CHAPTER 25

INTERNATIONAL JUDICIAL BEHAVIOR

ERIK VOETEN*

1 Introduction

The field of judicial behavior studies *why* judges make the choices that they do. The most obvious answer is that the law determines judicial decision-making. This answer is not so much wrong as it is incomplete. What the law means and how it should be applied to concrete instances is not always obvious. Judges have discretion in how they interpret the law. The study of judicial behavior examines the factors

* Erik Voeten is the Peter F. Krogh Associate Professor of Geopolitics and Justice in World Affairs at Georgetown University's Walsh School of Foreign Service and the Government Department. I thank Yuval Shany, Cesare Romano, and Karen Alter for helpful comments and suggestions.

that determine how judges use that discretion. This question has mostly focused on identifying extra-legal influences on judicial behavior, including political leanings, career motivations, education, race, gender, culture, socialization, public opinion, panel composition, and appetite.[1]

There are two main strands of research in the study of international judicial behavior. The first, inspired by international relations theory, asks to what extent governments shape judicial behavior. International adjudication promises an arena that is distinct from traditional inter-state diplomacy. But how removed from political considerations are international court judgments? Realists expect government interests to prevail regardless of what the law says. This is not just because powerful governments can and do refuse to implement judgments they dislike, but also because the ability of the powerful to undermine courts will make judges reluctant to rule against them in the first place. Others, however, have more optimistic theories about the ability of international courts to influence government behavior and of judges to act independently of government demands.

The second strand of research is inspired by sociological theories. This research asks how judges are influenced by communication, appropriate norms of behavior (culture), and their past roles and identities. Like the political science literature, the sociological literature focuses on extra-legal factors although it does not share an emphasis on governments.

This chapter evaluates first the political and then the sociological influences on judicial behavior. I define judicial behavior broadly, such that it includes the direction of rulings but also legal reasoning and case management. Nevertheless, most of the literature has focused on judicial decisions, and so will this chapter. I understand the study of international judicial behavior to be the study of *why* international judges behave the way they do, with an emphasis on the extra-legal sources of judicial behavior. This brackets the main motivating question as a positive social science question, the answer to which includes quantitative and qualitative studies by lawyers, sociologists, and political scientists. Still, I leave descriptive and normative discussions of legal doctrine for other chapters. Moreover, while I highlight some normative implications of empirical studies, I limit discussions of judicial ethics. This is not because I find these topics uninteresting or unimportant, but because others in this volume are better equipped to address them.

[1] For a recent volume that provides an overview of perspectives, see C Geyh (ed.), *What's Law Got to Do With It?: What Judges Do, Why They Do It, and What's at Stake* (Palo Alto, CA: Stanford University Press 2011). For the appetite study, see S Danziger, J Levav, and L Avnaim-Pesso, "Extraneous factors in judicial decisions" (2011) 108(17) Proceedings of the National Academy of Science 6889–92.

2 Political Influences

Scholars who emphasize that judges are highly independent from the influence of state governments often refer to judges as "trustees."[2] International judges and governments have a fiduciary relationship in which the latter entrust the former to exercise their expertise when interpreting international law. A different group of scholars analyze the relationship between judges and governments with a principal-agent (P-A) model. The governments, who are the principals, conditionally grant judges the authority to resolve disputes and interpret treaties.[3] Yet governments retain control over a range of mechanisms through which they can influence judges, including the appointment process, budgetary constraints, compliance with decisions, and so on. In the realist version of this argument, international judges simply cater to the wishes of governments. A more modest claim is that the influence of governments on judicial decision-making depends on the effectiveness of these control mechanisms. Governments sometimes design control mechanisms to be ineffective in an effort to boost the credibility of the commitment they make to international law. If this is so, then the trustee model can be derived from the P-A model.[4] Legal scholars have also debated the normative question, "Is a court that is more independent from governments likely to be more or less effective?"[5]

Much of the earlier literature tackled the question of government influence by identifying key cases in which "the law" allegedly pointed courts in a different direction than powerful governments. This led some scholars to conclude that governments still ran the show,[6] while others found that international courts had considerable agency to make governments act against their proclaimed interests[7] —sometimes based on the

[2] See, e.g., K Alter, "Agents or Trustees? International Courts in their Political Context" (2008) 14 EJIR 33;. G Majone, "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance" (2001) 2 E.U. Pol. 103.

[3] See, e.g., G Garrett, "The Politics of Legal Integration in the European Union" (1995) 49 Int'l Org.171; M Pollack, "Delegation, Agency, and Agenda Setting in the European Community" (1997) 51 Int'l Org. 99.

[4] A Stone Sweet, "Constitutional Courts and Parliamentary Democracy" (2002) 25 West Eur. Pol. 77.

[5] LR Helfer and A-M Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 Yale L. J. 273; E Posner and J Yoo, "Judicial Independence in International Tribunals" (2005) 93 Calif. L. R. 1; LR Helfer and A-M Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 Calif. L. R. 889.

[6] Garrett, note 3; G Garrett, RD Kelemen, and H Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union" (1998) 52 Int'l Org. 149; G Garrett and BR Weingast, "Ideas, Interests and Institutions: Constructing the European Community's Internal Market" in J Goldstein and RO Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithica, NY: Cornell University Press 1993) 173–206.

