and the percentage of women. The dependent variable used in these regressions is "decision," which takes the value of "1" if the HRC finds no violation of the ICCPR, and "0" otherwise. I used a logit regression and controlled for the human rights score of the respondent State and for the year of the decision. Unlike the other regressions, in this regression the unit of observation is a decision in a communication ( $N=571$ ). However, as can be seen in **Table 3**, none of the specifications reach statistical significance.

**Table 3.**

	(1) Latin- Eastern	(2) Legal System	(3) Judicial Independence	(4) Legal Occupation	(5) Gender
% Latin Eastern	2.738 (2.259)				
% Civil law and others		-0.720 (2.053)			
Average judicial			-0.812 (0.658)		
% Government				0.908 (1.951)	
% Women					0.114 (1.555)
Human Rights score	0.675*** (0.0981)		0.679*** (0.0983)	0.678*** (0.0982)	0.677*** (0.0981)
Year decide	-0.0474* (0.0283)	-0.0468 (0.0331)	-0.0589* (0.0337)	-0.0390 (0.0276)	-0.0365 (0.0288)
Observations	571	571	571	571	571

Standard errors in parentheses  
 \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

In line with the previous approach, I also looked into whether the percentage of CMs in specific subject-matter cases might influence the outcome of the case. I tested the following hypotheses: (1) the percentage of Western CMs increases the probability of a decision in favor of a State in immigration cases; (2) The percentage of CMs from Eastern European and Latin American countries increases the probability of voting against a State in political cases; (3) the percentage of non-common law CMs influences the voting pattern in due process cases. It is noteworthy that due to small variance, I could not examine cases of specific hypotheses regarding whether the percentage of women in women's rights cases and the percentage of Western CMs in LGBT rights cases influences the result. Also, given that there is less variance, I do not control for the human rights score of the country in these specifications. Table 4 presents the results of the regression.

**Table 4.**

	(1) Immigration	(2) Political	(3) Due Process
% Western	12.82** (6.264)		
% Latin Eastern		6.905 (9.444)	
% Civil Law and others			-0.829 (2.658)
Year decide	-0.153* (0.0911)	-0.156 (0.114)	0.0304 (0.0432)
Observations	54	104	355

Standard errors in parentheses  
 \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

As can be seen from Table 4, the only variable that reaches statistical significance is the percentage of Western CMs in immigration cases. This coefficient is positive and statistically significant ( $p < .01$ ), meaning that the more Western CMs there are in immigration cases, the more likely the HRC is to rule in favor of the State and against the applicant.

#### IV. DISCUSSION

##### A. *Empirical Implications*

This article seeks to determine whether geography, gender, legal system, and professional background influence decision making in the HRC. This question is of special importance, given that diversity clauses are included in statutes of international judicial institutions and the scholarship argues in favor of diversity. Since the theoretical literature suggests several ways in which diversity could influence the decision-making process, this article uses three dependent variables that seek to reflect both influence on the vote of the individual CM and influence on the result that the HRC reaches. The article also looks into two possible planes in which diversity could influence decision-making by influencing voting patterns in general and on specific issues.

Regarding the *geographical* hypothesis, there seem to be two significant findings. The first is on general voting patterns of CMs from the Latin American group. These CMs tend to vote *against* countries on a statistically significant level. Also, contrary to the hypothesis, CMs from Eastern European States tend to write significantly fewer separate opinions than CMs from other regions. Also, according to the data, African CMs are less likely to write separate opinions.

The most interesting and consistent voting pattern in the geographical hypothesis is that Western CMs tend to vote more in favor of States and write

more separate opinions in immigration cases. Also, the more CMs from Western countries on the Committee, the more likely the HRC is to decide that no violation exists in the case. Since cases on immigration and asylum are usually filed against States from the Western regional group, this pattern aligns with previous research, which shows that CMs (and decision-makers in other judicial institutions) tend to protect the interests of their countries and countries similar to their countries of origin. However, when I controlled in a regression for the CM and the respondent State being from the same regional group, the immigration variable lost its statistical significance. Therefore, it is somewhat of an open question whether a Western CM votes in favor of States in immigration cases because of the subject matter of the communication, or due to a general allegiance with a country from the regional group. Another interesting finding is that Western CMs tend to vote *against* States in LGBT rights cases. This is probably a reflection of the increased awareness that the issue has in the Western regional group, and especially of the constantly broadening protection that the European regional human rights system gives to LGBT rights.

