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# More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights

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## Abstract

*Building on the heightened attention that the optic of judicial selection receives in the world of international courts, this article focuses its attention on one particular criterion that is gaining in importance in that respect: gender. By choosing the European Court of Human Rights as a case in point, the article provides a unique analysis of the history of the 2004 Resolution of the Council of Europe's parliamentary assembly that formulated a rule of gender balance on the list of candidates presented by states for the post of judge at the Court. It first unearths the dynamics that allowed the adoption of the rule as well as all of the fierce opposition it triggered as well as the ways in which counter-mobilization eventually prevailed and watered down the initial rule, with the help of states, the Committee of Ministers and the Court itself (which delivered its first advisory opinion on the topic in 2008). It then looks beyond the static analysis of the rule as a mere constraint and addresses in a more dynamic fashion the multiple interpretations, strategies and, ultimately, politics it opens up.*

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*By providing a unique qualitative, comparative and exhaustive analysis of the curriculum vitae of all the 120-odd women who were ever listed as candidates to the Strasbourg judicial bench (1959–2012), the article delivers original data and analyses both the features that women candidates put forth when listed for the job and the strategies of states with regard to the gender criterion. It concludes that while there is a strong proportion of candidates that support the notion that states do not differentiate according to gender or require different qualities from men and women candidates, there is a comparable proposition that contrarily indicates that the world of international judicial appointments is far from gender neutral.*

## 1 Introduction

Concerns for legitimacy are on the rise in the world of international courts. To be sure, issues of legitimacy have been prominent ever since international courts (ICs) began to appear and develop. What are the rules for judicial interpretation in the realm of international law? How are ICs to manoeuvre in order to make domestic courts their allies – rather than be threatened or distrustful interlocutors? How should compliance to ICs' rulings be secured and justified? Over the past decades, these have been the core questions of the larger issue of ICs' legitimacy.<sup>1</sup> To be sure, not all of them are settled and solved – once and for all. They periodically re-emerge, and international courts are never fully preserved from contestation, whichever form it may take: their rulings can be ignored,<sup>2</sup> states can threaten to withdraw from international control mechanisms<sup>3</sup> or they can even question ICs' very existence.<sup>4</sup>

However, this article wishes to shift attention to other, possibly newer, dimensions of the issue of ICs' legitimacy that parallel these traditional ones. In particular, it wishes to suggest that ICs are no longer engaging in a dialogue with national courts and legal actors alone, but that they are also addressing a wider audience – albeit an abstract one – with whom they speak the language of transnational (cosmopolitan?) democratic citizenship.<sup>5</sup> Armin Von Bogdandy and Ingo Venzke have recently argued that ICs have been exercising public authority, especially since, in addition to their traditional role of dispute settlement, they have become authentic law-making authorities that are a 'part of the overall framework of

<sup>1</sup> On the growing importance of international courts (ICs), see K. Alter, *The New Terrain of International Law* (2014).

<sup>2</sup> Prime Minister Silvio Berlusconi certainly announced Italy would ignore the European Court of Human Rights's (ECtHR) first ruling in the *Lautsi* case (ECtHR, *Lautsi v. Italy*, Appl. no. 30814/06, Judgment of 3 November 2009), whereby it ruled that the presence of the crucifix in public schools was a violation of the provisions of the European Convention of Human Rights (ECHR). The Court's grand chamber later reversed that finding (ECtHR, Grand Chamber (GC), Appl. no. 30814/06, Judgment of 18 March 2011). All ECtHR decisions are available online at <http://hudoc.echr.coe.int/> (last visited 26 January 2015).

<sup>3</sup> Over the past decade, withdrawal has been voiced as a serious option in the United Kingdom over contestation of the ECtHR's authority to issue a pilot judgment on prisoners' voting rights (ECtHR, *Hirst v. UK*, GC, Appl. no. 74025/01, Judgment of 6 October 2005) and other contentious issues.

<sup>4</sup> After the African Court of Human and Peoples Rights was created by a 1998 Protocol to the Banjul Charter (entered into force in 2004), the 2008 Sharm El Sheikh Protocol decided its fusion with the African Union's Court for Justice. This protocol has not yet received a sufficient number of signatures and has not entered into force.

<sup>5</sup> von Bogdandy and Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23(1) *European Journal of International Law* (2012) 7.

democratic politics<sup>6</sup> – and that the conditions of their democratic legitimacy therefore concern the ‘individual citizen’ who is ‘invested with a national as well as cosmopolitan identity’.<sup>7</sup>

Although the article does not wish to discuss – let alone settle – the issue of cosmopolitan citizenship<sup>8</sup> and the relationship it may or may not have with the legitimacy of ICs, it calls attention to this democratic supplement to ‘traditional’ interrogations about ICs’ legitimacy. It takes seriously the hypothesis that the legitimacy of ICs no longer depends solely on factors external to the courts (in particular, the acceptance of their authority by other – domestic – national actors) but, increasingly, on factors internal to them (in particular, who they are, how they are composed and how they are formed).<sup>9</sup> To be sure, the relevance of such factors is not new. Historically, the courts’ composition has always been the subject of close scrutiny by governing elites,<sup>10</sup> and, in fact, designing the courts and who should sit on them has often even proven to be trickier than deciding that they should exist in the first place in the grand history of the judicialization of world affairs.<sup>11</sup> Arguably, however, the issue is (re) gaining momentum: publications<sup>12</sup> and conferences<sup>13</sup> about the selection of international judges abound – and reform sometimes effectively occurs. In this respect, the intervention of a selection committee that acts as a filter between national selection processes and the actual international appointments seems to be the trend, and it has been implemented in various courts throughout the world, such as the Caribbean Court of Justice in 2005,<sup>14</sup> the Court of Justice of the European Union<sup>15</sup> and, ultimately, the European Court of Human Rights (ECtHR).<sup>16</sup>

<sup>6</sup> *Ibid.*, at 30.

<sup>7</sup> *Ibid.*, at 35.

<sup>8</sup> On which, see, e.g., Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times’, 11 *Citizenship Studies* (2007) 22.

<sup>9</sup> To be sure, this is an important theoretical shift for classical theories of legitimacy and representation. Hannah Pitkin, e.g., had clearly established that legitimacy depends on what an institution does and not on what it is. H. Pitkin, *The Concept of Representation* (1967). For a call to update this theoretical framework, see S. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (2013), at 131–132.

<sup>10</sup> See also Mackenzie and Sands, ‘Judicial Selection for International Courts’, in K. Maleson and P. Russell (eds), *Appointing Judges in an Age of Judicial Power* (2006), at 216–217: ‘States have always been greatly concerned about the manner in which international judges are appointed. ... The first efforts to move beyond *ad hoc* arbitration to a permanent international court, during the Hague Peace Conference of 1899, failed because states were unable to agree on how to choose a representative group of judges.’ See also R. Mackenzie *et al.*, *Selecting International Judges: Principle, Process and Politics* (2010).

<sup>11</sup> Vauchez, *Judiciary without Judicature? The Drafting of the First World Court and the Genesis of the International Ways of Court*, Working Paper, Robert Schuman Center, EUI Global Governance Program Series (2014).

<sup>12</sup> Among many references, see Maleson and Russell, *supra* note 10; Mackenzie *et al.*, *supra* note 10; and M. Bobek (ed.), *Selecting Europe’s Judges* (forthcoming).

<sup>13</sup> See, e.g., the November 2013 conference at the Collège de Bruges, available at [http://droit-public.ulb.ac.be/wp-content/uploads/2013/03/FJ\\_Flyer\\_FR.pdf](http://droit-public.ulb.ac.be/wp-content/uploads/2013/03/FJ_Flyer_FR.pdf) (last visited 23 January 2015).

<sup>14</sup> See Maleson, ‘Promoting Judicial Independence in the International Courts: Lessons from the Caribbean’, 58(3) *International and Comparative Law Quarterly* (2009) 671.

<sup>15</sup> Art. 255 of the Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon, [2010] OJ C83/49, creates a panel of seven highly qualified persons (former judges of the Court of Justice of the European Union (CJEU) and/or national supreme courts, lawyers of recognized competence and so on) to give an opinion on the suitability of candidates to the post of judge at the Luxembourg court.

<sup>16</sup> See Resolution CM Res. 2010(26) of 10 November 2010, creating a similar panel of seven people to advise high contracting parties on whether their candidates meet the criteria for judge at the ECtHR.

Again, this article does not wish to tackle the issue of judicial selection in its entirety. Rather, it chooses to focus on one particular aspect of the conversation about the criteria for democratic ICs: gender balance. A number of courts throughout the world are now governed by composition rules that require that their composition be gender balanced or, in some cases, that it reflects other forms of ‘diversity’: racial, religious or linguistic.<sup>17</sup> This is an interesting phenomenon because it invites scholars and students of ICs to stop looking at courts and, instead, to start looking inside courts, paying attention to the individual judges that populate them. Of these new emerging criteria in the ICs’ composition, this article chooses to focus on gender – both because it seems to be the most commonly spreading criterion and because it has contributed to the renewed visibility of the topic of the ICs’ composition.