[7] A-M Burley and W Mattli, "Europe before the Court: A Political Theory of Legal Integration" (1993) 47 Int'l. Org. 41; W Mattli and A-M Slaughter, "Revisiting the European Court of Justice" (1998) 52 Int'l. Org. 177; KJ Alter and S Meunier-Aitsahalia, "Judicial Politics in the European Community European Integration and the Pathbreaking Cassis de Dijon Decision" (1994) 26 Comp. Pol. Stud. 535.

same European Court of Justice (ECJ) cases. More recent literature has started to take advantage of the increasing caseload of international courts to examine the question in more disaggregated ways. As a result, the study of international judicial behavior is starting to look more like the study of domestic judicial behavior, although the volume of work in the international arena is still quite limited.

The provisionary evidence for and against governmental influence is mixed and disputed. Below, I break down the evidence in terms of three different charges of judicial bias resulting from government influence.

2.1 Home-state bias

The most straightforward claim is that judges are more lenient toward their home states than to others. Evidence for this proposition can only come from courts where judges both frequently assess their own government's behavior and where the positions of individual judges can be observed because dissents are allowed. The earliest evidence for this proposition comes from the International Court of Justice (ICJ),[8] where judges were found to have voted in favor of their home state about 85 to 90 percent of the time.[9] Similar percentages are found in the European Court of Human Rights (ECTHR), where evidence is available from over 10,000 cases.[10] In both courts, the incidence of judges voting in favor of their home states is statistically significantly different from non-home-state voting behavior.

While judges indisputably display national bias in their rulings, the reasons for this result are open to interpretation. The principal-agent explanation is that governments retain control over the appointment and reappointment of judges. Judges who care about their career prospects should thus be sensitive to government interests. By contrast, one could claim that home-state bias results from cultural or sociological processes. It may be that judges identify more with the claims made by their governments not because they fear losing their jobs, but for reasons similar to why people root for their national teams in soccer tournaments. Or, it could be that judges have a deeper understanding of the legal system of their home states, and are thus more receptive to arguments for why a national legal system seemingly departs from international standards.

This debate cannot be settled conclusively. Some evidence does suggest that career motivations are relevant. Judges of the European Court of Human Rights

[8] I Ro Suh, "Voting Behavior of National Judges in International Courts" (1969) 63 AJIL 224; TR Hensley, "National Bias and the International Court of Justice" (1968) 12 Midwest J. Pol. Sci. 568.

[9] E Posner and M de Figuerido, "Is the International Court of Justice Biased?" (2005) 34 J. Legal Stud. 599.

[10] E Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights" (2008) 102 Am. Pol. Sci. Rev. 417, 417–33.

(ECtHR), who will reach the mandatory retirement age by the end of their terms, show significantly less national bias than judges who face reappointment pressures (controlling for time served on a court).[11] Ad hoc judges, who are appointed on a case-by-case basis, have much stronger national bias than regular judges. Moreover, judges from poorer countries, for whom the salary of an international judge is presumably more attractive relative to their prospects in private practice, display more national bias than judges from richer countries.[12] There is little direct evidence for cultural arguments. For example, national bias does not increase or decrease in specific legal cultures, or at different levels of domestic judicial independence.[13] Yet culture may matter in ways that are more difficult to directly observe.

While careerist motivations are unseemly to some, they have relatively straightforward institutional solutions. For example, longer, non-renewable terms, as the ECtHR recently implemented, should help reduce national bias if career motivations are to blame, but would be of little use if culture is primarily responsible. The literature also finds that judges who had previous careers as diplomats exhibit more national bias than other judges.[14] Thus, implementing longer, nonrenewable terms and reforming selection procedures so as to minimize the presence of former diplomats may be the most effective ways to reduce home-state bias.

While national bias is relatively easy to demonstrate, it ultimately might not matter much for the purposes of international justice. Judicial decisions are made by panels where the national judge is at most one of seven (regular ECtHR Chambers) or one of nine (ICJ) judges, so they are unlikely to be pivotal. I estimated that out of the ECtHR's first 10,000 judgments, national bias led to about a dozen rulings in which the ECtHR did not find a violation against a state, but would have ruled differently had all judges been non-nationals.[15] However, this result may understate the true problem because this study did not look at admissibility decisions, for which national judges often have a bigger say. Moreover, it may be that effective nationals can sway their colleagues through persuasion or strategic coalition formation. Still, the home-state bias is manageable and may be outweighed by the benefits of expertise and language abilities such judges bring to the table. How this trade-off works out depends on the institutional insulation of judges and the context of each court.

[11] Voeten, note 10, at 417–33.

[12] Voeten, note 10, at 417–33.

[13] Voeten, note 10, at 417–33.

[14] Voeten, note 10, at 417–33; FJ Bruinsma, "Judicial Identities in the European Court of Human Rights" in A van Hoek et al., (eds), *Multilevel Governance in Enforcement and Adjudication* (Cambridge: Intersentia 1996) 203–40.

[15] Bruinsma, note 14.