Regarding the *legal systems* hypothesis, the results are more mixed. If we refer to the classical definition of legal systems, then the regression analysis shows that CMs from non-common law States are less likely to vote in favor of States and less likely to write separate opinions, however the results do not reach statistical significance. This might suggest that the traditional attribution of certain patterns of thinking to common law and non-common law countries is erroneous. This perhaps also reflects the tendency in the era of globalization for different legal systems to become more similar to each other.<sup>180</sup> Another explanation might be that when CMs, and other international decision-makers, are nominated to an institution, they socialize into the institutions' existing legal culture. This effect might be of special importance for writing separate opinions, since writing these opinions might be affected by the laws and customs of each institution. Therefore, when a decision-maker is placed on a judicial institution where it is more (or less) common to write separate opinions, he or she will quickly adjust to the new culture and act accordingly. Finally, no statistically significant voting patterns were found in due process cases.

Regarding the broader view of legal systems as reflecting certain political regimes, looking at voting patterns through the lens of the judicial independence score reveals an interesting picture. In line with the hypothesis, CMs from States with high judicial independence scores are more likely to vote against respondent States, although the coefficient does not reach statistical significance. However, the squared coefficient of the judicial independence score is positive and

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180. See generally Jean-Louis Baudouin, *Mixed Jurisdictions: A Model for the XXIst Century?*, 63 LA. L. REV. 983, 984 (2003) (arguing that "both the civil and common law systems are coming to be much closer one to another than they have ever been" in the 21st century); Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083 (2008) (comparing the international legal system to mixed common law and civil law jurisdictions around the world); Teteley, *supra* note 88, at 725 (discussing the creation process of mixed jurisdictions).

statistically significant—meaning that the higher the judicial independence score of the CM, the less influence it has on his or her tendency to vote in favor of a State. This finding is in line with the previous literature, which suggests that emerging democracies are more likely to appoint activist judges that protect human rights.

As to the *professional background* of CMs, the only statistically significant result regards the voting patterns of CMs who worked for the government before their HRC appointment. According to the results, these CMs tend to vote more against States on a statistically significant level, but at the same time write significantly fewer separate opinions. The hypothesis regarding government officials assumes that over the years of working for the government they would have become more used to adopting the *raison d'etat* and be more conservative with finding violations of human rights. Furthermore, as mentioned above, research on the ECtHR indeed supports the hypothesis that judges who worked for the government were more likely to vote in favor of States.<sup>181</sup> A possible *realpolitik* explanation to this finding in the HRC context is that CMs usually retain their old professional positions when they are appointed to the HRC. This is contrary to the practice in many international courts, such as the International Court of Justice, the European Courts and the International Criminal Court, where judges should resign from any other professional occupation. For instance, Bouzid Lazhari, a CM from Algeria, retained his position as a Senator and member of the Foreign Affairs Commission at the Algerian Council of the Nation.<sup>182</sup> Also, Duncan Muhumuza Laki, a CM from Uganda, served simultaneously as the legal adviser to the permanent mission of Uganda to the UN.<sup>183</sup> Therefore, perhaps CMs who work for the government are more likely to promote the policy of their governments in the HRC as well, and to vote against countries that are politically distant from their countries. However, deeper empirical research is needed in order to determine the reason for this voting pattern.

