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# *A Study of Lawyers Appearing before the International Court of Justice, 1999–2012*

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## Abstract

*This article provides empirical support for what might strike some as a truism: oral proceedings before the International Court of Justice (the Court) are dominated by male international law professors from developed states. In order to test this claim, our study examines the composition of legal teams appearing on behalf of states before the Court in contentious proceedings between 1999 and 2012. We have focused, in particular, on counsels' gender, nationality, the development status and geographical region of their country of citizenship, and their professional status (as members of law firms, barristers or sole practitioners, professors, or other). The results of our study raise questions about the evident gender imbalance among counsel who have appeared before the Court during the timeframe of this study, as well as the apparent preference that states have shown for 'repeat players' and professors of public international law. By presenting data on the composition of legal teams, and discussing possible explanations for the patterns that we have observed, this study aims to contribute to the development of a body of scholarship on international law as a profession.*

## Introduction

Oral proceedings at the International Court of Justice (ICJ or the Court) give the general impression that advocacy before the Court is dominated by a small group of individuals. Even a casual observer might conclude that states are mainly represented by a limited number of men from developed states, who tend to appear before the Court in case after case. Yet, without some empirical support for these impressions, it is difficult to determine the extent to which this portrayal is accurate. While some existing

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literature provides anecdotal support for these claims, international legal scholarship lacks a robust body of literature that systematically examines the profession itself. This article aims to help build such a body of literature by presenting an empirical study of the composition of the lawyers who appeared before the Court over a 14-year period from January 1999 through December 2012. Having collected a range of data on this subject, we explore possible explanations for our findings, and make a number of observations about what they may mean for the state of the international legal profession. The article begins with an explanation of our empirical methodology (section 1), followed by the results of our study (section 2), and some possible explanations for the trends that we have observed and suggestions for future work on this topic (section 3).

## 1 An Explanation of Our Methodology

This study seeks to test two hypotheses about the contemporary international legal profession, as represented by lawyers appearing before the ICJ in contentious cases from 1999 through 2012. The first hypothesis is that the individuals who appear before the Court during oral proceedings are overwhelmingly men from developed countries who typically are professors of public international law. The second hypothesis is that the lawyers who regularly appear before the Court are a relatively small group. This study aims to determine whether these commonly held perceptions are in keeping with reality and, if so, what significance this may have for a sociological understanding of international law as a profession.

We have accordingly assembled statistics that show the nationality and gender of the lawyers who have appeared before the Court during oral proceedings in contentious cases. In particular, this study focuses on the nationality of the lawyers, whether they are citizens of a developing or developed state, the geographical region of their country of citizenship, and their professional status (member of a law firm, barrister or sole practitioner, government lawyer, professor, or other).[1] The study also looks at whether the lawyers addressed the Court in English or French (the ICJ's two official languages), and at the length of their speaking time (estimated based on the number of pages in the verbatim transcripts of the oral proceedings).

This article thereby takes an empirical approach to the sociology of the contemporary international legal profession, as represented by lawyers appearing before the Court. This empirical methodology may be contrasted with a more historical approach to this subject, such as through biographies of prominent international lawyers.[2] Both approaches aim to contribute to a sociology of the international legal profession through an analysis of the roles played by particular individuals, but an empirical approach allows for a broader and more systematic assessment, while a biographical

[1] Our data on the nationality of counsel is based on publicly available information, and its accuracy may suffer somewhat from this limitation. Professional status is based on the primary affiliation provided in the transcripts of the oral proceedings. When an individual had different positions in different proceedings, we assigned the status provided in the majority of appearances.

[2] See, e.g., M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 7; E. Lauterpacht, *The Life of Sir Hersch Lauterpacht, QC, FBA, LLD* (2010).

approach is more anecdotal. This study opts for an empirical approach to the subject because it permits greater objectivity and comprehensiveness. The remainder of this section offers some further explanations of the study's design – why it focuses on the ICJ as opposed to other international adjudicatory bodies, on oral rather than written proceedings, and on lawyers rather than diplomats appearing as agents. The following also clarifies the reasoning behind the timeframe for the study, and the use of a number of different proxies for development status.

## A *The Focus on Proceedings at the ICJ*

This study focuses on proceedings before the ICJ for both legal and practical reasons.[3] As the UN's principal judicial organ, the Court represents one of the only permanent international institutions tasked with the adjudication of disputes between states.[4] As a result of the Court's role within the UN system, it has come to occupy an important position in the field of public international law and it is the only permanent international court of general jurisdiction (that is, its jurisdiction is not limited to a particular geographic region or to a specialized subject matter). Because of the Court's unique role in the settlement of inter-state disputes and its relatively long history as an institution dating from 1946 (with its predecessor, the Permanent Court of International Justice, dating from 1922), its jurisprudence has been influential in the development of public international law, especially in certain areas like immunities and the law of the sea.[5] While the International Tribunal for the Law of the Sea (ITLOS), established in 1996, also has jurisdiction over disputes between states, its subject matter jurisdiction is more specialized than that of the ICJ, as it basically deals with disputes arising out of the interpretation and application of the 1982 United Nations Convention on the Law of the Sea.[6] The sheer number of disputes settled by the ICJ is also significantly greater than the number settled by ITLOS, which only received its first case in 1997, and has received just 22 since then.[7]

The transparency of oral proceedings at the ICJ has also guided our selection of this institution for the study. In contrast with investor–state arbitration and dispute settlement proceedings at the World Trade Organization (WTO), for example, oral proceedings at the ICJ are typically open to the public (and streamed online), and transcripts of the proceedings are publicly available.[8] Hearings in proceedings before investor–state arbitral tribunals and even tribunals handling inter-state disputes are, by contrast,

[3] 'Proceedings' refers to proceedings on the merits and regarding preliminary objections. For cases in which there were proceedings on the merits and preliminary objections within the 14-year period of the study, we treated them as a single set of proceedings.

[4] UN Charter, Art. 92.

[5] Rosenne, 'International Court of Justice (ICJ)', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008, online edn); Donoghue, 'The Role of the World Court Today', 47 *Georgia L Rev* (2012) 181; J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 732.

[6] Statute of the International Tribunal for the Law of the Sea, Annex VI of the UN Convention on the Law of the Sea (UNCLOS), Art. 21; UNCLOS, Arts 297–299.

[7] ITLOS, List of Cases, available at: www.itlos.org/index.php?id=35.

[8] Rules of Court, Arts 59, 71.

generally confidential and transcripts are not made public, with the notable exception of some ICSID proceedings.[9] Similarly, oral proceedings at the WTO are confidential as a general rule, although panels and the Appellate Body have authorized public observation of hearings on a few occasions at the joint request of the parties.[10] Should transparency at such international adjudicatory bodies increase at some point in the future, then similar studies could be carried out, but until then we lack a sufficient set of oral proceedings transcripts. In the meantime, if the case load of ITLOS continues to grow, then this institution could become the focus of a similar study, as it also publishes verbatim records of oral proceedings. Similarly, the international criminal tribunals have generated publicly available transcripts for hundreds of cases which could form the basis for a study focused on the development of international humanitarian law and international criminal law, rather than public international law more generally.

## B *The Focus on Oral Proceedings in Contentious Cases*

Our decision to focus on oral rather than written proceedings also merits some explanation. This choice was guided by the particular significance of oral proceedings at the Court, and by the prominent role that individual expertise and skills can play at this stage of proceedings. Oral proceedings take place after the close of written proceedings, at which point the parties are meant to focus on the issues that still divide them, and must not 'go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain'.[11] In practice parties do, to an extent, repeat arguments set forth in their written pleadings, but oral proceedings nevertheless can highlight the parties' strongest arguments, as they focus their efforts, respond more directly to counter-arguments by the opposing party, and informally abandon weaker lines of argument. Because the parties may concentrate on their stronger arguments during oral proceedings, and may do so in a relatively concise manner, this phase of proceedings can take on a particular importance for the Court.[12] Oral proceedings at the Court may also have symbolic value, as they represent a rare moment when litigating states formally and peaceably present their views in public on a legal dispute between them. By contrast, other international dispute settlement procedures like negotiations often remain relatively hidden from public view.[13]

Because the composition of legal teams usually remains the same between the written and oral proceedings at the Court, this study could have examined the composition of legal teams that represent states before the Court at all procedural stages.[14] We have instead focused on lawyers who appear before the Court during oral proceedings because

[9] Marceau and Hurley, 'Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms', 4 *Trade, Law and Development* (2012) 19, at 39–40.