2.2 Geopolitical biases

A second and potentially farther-reaching concern is that judges may more broadly represent the geopolitical interests of their national governments on international courts. If this is so, then judges really are just "diplomats in robes." These concerns are greatest on tribunals that resolve high-stakes inter-state disputes, such as the WTO and the ICJ.[16]

The most influential article that examines this claim is Eric Posner and Miguel de Figueiredo's study of bias at the ICJ.[17] In a quantitative study of all ICJ decisions, they found that judges favor governments with wealth levels and political systems that are similar to their own. However, they found no evidence that judges are influenced by regional or military alliances. Posner and Figueiredo do not take this as direct evidence for strategic bias as it may be possible that judges simply vote in ways that reflect their own psychological or philosophical preferences. There is considerable room for further exploration of this question.[18] For example, scholars could look at the correspondence between the UN General Assembly voting records of countries and ICJ judges.

Evidence from the WTO is more difficult to come by given that heterogeneity among judges is not so easily observable there. We do know that the United States and the European Union go through great pains to ensure that judicial appointees to the Appellate Body (AB) have judicial philosophies that meet their preferences.[19] Moreover, empirical research strongly suggests that third party submissions by governments influence decision-making and judicial reasoning.[20] Yet, governments do not have clear mechanisms to hold individual AB members accountable, and we have no information how individual panel decisions were reached. This limits our ability to speculate on judicial motivations.

For most international courts, governments have been quite willing to step away from control mechanisms that allow them to directly influence judges to represent their political interests. This makes sense as courts are supposed to increase the credibility of states' commitments to promoting free trade, not expropriating

[16] Indeed, there is little evidence for this claim on the ECtHR. See Voeten, note 10.

[17] See Posner and de Figuerido, note 9; see also E Posner, "The Decline of the International Court of Justice" in S Voigt, M Albert, and D Schmidtchen (eds), *International Conflict Resolution* (Tübingen: Mohr Siebeck 2006) 111–42.

[18] Quite surprisingly given the level of controversy this article invoked, I have not found a follow-up study that looks at this data.

[19] R Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints" (2004) 98 AJIL 247; M Elsig and MA Pollack, "Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO Appellate Body," (2011) paper prepared for presentation at the 4th Annual Conference on the Political Economy of International Organizations (Zurich).

[20] M Busch and K Pelc, "The Politics of Judicial Economy at the World Trade Organization" (2010) 64 Int'l. Org. 257; M Busch and E Reinhardt, "Three's a Crowd: Third Parties and WTO Dispute Settlement" (2006) 58 World Pol. 446.

investments, respecting human rights, and so on. If international judges were simply diplomats in robes, then courts would not serve the purposes that states intended when they created these courts. This does not mean that judges cannot be swayed by governments, but neither theory nor evidence lead us to equate international courts with political intergovernmental organizations.

2.3 Policy and institutional motivations

The most important extra-legal motivations ascribed to judges concern their desire for judgments to be implemented, to influence policy and law, and to increase the legitimacy and authority of their respective court or tribunal.[21] These goals are not identical, but they are related. The first goal, of compliance, is the narrowest. Still, judges may care not just that a decision is narrowly implemented (e.g., compensation for a victim), but also that the underlying policies and practices are altered. Moreover, they may believe compliance is important not just because of the immediate legal or policy implications of their judgments, but also because they might believe that if their judgments are not complied with, their court will ultimately lose legitimacy and authority.

Thus, there is a clear link between the desires for compliance and the goal of institutional legitimacy. Yet there can also be tensions between these goals. A court that simply maximizes compliance would take "easy" decisions that require few if any meaningful adjustments from governments. This gives rise to the criticism that good news about compliance may not necessarily be good news for law-based cooperation.[22] Clearly, a court's institutional legitimacy depends not just on compliance but also on the degree to which a court issues consistent, high-quality rulings that are motivated by the law. Thus, courts that want to enhance their legitimacy will sometimes have to adopt rulings that go against the wishes of the powerful.

This tension between legal and political pressures leads judges and courts to act strategically; i.e., they anticipate how their audiences will respond to their rulings and adjust rulings accordingly.[23] For example, Daniel Kelemen described decision-making by the ECJ and the WTO on disputes that involve trade and environmental claims as a strategic trade-off between pressures for legal consistency

[21] See, e.g., L Baum, "What Judges Want: Judges' Goals and Judicial Behavior" (1994) 47 Political Research Quarterly749.

[22] G Downs, DM Rocke, and PN Barsoom, "Is the Good News About Compliance Good News About Cooperation?" (1996) 50 Int'l. Org. 379.

[23] For information on strategic judicial behavior, see: L Epstein and J Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead" (2000) 53 Political Research Quarterly 625. An application to international courts is discussed in: RD Kelemen, "The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU" (2001) 34 Comp. Pol. Stud. 622.

and appeasing powerful audiences.[24] Debates between principal-agent theorists and proponents of the trustee perspective have concentrated on the strength of these political pressures. Advocates of the trustee perspective maintain that most courts are well insulated from political pressures; non-compliance is often a non-issue; and is difficult. Thus, the need for strategic behavior that balances legal and political pressures is minimal. By contrast, advocates of the principal-agent perspective emphasize the political pressures on courts.

