



The Motivations of Individual Judges and How They Act as a Group

Dothan, Shai

Published in:
German Law Journal

Publication date:
2018

Document version
Publisher's PDF, also known as Version of record

Document license:
[Other](#)

Citation for published version (APA):
Dothan, S. (2018). The Motivations of Individual Judges and How They Act as a Group. *German Law Journal*, 19(7), 2165-2188.

The Motivations of Individual Judges and How They Act as a Group

By Shai Dothan

Abstract

States have a significant influence on the selection of judges to international courts. This raises the concern that judges will be biased in favor of their home states, a concern backed by some empirical research. To counter that danger, international courts usually sit in large and diverse panels. Scholars have argued that this gives judges only rare occasions to tip the balance in favor of their home states. The problem begins, however, when judges start forming coalitions among themselves, giving judges with national biases a practical possibility to change the result of cases. To assess the magnitude of this threat to judicial independence, the paper draws on decades of scholarship in the field of judicial behavior. By understanding how judges behave, scholars can come closer to deciphering the true impact of judicial selection to international courts on international judgments.

* Associate Professor of International and Public Law, University of Copenhagen Faculty of Law affiliated with iCourts – the Centre of Excellence for International Courts. PhD, LL.M, LL.B, Tel Aviv University Faculty of Law. This research is funded by the Danish National Research Foundation Grant no. DNRF105 and conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts. The research leading to this article has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 678375-JUDI-ARCH-ERC-2015-STG).

A. Introduction

Mechanisms for judicial selection at international courts often allow states to participate in choosing the judges appointed to these courts. This may raise a concern about the independence of international judges: Even if judges are untouchable once appointed to the court, states can pick the judges that suit their ideological preferences or that are loyal to them. To some extent, this problem can be addressed by improving mechanisms for judicial self-government, for example by allowing current judges to intervene in future appointments to the court or, alternatively, by tightening the control of Presidents and legal staff on the work of the judges. Such mechanisms of institutional design can clearly make a difference, but they cannot completely dispel the risk that individual judges may be biased.

While international judges may not be individually independent, they regularly seat in panels with judges from other countries. Scholars have argued that large panels limit the danger of national biases because the chances that a single judge would cast the pivotal vote in favor of her country are really quite small. The problem is, however, that judges do not just cast their votes independently. When judges deliberate, they may form coalitions and influence each other, letting a committed national judge sweep the court in the direction desired by his country.

Furthermore, judges are not the only people that matter in international courts. Some courts, especially human rights and criminal courts, have a large professional staff that can significantly affect judicial decision-making. Those who control the staff may determine the direction of judicial decisions, and their biases may set the tone for the policy made by the court.

Finally, an international court is more than a sum of the people who work for it. It is an institution that develops a life of its own. The behavior of the court as an institution can be analyzed as a strategic attempt to avoid political backlash and to build the court's power over time. The judges in the court have an incentive to serve the institution that sustains their personal prestige and their ability to influence society. They would also adopt policies that suit the court's interest unconsciously, by imitating accepted judicial practices.

In order to investigate the intricate connections between the biases of individual judges and policy-making by the court as a whole, this paper will rely on insights from the field of Judicial Behavior. This large body of literature, written by lawyers and political scientists, can throw light on the way individual judges act together as a group. While much of this literature was developed to study national courts, many of its insights can be fruitfully applied to the study of international courts.

Part B investigates the biases of individual international judges. Part C uses insights from the research on Judicial Behavior to investigate how judges make collective decisions. Part

D explores the influence of other people besides judges on the decisions of international courts. Part E demonstrates how international courts act as strategic institutions. Part F concludes.

B. Why Judges are Different from Each other

1. Judicial Selection in International Courts

The existing empirical work on the behavior of international judges is mostly focused on the bias of judges towards their home states. This naturally raises the question of the level of involvement countries have in the appointment of judges to international courts. There is, in fact, great variation in this respect between international courts. Some courts allow states to select judges, while in others the decision is delegated to an international organization that is somewhat independent from states.¹

In the International Court of Justice (ICJ), states create the lists of nominations, but judges are approved by the United Nations General Assembly.² A similar rule applies in the International Criminal Court (ICC), in which the deciding body is the Assembly of State Parties.³ Judges in the World Trade Organization Appellate Body (WTO AB) are appointed by the Dispute Settlement Body itself.⁴

In contrast, two of the most influential regional courts used to present a much tighter involvement of states in appointing judges, before structural changes altered that condition significantly. In the European Court of Justice (ECJ), every government had a right to appoint a national judge. While theoretically appointments required the "common accord" of all governments,⁵ the choices of the states were traditionally almost always respected.⁶ In the European Court of Human Rights (ECHR), every member state could suggest three candidates out of which the Parliamentary Assembly of the Council of Europe chooses one.⁷ To reduce the involvement of states in the selection of judges in the ECHR and the Court of Justice of the European Union (CJEU), as it is now called, new procedures were implemented.