Finally, regarding *gender*, the regressions show a tendency of women CMs to vote against States on women's rights issues and write more separate opinions in cases of women's rights. However, none of the relevant coefficients in the regressions reach statistical significance. This might be explained by the fact that only twelve women served on the HRC over a sixteen-year period, and only seven cases on women's rights were decided during that time. Therefore, the relatively small number of observations and less variance might lead to a "type 2" statistical error (failure to reject a false null hypothesis). Perhaps with time, when there are more women CMs appointed and more decisions on women's rights, we would gain more variance that could show statistical significance. It should also be noted

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181. See Voeten 2008, *supra* note 62, at 430.

182. *Algeria Introduces a Senator to Serve on the Human Rights Committee*, ALKARAMA (Sep. 3, 2008), <https://www.alkarama.org/en/articles/algeria-introduces-senator-serve-human-rights-committee>.

183. Curriculum Vitae of Amb. Duncan Muhumuza Laki, U.N. OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS [www.ohchr.org/Documents/HRBodies/CCPR/Membership/DMLaki.doc](http://www.ohchr.org/Documents/HRBodies/CCPR/Membership/DMLaki.doc) (last visited Oct. 31, 2017).

that when I tried to run a specification without clustering standard errors on the level of CMs, the results were that women CMs were less likely to vote in favor of States in women's rights cases on a statistically significant level ( $p < .05$ ).

This article finds certain voting patterns associated with geography, legal systems (broadly defined), professional background (for CMs working for the government), and possibly gender. However, on many issues, the article did not find evidence that the background of the CMs had significant influence on their voting patterns. The fact that the article did not find evidence for the existence of certain voting patterns does not necessarily mean that they do not exist. Rather, for various reasons, like lack of sufficient variance or too small number of decisions, statistical analysis could have missed these patterns. On the other hand, the reader should also take into account that since I have examined multiple hypotheses in this article, this might have caused a "type 1" statistical error (false positive).

### *B. Implications on Legitimacy and Beyond*

The next step is to ask a "so what?" question. It seems that, in general, the background of a CM does not strongly affect his or her voting patterns in most cases. So is it still worth retaining and insisting on diversity clauses? Both in the HRC context, as well as in other international judicial institutions, I would answer in the affirmative, but with certain reservations.

As was mentioned at the beginning of this article, diversity is seen as very important to the normative and sociological legitimacy of international institutions. However, it is worth distinguishing between diversity criteria that may actually assist in establishing the international legitimacy of judicial institutions and those which serve only a functional role. For instance, it seems that equal geographical and gender representation are vital to the legitimacy of international judicial institutions. International law and international institutions cannot be titled as "international" if only individuals from certain geographic regions are appointed to them. Also, when taking gender into account, it is hard to accept a situation in which half of the population of the world does not take part in decisions that affect the international system. This is especially true in the context of human rights tribunals that adjudicate, among others, cases on women's rights.

On the other hand, it might be argued that diversity of professional background and of legal systems should be promoted only if empirical evidence justifies its existence. The legal profession is probably not seen as representing any value, group, or interest in the eyes of the international public. Therefore, in the absence of any empirical evidence or specific practical needs of the institution (such as in the international criminal courts), it is not worthwhile to insist on professional diversity. The same is somewhat true for legal systems. Although this diversity criterion appears in many statutes, it seems that States are really interested in the regional background of the nominee. Therefore, once again, the insistence on diversity in legal systems should be reserved only for judicial

institutions where there are grounds to believe that diversity could be relevant for legal questions brought to the institution.

Additionally, it seems that diversity in the *regional* background of decision-makers is of special importance to judicial institutions that decide questions of human rights, such as the HRC, because of claims of cultural relativism.<sup>184</sup> Since many human rights norms are general and abstract, judges have a significant role in widening and shaping them.<sup>185</sup> Thus, having a culturally diverse panel reaching a decision on a human rights question can contribute both to the sociological and to the normative legitimacy of the institution. Also, given that human rights evolve around the relationship between the State and the people under its jurisdiction, States have fewer incentives to implement the decision of a human rights judicial institution. Therefore, a geographically diverse and representative panel of decision-makers might increase the probability that a State implements the decision of the institution.