A heated debate in the *American Political Science Review* about alleged political constraints on ECJ decision-making illustrates the controversy. Clifford Carrubba, Matthew Gabel, and Charles Hankla found that the ECJ was significantly more likely to find in favor of a plaintiff if a governmental third-party had submitted an observation to the court that favored the plaintiff.[25] The researchers interpreted this as evidence that the threat of legislative override affects ECJ behavior. Moreover, they found an additional effect of third-party observations when a government was the litigant. The authors argue that the ECJ depends on third-party enforcement of its decisions. Government litigation supported by many other governments (as evidenced by third party observations) makes such third-party enforcement more credible. This suggests that the ECJ takes the likelihood of compliance into account when ruling against a plaintiff.

In a response article, Alec Stone Sweet and Thomas Brunell have reanalyzed Carrubba, Gabel, and Hankla's data and concluded that, "Neofunctionalism wins in a landslide."[26] They find that legislative override was not a credible threat, and that there were no qualitative examples of legislative override in their data. Moreover, there were no cases in which government observations approached unanimity among EU member states, the threshold for legislative override in virtually all the cases in the data. Sweet and Brunell also observe that, on average, member state observations tend to favor the European Commission as frequently as the plaintiff (i.e., governments frequently file in favor of more active enforcement).

Stone Sweet and Brunell make a strong case against override as a credible threat. Moreover, they make an important point that government observations are often in favor of more active enforcement rather than constraining the court.[27] Indeed, there are many governments whose interests are served very well by active ECJ enforcement against member state infringements.[28] Still, this does not settle the issue of

[24] Kelemen, note 23.

[25] CJ Carrubba, M Gabel, and C Hankla, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice" (2008) 102 Am. Pol. Sci. Rev. 435.

[26] A Stone Sweet and T Brunell, "The European Court of Justice, State Non-Compliance, and the Politics of Override: Reply to Carrubba, Gabel, and Hankla" (2012) 106 Am. Pol. Sci. Rev. 204.

[27] Stone Sweet and Brunell, note 26.

[28] The finding that some governments willingly appoint activist ECtHR judges is also consistent with this more general point. See Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights" (2007) 61 Int'l. Org. 669. On the ECJ, see also M Malecki,

political influence. Non-compliance remains an issue in the European Union.[29] Moreover, Stone Sweet and Brunell did not offer a strong explanation for why member state observations and ECJ rulings are so strongly correlated. This correlation is not likely to be a purely legal story. For example, the correlation remains robust when controlling for the advocate general's opinion. Stone Sweet and Brunell interpreted the correlation between member state observations and ECJ rulings as evidence that the court exercises "majoritarian activism." This refers to the tendency of the ECJ to rule against a plaintiff when its policies are out of sync with those in a majority of the other EU states.[30] Under this conceptualization, the ECJ acts as an agent of the majority of EU states when the majority cannot pass its preferred policies and regulations through the regular channels. There is no obvious legal imperative to act this way, except if judges maintain a "living instrument" judicial philosophy in which developing practices and norms help guide interpretation of EU law. Yet it is not clear that this guiding principle for judicial behavior can be so easily distinguished from one where judges care about state practices because they are concerned about implementation.[31] Both suggest strong links between judicial behavior and member state preferences.

The issue of how and to what extent threats of non-compliance and legislative override matter for judicial decision-making is hardly settled. The issue has barely been addressed systematically for courts other than the ECJ, and analyses of the ECJ data can still be improved upon. It is also worth repeating that a finding that political constraints "significantly" influence judicial decision-making does not necessarily undermine the promise of international law. Studies of domestic judicial behavior, including in the United States, frequently report evidence that judges, especially those on constitutional review courts, look to the political branches or public opinion when making important decisions.[32] This does not mean that legal concerns are unimportant. For example, Michael Bailey and Forrest Maltzman carefully unpack legal and political factors, and find that both are important to

"The Politics of Constitutional Review: Evidence from the European Court of Justice," (2009) paper presented at the Annual Meeting of the American Political Science Association.

[29] T Börzel, T Hofmann, and D Panke, "Opinions, Referrals, and Judgments: Analyzing Longitudinal Patterns of Non-compliance" (2009) Berlin Working Paper on European Integration No. 13 (Freie Universität Berlin, Berlin Centre for European Integration).

[30] MP Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing 1998).

[31] For a more detailed treatment of majoritarian activism, see A Stone Sweet and TL Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECtHR, the EU, and the WTO," J. Law & Courts, forthcoming.

[32] A few examples from the US context are: W Mishler and RS Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions" (1993) 87 Am. Pol. Sci. Rev. 87; G Caldeira and J Wright, "Organized Interests and Agenda Setting in the U.S. Supreme Court" (1998) 82 Am. Pol. Sci. Rev. 1109.

a different degree for different cases and justices.[33] The study they undertook required extensive coding of precedent and statements by politicians. Datasets on international court judgments do not have this degree of detail—yet. The bigger point, though, is that debates about political influence are hardly unique to international courts.