¹See Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L. L. 387, 401–402 (2009)

² Statute of the International Court of Justice, Article 4.

³ Rome Statute of the International Criminal Court, Article 36.

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17(2).

⁵ The Treaty on the Functioning of the European Union, Article 253.

⁶ See Voeten, *supra* note 1, at 401.

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 20, 22.

The Lisbon Treaty of 2009 fundamentally changed the self-government of the CJEU regarding the appointment of new judges. CJEU judges now must pass an advisory panel, known as the Article 255 Panel. The composition of the Panel is set following a proposal by the ECJ's President who also proposed the operating rules of the Panel. The proposals of the President were to a large extent followed. This move increased significantly the ability of CJEU judges, particularly the President, to govern themselves with less external influence from the states. The Panel has in fact found several judges proposed for the ECJ General Court to be unsuitable, leading to the proposal of new candidates by the states.⁸ States probably realize that in order to avoid a rejection of their candidates, which they can only overturn by a unanimous decision of the states, they need to exercise special caution in choosing candidates that the Panel is likely to find suitable. This implies that the ability of states to select judges who are fundamentally biased towards their own interest is now significantly curtailed.

In the ECHR, a similar, if perhaps less extreme, shift in the self-governance of the judges on appointments has occurred following the establishment of an Advisory Panel of experts to monitor the election of candidates for a judicial position.⁹ The President of the ECHR is consulted by the Committee of Minister on appointments to the Panel, giving the President a strong grip on the panel and by extension some influence on the appointment of ECHR judges. Views on the actual effectiveness of the panel in ensuring candidates are chosen based on legal expertise and not on political grounds have been mixed. Furthermore, the panel has only an advisory role and its advice has sometimes been ignored in the past. Nevertheless, the Panel's review of the candidates' CVs may have already influenced the rejection of candidates to the ECHR.¹⁰

The analysis so far suggests that states have some control over the selection of judges, but this level of control differs in different international courts and is often different in the same court across time. The more states control the selection of judges to international courts, the greater the resulting risk of national influence on the judge's future decisions. Clearly, people who are interested in preserving the impartiality of international courts realize that and push for greater self-governance of international courts on their appointment process.

⁸ See Christoph Krenn, *Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success*, in this issue.

⁹ Following Resolution CM/Res(2010)26 on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

¹⁰ See Basak Cali & Stewart Cunningham, *Judicial Self Government and the Sui Generis Case of the European Court of Human Rights*, in this issue.

II. National Bias

Why would we suspect an international judge is suffering from a national bias? The literature suggests four main reasons:

1. *Psychological* – Some judges are national patriots. They may be inclined to decide in favor of their country for reasons of loyalty and national pride.
2. *Economical* – Judges may want to curry favor with their country in the hope of getting some benefits in return. These benefits may include a support for reappointment, if such is possible, or a comfortable position in their country once they retire from the international court.
3. *Selection effect* – Judges may be selected because they hold certain political and ideological positions or because they are committed to certain legal dogmas. A judge with this incentive will rule a certain way only because she believes that is the right legal decision. But this would suit the interest of the state, which selected the judge exactly because of her specific beliefs about the law.¹¹
4. *Cultural* – Judges who were educated and gathered legal experience in their own country may be naturally inclined to see eye to eye with their country on many legal issues.¹²

There may be procedural solutions that could reduce every one of these biases. To reduce the psychological bias, judges are committed to complete impartiality by the court's rules. In the ICJ, for example, every judge has to make a "solemn declaration in open court that he will exercise his powers impartially and conscientiously".¹³ To reduce the economic bias, some international courts, for example the ICC, appoint judges for a non-renewable term.¹⁴ The ECHR even shifted from renewable to non-renewable terms.¹⁵ To reduce the selection effect, international bodies are often involved in the process of appointing the judges as shown above. The cultural bias may be somewhat mitigated by preferring judges with a more international profile, such as judges who studies in elite institutions abroad.

¹¹ See Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 608 (2005).

¹² See Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417, 420 (2008).

¹³ Statute of the International Court of Justice, Article 20.