There are also good reasons to believe that retaining legitimacy is vital to the HRC itself. As mentioned in Section II(A), there is a disagreement between the HRC and the member States on the normative status of the decisions in individual communications. Whereas in General Comment 33<sup>186</sup> the HRC promotes the view that its decisions are binding, many States disagree and see the decisions merely as recommendations that the State can choose to adopt or not.<sup>187</sup> This position of the member States perhaps also leads to the very low implementation rate of decisions (only 12.7%). Increasing the diversity of CMs might increase the legitimacy of the HRC and thus the readiness of States to implement its decisions. As previously discussed, this might also be true for other international judicial institutions. However, this claim is only suggestive, and more in-depth empirical research is necessary to determine the connections between the legitimacy of international judicial institutions, diversity, and the implementation rate of decisions.

Also, the HRC has two additional roles beyond issuing decisions on communications as a quasi-judicial body. The HRC issues concluding observations on member States and general comments on the ICCPR. Diversity

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184. See Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 42 (1990) (discussing problems and possible solutions to reconcile Muslim tradition with Western human rights); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391 (2001) (discussing cultural relativism in human rights and ways to accommodate cultural differences in international human rights law through the concept of "margin of appreciation"); Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y 24 (1993); Amartya Sen, *Human Rights and Asian Values*, NEW REPUBLIC 33, 38–40 (1997) (discussing Asian perceptions of human rights and ways to accommodate them within international human rights law).

185. See Erik Voeten, *Politics, Judicial Behavior, and Institutional Design*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 61, 61 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

186. General Comment 33, *supra* note 141.

187. EGAN, *supra* note 139, at 262.

can be important in these two roles, both from the functional perspective and from the perspective of legitimacy. For instance, in the process of reviewing a State report, the HRC has the opportunity to choose which specific issues it will address with the State, and to conduct an oral dialogue with the representatives of the State. CMs from the region are more likely to be aware of problems particular to the region, collect information from the regional NGOs and civil society, and bring them to the attention of the committee. CMs from other regions might simply not be aware of those problems or lack the linguistic skills to communicate with the civil society in those countries. Therefore, regional diversity might be important for promoting more relevant and in-depth inquiry into State-specific problems. This argument is also true, to a certain extent, in the context of adjudication—both in the HRC and in other international judicial institutions. Judges from certain regions and backgrounds might be more aware of the political and historical context of problems in certain regions, and they can explain these backgrounds to their colleagues from other parts of the globe.

Under the procedure of the periodical review, the HRC monitors each State's compliance with the ICCPR. In the course of this procedure, there is a direct dialogue with the representatives of States, where a similar background with the State can also be useful. For instance, during the 114th Session of the HRC,<sup>188</sup> two of the States under review were the Former Yugoslav Republic of Macedonia (Macedonia) and Uzbekistan. When the HRC reviewed Macedonia, Ivana Jelic, a CM from Montenegro, welcomed the representatives in their native Macedonian language in the name of the Committee. Later, when the HRC reviewed Uzbekistan, Yadh Ben Achour, a CM from Tunisia, told the Uzbek representatives how much the legacy of Uzbekistan had influenced he and many other Muslims. Achour then tried to appeal to the government of Uzbekistan, insisting that they should not leave their influence on the Muslim world in the past, but instead should become leaders in promoting human rights today. The influence of these more personal appeals may not seem significant, but incorporating them can enhance the legitimacy of the HRC in the eyes of the member States and the broader international public in the long run. The identification with CMs might encourage States to be more open to a dialogue with the committee and accept its recommendations.

Also, diversity might be important in the process of drafting the general comments. The general comments are not only a restatement of the past jurisprudence of the HRC, but are also seen by the HRC as an authoritative and binding interpretation of the ICCPR. Therefore, both from functional and legitimacy perspectives, the diversity of CMs is very important. For instance, it is important for women to participate in drafting general comments on gender-sensitive issues. A good example is General Comment No. 28, Article 3 on "The

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188. The 114<sup>th</sup> session took place during June 29 – July 24, 2015. ICCPR: CCPR, 114 Session General Documentation, CCPR/C/114, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=899&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=899&Lang=en).