[10] *Ibid.*, at 36–38. See, e.g., Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, 29 Nov. 2010, at para. 9.

[11] Rules of Court, Arts. 54, 60(1).

[12] Highet, 'Book Review of *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute*, by Terry Gill', 86 *AJIL* (1992) 400, at 402; Jennings, 'The Role of the International Court of Justice', 68 *British Yrbk Int'l L* (1997) 1, at 14.

[13] *Ibid.*

[14] Pellet, 'The Role of the International Lawyer in International Litigation', in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (2000), at 157.

this is the stage at which the backgrounds of counsel are likely to have the most influence on the arguments presented to the Court and on how they are perceived by the judges. Admittedly, however, the dynamics within legal teams may in some cases unfold in other ways that are less in keeping with these assumptions. Due to our focus on the lawyers who appeared before the Court during oral proceedings, we have not gathered data on members of legal teams who did not address the Court but worked behind the scenes. Even though these lawyers may have made significant contributions to the factual and legal development of these cases, their role is more difficult for researchers to assess.

Finally, this study does not encompass the hearings in advisory proceedings. The composition of the lawyers who have presented oral statements in advisory proceedings has been too distinct from those in contentious cases for meaningful comparisons to be possible. Since 1999, the Court has heard three requests for advisory proceedings, but there have been oral statements in only two: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[15] The *Kosovo* proceedings were especially distinct from oral proceedings in contentious cases, as 27 states appeared before the Court, in addition to the authors of the unilateral declaration of independence.[16] Each state's representative(s) spoke for under an hour, which is significantly shorter than the time each state would typically be afforded in a contentious case. Also, a higher proportion of states were represented by nationals in high-level government positions and by women. While these results are noteworthy, their inclusion in this study would have skewed the results.

## C *The Focus on Co-Agents, Counsel, and Advocates*

A related issue concerns our focus on co-agents, counsel, and advocates who appear before the Court, to the exclusion of both agents and non-lawyer experts. The ICJ's Statute provides that agents, who are typically high-ranking diplomats (i.e., ambassadors to the Netherlands), 'represent' parties before the Court, while counsel and advocates provide them with 'assistance'.[17] In practice, however, agents have played a more limited role in oral arguments than the Statute might suggest. Agents normally book-end the oral proceedings by opening their party's pleadings with a brief historical and factual background to the dispute and a substantive overview of the case, and by concluding the pleadings with a reading of their party's final submissions.[18] In general, agents do not make extended legal arguments, beyond providing an overview or summary, but when they have done so, we have included them in our data set.[19]

[15] There were no oral statements in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, [2012] ICJ Rep 10.

[16] 36 states submitted written statements to the Court see, www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1.

[17] ICJ Statute, Arts 42–43.

[18] Rosenne, 'International Court of Justice: Practice Directions on Judges ad hoc; Agents, Counsel and Advocates; and Submission of New Documents', 1 *L and Practice Int'l Courts and Tribunals* (2002) 223, at 226.

[19] The agents included are: Abdullah bin Abdulatif Al-Muslemani, Agent for Qatar in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, and Abednego Batshani Tafa, Agent for Botswana in *Kasikili/Sedudu Island (Botswana/Namibia)*.

In between the agents' opening and closing statements, co-agents, counsel, and advocates present the substantive legal arguments in which this study is most interested. Even though the Statute and the Rules of Court make no provision for 'co-agents', it appears that at least some litigants have adopted the term in order to signify the most senior lawyers on their teams who are primarily responsible for presenting oral arguments.[20] Our analysis excludes not only agents, but also non-lawyer experts who have somewhat controversially appeared before the Court in recent years, not as fact or expert witnesses, but as counsel or advocates.[21] Because their presentations tend to be less legal in character, they also fall outside the scope of this study.

## D *The Timeframe for the Study*

Although records for oral proceedings at the Court date back to 1948, this study analyses proceedings from 1999 through 2012 because a previous study has already analysed the composition of states' legal teams from 1948 through 1998. In 2001, Kurt Gaubatz and Matthew MacArthur published a study documenting 'the extent of the Western monopoly of international legal practice at the ICJ', and on this basis argued that international law 'is not as *international* as its name implies'.[22] According to the authors, the relative lack of non-Western legal practitioners points to a 'systemic lack of legal expertise within non-Western foreign policy institutions', such as foreign ministries.[23]

In order to substantiate these arguments, the authors gathered data on 47 contentious cases, involving 50 countries and 593 legal team members.[24] The authors showed that Western states tended to have legal teams with a very high national composition, while non-Western states tended to have teams with a relatively low national composition.[25] Forty-six of the 50 legal teams representing OECD states before the Court had a national composition of 60 per cent or more. Of the 47 legal teams representing non-OECD states appearing before the Court, 18 had a national composition of 60 per cent or more, while 29 had a national composition of less than 60 per cent. Moreover, of the 148 lawyers who had served as non-nationals on legal teams, only six (4 per cent) were nationals of non-OECD states.[26] Of the 44 lawyers who had appeared in such a capacity more than once, only one – Eduardo Jiménez de Aréchega – was from a non-OECD state.[27] Seventy-seven per cent of the non-nationals hired by legal teams came from France, the United Kingdom, the United States, Belgium, and Italy.

[20] Valencia-Ospina, 'International Courts and Tribunals, Agents, Counsel, and Advocates', in Wolfrum (ed.), *supra* note 5.

[21] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment* [2010] ICJ Rep. 14, at para. 167, and Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, at 111; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* [2011] ICJ Rep. 624.

[22] Gaubatz and MacArthur, 'How International is "International" Law?', 22 *Michigan J Int'l L* (2001) 240, at 241.

[23] *Ibid.*, at 247.

[24] *Ibid.*, at 251.

[25] *Ibid.*, at 252.

[26] *Ibid.*, at 257.

[27] *Ibid.*, at 257–258. Eduardo Jiménez de Aréchega, an Uruguayan, served as a member of the Court from 1970 to 1979. International Court of Justice, Members, All Members, available at: www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2.

Our own study collects similar data for the subsequent 14 years, but for the purpose of testing different hypotheses. As explained above, this study examines whether a relatively small group of men, who are nationals of developed states and who work primarily as professors of international law, are overwhelmingly responsible for presenting legal arguments before the Court in oral proceedings. Our study lays the foundation for considering how the composition of legal teams may or may not influence the Court's decision-making and its understanding of the cases before it. Gaubatz and MacArthur, by contrast, were more interested in how the composition of legal teams reflected a lack of capacity or domestic expertise in non-OECD member states. Their study viewed the data as a tool for measuring legal capacity in non-OECD countries, whereas this study uses the same data to reflect upon how the backgrounds of the individuals appearing before the Court may influence the development of public international law by the Court itself. Our study also differs from that of Gaubatz and MacArthur because ours includes gender as well as nationality. Future work could perhaps be done on building a complete understanding of the gender of counsel who have appeared before the Court for its entire history, since 1946, although the very small percentage of female counsel appearing before the Court from 1999 through 2012 suggests that the overall figures would be negligible at best.

Although our study covers just 14 years of oral proceedings at the Court, the number of cases heard by the Court during this period is comparable to the number heard from 1948 through 1998. During its first 50 years, the Court heard 47 contentious cases, while during the last 14 it heard 41 cases. (Forty-five cases appeared on the Court's General List during the period from 1999 through 2012, but only 33 oral proceedings took place.[28]) While our sample size is admittedly smaller than that of Gaubatz and MacArthur, these figures are still relatively close, and reflect the considerable growth of the Court's docket during this time period. This study covers oral proceedings at the Court during a period of relatively intense activity, in which the Court took some important steps towards modernizing and streamlining its working methods, including a reduction in the length of oral proceedings.[29]

## E *Proxies for Development Status*

Finally, we have retained the dichotomy adopted by Gaubatz and MacArthur between OECD and non-OECD member states, but because of its limitations as a proxy for development status, we have also classified states according to the World Bank's development groupings, and the Human Development Index (HDI),[30] both of which represent

[28] The discrepancy between the number of cases (41) and the number of oral proceedings (33) is due to the fact that the Court heard the 10 *Legality of Use of Force* cases together, even though it never formally joined them. We treated the cases brought by Yugoslavia against the USA and Spain as one oral proceeding, and the cases brought by Serbia and Montenegro against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the UK as another oral proceeding because the cases against the USA and Spain ended at the jurisdictional phase, while the other eight cases proceeded to the merits. Thus, we treated the 10 cases as having been heard in two separate sets of oral proceedings.