¹⁴ Rome Statute of the International Criminal Court, Article 36(9)(a).

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 23(1) was amended by Protocol No. 14.

It is difficult to tease out from data about judicial votes which explanation accounts for the national bias of international judges.¹⁶ Nevertheless, some scholars have found creative ways to get around this problem. For example, a finding that ECHR judges are more likely to decide in favor of their governments if they can expect reelection instead of facing retirement, suggests that economic factors may be playing a significant part in the judges' decisions.¹⁷

Regardless of the underlying reasons for national bias, there is conclusive empirical evidence that international judges are in fact systematically biased in favor of their homelands.¹⁸ The only question is, does this bias actually affect the result of their judgments? International courts deliberately include representatives from a variety of countries and they sit in large panels, which usually means that the chances of a biased national judge to serve as the pivotal vote are very small indeed.¹⁹

It seems that the architects of international courts assumed that judges will suffer from a national bias, even if they didn't welcome this behavior. To counter that, they made sure that there will be plenty of other judges from different nationalities making the critical decisions. The general expectation that national bias cannot be erased may even be responsible for the practice of ensuring judges from all the involved states are present when the ICJ deliberates²⁰ and for the rule that a national judge will be added to every Chamber or Grand Chamber in the ECHR.²¹ If national judges are biased in any case, the best way to level the playing field is to ensure that they will take part in every decision, but they will be properly balanced by judges with other nationalities.

III. Coalitions Between Biased Judges

If every judge is independently biased in favor of her home country, the policy implications of this bias are minimized thanks to the careful design of international courts. The problem begins when biased judges form coalitions and gain the power to tip the scale in favor of a certain state or a certain legal argument.

¹⁶ See Posner & Figueiredo, *supra* note 11, at 608.

¹⁷ See Voeten, *supra* note 12, at 427.

¹⁸ See *id.* at 425; Posner & Figueiredo, *supra* note 11, at 624.

¹⁹ See Voeten, *supra* note 12, at 426.

²⁰ Statute of the International Court of Justice Article 31

²¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 26(4).

Coalitions between judges can be formed in at least three ways:

1. Judges are biased not just in favor of their own country, but also in favor of other countries that are either connected to it or similar to it.
2. Judges from certain countries systematically favor certain legal or ideological positions that are common both to them and to judges from other countries.
3. Judges do not decide independently; instead they influence each other and carry other judges with them towards making a certain legal decision.

The first two possibilities are not coalitions of judges who deliberately collaborate with each other. They are groupings of judges who happen to think or act in a similar way. The paper addresses these two possibilities before focusing on potential collusion between judges.

There is some evidence that judges in the ICJ are systematically biased in favor of countries that are similar to their own across a series of economic, political, and cultural dimensions.²² The concerns raised by this possibility are obvious. Even if judges do not influence each other, if a contentious case is heard by ICJ judges who mostly come from countries similar to one of the sides of the dispute, this side automatically gains an unfair advantage.

Judges may also form a systemic bias that doesn't favor a specific state but rather a specific judicial policy. Scholars have noted, for example, that ECHR judges from former socialist countries are more activist than other ECHR judges. They are more likely to find violations against their home countries as well as against other former socialist countries.²³ This type of bias, again, may raise a concern about the impartiality of judicial panels. A panel staffed with judges from a certain background may end up being systematically more likely to find violations compared to a panel staffed with judges from other countries.

Yet these two possibilities are still less dangerous to the impartiality of judicial panels than the potential risk of judges influencing each other. If the panels are large and diverse enough, the risk of forming a majority among judges which are all biased in the same direction can be minimized. But if a single biased judge holds the power to sway with her other members of the panel, diversity would not help. To investigate the magnitude of that risk, a better understanding of the motivations of judges is needed. This is the topic investigated by the field of Judicial Behavior, as the next part explains.

²² See Posner & Figueiredo, *supra* note 11 at 623–624.

²³ See Voeten, *supra* note 12 at 431.

C. What Happens When Different Judges Decide Together

Studies of Judicial Behavior developed primarily to explain the behavior of national judges, but they are increasingly applied to international courts as well. The most basic division of theories about Judicial Behavior speaks of three distinct groups of models:

1. *Legal models* - Judges simply uphold the law in their judgments.
2. *Attitudinal models* - Judges follow their own policy preferences in their judgments.
3. *Strategic models* - Judges try to promote their policy preferences strategically, by taking into account the expected decisions of other judges and changing their own decisions accordingly, to reach a certain policy goal.²⁴

Naturally, when the main concern is the bias of judges and their influence on each other, there isn't much to say about judges that fit the legal model. These judges are not biased by political concerns or policy goals. They simply do their best to decide according to the law. While it is possible that legalist judges would have a distinct vision of the law to which they are committed²⁵ and it is also possible that this vision would correlate with their home countries or the countries where they were educated, these judges, by definition, are not influenced by other judges and will not change their behavior in the hope of influencing others.