The objective of gender balance has made its way through the agenda of the ICs over the past decade. Famously, the International Criminal Court (ICC) was created as a gender-balanced court,<sup>18</sup> and ever since its installation in 2003 half of the judges of the ICC have indeed been women. In a less binding fashion, the Protocol on the Establishment of the African Court on Human and Peoples’ Rights also mandates that gender balance on the court be an objective.<sup>19</sup> Furthermore, even in courts where the rules themselves have not (yet?) been altered, the practice shows a general trend towards a greater inclusion of women, and the number of women judges in ICs is increasing overall.<sup>20</sup>

All in all, the idea that courts should somehow reflect the societies within which they adjudicate is gaining traction throughout the world. Sometimes, this idea is

<sup>17</sup> Although they lie beyond the scope of this project, national supreme and constitutional courts are also increasingly composed according to such rules of gender balance. See, e.g., the constitutions of Ecuador (2008, Art. 176) or South Africa (1996, Art. 174, s. 2). In some countries, linguistic diversity is prescribed (see Belgium or Canada (Supreme Court Act, Art. 6); and religion can play a role in the practice of judicial appointments. For Israel, see K. Malleon and P. Russell, *Appointing Judges in an Age of Judicial Power* (2006), at 7: ‘[F]or countries in which there are strong religious divisions, such as Israel, the religious backgrounds of the judges are ... critical. In many African jurisdictions, the question of racial composition is inevitably at the fore. Nor are the categories of representation unchanging or universal. The South African Judicial Services Commission, e.g., takes pride in its record promoting disability equality in its appointments process.’

<sup>18</sup> See Art. 36.8.(a) of the Rome Statute on the International Criminal Court 1998, 2187 UNTS 90, which reads that ‘[t]he States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for ... a fair representation of female and male judges’.

<sup>19</sup> Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights, Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev. 2 (1997), Art. 12 reads: ‘2. Due consideration shall be given to adequate gender representation in the nomination process.’

<sup>20</sup> This is a recent trend. There had been no woman at the International Court of Justice (ICJ) before the election of Rosalyn Higgins in 1995, and there are now two women sitting on it (Joan Donoghue and Hanqin Xue), which leads the total number of women in the Court’s history to three. At the CJEU, the two first women judges were appointed in 1999 (Irish judge Fidelma Macken and German judge Ninon Colneric. Simone Rozès (France) had been appointed advocate general in 1981). Since then, numbers are on the rise, and the Court currently is composed of 24 judges, of which five are women, and 12 advocate generals, of which two are women. In 2003, Merit Janow was the first woman ever appointed to the World Trade Organization’s Appellate Body; two other women have followed her lead. See Grossman, ‘Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?’, 12(2) *Chicago Journal of International Law* (2012) 647.

expressed as an issue of enhanced outcome (better women judges for better/more gender-sensitive case law?) and sometimes it is expressed as a matter of judicial impartiality and legitimacy. At other times, it is put forward as a matter of democratic inclusion. Which of these theoretical frameworks is best suited to an objective of gender balance on ICs? Should the case normatively be made for such an objective at all? And if so, why focus on gender, and what about other forms of diversity that might be of importance for courts' representativity? Furthermore, what links, if any, can be established between this movement in favour of gender balance in courts and the wider 'parity democracy' model<sup>21</sup> that has occupied much of the constitutional debates of the past two decades<sup>22</sup> and seems to be spreading around the world in a variety of sectors such as parliamentary assemblies,<sup>23</sup> instances of economic governance<sup>24</sup> and public administrations?<sup>25</sup> I focus on these various theoretical framings and stakes and discuss them elsewhere.<sup>26</sup>

The present article looks at one particular example of a court (the ECtHR) in which concerns over gender balance have expressed themselves and become an actual rule. There are many reasons why the ECtHR appears to be a good candidate for the present project. First and foremost, the ECtHR serves as a model, or at least a laboratory, for ICs in general. Historically, it was one of the first significant supranational courts that was ever created, and, 50 years into its existence, it is widely understood to be essentially a success story.<sup>27</sup> It concretized paradigmatic changes in the field of international law thanks to the actual presence in Strasbourg of many of those judges who, as professors, had advocated them; it invented doctrines that are thought to permeate well beyond the European playing field and it is striving towards a constitutional future.<sup>28</sup> Additionally, the ECtHR is embedded in the wider institutional design of the Council of Europe (COE), which provides the Court with a political arena – a parliamentary assembly (hereinafter, the PACE). This is not the case with all ICs, and it certainly needs to be taken into account for the purposes of the present project. Had there been no PACE, there probably would not have been a gender balance rule for the ECtHR. This leads to a second reason for choosing the ECtHR as an example: the existence of the rule and, thus, the relevance of unearthing its particular history and modes of coming to existence.

However, the article also goes beyond the study of the rule of gender balance itself and rests on the gathering and analysis of new material that allows one to reflect

<sup>21</sup> Rubio-Marín, 'A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the States', 60 *American Journal of Comparative Law* (2012) 99.

<sup>22</sup> J.W. Scott, *Parité! Sexual Equality and the Crisis of French Universalism* (2005).

<sup>23</sup> D. Dahlerup, *Women, Quotas, Politics* (2006).

<sup>24</sup> Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards', 10 *International Journal of Constitutional Law* (2012) 449.

<sup>25</sup> Bui-Xuan, 'L'égalité professionnelle entre hommes et femmes dans la fonction publique', 20 *Actualité Juridique Droit Administratif* (2012) 1100.

<sup>26</sup> Hennette Vauchez, 'Le juge est une femme: courts, Representativity, Gender ... and Other Things?', (forthcoming). See also Kenney, *supra* note 9; U. Shultz and G. Shaw (ed.), *Gender and Judging* (2012).

<sup>27</sup> Bruinsma and Parmentier, 'Interview with Mr Luzius Wildhaber, President of the European Court of Human Rights', 21(2) *Netherlands Human Rights Quarterly* (2003) 193.

<sup>28</sup> E. Bates, *The Evolution of the European Convention on Human Rights* (2010).

on the politics of the rule's actual application. By doing so, the article wishes to go beyond the static analysis of the rule of gender balance in the ECtHR's composition as a mere constraint and also address in a more dynamic fashion the multiple interpretations, strategies and, ultimately, politics that it opens up. By contrasting the history of the rule of gender balance at the ECtHR (its genesis, supporters and opponents, amendments and final holding) with an in-depth micro analysis of its actual application throughout the exhaustive comparative study of the curriculum vitae (CVs) of all of the 120-odd women who have ever been presented as candidates for the post of judge at the ECtHR (from 1959 to 2012), the article seeks to invite scholars of gender balance mechanisms to look beyond the rules themselves towards the strategic moves they incite or allow for, the strategies of self-presentation they trigger and the ways in which they are bypassed or tamed into the business-as-usual modes of appointing judges. In other words, this article is about the establishment of a new rule of gender balance at the ECtHR as well as about the politics of the application thereof.

## 2 The Politics of Establishing a New Rule of Gender Balance

As of May 2014, 18 women were sitting as judges at the ECtHR, out of a total of 47. Between the first election in 1959 and May 2014, 171 judges had been appointed to the ECtHR in Strasbourg, 33 of which were women. However, one needs to go beyond (or behind) these static elements of description and unearth the dynamics that produce them. Only then does it become apparent that in 21 of the 47 countries of the COE, no female judge has ever been elected.<sup>29</sup> Conversely, 26 of the 47 countries have now had at least one female judge. These figures should also be read against their particular chronology: the first woman judge at the ECtHR, Helga Pedersen from Denmark, was elected in 1971 – that is, 12 years after the Court started operating. Between 1971 and 1998 (that is, 39 years into the Court's operation), only three women had been appointed as judges in Strasbourg<sup>30</sup> – and never did more than two at a time ever sit on the bench.<sup>31</sup> The notable evolution that has led from no women judges well into the Court's history to currently just about 40 per cent women judges, and half of the states having had a woman 'representing'<sup>32</sup> them at Strasbourg, was by no means a

<sup>29</sup> These countries are: Cyprus, Spain, Azerbaijan, Albania, Malta, Luxembourg, Liechtenstein, Italy, Iceland, Hungary, Greece, France, Slovenia, Serbia, Russia, United Kingdom, Czech Republic, Portugal, Poland, Montenegro and Moldova.

<sup>30</sup> In addition to Helga Pedersen, there was Denise Bindschedler-Robert (Switzerland) and Elisabeth Palm (Sweden).

<sup>31</sup> 1975–1980: Denise Binschedler-Robert and Helga Pedersen sit together; and 1988–1991: Elisabeth Palm and Denise Bindschedler-Robert sit together. Whereas, as of 1998, there has always been a minimum of eight women on the Court at a given time; there were 14 in 2004, 18 in 2008 and 17 in 2013.

<sup>32</sup> Technically, judges do not represent the state that has appointed them on the Court, nor do they have to be a national of the state that proposes their appointment.

natural evolution.<sup>33</sup> To the contrary, as this article shows, it is largely the result of a very tense, intense and much disputed deliberate enterprise of the PACE.

According to the mechanism that was first agreed upon in 1950, as the European Convention on Human Rights (ECHR) came into existence, judges at the ECtHR are elected by the PACE,<sup>34</sup> from a list of three candidates presented by the states.<sup>35</sup> Every state is entitled to send one judge to the Court (although judges are not required to be nationals of the state in respect of which they sit). Whereas the ECHR itself says very little about the composition of the Court, the PACE has undertaken to add a number of criteria for the selection of judges. In particular, it voted on an important resolution in 2004 by which it announced that it would no longer ‘consider lists of candidates where ... *the list does not include at least one candidate of each sex.*’<sup>36</sup> To be sure, this mechanism presented only a weak form of affirmative action. As Margaret Thornton explains:

[A]ffirmative action is an open-ended concept that encompasses a range of pro-active strategies designed to promote institutional diversity. These strategies are best thought of as positions on a continuum. At one end are clustered minimalist strategies, or weak forms of AA, which might include encouraging women and minorities to apply or ensuring that the names of women and Others are included among the short-listed candidates. At the other end of the continuum are stronger forms of AA, such as quotas and preferences, interventions designed to overcome under-representation problems sooner rather than later.<sup>37</sup>

The 2004 PACE Resolution clearly fell under what she calls ‘weak forms of AA’ since its provisions barely interfered at the level of lists of candidates, with no guarantee as to the outcome. This rather minimal obligation did raise strong opposition within the COE. Within both the PACE and the Committee of Ministers, a number of actors deployed considerable energy in order to oppose the objective of gender balance in the Court’s composition. They eventually succeeded in amending Resolution 1366 and watering it down considerably by building in possible escape routes. Not only may ‘exceptional circumstances’ allow for the requirement of the presence of candidates

<sup>33</sup> The ‘natural evolution’ argument is well known to be one of the main arguments raised by those who oppose parity measures generally. It has not only been widely used in debates over parity in Parliaments, but it also plays out in the more discrete debate over the judiciary. See, e.g., Institut de droit international, Session de Rhodes 6<sup>e</sup> commission, *La situation du juge international* (the position of the international judge) (2011), at 8. The report evokes the COE’s PACE initiatives to impose gender balance as an aim for the Court’s composition and takes position in favour of the Committee of Ministers’ and the Court’s more cautious (and, in fact, opposing) stance: ‘*La position ainsi prise par la Cour paraît justifiée. En effet, la stature morale et la compétence doivent rester les premiers critères de choix ... Cette exigence doit l’emporter sur tout considération de sexe, d’origine ethnique ou de religion. Aussi bien les femmes, dans beaucoup de pays, sont-elles à l’heure actuelle plus nombreuses à occuper des fonctions judiciaires de plus en plus importantes et ce mouvement au plan national se traduira tout naturellement au plan international dans les années à venir*’ [emphasis added].