Another parallel with domestic judicial behavior is the role of judicial philosophies in both appointments and decision-making. Just as Democratic US presidents are more likely to appoint judges that express liberal leaning philosophies on the bench, more pro-European governments are more likely to appoint more "activist" ECtHR judges.[34] Activism in this context refers to the extent to which judges reject claims that governments should have a wide margin of appreciation in implementing the obligations from the European Convention on Human Rights. Similar anecdotal evidence that partisan politics matters exists for the European Court of Justice.[35] This finding suggests that governments may influence judicial decision-making even if they cannot directly sanction judges for non-performance.

The downside of this is that international judges may not be selected only for their competence. As an independent evaluation of the ECtHR appointment process concluded: "Even in the most established democracies, nomination often rewards political loyalty more than merit."[36] Yet there is also a silver lining to this finding: it suggests that some accountability is operative in the sense that the ideological views of the winners of elections get greater representation on the courts than those of the losers. This can provide some counterweight to charges that international courts enhance the democratic deficit of international institutions by creating positions of authority for unaccountable judges.

Numerous other theories by political scientists and legal scholars are built around the assumption that international judges act strategically to make their judgments more effective. Tom Ginsburg and Richard McAdams, for example, argue that the ICJ's lack of enforcement power means that it is more effective when it constructs rulings that create focal points to resolve coordination dilemmas than when its judgments simply impose solutions.[37] Marc Busch and Krzysztof Pelc argue that WTO panels often invoke judicial economy when the broader WTO membership is ambivalent about the precedential consequences of a ruling.[38] These types of

[33] M Bailey and F Maltzman, "Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court" (2008) 102 Am. Pol. Sci. Rev. 369.

[34] Voeten, note 28.

[35] KJ Alter, "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice" (1998) 52 Int'l Org. 121.

[36] J Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: International Centre for the Legal Protection of Human Rights 2003).

[37] T Ginsburg and R McAdams, "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution" (2004) 45 Wm. & Mary L. Rev. 1229–39.

[38] Busch and Pelc, note 20, at 257.

strategic theories of judicial—and court—behavior are likely to become increasingly prolific.

2.4 Summary

It is difficult to maintain that international judges are "trustees" according to the purest meaning of the word, that is, individuals who are selected entirely for their expertise and who are left alone by governments to do what they do best: reach quality judgments based solely on legal considerations. Yet there is also no evidence that international judges are simply "diplomats in robes." Judges don't simply do what national or powerful governments tell them to do. Indeed, governments have explicitly and deliberately designed most international courts to reduce this possibility.

As is so often the case, the messy truth lies somewhere in the middle. There is a fair degree of agreement that this is so. Even staunch advocates of the trustee perspective do not argue that judges operate in splendid isolation.[39] The debates are and should be about the extent to which specific control mechanisms do or do not influence judicial decision-making in specific contexts. Indeed, it is somewhat silly to have only one model for the "international judge," not just because they vary in the degree to which they are insulated, but also because the political pressures they experience vary considerably.[40]

Aside from the influence of home-state bias, which is fairly particular to international courts, there are important similarities between domestic and international judges.[41] Like international judges, domestic judicial appointments are often affected by partisan politics. Like international judges, domestic judges are concerned with the policy and institutional implications of their judgments. Moreover, domestic judges vary considerably in their institutional protections. This suggests opportunities for cross-fertilization between the studies of domestic and international judicial behavior where the study of domestic judicial behavior includes countries other than the United States.[42]

[39] See, Alter, note 2.

[40] A useful impression of these varying pressures can be gleaned from interviews with judges on different courts. See especially, D Terris, CPR Romano, and L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Boston, MA:Brandeis University Press 2007).

[41] JK. Staton and WH Moore, "Judicial Power in Domestic and International Politics" (2011) 65 Int'l. Org. 553; Voeten, note 10.

[42] For a terrific overview of the study of comparative judicial politics, see N Tate, "The Literature of Comparative Judicial Politics: A 118 Year Survey" (2006) prepared for presentation at the 20th World Congress of the International Political Science Association (Fukuoka, Japan).

3 Socio-Legal Influences

As international courts have matured, an increasing number of scholars have begun to look beyond interactions between states and international courts. These scholars are interested in the broader social environment in which international courts operate, and indeed in the social environment created by the court itself. Most of these scholars are inspired by sociological rather than political science theories. Sociologically inspired, or Constructivist, theories of international law have focused less on judicial behavior and more on the effects of international law and court judgments.[43] Still, there are at least three tenets of sociologically inspired research on judicial behavior. First, I examine the communication between judges on various international and national courts. Second, I discuss cultural determinants of judicial behavior. Third, I briefly highlight the literature that examines the role of personal characteristics and professional backgrounds. There is somewhat of a geographic disparity in the research here. While the political science literature is heavily concentrated in the United States, the sociological approach has been more influential in continental Europe, with the exception of the transjudicial communication literature. Since I focus on English language literature, this limits the scope of the review somewhat to transjudicial communication.