Equality of Rights Between Men and Women,”<sup>189</sup> as well as General Comment No. 19, Article 23 on the “Protection of the family, the right to marriage and equality of the spouses.”<sup>190</sup> Additionally, CMs from different legal systems should discuss various aspects of the right to due process in national-level courts before issuing a document like General Comment No. 13, Article 14 on the “(Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law.”<sup>191</sup> Finally, it is of special political importance that CMs coming from different political regimes participate in writing general comments on political rights, such as General Comment No. 25, Article 25 on “The right to participate in public affairs, voting rights and the right of equal access to public service.”<sup>192</sup>

There might be a certain “legitimacy problem” if the HRC requires States to promote diversity and non-discrimination of women and minorities, when the HRC itself is far from being diverse. A good example for that is statements on women’s rights. For instance, in General Comment 28, Article 3 about the Equality between Men and Women, the HRC explicitly States that: “States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women’s participation in the conduct of public affairs and in public office, including appropriate affirmative action.”<sup>193</sup> Another example is the HRC’s recent observations in the case of Namibia: “The rate of female unemployment is high, occupational segregation persists between men and women, and the number of women in positions of responsibility is relatively low (arts. 2, 3, 7 and 26).”<sup>194</sup> The HRC might be seen as less legitimate when discussing gender inequality, due to the fact that women have historically been significantly under-represented on the Committee.

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189. U.N. Human Rights Comm., CCPR General Comment No. 23: The Equality of Rights Between Men and Women, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

190. U.N. Human Rights Comm., CCPR General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art. 23), U.N. Doc. CCPR/HRI/GEN/1/Rev.1 (July 27, 1990).

191. U.N. Human Rights Comm., CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 13, 1984).

192. U.N. Human Rights Comm., CCPR General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

193. U.N. Human Rights Comm., CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 29, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

194. U.N. Human Rights Comm., Concluding Observations on the Second Report of Namibia, ¶ 11(d), U.N. Doc. CCPR/C/NAM/CO/2 (Apr. 22, 2016); *see also* U.N. Human Rights Comm., Concluding Observations of the Human Rights Comm.: Chad, ¶ 17(d), U.N. Doc. CCPR/C/GHA/CO/1 (Aug. 11, 2009) (recommending that Chad “[m]ake further efforts to promote women’s participation in public life”); U.N. Human Rights Comm., Concluding Observations of the Human Rights Comm.: Gambia, ¶ 16(b), U.N. Doc. CCPR/CO/75/GMB (Aug. 12, 2004) (mentioning that in the case of Gambia “[t]he participation of women in political life, and in public and private sector employment, is particularly inadequate”).

The final question that has certain implications on legitimacy is whether States promote diversity because they think that there is a general interest for international judicial institutions to be diverse, or rather because they expect to receive certain “personal gains” from it. The present research found a pattern of Western CMs voting in favor of States in cases of immigration. In my previous research I showed that CMs tend to vote, on a very high level of statistical significance, in favor of States similar geopolitically to their State of origin. As previously discussed, research on international courts indicates that judges tend to vote in favor of their home States, or States similar to their States of origin. Since there is certain evidence that diversity benefits the States with representatives of a similar background on the institution, diversity makes a tribunal legitimate by allowing all States to benefit equally from votes in their favor on issues important to them.

#### CONCLUSION

Although diversity in international judicial institutions is an important aspect of the establishment of those institutions, there is little empirical evidence that diversity has practical implications on the work of the institution. This article finds certain voting patterns that are associated with geographical origin, domestic legal systems, professional background, and possibly gender. However, it seems that diversity matters most in cases where countries want to protect their interests by appointing decision-makers to international judicial institutions. For instance, this study finds that the most significant and consistent voting patterns are in cases of Western CMs in immigration cases—probably because the CMs want to protect the interests of their States and regions. Other studies, including my own previous study of the HRC, show that judges tend to vote in favor of States with geopolitical similarity to their State of origin. However, a significant aspect of diversity is that it helps promote the legitimacy of the institution, which is very important due to major implementation problems facing the international legal system.