[29] Higgins, 'Respecting Sovereign States and Running a Tight Courtroom', 50 *ICLQ* (2001) 132.

[30] The classification of development status was done at the end of the dataset using OECD, World Bank, and HDI data as of 31 Dec. 2012.

more nuanced, four-tiered classification systems.[31] OECD membership represents the best available method for creating a binary distinction between developed and developing states, but it results in some inconsistencies and lacks the nuance that can be gained through the World Bank's four-tiered classification of economies as low income, lower middle income, upper middle income, and high income.[32] Similarly, the HDI classifies states as having low, medium, high, and very high human development.[33] Using OECD membership as a dividing line between developed and developing states creates inconsistencies because some upper middle income countries qualify as developed while others do not. Because Chile and Mexico are both OECD member states, even though they are upper middle income economies, they would simply be classified as developed if the study relied only on OECD membership as a proxy.[34] Russia, by contrast, is also an upper middle income economy, but because it is not a member of the OECD, it would simply be classified as a developing country.[35] Conversely, Liechtenstein, Qatar, Bahrain, and Argentina all fall into the uppermost quadrant of either the World Bank's classification system or the HDI (or both), yet none are members of the OECD. The use of OECD membership as a proxy for development status also fails to capture the huge variation among non-OECD member states, which range from low income sub-Saharan African states to upper middle income Latin American and Eastern European states. Due to these shortcomings, we have decided to examine whether counsel before the ICJ tend to hail from a small number of the world's most developed states, based not only on OECD membership, but also on the four-tiered classification systems of the World Bank and the HDI.

## 2 The Empirical Results

Over the course of the 33 oral proceedings in contentious cases from 1999 through 2012, 52 states appeared before the Court as applicants or respondents, as parties in proceedings brought by Special Agreement (such that the states were neither applicants nor respondents), or as interveners (whether successful or not). As these figures suggest, a number of states were repeat litigants before the Court during this period.[36]

[31] The World Bank, Country and Lending Groups, available at: http://data.worldbank.org/about/country-classifications/country-and-lending-groups. UNDP, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World (2013). See Franck, 'Development and Outcomes of Investment Treaty Arbitration', 50 *Harvard Int'l LJ* (2009) 435, at 455; Franck, Garbin, and Perkins, 'Through the Looking Glass: Understanding Social Science Norms for Analyzing International Investment Law', and Van Harten, 'The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration', in K.P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2010–2011* (2012).

[32] The OECD has 34 members: see www.oecd.org/general/listofoecdmembercountries-ratificationofthecon-ventionontheoecd.htm.

[33] UNDP, *supra* note 31, at 144–147.

[34] While the World Bank classifies Chile as upper middle income, the HDI classifies Chile as having very high human development. In contrast, the HDI classifies Mexico as having high human development.

[35] The HDI classifies Russia as having high human development.

[36] The US appeared in five cases. Serbia and Montenegro (including the FRY) and Germany each appeared in four cases. The Democratic Republic of Congo, France, Honduras, Nicaragua, and Belgium each appeared in three cases.

Categorizing these states according to the UN's regional groups reveals that states in the Western Europe and Other Group (WEOG) appeared most frequently, in 20 different oral proceedings. States from the Africa Group appeared on 17 occasions, states from the Latin American and Caribbean Group (GRULAC) on 16 occasions, states from the Eastern European Group on 11 occasions, and states from the Asia-Pacific Group on 10 occasions. The United States alone appeared on five occasions (Table 1).[37] Categorizing the states that appeared before the Court according to membership in the OECD reveals that OECD member states appeared on 27 occasions, while non-OECD states appeared on 52 occasions (Table 2). Grouping them according to the World Bank's classification system shows that high income states appeared on 29 occasions, upper-middle income states on 23 occasions, lower-middle income states on 18 occasions, and low income states on nine occasions (Table 3). Classification according to the HDI yields similar results: states with very high human development appeared

**Table 1:** State Parties, by Geographical Region

| Region | Number of Appearances | Percentage |
|---|---|---|
| WEOG | 20 | 25.3% |
| Africa | 17 | 21.5% |
| GRULAC | 16 | 20.3% |
| Eastern Europe | 11 | 13.9% |
| Asia-Pacific | 10 | 12.7% |
| USA | 5 | 6.3% |
| **Total** | 79 | 100% |

**Table 2:** States Parties, by OECD Membership

| OECD Status of State Parties | Number of Appearances | Percentage |
|---|---|---|
| OECD Member | 27 | 34.2% |
| Non-OECD Member | 52 | 65.8% |
| **Total** | 79 | 100% |

**Table 3:** States Parties, by World Bank Status

| World Bank Classification | Number of Appearances | Percentage |
|---|---|---|
| High Income | 29 | 36.7% |
| Upper Middle Income | 23 | 29.1% |
| Lower Middle Income | 18 | 22.8% |
| Low Income | 9 | 11.4% |
| **Total** | 79 | 100% |

[37] Members of the General Assembly are arranged in Current Regional Groups: see www.un.int/wcm/webdav/site/gmun/shared/documents/GA_regionalgrps_Web.pdf. We treated the US separately because it is not a member of any regional group in the UN system, although it is an observer of WEOG and is considered to be a member of this group for electoral purposes.

**Table 4:** State Parties, by HDI

| HDI Status | Number of Appearances | Percentage |
|---|---|---|
| Very High | 29 | 36.7% |
| High | 22 | 27.8% |
| Medium | 13 | 16.5% |
| Low | 15 | 19% |
| **Total** | 79 | 100% |

on 29 occasions, states with high human development on 22 occasions, states with medium human development on 13 occasions, and states with low human development on 15 occasions (Table 4).

From 1999 through 2012, 205 lawyers presented legal arguments before the Court, and out of this total, 63 lawyers appeared two or more times. The 142 lawyers who appeared only once may have done so for a variety of reasons – some were working in a government ministry of one of the parties, others were associates at law firms hired by one of the parties, while a few were lawyers or academics working as assistants to professors who frequently appeared before the Court. We will refer to the 63 lawyers who appeared before the Court on multiple occasions as the 'ICJ Bar'.

Alain Pellet has suggested that this 'invisible Bar' of repeat players should consist of those who have appeared three or more times before the Court, but we have chosen a lower threshold to ensure an adequate sample size for our study.[38] The fact that these 63 lawyers account for 73.6 per cent of the total speaking time during oral arguments indicates that this lower threshold adequately identifies those lawyers who predominate in oral proceedings. For each of the following data points we have compiled figures for the total number of lawyers who appeared before the Court, as well as the ICJ Bar, to allow for a comparison between these two pools of lawyers.

The results show that a majority of oral proceedings were conducted in English: 57 per cent of the total speaking time in oral proceedings was in English, while 43 per cent was in French. In addition, the majority (122) of the lawyers who appeared before the Court spoke English.

## A *The Composition of the Legal Teams*

The number of lawyers who appeared on behalf of each party in oral proceedings varied from case to case, probably depending on a number of factors such as the importance or political sensitivity of the dispute, its complexity, and the resources available to the party. The largest legal team that presented oral arguments consisted of 14 lawyers[39] and the smallest teams had one lawyer.[40] Among the legal teams from OECD member states, 57 per cent of oral arguments were presented by nationals of those

[38] Pellet, *supra* note 14, at 147–148 (covering 1986 to 1998).

[39] At the merits and counter-claims stage, 14 lawyers spoke on behalf of Cameroon in *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, CR 2002/1–3.

[40] For example, J.G. Lammers was the sole lawyer who spoke on behalf of the Netherlands in *Legality of Use of Force*, CR 1999/20, 1999/31, and 2004/7.

states, while 43 per cent were conducted by non-nationals (Table 5). Out of the speaking time by non-nationals on behalf of OECD member states (which was 43 per cent of the total speaking time by nationals as well as non-nationals), 96.5 per cent was conducted by non-nationals from other OECD member states. Out of the total speaking time by both national and non-national lawyers on behalf of OECD member states, women spoke for 7.7 per cent of the time.

Among the legal teams from states not members of the OECD, 15.1 per cent of oral arguments were presented by nationals of those states, while 84.9 per cent were conducted by non-nationals (Table 6). Out of the speaking time by non-nationals on behalf of states not members of the OECD (which was 84.9 per cent of the total speaking time by nationals and non-nationals), 97.1 per cent was presented by non-nationals from OECD member states. Out of the total speaking time by both national and non-national lawyers on behalf of states not members of the OECD, women spoke for 7.4 per cent of the time.