3.1 Transjudicial communication

National and international judges increasingly communicate with each other both directly or via their judgments, potentially influencing each other's interpretations of legal issues.[44] According to Anne-Marie Slaughter, such "transjudicial communication" has become an integral part of a "new world order,"[45] leading to an emerging "global jurisprudence" created by a "global community of courts."[46] Harold Koh identified three functions for transjudicial communication: informing the interpretation of parallel rules, shedding empirical light on legal issues, and illustrating how

[43] See, e.g., J Brunnee and SJ Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19; R Goodman and D Jinks, "How to Influence States: Socialization and International Human Rights Law" (2004) 54 Duke L.J. 621.

[44] See, e.g., A Lester, "The Overseas Trade in the American Bill of Rights" (1998) 88 Colum. L Rev. 537; A-M Slaughter, "A Typology of Transjudicial Communication" (1994) 29 U. Rich. L. Rev. 99; see also, in this handbook, Nollkaemper, Ch. 4, for a more detailed discussion of this literature.

[45] A-M Slaughter, *A New World Order* (Princeton University Press, 2005).

[46] A-M Slaughter, "A Global Community of Courts" (2003) 44 Harv. Int'l. L. J. 191.

common standards should be applied.[47] Steven Calabresi and Stephanie Zimdahl add "logical reinforcement" as a fourth function.[48]

Most of the literature on this issue is motivated by the influence of international and foreign courts on US courts. Yet the basic logic applies equally to the influence of domestic and international jurisprudence on international courts.[49] The behavioral assumption underlying transjudicial communication theories is generally that judges want their opinions to have influence. Judges who are unwilling to participate in the transjudicial dialogue undermine their ability to influence other courts. As Slaughter put it:

> This *awareness* of constitutional cross-fertilization on a global scale—an awareness of who is citing whom among judges themselves and a concomitant pride in a cosmopolitan judicial outlook—creates an incentive to be both lender and borrower.'[50]

The weakness in this literature is that it mostly relies on selective cases that cite external decisions without providing any indication of how common reliance on external decisions is, what may explain variation in this practice, and how influential these citations are.[51] In the context of international courts, many are concerned about the dynamic opposite the one Slaughter has described: that international law is getting too fragmented[52] as each institution "[h]as a tendency to go its own separate way."[53] Consistent with this sentiment, some argue that the World Trade Organization's (WTO) Dispute Settlement Body and Appellate Body (DSB and AB, respectively) should be more willing to rely on public international law and engage sources other than their founding treaties.[54] By contrast, the Inter-American

[47] HH Koh, "Transnational Legal Process" (1996) 75 Nb. L. Rev. 181; HH Koh, "International Law As Part Of Our Law" (2004) 98 AJIL 43, 43–57.

[48] SG Calabresi and SD Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision" (2005) 47 Wm. & Mary L. Rev. 743.

[49] A-M Slaughter and D Zaring, "Networking Goes International" (2006) 2 Ann. Rev. L. & Soc. Sci. 211.

[50] Slaughter, note 45, at 74–5.

[51] For this criticism, see RC Black and L Epstein, "(Re-)Setting the Scholarly Agenda on Transjudicial Communication" (2007) 32 Law & Soc. Inquiry 789.

[52] International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (2006) Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. U.N. Doc A/CN.4/L.682.

[53] G Guillaume, "The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order" (October 27, 2000), Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, available at <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> accessed July 28, 2013. ICJ Presidents focused on the fragmentation of international law due to the proliferation of international tribunals in three consecutive annual speeches to the UN General Assembly. M Koskenniemi and P Leino, "Fragmentation of International Law? Postmodern Anxieties," (2002) 15 Leiden J. Int'l L. 553.

[54] J Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) 95 AJIL 535.

Court of Human Rights (IACtHR) has been accused for being too creative in its use of external judicial decisions, thus undermining regional support for the court.[55] Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has relied heavily on external court decisions and international customary law to motivate an expansive reading of its mandate.[56]

Why then do some international courts and judges extensively cite decisions from other courts, whereas others do not? The initial evidence suggests that there are large asymmetries in the extent to which international courts rely on one another's jurisprudence, thus contradicting the argument that transjudicial communication is driven by reciprocity principles.[57] Moreover, ECtHR judges sometimes refrain from external citations for strategic reasons. They are more likely to cite external decisions in separate, rather than majority, opinions, and some of the more "activist" judges do so more regularly than others. This suggests that, as in the United States, judicial ideology matters.[58] Yet much more research is needed to answer this question. Citations are a poor proxy for influence given that they are not necessarily decisive influences on the ultimate decisions. Relying on citations as evidence of transnational influence may also cause us to *underestimate* that influence if courts have reasons to conceal such influences. For example, Slaughter suggests that the UN Human Rights Committee has copied its reasoning from the ECtHR without making this explicit.[59]

Moreover, there is a disconnect between the transjudicial communication literature and the literature that highlights the strategic interdependencies between international and domestic courts.[60] If international and domestic courts can build strategic alliances, as this latter literature suggests, then this should be reflected in judgments. However, the transjudicial communications literature has mostly ignored strategic imperatives for borrowing and non-borrowing.

The promise of the transjudicial communication literature is that it conceives of international courts as part of a broader network that includes not only governments but also domestic courts, NGOs, IGOs, and others. This literature, however, has not yet adequately charted how precisely all these actors influence international judicial actors. For example, particularly in criminal and human rights tribunals,

[55] GL Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19 EJIL 101.