<sup>34</sup> The PACE is composed of designated members of the national parliaments of the COE member states. In total, the PACE has 318 members.

<sup>35</sup> Art. 22 of the ECHR reads: ‘The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.’

<sup>36</sup> Parliamentary Assembly of the Council of Europe, *Candidates to the European Court of Human Rights*, Resolution 1366 (2004), at pt 3.ii.

<sup>37</sup> Thornton, ‘Otherness on the Bench: How Merit Is Gendered’, 29 *Sydney Law Review* (2007) 406.

of the two sexes on lists presented by the states to be waived, but the new requirement also applies only when one sex is under-represented at the Court – a situation that occurs when the proportion of judges of one sex falls under the threshold of 40 per cent of the sitting judges.<sup>38</sup> I describe this adventure of the PACE mobilizing for the achievement of gender balance within the ECtHR by insisting on three main steps of the process: (i) mobilizing for the 2004 resolution; (ii) securing the 2004 resolution and (iii) failing to overcome opposition to the 2004 resolution.

### *A Mobilizing for the 2004 Recommendation*

For a long time, ICs remained essentially in the hands of the states as far as their composition went. The text of the ECHR is emblematic in this respect as its very minimal provisions<sup>39</sup> on the topic hardly conceal the continued grip of the states on the subject matter. Articles 20 to 22 essentially foresee the number of judges (equal to that of the high contracting parties), the few and minimal criteria for office (high moral character, qualifications equivalent to those necessitated for high judicial office or those detained by jurisconsults of recognized competence) and their election by the PACE on the basis of the lists of three candidates nominated by the states. The PACE took advantage of its competence to elect judges to become more and more active in the definition and refinement of criteria for candidates' suitability. For over a decade (from the end of the 1990s to the end of the 2000s), the PACE was indeed very active on the topic of judicial selection. It authored several reports on the links between the Court's composition and its legitimacy<sup>40</sup> and then moved to the normative grounds by proposing and passing a number of recommendations and resolutions. In 1996, the PACE's Committee of Legal Affairs and Human Rights took the position that the national modes of nomination to the post of judge at the ECtHR should be examined and rethought with the objective of enhancing gender balance within the Court,<sup>41</sup> and an in-depth examination of the national processes of candidates' selection took place in 1997–1998. In parallel, a first series of resolutions were adopted with the aim of enhancing the procedures for judicial selection. Resolution 1082 of 1996, for instance, decided that there should be a uniform model for the CVs that candidates ought to submit when they apply, which should be prepared by the PACE in order to allow for the genuine comparative assessment of candidates' profiles. It also decided that an *ad hoc* subcommittee of the Committee on Legal Affairs would organize interviews<sup>42</sup> with the candidates listed by the states. Several later resolutions continued to

<sup>38</sup> *Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights (Guidelines on the Selection of Candidates)*, Resolution CM(2012)40 final (29 March 2012): 'Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule.'

<sup>39</sup> The ECHR merely requires that 'judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence'.

<sup>40</sup> This coincides with the enlargement of the COE to countries of Central and Eastern Europe, which notably generated concerns regarding the recruitment of judges from former communist states.

<sup>41</sup> See *Procedure for Examining Candidatures for the Election of Judges to the European Court of Human Rights*, Order no. 519 (1996).

<sup>42</sup> Since 1998, this task falls on the Committee on Legal Affairs and Human Rights.

refine and improve these new features of the appointment process by recommending, for instance, that candidates be listed by alphabetical order rather than in order of preference, that calls for applications be issued in each country through the specialized press and that the candidates speak one of the two official languages of the Court.<sup>43</sup>

Gender balance soon appeared to crystallize much of the PACE's efforts to improve judicial selection at the ECtHR. The first expressions of the PACE's concern for gender parity at the Strasbourg Court appear in the early 1990s. Even before the Beijing platform that followed the fourth World Conference on Women,<sup>44</sup> two of the COE's secretary-generals had called member states' attention on the matter.<sup>45</sup> In a 1999 report on the national steps of the selection procedure, PACE member Renate Wohlwend reported that the Assembly had already started taking action on gaining a better representation of women at the Court. Evoking the large number of judicial elections that had taken place in 1998 for the installation of the new Court,<sup>46</sup> she wrote that:

the absence of female candidates from the majority of lists meant that the male candidates on those lists that did include women were penalized. The Assembly applied the principle of positive discrimination, deliberately rejecting suitable male candidates in favor of equally appropriate female candidates so as to obtain a balanced representation of the sexes.<sup>47</sup>

The report unsurprisingly then called on the states to ensure 'the presence of candidates of both sexes on each list'.<sup>48</sup> The idea of gender balance subsequently moved swiftly from prospective to normative grounds. The PACE first expressed a requirement that states include at least one woman in their list of three candidates in 2004. Resolution 1366 reads:

the Assembly decides not to consider lists of candidates where: (i) the areas of competence of the candidates appear to be unduly restricted; (ii) the list does not include at least one candidate of each sex; (iii) the candidates: (a) do not appear to have sufficient knowledge of at least one of the two official languages, or (b) do not appear to be of the stature to meet the criteria in article 21, §1, of the ECHR.

## B Securing the 2004 Resolution

Shortly after it was passed, Resolution 1366 became threatened by two instances of the continued presentation of single-sex lists by reluctant states. The first case was the all-male

<sup>43</sup> See, e.g., *Election of Judges at the European Court of Human Rights*, Resolution 1200 (24 September 1999).

<sup>44</sup> The platform did call on governments and international institutions to 'aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant bodies [such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the ICJ]' (UN Doc. A/CONF.177/20 (17 October 1995), s. 142b). See also Art. 8 of the Convention on the Elimination of all Forms of Discrimination against Women 1979, 1249 UNTS 13: 'Article 8: States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.'

<sup>45</sup> Daniel Tarschys in 1994 and Peter Leuprecht in 1995.

<sup>46</sup> In 1998, subsequent to the entry into force of Protocol 11 to the ECHR, the former European Commission on Human Rights disappeared, and the Court became the only judicial body that individuals could now access directly. A 'new court' was thus elected, and this Court coincided with the election of judges in respect of several Central and Eastern European countries that were sending judges for the first time.

<sup>47</sup> The 1998 election did mark a high water moment for the presence of women at the Court, with eight women elected (one of them re-elected).

<sup>48</sup> R. Wohlwend, *National Procedures for Nominating Candidates for Election to the ECtHR*, COE/PACE Doc. 8505 (September 1999).

list presented by the Slovak Republic in 2004.<sup>49</sup> Soon after it communicated the list to the COE's secretary-general, the Slovak government was asked to justify its disregard for the new rule. The Slovak government answered by assuring the COE that it was strongly committed to gender equality and that it did take the objective into account in its nomination policy for international organizations. It then insisted, in response to the COE, that the (then) current judge at the Court for the Slovak Republic was a woman (Vera Straznicka, elected in 1998) and that all of the permanent representatives of the country at the COE were women. The second instance of early opposition came from Malta, who also presented an all-male list for the 2004 election. Unlike the Slovak Republic, however, Malta had no explanation or justification to put forth. Both of these lists were rejected by the PACE.<sup>50</sup> However, while the Slovak Republic agreed to abide and eventually submitted a new list, which included one woman candidate,<sup>51</sup> the situation with Malta degenerated into a heated conflict between the PACE, Malta and the other states, which was soon to polarize the entire organization.

The next difficulty arose in the possibly unexpected form of an all-female list presented by Latvia in 2005. In the letter accompanying the list of three candidates, the representative of the Latvian government explained that no male candidate had applied after the position had been advertised nationally and that, despite the wording of Resolution 1366, it hoped that the 'exceptional and purely objective circumstances' of the case would convince the PACE to accept its list, given that the new criteria did aim at remedying the under-representation of women at the Court. The Latvian case quickly caused the PACE to take action and allow lists containing candidates of only one sex when they served to correct gender imbalance inside the Court (that is, when they were all-female lists). A couple of months later, Resolution 1426 amended Resolution 1366 in the following terms:

The Assembly decides not to consider lists of candidates where: (ii) the list does not include at least one candidate of each sex, *except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong.*<sup>52</sup>

In retrospect, however, this Resolution looks like the PACE's swan song. It might have temporarily allowed for all-female lists, but, in the meantime, Malta's opposition was enduring and the Maltese government was successfully rallying support within the COE as well as among fellow contracting parties. Eventually, the committees and groups of individuals inside the PACE that had promoted the rule of gender balance for almost a decade failed to overcome the opposition that it triggered, and they had to accept its being significantly watered down.