Though there was little difference between states not members of the OECD and OECD member states regarding the speaking time by women, there was a significant difference regarding the speaking time conducted by non-nationals. While nationals accounted for a majority of the speaking time for OECD member states (57 per cent of the total speaking time), non-nationals accounted for the vast majority of the speaking time for non-member states (84.9 per cent of the total speaking time). In the case of both OECD member and non-member states, non-nationals were almost exclusively drawn from OECD member states, as the percentages hover just below 100 per cent. Figure 1 illustrates the main distinction between the composition of OECD and non-OECD legal teams by showing that more than 50 per cent of OECD legal teams had a percentage of nationals of between 80 and 100 per cent, while more than 45 per cent of non-OECD legal teams had a percentage of nationals of between 0 and 19 per cent.

**Table 5:** Counsel for OECD Member States

| **Lawyers** | **Percentage** |
|---|---|
| Nationals | 57% |
| Non-Nationals | 43% |
| From OECD Member States | 96.5% |
| From Non-OECD Member States | 3.5% |
| **Total** | 100% |

**Table 6:** Counsel for Non-OECD Member States

| **Lawyers** | **Percentage** |
|---|---|
| Nationals | 15.1% |
| Non-Nationals | 84.9% |
| From OECD Member States | 97.1% |
| From Non-OECD States | 2.9% |
| **Total** | 100% |

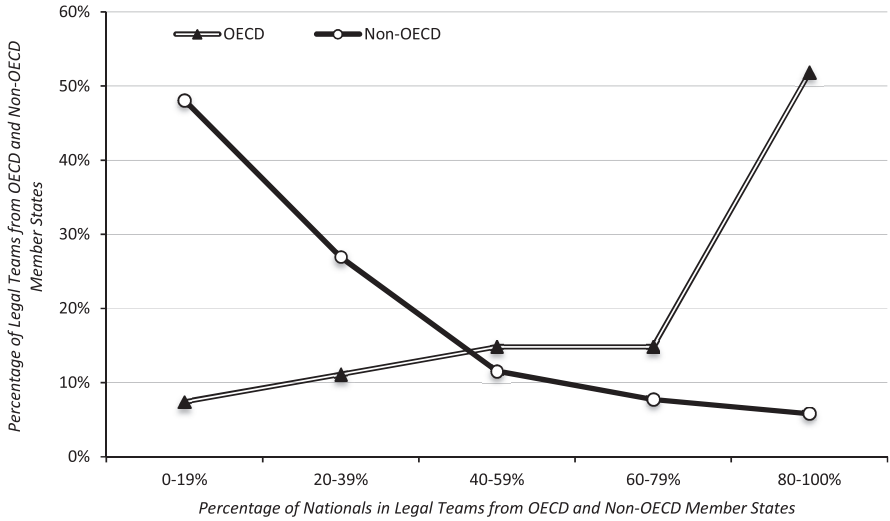


**Figure 1:** *Composition of States' Legal Teams, by Nationality*

## B *The Demographics of the Lawyers Appearing Before the Court*

Out of the 205 lawyers who appeared before the Court, 23 were women (11.2 per cent) (Table 7). These 23 female lawyers accounted for 7.4 per cent of the total speaking time for all oral arguments from 1999 through 2012. When viewed from the perspective of the ICJ Bar, however, the number of women, and their share of speaking time, shrinks considerably. Out of the 63 members of the ICJ Bar, there were four female lawyers, who accounted for 2.9 per cent of the total speaking time for the ICJ Bar, and 2.1 per cent of the total speaking time for all 205 lawyers (Table 8).

From 1999 through 2012, 27.8 per cent of all lawyers who appeared before the Court were nationals of OECD non-member states, while 72.2 per cent were nationals

**Table 7:** Gender of All Lawyers

| Gender | Number of Lawyers | Percentage of All Lawyers | Percentage of Speaking Time |
|---|---|---|---|
| Women | 23 | 11.2% | 7.4% |
| Men | 182 | 88.8% | 92.6% |
| **Total** | 205 | 100% | 100% |

**Table 8:** Gender of Members of ICJ Bar

| Gender | Number of Lawyers | Percentage of ICJ Bar | Percentage of Speaking Time for ICJ Bar |
|---|---|---|---|
| Women | 4 | 6.3% | 2.9% |
| Men | 59 | 93.7% | 97.1% |
| **Total** | 63 | 100% | 100% |

of OECD member states (Figure 2). Within the ICJ Bar, this disparity was more extreme: 15 per cent were nationals of non-OECD states, while 85 per cent were nationals of OECD states (Figure 3). Grouping counsel according to the World Bank and HDI classification systems leads to similar results. Out of the 205 lawyers who appeared before the Court, 71.5 per cent were from high income economies and 72.9 per cent were from states that have very high human development (Figure 4). Within the ICJ Bar, 84.9 per cent were from high income economies and states with very high human development (Figure 5).

The regional distribution of all lawyers who appeared before the Court during the time frame for this study shows that 68.8 per cent were nationals of either WEOG states (53.4 per cent) or the United States (15.4 per cent), while the remaining 31.2 per cent were nationals of states in Africa (12.7 per cent), Asia-Pacific (7.1 per