[56] AM Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War" (2006) 59 Vand. L. Rev. 1.

[57] E Voeten, "Borrowing and Nonborrowing among International Courts" (2010) 39 J. Legal Stud. 547.

[58] Voeten, note 57, at 547.

[59] Slaughter, note 44, at 106.

[60] One classic and one recent example are discussed in J H H Weiler, "The Transformation of Europe" (1991) 100 Yale L.J. 2403; and KJ Alter and LR Helfer, "Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice" (2010) 64 Int'l. Org. 563–92. See also, in this handbook, Huneeus, Ch. 20 for more details on this vast literature.

NGOs play a significant role in the legal process. To what extent do the briefs and other prepared submissions by NGOs influence legal reasoning? Or, indeed, to what extent do legal documents prepared by other international actors, such as international legal bureaucrats who work for IGOs, matter for legal reasoning? Nevertheless, the network approach and the increasingly sophisticated methods that come with it are highly promising.

3.2 Culture

Cultural influences on judicial behavior can be manifold. First, and most obvious, scholars have pondered how judges from different legal cultures come together to create collective judgments and justifications. Some scholars argue that legal reasoning crucially depends on cultural context. For example, Mitchell Lasser argues that legal justification "shapes (and is shaped by) the judicial system that addresses it, thereby conceptually creating and recreating that system's particular argumentative, conceptual, and institutional universe."[61] Sara Mitchell and Emilia Powell have shown that domestic legal culture powerfully shapes the propensity of governments to accept the compulsory jurisdiction of international courts and the design of those courts.[62] A logical corollary, then, is that domestic legal culture also shapes international judicial behavior. Nevertheless, to the extent that this evidence exists, quantitative[63] and qualitative assessments[64] of judgments, and citation patterns and reasoning, find little evidence for this hypothesis.

A second possibility is that courts develop their own sets of values, norms, and practices that influence how individual judges behave. This research has been shaped by Pierre Bourdieu's work on "legal fields."[65] Bourdieu criticizes both formalists, who view the law as a self-contained system that is autonomous from its social and political environment, and instrumentalists, who conceive of the law as a mere tool in the hands of the powerful. Formalists fail to appropriately acknowledge the influence of those who exercise power outside the legal domain, while instrumentalists do not account for the unique qualities that separate legal practice from

[61] M Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004) 298.

[62] S Mitchell and E Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge University Press 2011).

[63] Voeten, note 10; Y Lupu and E Voeten, "Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights" (2011) 42 Brit. J. Pol. Sci. 413.

[64] N-L Arold, "The European Court of Human Rights as an Example of Convergence" (2007) 76 Nordic J. Int'l L. 305, 320; T Dannenbaum, "Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed" (2012) 45 Cornell Int'l L. J. 77.

[65] P Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1986) 38 Hastings L. J. 805.

other social activities. These practices often develop as a consequence of conflict and interaction with those outside the legal field.

In an influential study, Yves Dezalay and Bryant Garth applied this framework to the field of international arbitration and found that Americans from elite law firms acquired a central role, which helped transform the practice of international arbitration into one that resembled the American model more than the continental European one.[66] Others have applied similar frameworks to the spread of American legal values,[67] and have examined the legal practices in human rights, international criminal law, and the construction of Europe.[68] These practices shape how judges and courts perform their daily roles—even if they do not yield precise predictions on how judges will rule on individual cases.

A third way in which culture can affect judicial behavior is through collegial norms. A swath of literature on American judicial behavior suggests that the partisan and/or gender composition of judicial panels affects judges' decisions.[69] Groups of people that deliberately make different decisions than individuals who are left to their own devices. There is no reason this would not be so on international courts. But as far as I can tell, propositions of this type have yet to be investigated in the context of international courts. This is unfortunate as the gender and professional composition of international courts is an issue of considerable institutional importance.

3.3 Roles and backgrounds

Another strand of research examines whether the professional and personal backgrounds of judges shape their behavior on courts. Scholars have observed that international judges come from a wide variety of professional backgrounds, ranging from former diplomats, career judges, academics, and private practitioners, to

[66] Y Dezaley and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

[67] B Brake and P Katzenstein, "The Transnational Spread of American Law: Legalization as Soft Power," Working Paper (June 2010), <http://www.iilj.org/courses/documents/HC2010Oct22.Katzenstein.pdf> accessed August 28, 2013.

[68] J Hagan, R Levi, and G Ferrales, "Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia" (2006) 31 Law & Soc. Inquiry 585; Y Dezalay and B Garth, "From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights" (2006) 2 Ann. Rev. Law & Soc. Sci. 231; A Cohen and A Vauchez, "The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited" (2011) 7 Ann. Rev. Law & Soc. Sci. 417; MR 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" (2007) 32 Law & Soc. Inquiry. 137. See also, in this handbook, [Madsen, Ch. 18) and Vauchez, Ch. 30) for more on this literature.