Attitudinal judges may be biased in favor of their country, but they are not affected by other judges. If every judge on the panel has only a miniscule chance to be the pivotal vote, national bias by attitudinal judges doesn't pose a real danger. In contrast, strategic judges may affect each other and form coalitions. If such judges are nationally biased, they may very well determine the result of the case in favor of some states and to the detriment of others.

To assess the danger of influence by biased judges, the analysis should start with understanding the policy goals of judges and how these policy goals affect their decisions on the bench. Complicated empirical tests have been devised by the literature to distinguish the actual ideological commitments of judges. Only by understanding the ideologies and behavior of individual judges can their behavior as a group be thoroughly understood.

²⁴ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44–114 (2002).

²⁵ See Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 485–486 (2001).

I. Attitudinal Models

The attitudinal model takes judicial decisions as sincere expressions of the judges' policy goals. According to this model, if the policy goals of judges can be discovered, their future decisions could be predicted with some accuracy.

Under certain circumstances, the identity of the appointing authority can serve as an excellent proxy for the judge's policy goals, as can aspects of their professional experience and social characteristics. However, the attitudinal model uses these parameters only as proxies to discover the policy goals of judges, not as instruments for predicting directly future judicial decisions. In contrast, there are scholars who use background characteristics of judges as a direct tool to predict judicial behavior.²⁶

Judicial background theories are agnostic about what judges are trying to achieve in their judgments. They only claim that certain facts about the background of the judges correlate with certain judicial decisions. The nature of this paper's inquiry is more ambitious because it tries to link judicial behavior—individually and in a group—with hypotheses about judicial policy goals, which are made based on observable facts.

The attitudinal model is committed to the idea that judges have consistent policy preferences that shape their decisions.²⁷ They do not change their preferences because of deliberation with their peers.²⁸ If judges believe in a wide protection of freedom of speech, for example, their judgments will consistently grant such a protection. In fact, judges can be arranged across a scale according to their policy views, for example from the most economically liberal judge to the most economically conservative judge.²⁹ Judges may also be arranged across several policy dimensions at the same time. A line would suffice to arrange judges across one policy scale. Two policy scales would require a surface and three scales can be described on a three-dimensional space. More scales can be added on to that, even if they cannot be modeled by a static physical depiction.³⁰

²⁶ See examples for factors studied by theories on judicial background at: Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions 1946–1978*, 75 AMER. POL. SCI. REV. 355, 355 (1981); Joel B. Grossman, Joseph Tanenhaus, *Toward a Renaissance of Public Law in FRONTIERS OF JUDICIAL RESEARCH* 3, 14 (ed. Joel B. Grossman, Joseph Tanenhaus, 1969).

²⁷ See SEGAL & SPAETH, *supra* note 24 at 86.

²⁸ Cf. J. Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 AMER. POL. SCI. REV. 43, 44 (1968). Howard argues that judges change their opinions following deliberations. For attitudinal responses to this argument see Nancy Maveety & John Anthony Maltese, *J. Woodford Howard Jr.: Fluidity, Strategy and Analytical Synthesis in Judicial Studies in THE PIONEERS OF JUDICIAL BEHAVIOR* 228, 234–237 (ed. Nancy Maveety, 2003).

²⁹ See GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED – PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY* 11 (1974).

³⁰ See *id.* at 18–19.

1. *Proving that judges are attitudinal*

There are several problems with proving that judges behave according to the attitudinal model. The first problem is that this model may end up being inherently circular. If judges behave sincerely the way they think they should behave and if the only way to decipher how judges think they should behave is to look at their actual behavior, the attitudinal model collapses into a tautology.³¹

The literature has come up with ingenious ways to solve the circularity problem. One way is to contrast the votes of judges in one period with their votes in another period. This method can help form testable hypotheses about judges' behavior based on their conduct in the past, even if it doesn't reveal the underlying ideology that motivates judges to behave a certain way rather than another.³²