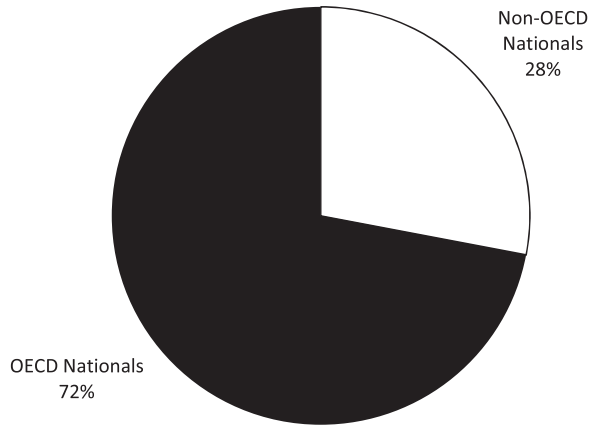


**Figure 2:** *All Lawyers, Classified as Nationals of OECD or Non-OECD Member States*

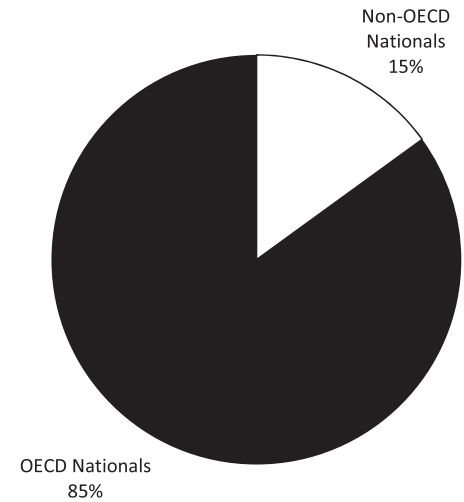


**Figure 3:** *Members of the ICJ Bar, Classified as Nationals of OECD or Non-OECD Member States*

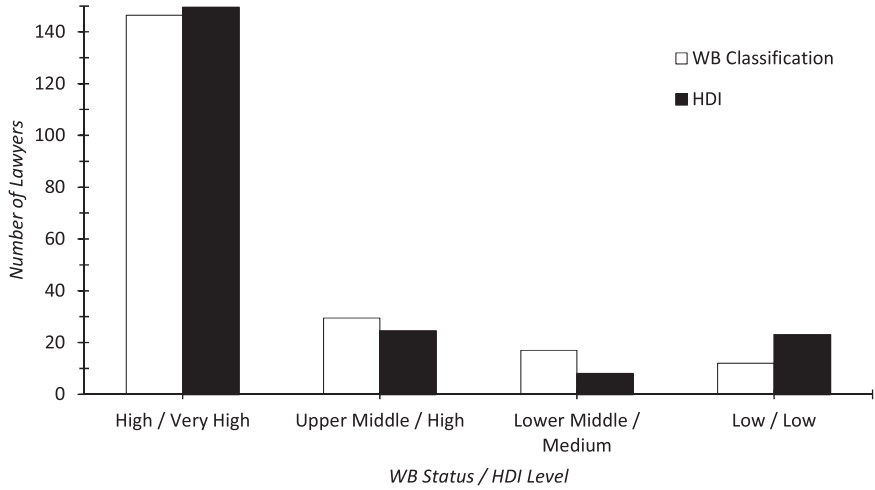


**Figure 4:** *All Lawyers, by World Bank Status and HDI*

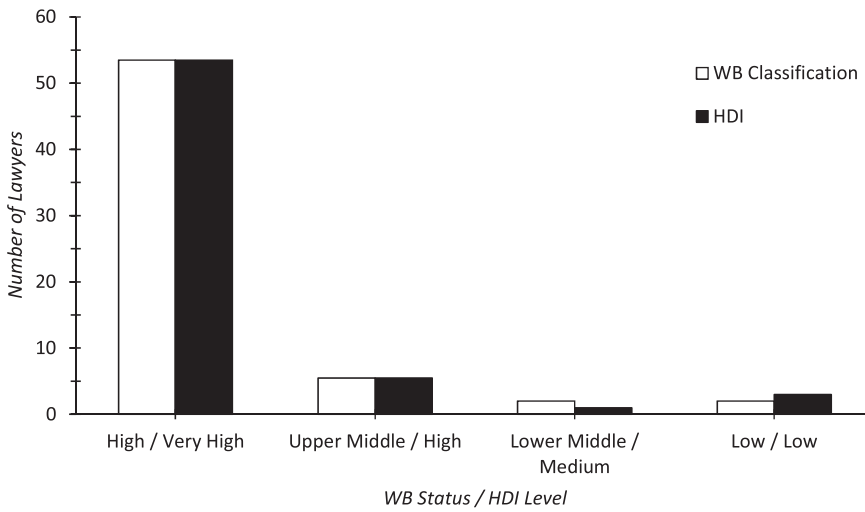


**Figure 5:** *Members of ICJ Bar, by World Bank Status and HDI*

cent), Latin America and the Caribbean (6.6 per cent), and Eastern Europe (4.9 per cent) (Figure 6). Within the ICJ Bar, 84.1 per cent were nationals of either WEOG states (63.5 per cent) or the United States (20.6 per cent), while the remaining 15.9 per cent were nationals of states in Africa (7.9 per cent), Latin American and the Caribbean (4 per cent), Eastern Europe (3.2 per cent), and Asia-Pacific (0.8 per cent) (Figure 6).

Lawyers of 42 different nationalities appeared before the Court, with the most represented states being the United States, France, and the United Kingdom. Out of the 205 lawyers who appeared before the Court, 36.8 per cent were nationals of the United States (15.4 per cent), France (11.1 per cent), or the United Kingdom

(10.2 per cent), while the next most represented states were Germany (8.3 per cent), Belgium (4.3 per cent), Italy (4.4 per cent), the Democratic Republic of Congo (3.9 per cent), Serbia (3.9 per cent), and Canada (2.9 per cent) (Figure 7). Within the ICJ Bar, 54.5 per cent were nationals of the United States (20.6 per cent), the United Kingdom (17.5 per cent), or France (16.4 per cent), while the next most represented states were Germany (7.9 per cent), Belgium (6.4 per cent), the Netherlands (4.8 per cent), Spain (4.8 per cent), Costa Rica (3.2 per cent), and Italy (3.2 per cent) (Figure 8).

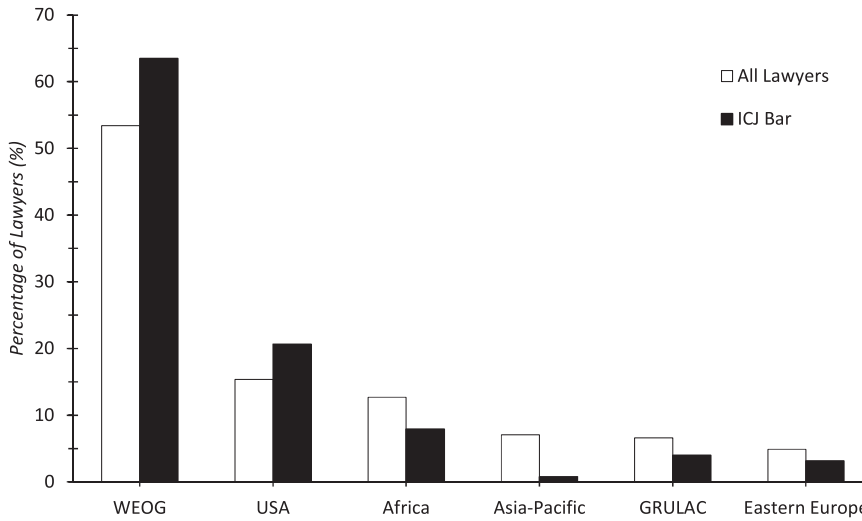


**Figure 6:** *All Lawyers and Members of ICJ Bar, by Geographical Region*

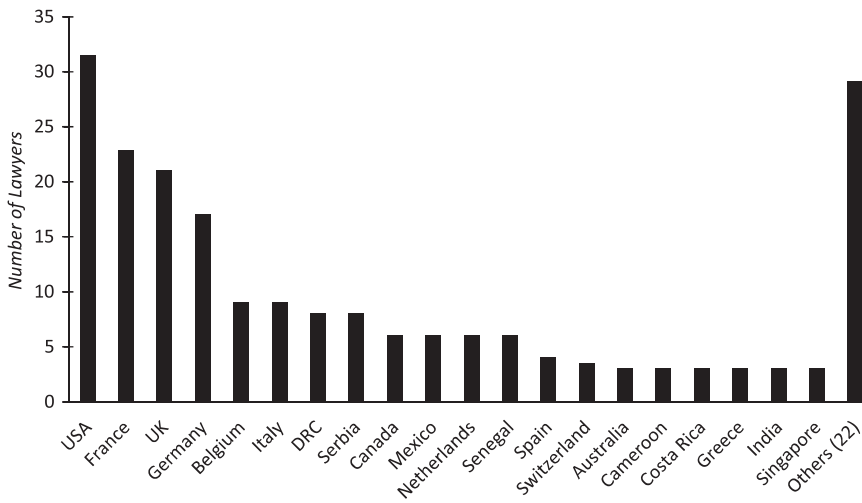


**Figure 7:** *All Lawyers, by Nationality*

Finally, regarding the professional status of the lawyers who appeared before the Court, 44.9 per cent were academics, 34.2 per cent were government lawyers, 10.2 per cent were sole practitioners (e.g., barristers), 8.3 per cent were lawyers from law firms, and 2.4 per cent were lawyers who worked in another capacity (Figure 9). Within the ICJ Bar, the majority of lawyers were academics (58.7 per cent), while the percentage of government lawyers was significantly reduced (15.9 per cent) (Figure 9). The