### **C Failing to Overcome Opposition**

The Malta case was thus a tipping point in the story. After the PACE rejected the all-male list presented in 2004, Malta refused to comply. It argued that the PACE had exceeded

<sup>49</sup> Committee of Ministers, *Election of Judges to the European Court of Human Rights*, Communication no. 10099 (15 March 2004).

<sup>50</sup> *Election of Judges to the European Court of Human Rights*, Decision (27 April 2004).

<sup>51</sup> Committee of Ministers, *Election of a Judge to the European Court of Human Rights with Respect to Slovakia*, Communication no. 10263 (16 September 2004).

<sup>52</sup> Parliamentary Assembly of the Council of Europe, *Candidates for the European Court of Human Rights*, Resolution 1426 (2005), at pt 3.ii.

its powers by adding unforeseen criteria to the process of judicial selection and insisted that the criterion of gender was illegitimate on merits. To substantiate its opposition to the new rule, Malta presented a new list in 2006 – again, an all-male list – and, again, it was rejected. This time around, however, Malta had anticipated the rejection and had organized counter-mobilization within the PACE. The lines along which the counter-mobilization ran were the following. Under the new gender criteria, rejection was automatic (according to the wording of Resolution 1366, the PACE had no choice but to reject lists that did not comply). Yet there are exceptional circumstances in which a state may fail to find suitable women candidates without tampering with the other Convention-imposed criteria for judicial selection. In other words, three years after its adoption, Resolution 1366 had successfully been turned into a problem.<sup>53</sup>

This rationale, unsurprisingly, garnered much support in those COE arenas where the states were represented. One of them was the Committee of Ministers, which had invited the PACE in 2005 to reconsider its gender balance rule.<sup>54</sup> Another important arena for the ultimate prevalence of this counter-mobilization proved to be the multiple meetings and seminars in which Protocol 14 to the Convention was being negotiated.<sup>55</sup> During these negotiations, the option of including the ‘new’ gender criteria for the composition of the Court in the text of the ECHR itself was indeed envisaged. However, it was ultimately rejected – a move that, as a serious setback for the objective of gender balance on the judicial bench, served the interests of the Malta-led counter-offensive.<sup>56</sup> In both cases, it was the fora in which the states made their voices heard

<sup>53</sup> Opponents inside the PACE proposed to amend Resolution 1366. See Legal Affairs Committee, Resolution Proposal, Doc. 11208 of March 2007: ‘The Assembly decides not to consider lists of candidates where: ... ii. the list does not include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong, or in exceptional circumstances considered as such by the Ad hoc Sub-Committee on the Election of Judges to the European Court of Human Rights and by the Committee on Legal Affairs and Human Rights, both by a two-thirds majority’ (emphasis in original).

<sup>54</sup> Committee of Ministers, *Candidates for the European Court of Human Rights*, Resolution 1649 (2004), Doc. 10506 (22 April 2005). The Committee invites the PACE ‘to consider the possibility of modifying its own rules in order to allow exceptional derogation from the rule where the authorities of the Contracting Party concerned present convincing arguments to the Committee of Ministers and the Assembly to the effect that, in order to respect the requirements concerning the individual qualifications of candidates, it could not do otherwise than to submit a single-sex list’. The Committee of Ministers explain that the need for an ‘exceptional circumstances’ rule is linked to the fact that the ‘circumstances may exceptionally arise in which, as a result of the correct application of the other five criteria [enumerated in paragraph 19 of the Recommendation], a Contracting Party may find itself obliged to submit a list containing candidates of only one sex in derogation from that rule. ... In this context, the Committee draws attention to the danger that such an obligation could under certain circumstances give rise to difficulties in satisfying the requirements of Article 21 of the Convention.’

<sup>55</sup> Protocol 14, which was adopted in 2004, was adopted with a view to increase the ECHR’s protection mechanism in the case of its growing case load (and backlog). It allowed, in particular, for single-judge formations.

<sup>56</sup> The Bemelmans Videc report (PACE Committee on Legal Affairs and Human Rights, *Report*, Doc. 11208 (19 March 2007), states that ‘attention should be drawn to paragraph 49 of the explanatory report on Protocol No 14 to the European Convention on Human Rights’, according to which ‘it was decided not to amend the first paragraph of Article 22 to prescribe that the lists of three candidates nominated by the High Contracting Parties should contain candidates of both sexes, since that might have interfered with the primary consideration to be given to the merits of potential candidates. However, Parties should do everything possible to ensure that their lists contain both male and female candidates.’

that were the ones in which anxieties over the ‘risks’ and intolerable burden associated with the PACE-imposed gender criterion<sup>57</sup> were most successfully voiced and heard. A resolution proposal was thus submitted with the effect of watering down Resolution 1366; its justification was the necessity to foresee adaptations of the rule to situations where gender balance could not be met.

To be sure, this proposal triggered opposition by the PACE’s Committee on Equal Opportunities for Women and Men.<sup>58</sup> In particular, the Committee found that the notion that the rule could play out to the detriment of the other criteria ‘is an assumption that damages the credibility of female candidates and female judges on the European Court of Human Rights’.<sup>59</sup> It insisted that the argument, according to which exceptional circumstances may arise in which, although a state has done everything possible to include a female candidate, it has failed because of the obligation to comply with the other criteria, was untenable and equally insulting (‘it presupposes that a State may face a situation where there is not one single woman at least as qualified as a man – which is impossible’<sup>60</sup>). These arguments were classical arguments against affirmative action. Neither of them directly confronted gender balance as an objective, but while at face value they only sought to ensure that there were ways out of the new requirement, they in fact considerably weakened the rule into which they were carving out exceptions. The Committee on Equal Opportunities for Women and Men thus expressed its strong disagreement on merits with the proposed amendments to Resolution 1366. It also underlined the direct link between the proposal and the Malta case and denounced the idea that ‘the proposal of the Committee on Legal Affairs is, in fact, a proposal designed to change the Assembly’s rules to suit one single country, rather than make that one single country abide by the Assembly’s rules which it has already flouted twice’.

This strong and principled opposition of the Committee was initially successful in securing Resolution 1366. On 17 April 2007, the Plenary Assembly rejected the draft resolution that intended to amend it. This was only a pyrrhic victory – a merely temporary reprieve for the gender balance rule – for a highly tricky move was just about to be made by those standing on the side of the rights of the states, one that was eventually to ensure their victory. For the first time ever, the Court was asked by the Committee of Ministers to deliver an advisory opinion on whether criteria additional

<sup>57</sup> As is well known, the state is often described by feminist legal theorists in the field of international law as the bastion that opposes most resistance to various forms in which the concept of gender can be taken into account. See, e.g., H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

<sup>58</sup> PACE Committee on Equal Opportunities for Women and Men, *Opinion*, Doc. 11243 (6 April 2007) (Rapporteur José Mendes Bota). Although it is difficult to retrace the PACE internal politics with regard to the gender balance rule, it stems from both the parliamentary documents and some interviews with PACE permanent staff that Committee of Legal Affairs and the (then) Committee on Equal Opportunities for Men and Women were at the forefront of activism in favour of the gender balance rule.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.* One could add that this argument is all the more untenable since there is no nationality requirement for nomination to the position of judge at the ECHR. In fact, it is not uncommon in the history of judicial appointments to the Court that non-nationals have sat on the bench.

to the wording of Article 21 of the ECHR could be used by the PACE.<sup>61</sup> Although the ECtHR had been awarded the competence of delivering advisory opinions by Protocol 2, which entered into force in 1970, it had never been asked to do so before this 2007 request on the lists of candidates submitted with a view to the election of its judges.<sup>62</sup> Although the 2008 opinion affirms the Court's support of the PACE's commitment to gender equality and confirms that equality between the sexes was an important value of the COE's,<sup>63</sup> it decided that:

in not allowing any exceptions to the rule that under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidatures, the Assembly may not reject the list in question on the sole ground that no such candidate features on it', and that 'exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible'.<sup>64</sup>

Of course, the Court is a prominent actor in the COE's institutional setup, and this first advisory opinion was bound to have a strong resonance. It is thus hardly surprising that the 2008 opinion was the tipping point in the tug of war between those who, within the PACE, had crafted and supported the 2004 Resolution and those who, within and outside the PACE, wanted to secure a way out of the gender balance rule and allow for states to continue presenting all-male lists. The gauntlet was thrown – a new motion for a resolution<sup>65</sup> was presented according to which Resolution 1366 should be amended in order for exceptions to the rule to be carved out. Even the PACE Committee for Equal Opportunities for Women and Men seems to have left the

<sup>61</sup> ECtHR, *Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the ECtHR (Election of Judges)*, GC, No. 1, 12 February 2008; for a commentary, see Mowbray, 'The Consideration of Gender in the Process of Appointing Judges to the ECtHR', 8(3) *Human Rights Law Review* (2008) 549.

<sup>62</sup> Since then, it was used only once, in the context of a polemic with Ukrainian authorities regarding the designation of ECHR judges. ECtHR, *Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights*, GC, No. 2, 22 January 2010, available online at <http://hudoc.echr.coe.int/> (last visited 15 January 2015). For a more recent polemical 2012 election of a Czech judge, and a broader critique of judicial selection at Strasbourg, see Kosar, 'Selecting Strasbourg Judges: A Critique', in Bobek, *supra* note 12.

<sup>63</sup> *Election of Judges*, *supra* note 61, at s. 49: '[T]he criterion in question derives from a gender-equality policy which reflects the importance of equality between the sexes in contemporary society and the role played by the prohibition of discrimination and by positive discrimination measures in attaining that objective. The measures concerned in the present case certainly fall into the latter category. Moreover, there is far-reaching consensus as to the need to promote gender balance within the State and in the national and international public service, including the judiciary.'

<sup>64</sup> *Ibid.*, at s. 54.