[69] See, e.g., CR Sunstein, "Deliberative Trouble? Why Groups Go to Extremes" (2000) 110 Yale L.J. 71.

politicians with barely any legal experience. Judges tend to carry their prior identities, expertise, and practices into their new roles as international judges.[70]

Both quantitative and qualitative research provide evidence of this. For example, former diplomats were much more likely to accept the *raison d'état* and thus a higher margin of appreciation for ECtHR member states.[71] Interviews with judges suggest that judges find professional backgrounds "almost more important" than national backgrounds for their work, with judges from different backgrounds preoccupied with different aspects of judicial reasoning, problem solving, and case management.[72] There has been institutional recognition of this too, especially in the context of the International Criminal Court, where judges are now elected from two lists in order to ensure that judicial panels have both knowledge of international criminal law and experience of running criminal trials.[73]

While the role of professional backgrounds has attracted scholarly efforts, relatively little attention has been devoted to personal backgrounds. Perhaps the most obvious personal characteristic of interest is gender, which has attracted a great deal of attention in the domestic literature[74] and is of institutional interest.

3.4 Summary

These three strands of socio-legal research are complementary in their reliance on sociological rather than political science theories as their main sources of theoretical inspiration. Yet they also sometimes have contradictory implications. For example, the literature on professional backgrounds points to important sources of heterogeneity among judges that stems from prior roles, whereas the "field" literature emphasizes the formation of a new, relatively homogenous culture (or fields of international law practice). Moreover, the transjudicial communication literature highlights the common enterprise judges of various stripes engage in, whereas the field literature can be interpreted as leading to potential competition between different fields of judicial practice. These and other sources of tensions between sociological theories should be addressed more explicitly in future literature.

[70] For a discussion of this argument in the domestic context, see L Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006). For an example in the international context, see, Bruinsma, note 14.

[71] Voeten, note 10. [72] Terris et al., note 40, at 64.

[73] The non-permanent international criminal tribunals lacked especially the latter, leading to charges of inefficiency. See M Langer, "The Rise of Managerial Judging in International Criminal Law" (2005) 53 Am. J. Comp. L. 835.

[74] See, e.g., CL Boyd, L Epstein, and AD Martin, "Untangling the Causal Effects of Sex on Judging" (2011) 54 Am. J. Pol. Sci. 389.

4 Conclusions

The study of international judicial behavior is still very much in its infancy. The knowledge reflected in this chapter comes from a relatively small but growing body of research based on relatively few international courts. As international courts continue to issue more decisions, the number of studies will surely expand—as should, hopefully, our understanding of judicial behavior. Within the political science literature, I expect to see an expansion of strategic theories of judicial behavior that take seriously the notion that judges care both about legal consistency and the effectiveness of their rulings. Within the sociological literature, I expect to see more sophisticated analyses of the network of courts and judges, and how they interact and affect each other—albeit not always harmoniously. I also expect more Bourdieu-inspired studies of fields of practice.

The sociological literature has largely developed parallel to the political science literature with few cross-citations. This is unfortunate as there are numerous areas for cross-fertilization. The extent to which governments can and cannot influence judges cannot be seen as an entirely separate question from other sociological influences that lead judges to form separate sets of practices. There is some hope that this might change as some of the sociological approaches are becoming more mainstream in political science.[75] Additional tension exists between the legal field and the social sciences. The history of the study of judicial behavior in the United States provides little encouragement that this tension will be fully resolved.

Research Questions

1. Which mechanisms are the most and least effective ways for governments to influence judicial behavior?
2. Do changes or cross-court variation in the selection procedures of international judges correlate with changes in international judicial behavior?
3. Does judicial reasoning affect the effectiveness of international court judgments?
4. How do personal characteristics, such as gender, influence international judicial behavior?
5. How do network relationships influence international court rulings?

[75] See, e.g., E Adler and V Pouliot (eds), *International Practices* (Cambridge University Press 2011).

Suggested Reading

Alter, KJ, "Agents or Trustees? International Courts in their Political Context" (2008) 14 Eur. J. Int'l Rel. 33.

Baum, L, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006).

Carrubba, CJ, Gabel, M, and Hankla, C, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice" (2008) 102 Am. Pol. Sci. Rev. 435.

Dezaley, Y and Garth, BG, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

Epstein, L and Knight, J, *The Choices Justices Make* (Washington D.C.: CQ Press 1998).

Hafner-Burton, EM, Victor, DG, and Lupu, Y, "Political Science Research on International Law: The State of the Field" (2011) 106 AJIL 47.

Shaffer, G and Ginsburg, T, "The Empirical Turn in International Legal Scholarship" (2012) 106(1) AJIL 1.

Slaughter, AM, "A Global Community of Courts" (2003) Harv. Int'l. L. J. 191.

Staton, JK and Moore, WH, "Judicial Power in Domestic and International Politics" (2011) 65 Int'l Org. 553.

Stone Sweet, A, and Brunell, T, "The European Court of Justice, State Non-Compliance, and the Politics of Override: Reply to Carrubba, Gabel, and Hankla" (1998)" (2012) 106(1) Am. Pol. Sci. Rev. 204–13.

Terris, D, CPR Romano, and Swigart, L, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Boston, MA: Brandeis University Press 2007).

Voeten, E, "The Impartiality of International Judges: Evidence from the European Court of Human Rights" (2008) 102 Am. Pol. Sci. Rev. 417.