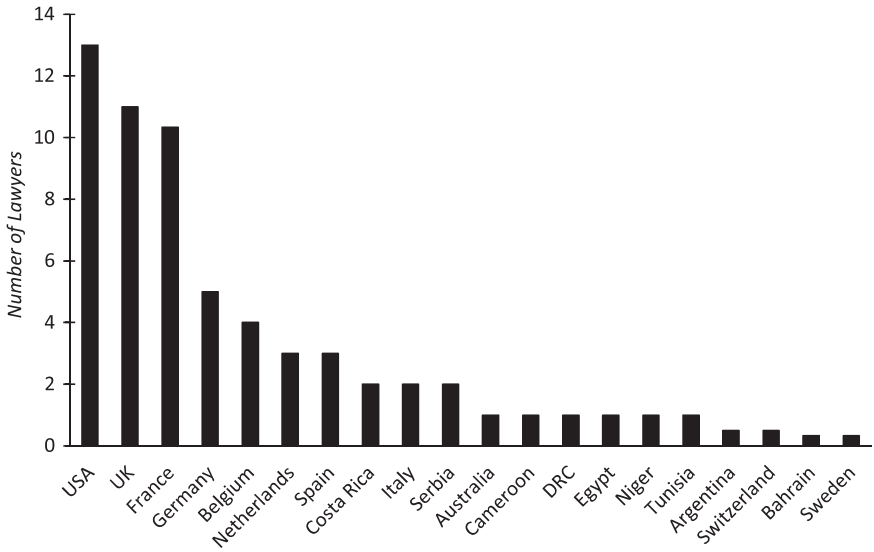


**Figure 8:** *Members of the ICJ Bar, by Nationality*

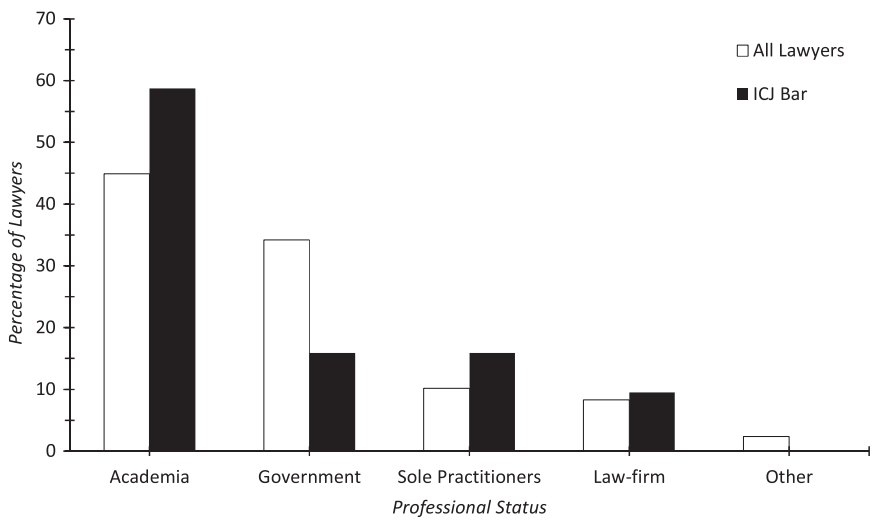


**Figure 9:** *Professional Status of All Lawyers and Members of ICJ Bar*

percentage of sole practitioners was slightly larger (15.9 per cent), and the percentage of lawyers from law firms was approximately the same (9.5 per cent).

## 3 Discussion of the Empirical Results

The results of our empirical research support both of our hypotheses. First, the data shows that the vast majority of lawyers who appeared before the Court were men from developed countries. As discussed above, only 23 women spoke during oral proceedings during this period, thus accounting for 11.2 per cent of the 205 lawyers who appeared before the Court, and 7.4 per cent of the total speaking time during oral proceedings. Among the ICJ Bar, women were even less represented, as only four female lawyers appeared before the Court more than once, thereby constituting just 6.3 per cent of the 63 members of the ICJ Bar. Furthermore, the lawyers who appeared before the Court were overwhelmingly nationals of developed states, as 72.2 per cent of the 205 lawyers were nationals of OECD member states. Again, this figure is even more extreme among the ICJ Bar, 85 per cent of which comprised nationals of OECD member states. Moreover, the data shows that non-nationals on legal teams were almost entirely from OECD member states, whether or not the party before the Court was an OECD member state.

In keeping with the second hypothesis, the data shows that those lawyers who appeared before the Court more than once were a relatively small group, the majority of whom were professors of public international law or academics in this field. The 63 members of the ICJ Bar constituted 30.7 per cent of the 205 lawyers who appeared before the Court, or less than a third of the total number of lawyers. Had we required three rather than two appearances for inclusion in the ICJ Bar, then the Bar would have been considerably smaller: 36 lawyers, or 17.6 per cent of the total number, appeared before the Court three or more times. Together, these 36 lawyers accounted for 60.8 per cent of the oral arguments presented from 1999 through 2012. If we were to raise the threshold for inclusion in the Bar even further, then only 17 lawyers (8.3 per cent of the total 205) appeared before the Court four times or more, and they accounted for 41.9 per cent of the total oral arguments before the Court. The data also shows that a relatively small number of lawyers were responsible for a disproportionate amount of the total speaking time for all lawyers who appeared before the Court. Twenty-two lawyers accounted for 50 per cent of the total speaking time, and seven of these 22 lawyers accounted for 30 per cent of the total speaking time. In addition, just one individual accounted for 10.4 per cent of the speaking time of the total pool of 205 lawyers.

Finally, the ICJ Bar was largely, though by no means exclusively, composed of academics (58.7 per cent), while government lawyers (15.9 per cent), sole practitioners (15.9 per cent), and lawyers at law firms (9.5 per cent) trailed behind the professors. The remainder of this section offers some possible explanations for the patterns that we have observed, with the caveat that many of these explanations are necessarily speculative or anecdotal. In addition, these explanations are premised on the notion that states have hired lawyers in a largely rational manner, which, in reality, may or may not have always been the case.

### A *Possible Explanations for Reliance on Non-Nationals from Developed States*

Most states only engage in inter-state litigation on an intermittent basis, such that they may lack adequate 'in-house' expertise within the government itself, or may not perceive a need to develop such expertise. Some states may have therefore sought out external expertise in the field of public international law, without regard for whether these experts were nationals or non-nationals. In other words, some states may have valued expertise above all, and thus would have given little, if any, weight to the nationalities of those selected. This explanation accounts for the presence of non-nationals on legal teams, but not for the extremely high percentage of non-nationals from OECD member states. One of the most persuasive explanations for this phenomenon may instead be a lack of domestic capacity in non-member states, where legal education, particularly in a relatively specialized field like public international law, may not be robust enough to develop adequate expertise among national lawyers.[41] This explanation is in keeping with our results, which show not only that developing states hired non-national lawyers to a much greater extent than did developed states, but that the non-nationals who served on these legal teams came from developed rather than developing states (Table 6). There are some exceptions to these general trends, however, as small developed states like Liechtenstein may face the same lack of domestic capacity,[42] and large developing states like the Democratic Republic of the Congo may select legal teams composed entirely of nationals.[43]

Language skills may also guide states' choice of lawyers. Because the official languages of the Court are English and French, states must hire lawyers who speak one of these two languages fluently.[44] Moreover, legal teams traditionally plead in both languages, so that Anglophone states generally ensure that their teams include at least one Francophone lawyer, and vice versa. The data shows that non-nationals on legal teams were most frequently citizens of the United Kingdom, the United States, and France. Lawyers from these states would, most likely, be native speakers of English or

[41] Conversely, countries such as the UK may consider that 'they can find the necessary legal talent inside their own countries': Maher, 'Half Light Between War and Peace: Herbert Vere Evatt, The Rule of International Law, and the Corfu Channel Case', 9 *Australian J Legal Hist* (2005) 47; Gaubatz and MacArthur, *supra* note 22, at 266.

[42] *Certain Property (Liechtenstein v. Germany)*, CR 2002/24–27.

[43] *Armed Activities in the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)*, CR 2002/36, 2002/38, 2005/18 and 2002/20, and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, CR 2006/50, 2006/52, 2010/3, 2010/4, and 2010/6. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* CR 2009/9, 2009/11, 2012/5–7. States lacking financial resources may seek assistance from the Secretary General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice.

[44] ICJ Statute, Art. 39(1); Rules of Court, Art. 70(1). Valencia-Ospina, *supra* note 20; Jennings, 'The Work of the International Bar', in L. Vohrah *et al.* (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003), at 447; Sanchez Rodriguez, 'Litigation Practice before the International Court of Justice: Some Specific Problems of Developing and Small Countries', in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999), at 465–466; S. Jayakumar and T. Koh, *Pedra Branca: The Road to the World Court* (2009), at 73.

French, and would have received their legal education in one of these two languages. The data thus suggests a correlation between the official languages of the Court and the hiring of lawyers from states where these languages are spoken. Whether a causal relationship exists between the Court's official languages and the disproportionate hiring of lawyers from these three states remains a matter of speculation. Given the existence of many other English and French speaking states throughout the world, other factors must also be at play.

Language skills may also factor into the apparent preference that former colonies have demonstrated for lawyers who are nationals of the former colonial power. Francophone African states typically hired lawyers from France and Belgium,[45] and likewise, certain Latin American states consistently hired Spanish lawyers.[46] In addition, Cameroon, which was partly a German colony, hired a significant number of Germans in *Cameroon v. Nigeria*.[47] For some states, a shared language, dating back to the colonial period, may have played an important role in the selection of lawyers, whether or not this shared language is also one of the official languages of the Court. Colonial heritage may have also guided the selection of lawyers in cases that involved colonial era documents or laws, which are frequently at issue in disputes relating to territorial sovereignty and maritime delimitation.[48] In such cases, greater ease or familiarity with colonial laws could be an asset to a team that intends to pursue legal arguments on this basis. Thus, it appears that historical and linguistic factors may have influenced the choice of counsel by states.[49]

In cases concerning domestic compliance with international law, litigating states may consider it advantageous to include non-nationals who are nationals of the opposing party. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, for example, Germany's team included one Italian lawyer, who may have been able to provide Germany with expertise in the Italian domestic legal system and with insights into the Italian court judgments that were the focus of the case.[50] Alternatively, Germany may have considered that its legal arguments would carry more weight if presented to the Court by a national of the opposing party. Similarly, in the cases brought by Germany and Mexico against the United States regarding its compliance with the Vienna Convention on Consular Rights (*LaGrand* and *Avena*, respectively), the American lawyers who represented Germany and Mexico focused, in part, on issues concerning the US criminal justice system. Again, Germany and

[45] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep. 3; *Frontier Dispute (Benin/Niger)* [2005] ICJ Rep 90; *Certain Criminal Proceedings in France (Republic of the Congo v. France)* [2003] ICJ Rep 102; *Frontier Dispute (Burkina Faso/Niger), Judgment 2013*.