<sup>65</sup> See *Candidates for the European Court of Human Rights*, Motion for a Resolution, Doc. 11532 (11 March 2008) (Rapporteur Marie Louise Bemelmans Videc); and PACE, Committee on Legal Affairs and Human Rights, Doc. 11682 (4 July 2008) (Rapporteur Marie Louise Bemelmans Videc).

battlefield at that point. In its opinion of 12 September 2008,<sup>66</sup> it expressed its support of the draft resolution, provided that it would be associated with the decision as to whether ‘exceptional circumstances’ did indeed exist or not. The explanatory memorandum to the Committee’s opinion confirms the importance of internal institutional politics. While insisting that ‘this committee, in principle, opposes any attempt to weaken the few gender-based quotas the Assembly has put into place in the past few years’, Lydie Err’s report noted that ‘however, the committee does not wish to push the Assembly into an open confrontation with the Committee of Ministers, one of its member states and/or the European Court of Human Rights’.<sup>67</sup> Therefore, as it continued, ‘it is willing to accept that, in truly exceptional circumstances, states be allowed to derogate from the requirement to include a member of the under-represented sex on their candidate lists to the Court, if the Assembly itself so decides’. Subsequent to this final rallying of the watered down reformulation of the 2004 Resolution, it was amended by Resolution 1627 of 30 September 2008, which added a new paragraph, according to which:

The Assembly decides to consider single-sex lists of candidates of the sex that is over-represented in the Court in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21 § 1 of the European Convention on Human Rights.

Such exceptional circumstances must be duly so considered by a two-thirds majority of the members casting a vote and a majority of the members entitled to vote of both the Sub-Committee and the Committee on Legal Affairs and Human Rights. This position shall be ratified by the Assembly in the framework of the Progress Report of the Bureau of the Assembly.<sup>68</sup>

To be sure, this ultimate amendment to Resolution 1366 of 2004<sup>69</sup> marked the relative defeat of the PACE’s decade-long endeavour to oblige states to include female candidates on their lists. In fact, it is quite striking that the rather minimal obligation that the PACE had managed to include in Resolution 1366 (one candidate of the under-represented sex on the list of three candidates that a country should come up with

<sup>66</sup> PACE, Committee on Equal Opportunities for Women and Men, Doc. 11 (26 September 2008), at 718 (Rapporteur Lydie Err).

<sup>67</sup> *Ibid.*, at s. 4–5.

<sup>68</sup> This formulation has been slightly altered by *The Amendment of Various Provisions of the Rules of Procedure of the Parliamentary Assembly – Implementation of Resolution 1822 (2011) on the Reform of the Parliamentary Assembly*, Resolution 1841 (7 October 2011), and now reads: ‘The Assembly decides to consider single-sex lists of candidates when the candidates belong to the sex which is under-represented in the Court (i.e. the sex to which under 40% of the total number of judges belong), or in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains candidates of both sexes meeting the requirements of paragraph 1 of Article 21 of the European Convention on Human Rights. Such exceptional circumstances must be duly so considered by a two-thirds majority of the votes cast by members of the Sub-Committee on the Election of Judges to the European Court of Human Rights. This position shall be endorsed by the Assembly in the framework of the Progress Report of the Bureau of the Assembly.’

<sup>69</sup> The reformulated rule was soon confirmed by its incorporation into the 2012 *Guidelines on the Selection of Candidates*, *supra* note 38 – guidelines that manage the *tour de force* of not even mentioning Resolution 1666 of the PACE.

approximately every nine years) was met with such sustained, organized and successful hostility and eventually substituted with a now dispensable rule.<sup>70</sup>

It did not take long for the concrete consequences of this defeat to become visible, as several elections were soon to take place under the revised rule. Most interestingly, the all-male list presented by the Belgian authorities for the replacement of Françoise Tulkens is a case in point. In order to justify their list, the Belgian authorities argued that only one woman had applied after the national call for applications had been issued and that she was under-qualified. However, they also insisted that, since at the precise moment at which they were presenting their candidates 19 women were sitting on the Court, this was one unit in excess of the threshold of 40 per cent.<sup>71</sup> Thus, they claimed, there was no longer a manifest under-representation of either sex on the bench. Of course, both of these arguments are far from compelling. With respect to the former argument, one could only cautiously recall how often throughout history quality has been strategically pitted against gender equality – notwithstanding the fact that ‘like beauty, quality is in the eye of the beholder’.<sup>72</sup> With respect to the latter argument, it shows both how arbitrary the threshold is and how fragile the reasoning that allows for derogations to the rule. Indeed, the sole election of one male judge in the case of the election concerning Belgium in 2011 was enough to lower the percentage of female judges under the 40 per cent threshold again. At any rate, such reasoning allows for states to consider the proportion of 40 per cent women on the benches as a maximum one – since, at the very minute that the 40 per cent of women threshold is met, states recover the ability to ignore any preoccupation of gender balance and propose only male candidates. In fact, this seems to be very much what has happened ever since. In 2012 alone, no less than eight vacant judicial positions were filled, and only two of them by women. Clearly, the 40 per cent threshold is becoming a ceiling – not a floor – which calls for a closer look at the conditions of application of the new (watered-down) gender balance rule.

### 3 The Politics of Applying a New Gender Balance Rule

The goal in this second part of the article is to expand the focus and look outside of the ECtHR and beyond the gender balance rule itself, by observing how it is being received,

<sup>70</sup> Subsequent to these intense legal and political battles, some groups remain mobilized within the PACE. The Committee on Equal Opportunities for Women and Men has continued to push for measures aimed at improving the selection of judges generally. Rapporteur Mrs Lydie Err, *Nomination of Candidates and Election of Judges to the European Court of Human Rights*, Doc. 11798 (26 January 2009). Significantly, it contributed to reorienting the focus on the national steps of that procedure. See, e.g., *Candidates for the European Court of Human Rights*, Resolution 1649 (27 January 2009), formulated new requirements, such as: open calls for candidatures in member states, greater attention to the transparency of the procedure or increased gender balance in the national selection bodies and panels. The final resolution does not, however, echo other proposals of the committee, such as (i) an invitation to the member states to consider ‘putting into place quotas of outcome at the national level, stipulating that 2 out of 3 candidates proposed to the Assembly have to be women, until women are no longer under-represented on the ECHR’ or (ii) ‘appoint more women parliamentarians of the Parliamentary Assembly’.

<sup>71</sup> When the Court is composed of 19 women out of a total of 47 judges, women represent 40.42% of the Court membership.

<sup>72</sup> Rapporteur José Mendes Bota, *Candidates for the ECtHR: Report of the Committee on Equal Opportunities*, Doc. 11243 (16 April 2007).

interpreted, used and maybe even circumvented by those it constrains. My goal in this second part of the article is to reflect on the politics of rules of gender balance: what spaces and moves does a gender balance rule open up and how do those whom it concerns react to it and play with it? To be sure, this inquiry is partly about the rule's effectiveness. As it addresses the question, the article also ponders how the effectiveness of such a rule can be assessed. There are at least two ways of understanding and measuring state compliance with a gender balance rule in lists of candidates to the post of judge at the ECtHR. One is mechanical. Do states present more women after the rule was adopted than they did before? Although there are some interesting cases of non-compliance that are worth looking into, the general answer to the question thus framed is positive. Another way to measure compliance, however, refines the question and asks it in a more qualitative fashion. Do states present plausible female candidates for judge at the ECtHR – that is, women that are as qualified and convincing as their male counterparts?

In order to provide some information in this regard, the article also considers several questions about the politics of gender balance rules and mechanisms. In order to do so, it presents the results of a comparative study of the CVs of all of the (approximately 120) women who have ever been presented (that is, since 1959) by one of the now 47 high contracting parties for a position as judge at the ECtHR and tries to make sense of the dominant profiles.<sup>73</sup> By analysing the CVs, my goal is to refine our knowledge and understanding of the processes of judicial selection.

It must be acknowledged, however, that CVs constitute a peculiar corpus. To be sure, their study only allows one to grasp parts of the story – candidates' CVs are only a very small and formal part of the selection process and surely do not tell the whole story that lies behind every single election – or, for that matter, defeat. The information they provide, however, especially when approached in an exhaustive and comparative fashion, is very valuable in that it shows that gender can play at least two different roles in the appointment process. It can be used by the candidates themselves. CVs, after all, are texts of self-presentation whereby one chooses to reveal or conceal experiences and affiliations, underline or water down the importance of particular events and associations and so on. It can also be used by the states, for they are the ones who are vested with the task of interpreting the rule of gender balance and can choose to do so either explicitly or implicitly, thus depicting either a gender sensitive or a post-gender world – one in which the criterion's relevance would have disappeared. There are, in other words, two main ways of addressing the question of the gender balance rule's effectiveness. One is quantitative (how many women?) and the other is qualitative (who are the women?). This article tentatively addresses the two, by presenting

<sup>73</sup> The material that was gathered for this research was generated from the 166-odd elections for judges at the Court that have taken place since the inaugural one in 1959 until the end of 2012 and includes not only the lists of candidates themselves but also the corresponding curriculum vitae (CVs) and biographical data. It is quite difficult to give an exact count of the number of elections that have taken place because over time a number of elections have been cancelled, done over or postponed (sometimes for as many as several years with some seats thus remaining vacant) for reasons of deaths, resignations and the refusal of states' lists of candidates (for reasons not necessarily linked to gender requirements).

and analysing a unique set of data pertaining to both the numbers and the profiles of women who have been presented as candidates for the post of judge at the ECtHR throughout history.