In the debate about promoting diversity in international judicial institutions, the qualifications of the individual CM candidate are often put aside. It is true that diversity may promote the legitimacy of the institution, and in certain instances the background of the individual member might also influence the decision-making process. However, if the international legal system wants to promote itself as a legal, rather than political, system, it should also promote candidates who can produce high quality jurisprudence. Therefore, perhaps the next step in the diversity debate is not only to discuss which diversity criteria are important and why, but also to determine the right balance between diversity requirements and the personal qualifications of candidates in international judicial institutions.

## APPENDIX 1

Variable	Description	Coding Range	Source(s)
Vote in favor	Dependent variable	0 = CM voted that there was a violation 1 = CM voted that there was no violation	Author
Separate opinion	Dependent variable	0 = CM did not write a separate opinion. 1 = CM wrote a separate opinion	Author
Decision	Dependent variable	0 = the HRC decided that there was a violation 1 = the HRC decided that there was no violation	Author
CM Group	Regional voting group UN of CM State.	1=African Group 2=Asia-Pacific Group 3=Eastern-European Group 4=Latin American and Caribbean 5=Western Europe & others	UN website: <a href="http://www.un.org/depts/DGACM/RegionalGroups.shtml">http://www.un.org/depts/DGACM/RegionalGroups.shtml</a>
Africa	The CM comes from a State belonging to the African regional group.	0 = no 1 = yes	UN website: <a href="http://www.un.org/depts/DGACM/RegionalGroups.shtml">http://www.un.org/depts/DGACM/RegionalGroups.shtml</a>
Asia	The CM comes from a State belonging to the Asia-Pacific regional group.	0 = no 1 = yes	UN website: <a href="http://www.un.org/depts/DGACM/RegionalGroups.shtml">http://www.un.org/depts/DGACM/RegionalGroups.shtml</a>
Eastern Europe	The CM comes from a State belonging to the Eastern European regional group.	0 = no 1 = yes	UN website: <a href="http://www.un.org/depts/DGACM/RegionalGroups.shtml">http://www.un.org/depts/DGACM/RegionalGroups.shtml</a>
Latin	The CM comes from a State belonging to the Latin American and Caribbean regional group.	0 = no 1 = yes	UN website: <a href="http://www.un.org/depts/DGACM/RegionalGroups.shtml">http://www.un.org/depts/DGACM/RegionalGroups.shtml</a>

Western	The CM comes from a State belonging to the Western Europe & others regional group.	0 = no 1 = yes	UN website: <a href="http://www.un.org/depts/DGACM/RegionalGroups.shtml">http://www.un.org/depts/DGACM/RegionalGroups.shtml</a>
Latin Eastern	The CM comes from a State belonging to the Latin or the Eastern European regional groups.	0 = no 1 = yes	UN website: <a href="http://www.un.org/depts/DGACM/RegionalGroups.shtml">http://www.un.org/depts/DGACM/RegionalGroups.shtml</a>
Government	Prior to the nomination to the HRC the CM was a government official.	0 = no 1 = yes	Author
Academia	Prior to the nomination to the HRC the CM worked in the academia.	0 = no 1 = yes	Author
Judge	Prior to the nomination to the HRC the CM worked as a Judge.	0 = no 1 = yes	Author
Gender	Gender of the CM	0=male 1=female	Author
Legal system	The legal system from which the CM comes	0= common law 1= civil law and other	The Journal of Legal Studies, Vol. 30, No. 2 (June 2001), pp. 503-525 and <a href="http://referenceworks.brillonline.com.proxy.uchicago.edu/browse/foreign-law-guide">http://referenceworks.brillonline.com.proxy.uchicago.edu/browse/foreign-law-guide</a>
Judicial Independence	Judicial independence score of the State from which the CM comes when he was nominated	0-2	CIRI <a href="http://www.humanrightsdata.com/">http://www.humanrightsdata.com/</a>