[46] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* [2003] ICJ Rep. 392; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* [2007] ICJ Rep. 659; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* [2012] ICJ Rep. 624.

[47] Three members of Cameroon's legal team were German.

[48] *Frontier Dispute (Burkina Faso/Niger), supra* note 45.

[49] Sanchez Rodriguez, *supra* note 44, at 466, 473–474.

[50] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* CR 2011/17, at 37–48; CR 2011/20, at 30–43 (Gattini).

Mexico may have viewed the hiring of American lawyers as important not only for their expertise in US law, but also because the presence of American lawyers during oral proceedings could influence the Court's perception of their claims.[51]

On a more speculative note, both developed and developing states may turn to non-national lawyers for an outsider's perspective on an international dispute that may be intricately linked to domestic politics or history. Outsiders may, for example, be better positioned than government lawyers to help steer parties away from domestic narratives that sometimes result in less promising legal strategies or lines of argument. Outsiders may also be well positioned to help coordinate legal strategies for states that involve multiple government ministries in the process of preparing a case for litigation before the Court. In such situations, non-nationals may be able to help mediate between government ministries that have conflicting or divergent ideas about how to approach a dispute.[52]

## B *The Closed Character of the ICJ Bar*

### *1 The preference for repeat players and professors*

The figures discussed above indicate that a relatively small number of repeat players accounts for a significant majority of the speaking time during the Court's oral proceedings, thus supporting the existence of an 'invisible' or 'informal' Bar of the ICJ, even in the absence of a structured or formal organization for this Bar.[53] The ICJ Bar may favour repeat players in part because states value the professional experience of counsel, and therefore prefer lawyers who have appeared before the Court on previous occasions. Certain features of ICJ litigation and advocacy support this explanation. Most disputes that come before the Court are politically sensitive, both domestically and regionally, and are of considerable importance to the national governments involved.[54] Governments may therefore insist upon being represented by the 'best' counsel, whom they may identify as those who have prior experience appearing before the Court.

Anecdotal evidence supports this explanation. In discussing *Pedra Branca (Malaysia v. Singapore)*, the Agent and Counsel for Singapore explained that the process of selecting Singapore's counsel began with 'a shortlist of the world's most eminent international lawyers and those who have frequently argued cases in the ICJ'.[55] Similarly, one member of the ICJ Bar noted that he was appointed as counsel in one case only after government officials of the appointing state had ascertained that he had 'pleaded a great many times during the last ten years'.[56]

[51] *LaGrand* (*Germany v. United States of America*), CR 2000/27, at 18–23 (Donovan); CR 2000/30, at 38–43 (Donovan); *Avena* (*Mexico v. United States of America*), CR 2003/25, at 10–16 (Babcock); CR 2003/28, at 16–31 (Babcock).

[52] Shaw, 'A Practical Look at the International Court of Justice', in M. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (1998), at 14.

[53] Pellet, *supra* note 14, at 147; Jennings, *supra* note 44, at 444.

[54] *Ibid.*, at 445.

[55] Jayakumar and Koh, *supra* note 44, at 74–78.

[56] Pellet, *supra* note 14, at 151.

Generally speaking, counsel with prior pleading experience before any court may be more skilled than those without, as oral advocacy skills lend themselves to experiential learning. Prior experience may also be considered valuable before the ICJ because of the unregulated character of oral proceedings before the Court. The Court's Rules and Practice Directions[57] provide counsel with little guidance on pleading before the Court, in contrast to domestic legal systems, where oral proceedings are usually regulated by the courts themselves, as well as bar associations or councils.[58] Some other international courts have provided guidelines that would assist counsel who may be unfamiliar with the procedural intricacies and practice of presenting oral arguments before them,[59] but the 'rules of the game' at the ICJ are largely unwritten and learned by experience.[60]

With respect to the relatively high percentage of professors in the ICJ Bar, one possible explanation may be the perception that disputes before the ICJ primarily deal with 'legal' questions of an academic nature, rather than disputed facts. Even though the ICJ is a court of first and last instance, proceedings before the Court often focus on issues of law and legal analysis, and involve limited engagement with factual evidence, witnesses, and experts.[61] The prevalence of professors in the ICJ Bar who lack experience as practising lawyers may have contributed to the historic lack of emphasis on factual issues in ICJ cases, and it arguably raises problems in fact-intensive disputes. Jennings, for example, observed that the rare attempts by professors at examining and cross-examining witnesses and experts before the Court have not shown professors 'at their best'.[62]

States may nevertheless seek out international law professors to represent them in ICJ proceedings because they consider that academic experts in the field are able to provide a level of substantive expertise that cannot be matched by lawyers with greater practical litigation experience. States appear, with good reason, to seek out counsel who are able to bring a deep knowledge of the rules and principles of public international law to any dispute, and who speak the common language of international legal discourse. The generally academic or scholarly character of the international legal field, and the role that professors have historically played in its development, may also help to explain the prominence of professors in the ICJ Bar.[63]

### *2 The gender imbalance*

These explanations of the closed and academic character of the ICJ Bar do not explain the extreme gender imbalance revealed by our results. As explained above, out of the

[57] Rules of Court, Arts 54–72; Practice Directions VI, VIII, IX*ter* and XI.

[58] See, e.g., US Sup. Ct, *Rules of the Supreme Court of the United States* (adopted 12 Jan. 2010), Rule 28, available at: www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf.

[59] CJEU, 'Notes for the Guidance of Counsel' (Feb. 2009), at 22–27, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008–09/txt9_2008-09-25_17-37-52_275.pdf.

[60] Pellet, *supra* note 14, at 149.

[61] Jennings, *supra* note 44, at 450; Riddell and Plant, Sept. 2006 – Project Progress Update, available at: www.biicl.org/evidence/.

[62] Jennings, *supra* note 14, at 450.

[63] Art. 38(1)(d) of the Court's Statute provides that, in deciding disputes, the Court shall apply the teachings of 'the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)', in Wolfrum (ed.), *supra* note 5.

63 lawyers in the ICJ Bar, only four were female (6.3 per cent), and they accounted for 2.9 per cent of the speaking time of the ICJ Bar (63 lawyers). The figure for all counsel appearing before the Court is only slightly larger. Out of the 205 counsel that appeared before the Court, 23 were women (11.2 per cent), and they spoke for 7.4 per cent of the oral proceedings before the Court. These numbers point to a significant gender imbalance among the repeat players. By identifying these disparities, this article aims to make a small contribution to the understanding of gender imbalance in the ICJ Bar – a subject that merits a more in-depth study.[64]

An interesting comparison may be drawn between the statistics for contentious cases, discussed above, and those for advisory proceedings, in which notably more women appeared before the Court. Out of a total of 62 lawyers who spoke before the Court in advisory proceedings, 12 were women (19.4 per cent), and they spoke for 18.4 per cent of the total speaking time in advisory proceedings. The higher percentage of women who appeared in advisory proceedings correlates with the fact that states are usually represented by their own officials and diplomats in advisory proceedings. Women who have risen to senior levels within their domestic bureaucracies have therefore had opportunities to appear before the Court in these proceedings.[65] Further research could compare the gender imbalance among senior lawyers in foreign ministries with the gender imbalance among ICJ counsel, as well as faculties, international law firms, members of the International Law Commission, and international judges and arbitrators. In addition, the gender imbalance among ICJ counsel could be compared to the gender composition of the lawyers playing support roles behind the scenes.