### *A Mechanical Conclusion: How Many Women?*

The principle laid out in Resolution 1366 of 2004, according to which the lists presented by the states should include in principle at least one candidate of each sex, has certainly proven to be efficient: its adoption has indeed corresponded to a dramatic increase in the number of women candidates. Until 2004, 19 countries had never listed female candidates.<sup>74</sup> By contrast, since 2004, all lists but those emanating from four countries have included female candidates. These ‘rebellious’ lists have included the earlier-mentioned Slovak and Malta cases as well as the Belgian 2011 all-male list and an all-male Moldovan list in 2012. As explained earlier, the Slovak all-male list was eventually substituted with one that complied with the gender balance requirements. With respect to Malta, the drama went on: after its all-male lists were rejected twice by the PACE, Malta eventually presented a list containing a female candidate (in 2010). It is however a male judge, Vincent de Gaetano, that was elected. Finally, in regard to the Moldovan 2012 all-male list, it is notable that the state successfully convinced the PACE that a situation of ‘exceptional circumstances’ had arisen, thus allowing for the non-rejection of the list and the eventual election of M. Valeriu Gritco. This result is all the more striking when one considers that the justifications presented by the Republic of Moldova were not very compelling. The government only certified that, at the national level, the seven male candidates and the one female candidate had been given equal opportunities in the application process. It could well be argued, however, that what is at stake in push for greater gender balance on the lists of candidates is precisely that the formal proclamation of equal opportunities is not enough. Indeed, in most countries, women were free to apply (or states were free to nominate women) as of 1959. It just so happened that they did not. In this respect, the acceptance of the 2012 Moldovan all-male list can be read as a serious retreat as far as the requirement of gender equality from states is concerned. This last example, however, does not alter the overall positive assessment of the impact of Resolution 1366 of 2004. Despite its amendments, it has led states to generally comply with the gender balance rule.

With the exception of these somewhat reluctant states, however, a word should be said about the states who undertook to nominate female candidates before it actually became compulsory. Twenty-eight states had presented women before 2004, among which 11 states had actually presented women before the question even became an issue – prior to 1994. In the very early years, these states included Greece, Denmark (1971, Helga Pedersen was the first woman elected) and Switzerland (Denise Bindschedler-Robert was presented in 1972, elected in 1975 and re-elected in 1988).

<sup>74</sup> These countries are Andorra, Bosnia and Herzegovina, Cyprus, Georgia, Hungary, Ireland, Iceland, Italy, Liechtenstein, Lithuania, Luxemburg, Moldova, Monaco, Montenegro, Portugal, Russia, Serbia, Turkey and Ukraine. Of course, many of them only joined the COE later in the 20th century.

Later on, they included Bulgaria (1992, two women), France (1979), Norway (1985), Poland (1992), the Czech Republic (1993), the United Kingdom (1991), Slovenia (1993) and Sweden (Elisabeth Palm was elected in 1988 and re-elected in 1992 and 1998). Furthermore, some have nominated – sometimes several times – more than one woman for judge at Strasbourg on the list of candidates, as shown in [Table 1](#).

Unsurprisingly, these figures support the view that the existence of the rule is not all that affects the choice of states to present women as candidates for the post of judge at the ECtHR. Gender politics certainly needs to be taken into account as well. As it is, the fact that northern, central and eastern European (CEE) countries form the bulk of the group of states who have moved both autonomously (that is, before it became compulsory in 2004) and enthusiastically (that is, including more than one female on the lists of candidates) towards a goal of sending a female judge to Strasbourg needs to be unpacked in this regard. Famously, Nordic countries are associated with early and voluntary measures aimed at promoting women in positions of power. As far as CEE countries go, their eagerness to nominate women may well have to do with their socialist past during which quotas were more widespread than in Western Europe and other parts of the world. However, they also became contentious as these former socialist countries became liberal democracies.<sup>75</sup>

These tentative interpretations of the figures of compliance with Resolution 1366 also need to be situated within a wider framework put forth by sociology scholars that reveal, generally, that it is only in positions, sectors and institutions that are either under-estimated or powerless that women are actively promoted.<sup>76</sup> Should this theory be used as an interpretative key in this particular case? The notion that, on the international plane, human rights have remained ancillary to the more ‘serious’ issues of public international law and, thus, were typically a woman’s issue has been voiced in the past. To be sure, there are traces in both the institutional politics of international law and the literature of many stereotypes that associate women with human rights.

**Table 1:** Eagerness to Present Women Candidates

Before 2004	After 2004
Albania, 1993, 2 women	Bulgaria, 2007, 2 women
Bulgaria, 1998, 2 women; 2001, 3 women	Croatia, 2004, 2 women
Croatia, 1998, 2 women	Serbia and Montenegro, 2004, 2 women
Macedonia, 2001, 2 women	Latvia, 2005, 3 women
Austria, 2001, 3 women	Armenia, 2007, 2 women
Sweden, 2003, 3 women	Macedonia, 2007, 2 women
	Latvia, 2007, 2 women
	Estonia, 2008, 2 women
	Switzerland, 2010, 2 women
	Croatia, 2012, 3 women

<sup>75</sup> Gaber Antic and Lokar, ‘The Balkans: From Total Rejection to Gradual Acceptance of Gender Quotas’, in Dahlerup, *supra* note 23, at 138–160.

<sup>76</sup> For an assessment of this interpretative key in the field of the judiciary, see M. Mekki (ed.), *La féminisation des métiers de la justice* (2011).

For instance, a tribute to Sonia Picado, the first woman judge on the Inter-American Court of Human Rights, reads that ‘the cause of women (is) totally linked to the cause of human rights’.<sup>77</sup> Although the continued existence of such stereotypical modes of reasoning is doubtless, it is unclear whether this classic trope of sociology studies is illuminating in this instance. If anything, human rights have become a central and indeed mainstream part of international law, and the field of human rights law is no longer devoid of positions and stakes of power. There are therefore counter-examples to the notion that women are best suited for human rights law. Rosalyn Higgins, for instance, the first woman ever to be appointed to the International Court of Justice (who eventually served as the Court’s president), had held prestigious academic and institutional positions prior to her appointment, including service on the UN Human Rights Committee. Her publications and main fields of expertise, however, also included petroleum law and the use of force.<sup>78</sup> Finally, in the particular case of central and eastern European countries appearing more prone to sending women to the ECtHR, one should keep in mind that admission to the COE and, in fact, commitment to European human rights standards had played a key role in former socialist countries’ admission to the post-1989 new unified Europe and, ultimately, to the European Union (EU). For that reason, there are many topics on which CEE countries have outperformed Western European countries in order to secure admission to the EU.<sup>79</sup> It may well be the case then that these figures and this eagerness to play the gender balance card are more revealing of the wider politics of European integration than they are of the classic thesis of the correlation between lesser importance and feminization.

## B *Qualitative Hypotheses: Who Are the Women?*

Counting the number of women presented for the post of judge at the Court is clearly not enough. In order to understand how requirements or objectives of gender equality effectively play out and what kind of politics they give rise to, one needs to consider who the women are. For the purposes of the present article, this has been researched via the detailed and comparative<sup>80</sup> analysis of the CVs of all of the women that have

<sup>77</sup> Pasqualucci, ‘Sonia Picado, the First Woman Judge on the Inter-American Court of Human Rights’, 17 *Human Rights Quarterly* (1995) 794. See also J. Linehan, *Women and Public International Litigation* Background Paper prepared for the PICT Meeting (13 July 2001), available at [http://www.pict-pecti.org/publications/PICT\\_articles/Women1.pdf](http://www.pict-pecti.org/publications/PICT_articles/Women1.pdf) (last visited 23 January 2015): ‘[I]t seems likely also that some states persist in seeing women as “naturally suitable” candidates only for women’s rights and human rights bodies.’

<sup>78</sup> An article written in her honour by Thomas Buergenthal fails however to avoid all stereotyping. While Rosalyn Higgins is said to have exemplified ‘the legal and professional qualities that ICJ judges should embody’, it is also noted that ‘[s]he also brought to the Court and to her presidency a human touch, seeing her colleagues not merely as a group of lawyers joined by a common task, but also as a family that could count on her support in dealing with personal problems’. Buergenthal, ‘Rosalyn Higgins: Judge and President of the ICJ (1995–2009)’, 22 *Leiden Journal of International Law* (2009) 703.

<sup>79</sup> Albi, ‘Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums’, 15 *European Law Journal* (2009) 46.

<sup>80</sup> The CVs of female candidates have been compared to each other but also, for every national list, the CV(s) of the female candidate(s) were compared to that of the male counterparts, in order to assess the relative plausibility of the female nomination.

ever been listed as candidates at the ECtHR.<sup>81</sup> This research has led to two main observations: one that pertains to the understanding that the candidates themselves may or may not grasp the importance of the concept of gender in the selection process and a second that has to do with the gender politics played by the states as they draw their lists of candidates.

### 1 *Gender and Self-Presentation Strategies*

Initially, this research project was essentially aimed at unpacking the states' strategies with regard to the gender of candidates for the post of judge at the ECtHR. However, it appeared in the course of this project that it would be a mistake to neglect the particular status that is held by a CV. CVs, to be sure, are instruments of self-presentation strategies. Of course, in the particular case of judicial selection processes at the ECtHR, the CV is now very strictly formatted. Since the 1990s, the PACE formally requires that candidates fill in a standardized CV when listed as candidates, and this requirement, to be sure, has significantly limited personal strategies. Until then, however, the information provided varied in shape and form, and, even since that time, some candidates have managed to give a significantly personal tone to their CV. The 2004 application by Fionnula Ni Aolain is a case in point, as she uncommonly chose to write her CV in the first person. In addition, besides issues of form, what the study of the CVs revealed was the large proportion of women candidates for which distinctively feminist features were put forth. Many of them include in their CVs features that are not only sex-related but that also evidence commitment to feminist beliefs, such as membership in specifically female professional networks, organizations and institutions that can either be official (the UN Commission on the Status of Women (CSW)) or activist (the International Council of Women) or fields of interest associated with the female sex (practising lawyers who insist they do lawyering for women's (or children's) rights; academics who teach feminist legal theory and so on).