Judicial independence sqr	Squared Judicial independence score of the State from which the CM comes when he was nominated	0-4	CIRI <a href="http://www.humanrightsdata.com/">http://www.humanrightsdata.com/</a>
Immigration	Is the case about immigration (including asylum and <i>non-refoulement</i> )?	0 = no 1 = yes	Author
Women	Is the case about women's rights?	0 = no 1 = yes	Author
LGBT	Is the case about LGBT rights?	0 = no 1 = yes	Author
Political	Is the case about political rights (including enforced disappearance)?	0 = no 1 = yes	Author
Minority	Is the case about minority rights?	0 = no 1 = yes	Author
Due process	Is the case about due process before the courts? (A violation of Article 14 is claimed)	0 = no 1 = yes	Author
Western X Immigration	Interaction variable between western and immigration	0 = no interaction 1 = interaction	Author
Women X women's rights	Interaction variable between Women and gender	0 = no interaction 1 = interaction	Author
Latin Eastern X Political	Interaction variable between Latin Eastern and Political	0 = no interaction 1 = interaction	Author
LGBT X Western	Interaction variable between LGBT and Western	0 = no interaction 1 = interaction	Author

African X Minority	Interaction variable between African and Minority	0 = no interaction 1 = interaction	Author
Legal System X Due Process	Interaction variable between Legal system and Due process	0 = no interaction 1 = interaction	Author
Year decide	When was the case decided?	1997-2013	Author
Vote majority	How did the majority of the CMs vote?	0 = violation 1 = no violation	Author
% Latin Eastern	What was the percentage of CMs from Eastern European or Latin States?	0 - 1	Author
% western	What was the percentage of CMs from Western States?	0 - 1	Author
% Civil Law	What was the percentage of CMs from non-common-law States?	0 - 1	Author
Average judicial	Average judicial independence score of the CMs in the case		Author
% Government	What was the percentage of CMs with background in government service?	0 - 1	Author
% Women	What was the percentage of women in the case?	0 - 1	Author

## APPENDIX 2

A. *General Hypotheses*

<b>Hypothesis</b>	<b>Description</b>	<b>Variables</b>
Geography	CMs from Eastern European and Latin American countries are more likely to be activist and vote against countries, as well as write more separate opinions.	African, Asian, Eastern Europe, Latin, Western.
Legal systems	<ol style="list-style-type: none"> <li>(1) CMs from common-law States tend to vote more against States and to write more separate opinions.</li> <li>(2) CMs from States with a high score of judicial independence are less likely to vote in favor of States and more likely to write separate opinions.</li> </ol>	Legal system, judicial independence.
Occupation	<ol style="list-style-type: none"> <li>(1) CMs who prior to their appointment served as judges or worked in academia are more likely to vote against States and more likely to write separate opinions.</li> <li>(2) CMs who prior to their appointment worked for the government are more likely to vote in favor of States and less likely to write separate opinions.</li> </ol>	Academia, judge, government

*B. Specific Hypotheses*

<b>Hypothesis</b>	<b>Description</b>	<b>Variables</b>
Geography	<p>(1) CMs from the Western regional group are more likely to vote in favor of States and write more separate opinions in immigration cases.</p> <p>(2) CMs from the Western regional group are more likely to vote against States and write more separate opinions in LGBT rights cases.</p> <p>(3) CMs from the Eastern European and Latin regional groups are more likely to vote against States and write more separate opinions in political cases.</p> <p>(4) CMs from the African region are more likely to vote in favor of applicants in minority rights cases.</p>	Western, Immigration, Western Immigration, LGBT, LGBT Western, Latin Eastern, Political, Latin Eastern Political, African, Minority, African Minority.
Legal systems	CMs from common law States vote differently in due process cases and write more separate opinions in those cases.	Legal system, due process, Legal System Due Process.
Gender	Women are more likely to vote against States and write separate opinions on women's rights cases.	Gender, women, Women on women's rights.