In recent years, gender diversity has also been a subject of discussion in the field of international arbitration, especially investor–state arbitration, and this emerging body of literature may provide a useful basis for comparison. Preliminary evidence suggests that there has been an increase in the absolute number of female lawyers appearing as counsel in the 'biggest arbitrations', measured by size of claims and counter-claims, but the percentage of women who have served as arbitrators in such cases is remarkably similar to the percentage of women in the ICJ Bar.[66] A recent survey notes that between 1972 and 2012, 746 arbitrators were appointed in 254 investment treaty arbitration cases administered by ICSID. Of these, only 5.6 per cent (42) were female arbitrators. In the field of international commercial arbitration, the same study estimates that approximately 6 per cent of arbitrators have been women.[67]

Certain features of the arbitral appointments process may also help to illuminate the gender imbalance at the ICJ Bar. The selections process for arbitrators heavily

[64] See, e.g., Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', 12 *Chicago J Int'l L* (2012) 647.

[65] Gal-Or, 'The Under-Representation of Women and Women's Perspectives in International Dispute Resolution Processes', 4 *Transnational Dispute Management* (2008) 1, at 2.

[66] Samuels, 'Women of Arbitration: Network Effects', 2 *Global Arb Rev* (2007) 9.

[67] Greenwood and Baker, 'Getting a Better Balance on International Arbitration', 28 *Arb Int'l* (2008) 653, at 655–656.

favours repeat players, with parties viewing 'previous service as an arbitrator as the "pre-eminent qualification for an arbitrator candidate"'.[68] In addition, the inherently subjective character of the selection process may allow for the expression of unconscious gender biases in arbitral appointments.[69] In light of the structural similarities between the ICJ Bar and the pool of international arbitrators, namely their small and closed character, the preponderance of repeat players, and the subjective selection processes, future research could compare the reasons for the relative absence of female arbitrators and the gender imbalance in the ICJ Bar.

### *3 Suggestions for future research*

Future research could also consider the data described above, and the two hypotheses they confirm, through the lens of sociology. Professional and occupational sociology tells us that 'service providers' frequently seek to shield themselves from market forces in order to enhance their own value.[70] In domestic legal systems, a variety of mechanisms limit the total number of lawyers who are available and eligible to provide legal services, such as requirements for earning law degrees, law school accreditation standards, other minimum educational qualifications, bar examinations, pupillages, apprenticeships, fees, and even malpractice liability insurance requirements. Yet, this list of mechanisms is of limited relevance in explaining the 'closed' character of the ICJ Bar.

Unlike the domestic legal profession, the ICJ Bar is unregulated and lacks formal mechanisms of closure, save perhaps the Court's official language requirements.[71] Despite the Court's admonition that parties should not appoint individuals to act as counsel for the purposes of presenting evidence to the Court based on 'scientific or technical knowledge' or 'personal experience', no formal rule prevents an individual without legal training or qualifications from appearing before the Court.[72] This is consistent with the view that the Court tends to emphasize deference to the sovereign parties that appear before it. If a state wishes to have a non-lawyer make legal arguments on its behalf – which would, in reality, be exceptional – it has the discretion to do so.

It may be useful to draw upon sociological concepts of 'capital' to understand why the ICJ Bar, despite its unregulated and weakly institutionalized nature, is made up of a relatively small number of individuals sharing key demographic characteristics.[73] These notions of capital include 'cultural' capital, 'social' capital, and 'symbolic' capital.[74] Future research might explore the extent to which these forms of 'capital'

[68] *Ibid.*, at 658; Rogers, 'The Vocation of the International Arbitrator', 20 *Am U Int'l L Rev* (2005) 957; Goldhaber, 'Madame La Presidente: A Woman Who Sits as President of a Major Arbitral Tribunal is a Rare Creature. Why?', 1 *Transnational Dispute Management* (2004) 3.

[69] Greenwood and Baker, *supra* note 67, at 659–662.

[70] R. Abel, *The Making of the English Legal Profession* (1998), at 10.

[71] Valencia-Ospina, *supra* note 20.

[72] *Pulp Mills*, *supra* note 21, at para. 167.

[73] Bourdieu, 'Forms of Capital', in J. Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education* (1986), at 241–258; Dezalay and Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law', 8 *Annual Rev L and Social Science* (2012) 433.

[74] An extensive literature exists on these concepts, the full treatment of which lies beyond the scope of this article. We instead offer basic summaries of these concepts in order to suggest areas for possible future research.

influenced the likelihood of certain individuals becoming members of the ICJ Bar. Alternatively, do the factors that we have identified as important fit within concepts drawn from sociology?

Cultural capital refers to attributes such as acquired knowledge, skills, and education, including specific academic qualifications and degrees. Regarding members of the ICJ Bar, it may be useful to study their educational backgrounds and personal histories to determine whether they share common ways of thinking and approaches to legal argument for reasons that can be attributed to particular forms of training and education. Social capital refers to resources derived from membership in groups and relationships of 'mutual acquaintance and recognition'. One study suggests that most of the counsel appearing before the Court until 1999 – thus largely covering the time period that precedes our own study – belonged to 'university or professional circles' from France, the United Kingdom, Belgium, and Switzerland.[75] One could examine the extent to which the ICJ Bar continues to demonstrate a high level of membership of a relatively small number of 'professional circles' and consider how this might impact on trends in membership in the ICJ Bar, the behaviour of those individuals already within the ICJ Bar, and the ways in which states select counsel.

Symbolic capital refers to the 'recognition, institutionalized or not', that social actors 'receive from a group'.[76] It is derived from the other forms of capital described above, but refers to the particular value ascribed to forms of cultural or social capital within a given field – in this case, the practice of public international law before the ICJ. Within this field, for example, prior experience before the Court or other international courts and tribunals and academic credentials may be recognized as being more valuable, or as having greater symbolic capital, than other credentials (such as an excellent professional reputation and high success rates in domestic litigation).

Anecdotal evidence suggests a broad consensus that subjective and personal factors, such as professional 'connections', reputation, and personal histories, play an important role in the selection of the individuals that appear as counsel before the Court.[77] This is neither surprising nor necessarily controversial. Further research into the various forms and amount of 'capital' that members of the ICJ Bar possess, both at the time that those individuals first appear before the Court and then over time, may offer further insights into the current make-up of the ICJ Bar and how it may evolve in the future. This research may, in turn, contribute to an understanding of how the composition of the ICJ Bar informs the content and form of legal argument before the Court, as well as the Court's own decision-making processes and outcomes. Finally, can a correlation be found between an argument's presentation by a member of the ICJ Bar, and its success with the Judges, such that the more members of the ICJ Bar, the stronger the arguments? Or could it be said that 'too many cooks spoil the broth', meaning that legal teams with multiple members of the ICJ Bar instead correlate with

[75] Sanchez Rodriguez, *supra* note 44, at 467–471.

[76] Bourdieu, 'Epilogue: On the Possibility of a Field of World Sociology', in P. Bourdieu and J. Coleman (eds), *Social Theory for a Changing Society* (1991), at 72.

[77] Pellet, *supra* note 14, at 150, 152; Jayakumar and Koh, *supra* note 44, at 74; Sanchez Rodriguez, *supra* note 44, at 267.

less effective or well-coordinated presentations, in which counsel make overlapping or even conflicting arguments?

## Conclusion

The results of this study provide strong empirical support for the general impression that oral proceedings at the ICJ are predominated by a small group of individuals, mainly comprised of men from developed states. Between 1999 and 2012, 205 lawyers presented oral arguments before the Court in contentious cases, but the 63 lawyers who appeared before the Court more than once accounted for 73.6 per cent of the total speaking time during oral arguments, thus demonstrating that 'repeat players' are in fact predominant. Only four members of the ICJ Bar were women, and they accounted for 2.91 per cent of the total speaking time. Moreover, 85 per cent of the Bar were nationals of developed states, as measured by membership in the OECD, as well as the classification systems of the World Bank and the HDI. The majority, or 58.7 per cent, of these 'repeat players' were professors of international law, or otherwise international legal academics. The figures for the entire group of 205 lawyers who appeared before the Court follow the same patterns, but are somewhat less extreme.

The results of our study point to a number of avenues for further research, particularly through the lens of sociology. It appears that the international legal profession, as represented by lawyers appearing before the Court, has achieved a degree of 'closure', but not through formal mechanisms such as required academic credentials and bar examinations. Instead, other factors appear to play an important role, including educational backgrounds, membership in professional circles, and prior experience pleading before the Court. These factors, among others, could perhaps be viewed as forms of capital that help shape the composition of the legal teams appearing before the Court, and which may affect the decision-making processes of the Court itself.