Of course, these various forms of association with 'women's issues' are very diverse, and some are clearly more personal (such as the choice of the classes taught or the causes defended), while others may well have to do with structural factors. For instance, membership in an international organization that parallels (or is side-lined from) the 'real' (male-dominated) world of international law (such as, for instance, the CSW) may well be the result of structural forces that push women to the margins of international organizations,<sup>82</sup> more than they are the result of actual personal choices. As Leila Rupp's study on the making of an international women's movement shows,<sup>83</sup> structures such as the International Council of Women were essentially elite institutions. Educated and upper middle-class women of a certain age, of European

<sup>81</sup> Not classified here because of missing information: the three women presented by Spain in May 2002 (Doc. 9468); Wil Tonkens Gerkema from the Netherlands in 2004 (Doc. 10099); Bozena Kowalycz from Poland in 2004 (Doc. 10099); the two women candidates for Serbia and Montenegro in 2004 (Doc. 10363); the three women on the list from Latvia in 2005 (Doc. 10489).

<sup>82</sup> Charlesworth, 'Transforming the United Men's Club: Feminist Futures for the UN', 4 *Transnational Law and Contemporary Problems* (1994) 421.

<sup>83</sup> See L. Rupp, *Worlds of Women: The Making of an International Women's Movement* (1997).

ethnicity and culturally Christian formed the first generations of women populating the international women's movement;<sup>84</sup> they were actually more of a replica of the male international elite that was in the making<sup>85</sup> than a threat or subversion thereof.

It must be added that the studied corpus of CVs reveals some evolution overtime. In more recent years, although an academic or otherwise active interest in feminist movements and issues continues to be a relatively common feature of the profiles of women candidates, it tends to be less institutional and more individualized. Whatever these evolutions signal, however, the prevalence within the studied cohort of feminist features in many of the women candidates' profiles remains notable. It reveals either that the women have chosen to put such engagements forth (either because they conceive of them as political engagements that they are unwilling to conceal or because they believe they will be assets in the selection process) or that states tend to look at the pool of self-identified feminist women when searching for suitable candidates. Let us list a few examples.

The very first woman ever listed for the position of judge at the ECtHR, Alexandra Mantzoulinos, was presented by Greece in 1968.<sup>86</sup> She had been a member of the Greek delegation at the CSW (initially a legal counsel to the Greek delegation at the CSW, she was later a delegate herself). Mantzoulinos had also been the president of the permanent legal commission of the International Council of Women (1963–).<sup>87</sup> Her short bio also mentions that she had authored 'several' articles in law reviews as well as literary short stories. The second woman nominated, Helga Pedersen (who also was the first woman ever elected to the Court in 1971) was also a member of the CSW. At the national level, she was a member of the Danish National Council of Women. Pedersen also had strong political credentials. She was a prominent figure of the Liberal Party in Denmark, of which she was a member. A magistrate by profession (she would be a judge at the Supreme Court from 1964 to 1971), she had been the minister of justice from 1950 to 1953. Her profile says something about the notion that women need a deliberately female identity to enter the world of politics – upholding the cause of women, working in women's organizations and so on. Several other women in 120-odd cohort that is analysed in this article also shared these features with the pioneers. Fionnula Ni Aolain, for instance, who was listed by Ireland in 2004 and 2008, was also a member of the CSW. Kina Stoyanova Choutourkova (listed by Bulgaria in 1998) was a member of the International Association of Women Judges. Nationally, she had been the president of the Association of Women Magistrates

<sup>84</sup> *Ibid.*, at 52–81. In a less systematically researched fashion, one also gets an interesting glimpse at the profiles of women who were early players in the field of international law and politics through biographies or autobiographies. A good example is J. Hart, *Ask Me No More: An Autobiography* (1998).

<sup>85</sup> Vauchez and Sacriste, 'The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s', 32 *Law and Social Inquiry* (2007) 83.

<sup>86</sup> In her particular case, it seems that the biographical information available cannot be read as the result of a self-presentation strategy, for it is very impersonal and may well have been written by others than herself. Of interest is the fact that her date of birth is not provided, whereas that of the two male candidates that were simultaneously listed by Greece is.

<sup>87</sup> The International Council of Women was founded in 1888 as one of the first international women's organizations with the aim of bringing together women from many countries to promote women's rights.

in Bulgaria. Elisabeth Bertagnoli, listed by Austria in 2001, had been in charge of the division of women's rights at the state department, and her co-nominee that year, Elisabeth Steiner (who eventually won the election), presented issues of women's rights as being central to her professional interests as an attorney. The woman listed by Azerbaïdjan in 2003, Nigar Rassoulbayaova, is also notable. She had been a founder and member of the Congress of Azerbaïdjani Women, and she had also organized a Conference on Women and the Law, which was sponsored by the UN in her home country. The 2004 woman candidate for Germany, Renate Jaeger (who was elected to the Court), demonstrates similar qualities. She was a founding member of the European Women Lawyers Association, a member of the German organization of female lawyers (*DJB: Deutscher Juristinnenbund*) and a member of the non-governmental organization Professional Women. In 2011, the candidate for Portugal, Maria Conceicao Simoes Gomes, was an academic who had authored many books and articles on women's rights and was a former member of the PACE's Committee on Equal Opportunities for Men and Women. These examples are not exhaustive – other women in the cohort stressed their academic involvement with international women's organizations, feminist legal theory, expertise in the field of women's rights and so on.

## 2 Gender and State-Selection Politics

The CVs, of course, can also be observed and analysed from the standpoint of the states. The question then no longer pertains to whether candidates put forth their feminist or gender-related achievements and commitments but, rather, to what extent these achievements led to the relative importance of the candidate's gender in the fact that he or she was eventually listed by states. From this perspective, the conclusions that the research provides are twofold. First, it seems (and increasingly so) that as they list women for the post of judge at the ECtHR, states largely favour women who are essentially *des hommes comme les autres* – that is, women whose profiles are very comparable to those of their male counterparts. Second, and conversely, it also seems that there are many outliers in the cohort of women candidates – that is, women who do not seem to have all of the credentials that are usually required for international (judicial) appointments. In the first case, states are essentially downplaying the role of gender and are putting forward the image of a post-gender world of judicial selection; in the second case, to the contrary, they may be suspected of using women candidates as a way of merely complying with the rule of gender balance while simultaneously remaining confident that eventually a man will be elected.

The group of women whose professional profiles do not significantly differ from that of their male counterparts is generously represented in the cohort of women listed as candidates for the ECtHR. Like their male counterparts, many of these women tended to have accumulated political and legal resources, thus confirming the findings of contemporary works in the field of the sociology and socio-history of international (and especially, European) law. According to these studies, legal elites are constituted in part by a special breed of individuals who are capable of acting simultaneously as masters of a technical knowledge and as diplomats sensitive to the *raison d'État*.<sup>88</sup> As

<sup>88</sup> Vauchez and Sacriste, *supra* note 85.

Mikael Madsen has shown in the particular case of the ECtHR, this quality has led historically to the dominant presence, at Strasbourg, of judge-professors of a particular calibre – that is, individuals who not only have the grand vision and technical expertise but also have served governmental interests in various capacities and are thought to be sensible enough to infuse nascent human rights law with the necessary flexibility.<sup>89</sup> In concrete terms, this duality in legal and political resources stems from the fact that a career as a lawyer (attorney, judge, law professor) is typically complemented by a para-political position (such as that of juriconsult, either at the Foreign Office or as a member of a national delegation to an international organization) or by a political position (such as member of parliament or of government). Whereas this accumulation of legal and political capital has long been the key to success for international legal elites, the present inquiry establishes that the same holds true for women, since a significant share of our cohort similarly exhibit both legal and political resources. Again, let us give some examples.

In addition to her qualifications as a lawyer under the criteria of the ECHR,<sup>90</sup> Dubravka Simonovic was presented by Croatia in 1998 with the official title of *ministre plénipotentiaire*. She had been a special counsel to the deputy prime minister as well as the minister of the Foreign Office. Antoaneta Illieva Arnaoudova, who was listed by Bulgaria in 2001, was not only a Supreme Court justice but also a former deputy minister of justice. Helga Pedersen, the first woman elected to the ECtHR in 1971, had been a minister of justice in Denmark. Jutta Stefan, presented by Austria in 2001, had been the chief of the country's permanent representation at the Organization for Security and Co-operation in Europe and held the official rank of ambassador. And the list goes on.

Interestingly, the study of our cohort also reveals that, as time goes by, the participation in international groups of expertise becomes either a synonym or a substitute for the detention of political resources as a necessary (or instrumental) complement to the strictly legal ones. Again, this has been found to hold true for the world of international politics in general<sup>91</sup> and is related to multiple factors. In part, it is a sign of the growth in size and importance of international arenas in general, which leads to the multiplication of opportunities for international missions, expertise and appointments. It also illustrates the fact that an increasing number of judges (and candidates) have had some form of training abroad and that many of them have also served as experts for a variety of international organizations. In the case of the particular cohort analysed in this article, it is striking that almost 20 of the approximately 120 women received part of their legal training in the USA – often on Fulbright scholarships – and many more have studied abroad – a doctorate in human rights law at

<sup>89</sup> Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics', 32 *Law and Social Inquiry* (2007) 137.

<sup>90</sup> As a reminder, Art. 21 of the ECHR: '[T]he judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be juriconsults of recognized competence.'

<sup>91</sup> Cohen and Madsen, "'Cold War Law": Legal Entrepreneurs and the Emergence of a European Legal Field (1945–1965)', in V. Gessner and D. Nelken (eds), *European Ways of Law: Towards a European Sociology of Law* (2007) 175.

the University of Strasbourg or a certificate delivered by the Institut International des Droits de l'Homme<sup>92</sup> not being uncommon. Many of them served as experts for international organizations such as the COE (Venice Commission, European Commission against Racism and Intolerance, Consultative Council of European Judges), the UN, the UN Education, Scientific and Cultural Organization and the UN Children's Fund. This international expertise can also take the form of being commissioned by national governments (not necessarily one's own) as either a delegate to an international organization or as an expert on a given topic.

Many women could be listed as examples here, but the 2007 Italian woman candidate, Mariavaleria Del Tufo, seems to be a particularly telling example of this kind of profile. Not only was she a prominent academic (a professor of criminal law at the University of Naples), but she had also been a legal counsel for various COE states upon her presentation as a candidate for a judicial position at Strasbourg. She had given her expertise on the drafting of criminal codes in Albania, Croatia, Moldova, Serbia and other countries; she had taken part in a report on counter-terrorist policies in Ireland and in Russia. She had been an expert in several COE working groups, such as the one on mental health and human rights (1996–2003). She had also worked as an expert for other international organizations, such as the EU (she was a member of the PHARE programme that was the main financial instrument of the pre-accession strategy for the CEE countries, in charge of assessing the compatibility of domestic and EU law) and had been a member of the Italian delegation at the UN diplomatic conference for the creation of the ICC, not to mention many other national missions of expertise. Internationalization is not merely a word in profiles such as hers, and the case of Mariavaleria Del Tufo is not uncommon in our cohort. Throughout the history of women candidates at the ECtHR, one finds such highly internationalized profiles: Denise Bindschedler (Switzerland, 1972 and elected 1975), Agnes Nygard (Norway, 1985), Françoise Tulkens (who was listed by Belgium and elected in 1998), Alenka Selih (Slovenia, 1993 and 1998), Vesna Crnic Grotic (Croatia, 2004 and 2012), Ursula Kriebaum (Sweden, 2007) and Helen Keller (Switzerland, elected in 2010).

Thus, are men and women treated by states on an equal footing when it comes to selecting candidates for the post of judge at the ECtHR? It may well be that this is increasingly the case – and, if so, such a state of affairs certainly has to do with the fact that internationalization seems to nowadays play the role that politicization did in the past as far as the visibility within the states' selection processes goes, for international arenas and resources are relatively more available than political ones. Access to training abroad, missions of expertise for international organizations and the like is more open comparatively than access to political posts, and this openness may well, overall and overtime, have favoured the increased visibility of female potential candidates.

<sup>92</sup> The Institut International des Droits de l'Homme (IIDH) was founded in 1968, under the impulsion of René Cassin (French judge at the ECtHR, 1959–1976) after he received the Nobel Peace Prize. From the outset, one of the IIDH's mission was to teach human rights law and organize training sessions for lawyers in order to raise their knowledge and awareness of human rights. For more information, see <http://www.iidh.org/index.php> (last visited 23 January 2015).

However, there is a last profile of women candidates that needs to be mentioned here, as it strongly counterbalances these observations. As significant as the group of women who appear to be *des hommes comes les autres* is the group of women that are best described as outliers to the world of international judicial appointments. These are the women whose profiles reveal the detention of mainly legal resources – to the exclusion of (visible) political resources or internationalized experiences. It seems to demonstrate that their selection was based purely on their legal/technical capital. The reason that they can be labelled as outliers has to do with the sociological elements of international legal elites, who typically have a variegated set of credentials and resources. The detention of purely legal/technical capital usually does not suffice to join the club.<sup>93</sup>

These are outliers in the strict sense – that is, only with respect to the particular features of international legal elites. It does not mean, of course, that they are not prominent lawyers in domestic settings. For example, one finds among this last group of women candidates barristers who have become entrusted with related offices and responsibilities (Ursula Wachter, for instance, presented by Liechtenstein in 2004, who was the bar president between 1998 and 2005) or who have climbed to the top of national judicial hierarchies (Karin Grasshof, listed by Germany in 2004, who had been a member of the Federal Constitutional Court; Ivana Janu, listed by the Czech Republic in 2004, who had been the vice-president of the Constitutional Court, and Elena Carcei, presented by Roumania in 2007 or Helga Pedersen, elected for Denmark in 1971, who had been members of their national Supreme Courts), to give just some examples.

Sometimes, their career paths (to the extent that it is decipherable on the basis of the information that is available in the CVs) do not appear to be flamboyant – in the case, for instance, of judicial careers that have not (yet) led to national supreme courts. Elisabeth Challe, the first (and only) woman to be presented by France in 1979, had a very remarkable career as a judicial magistrate and a steady progression from there. She was the president of the Court of Appeals of Nimes in 1978, which not only is a very high position in the judiciary but also one that was probably held by only a very small number of women in 1978.<sup>94</sup> Despite this important achievement, however, her biographical information available does not reveal any element that would have made her CV stand out. No official (governmental or international) mission of expertise or representation is mentioned – apart from the relatively minor fact that she had been a member of the French delegation sent to Brussels for a task force on directives relative to the free circulation of legal professionals. It does seem that she has purely

<sup>93</sup> As far as judges sitting on ICs go, see D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007).

<sup>94</sup> Whereas it is uncertain whether gendered statistics for the composition of the judiciary in 1978 exist, it is difficult to retroactively reconstruct them. This element of Elisabeth Challe's trajectory is, however, interestingly contrasted with figures that were recently released by the French Conseil Supérieur de la Magistrature (CSM), calling for attention to be paid to the glass ceiling within the judiciary. Between 2007 and 2011, only five women were among the 54 presidents of appellate courts nationwide. CSM, *Rapport Annuel 2011*, available at [http://www.conseil-superieur-magistrature.fr/sites/all/themes/csm/rapports/CSM\\_Rapport%202011.pdf](http://www.conseil-superieur-magistrature.fr/sites/all/themes/csm/rapports/CSM_Rapport%202011.pdf) (last visited 23 January 2015).

legal capital. To be sure, in this particular instance, it proved sufficient to be listed but insufficient to be elected. She did not overshadow the flamboyant candidature of Louis-Edmond Pettiti, the former president of the Paris bar (*bâtonnier*) with important international connections and a strong implication in the creation and animation of the bar's human rights institute, who was thus unsurprisingly elected.

The same holds true for other women who have similarly been listed on the basis of their rigorous legal credentials and who have similarly failed to be elected. One can think of Lady Fox or Raquel Agnello (listed for the United Kingdom in 1991, 2004 and 2012, respectively) or Aikaterini Sygouna (Cyprus, 2004). However, some women who have been elected as judges at the ECtHR did demonstrate profiles composed of mainly legal resources. Elisabet Fura Sandström, elected for Sweden in 2003, had had a very classical professional trajectory as a lawyer and president of the Stockholm Bar upon her appointment at the Court. Again, no particular international mission or activist involvement stems from the information available. This is also true for Finnish judge Päivi Hirvelä. She was first listed in 2004 and again in 2007, when she was elected. She also had had a steady career in the national judiciary, as a prosecutor, but no international, political or particular human rights involvement.

This finding, of course, raises the question: when the women who are listed seem to be outliers with respect to the most common standards of recruitment for international (judicial) posts, is their presence on the list merely a low cost form of state compliance with the gender balance rule? There certainly are some instances of bad faith on the part of states in applying the new rule on the lists of candidates, whereby they only wish to heighten the qualities of the women's (male) competitors or, at best, meet their obligation under the gender balance rule. In some of these cases, women can have extraordinary backgrounds and professional achievements, but the strength and multi-faceted nature of their opponents' resources leaves them very little chance. This must have been the case, for instance, for Nigar Rassoulbayova, listed by Azerbaijan in 2003. As impressive as her CV may have been, it would have been hard for anyone to overcome the competition of Khanlar Hajiyev – who must have counted among the small group formed by the most authoritative lawyers in the country, who had presided over the destiny of the national Supreme Court for over 10 years (he had been the vice president and president of the Supreme Court from 1990 to 1998 and then the president of the Constitutional Court from 1998 to 2003). In other cases, the suspicion is all the stronger that the women listed have a clearly lower level of professional experience. This suspicion, in turn, can be due to a significantly younger age or to a lesser rich career – both in terms of training or positions held. Emblematic as the Malta 2004/2006/2010 case has been in the entire story of gender balance at the ECtHR, it is interesting to refer, lastly, to the case of Abigail Lofaro. Since she was chosen by Malta when the government finally agreed to comply with the both-sexes rule, it was reported both by local newspapers and by members of the PACE that other women in Malta who held stronger professional credentials at the time could have been listed. Ironically, then, it appeared to be Abigail Lofaro's rigorous but weaker CV that led to the election of a male judge on behalf of Malta – in the very case in which it was fairly clear that PACE members would have preferred to elect a woman and thus nail down their point.

## 4 Conclusion

As 18 women sit on the judicial bench in Strasbourg and as a significant proportion of the women presented as candidates for the post of judge at the ECtHR resemble their male counterparts, can it be said that European judicial selection processes are entering a post-gender world? And if so, is it the horizon for other ICs that are similarly moving towards rules of gender balance? Probably not. First, what happens at the top of given segments of the social world should never be mistaken for the more comprehensive reality. In this sense, in the same way that Barak Obama's election has not meant that America was entering a post-racial chapter of its history, the increasing presence of deserving women on the lists of candidates that states submit for the high judicial office of ECtHR judge is widely insufficient for characterizing the disappearance of gendered hierarchies. Second, this evolution, it needs to be recalled, was by no means natural. It took a lot of activism inside the PACE and the eventual adoption of a rule (however watered down it has subsequently become) for the numbers of women candidates to effectively grow bigger. Third, the little hindsight available to 2014 observers tends to indicate that states are privileging a minimalist understanding of gender balance objectives at the ECtHR rather than a maximalist – or, for that matter, post-gender – understanding. As the threshold of 40 per cent is barely exceeded and all-male lists multiply, a gendered (male) pattern of candidates' selection seems enduring.