A more sophisticated method involves checking for correlations between the votes of judges on one policy issue and their votes on another policy issue. One can hypothesize, for example, that judges who protect the right of criminal defendants would also act in favor of the weaker party in economic disputes. If a correlation between judicial behavior in these two fields is proven, it may reveal something about the nature of the judges' ideologies.³³

The most accurate way to test the attitudinal model, however, is to form a hypothesis about the judges' future decisions based on some exogenous indication of their policy views. Scholars have used newspaper editorials about judges' ideological commitments—published before these judges were appointed—to make such testable hypotheses.³⁴ Nevertheless, the most common way to hypothesize about the content of judges' future decisions is to examine the political affiliations of those who appointed them.³⁵ In a way, the literature on political decisions of international judges does exactly that. It looks at the judges' country of origin as a proxy for their political commitments and finds that judges are indeed biased in favor of their homelands.

³¹ See SEGAL & SPAETH, *supra* note 24 at 320.

³² *Id.* at 320–321.

³³ See Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals 1961–1964*, 60 AMER. POL. SCI. REV. 374, 379–380 (1966).

³⁴ See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AMER. POL. SCI. REV. 557 (1989).

³⁵ See RICHARD A. POSNER, *HOW JUDGES THINK* 20–22 (2008) (demonstrating how this investigation can be conducted in different ways and in varying levels of complexity).

2. *Distinguishing attitudinal and other judges*

Another problem with the attitudinal model involves distinguishing its predictions from the other models of judicial behavior. If the judge's policy goals in a certain case are perfectly in line with the content of legal doctrine, legalist judges and attitudinalist judges would behave exactly the same way and be indistinguishable.³⁶ If the best strategy is simply to act according to one's sincere preferences, attitudinal judges and strategic judges would also behave the same way.³⁷

The crucial distinction for the purpose of this paper is that between attitudinal judges and strategic judges. Attitudinal judges may be biased, but they cannot form coalitions that would determine the result in diversified panels. Strategic judges, in contrast, may form coalitions and sway the result in favor of their countries. Distinguishing attitudinal and strategic judges is so difficult because the only thing that would make a strategic judge behave differently from an attitudinal judge with the same policy goals is the environment they operate in. The strategic judge must find circumstances that make it beneficial for her to behave in a sophisticated way instead of sincerely following her preferences just like the attitudinal judge.³⁸ The researcher can make conjectures about the conditions that would make a strategic judge shift from sincere to sophisticated behavior, but if no evidence for sophisticated behavior is found, it doesn't prove the judge is not strategic. It may just as well indicate that the conditions are not such that would trigger sophisticated behavior by this type of strategic judge. In other words, maybe the conjecture is simply wrong.³⁹

3. *Role perceptions*

Even if valid hypotheses about attitudinal behavior are tested and confirmed and the possibility of strategic behavior is convincingly ruled out, judges may not behave as attitudinalist all the time. A judge with firm ideological commitments may make a conscious decision not to follow them. This fact may actually reduce the danger of national bias if judges decide to replace their pursuit of policy goals with adherence to the law.

The literature has struggled with the task of distinguishing between a judge that does not have clear preferences and a judge that has a policy preference, but decides not to follow

³⁶ See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158 (1998).

³⁷ See Virginia A. Hettinger, Stefanie A. Lindquist, Wendy L. Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AMER. J. POL. SCI. 123, 125–126 (2004).

³⁸ See *id.* at 126.

³⁹ See *id.*, at 135.

it. Scholars have managed to isolate the willingness of a judge to follow her policy preferences and called it the judge's "role orientation".⁴⁰

If the judge believes, for example, that her role is to decide cases in line with previous decisions of the same court, she may not vote in favor of her state even if she holds the same policy views of the state on the matter. A different judge may believe that it is part of his role to follow his policy preferences and will end up deciding differently from the first judge even if their policy preferences are in fact exactly the same. The factor that leads two judges with the same policy views to decide differently may simply be their "role orientation"—their beliefs about the legitimacy of following their preferences in their decisions.

The risk of biased decisions increases if judges think it is part of their role to follow their policy preferences. This risk may increase even further if judges believe their role is to promote their preferences strategically, which would make it possible to form coalitions of biased judges as discussed below.

4. *The influence of doctrine*

An attitudinal judge may have a role orientation that permits her to follow her preferences in her judgments, but still show some respect to legal doctrine. Judges can follow their policy preferences when legal doctrine is vague, ambiguous, or incomplete enough to leave room for judicial discretion. Not every case leaves room for judicial discretion, and even when judicial discretion does exist its boundaries are always limited.

American Legal Realists have mentioned three reasons for the existence of judicial discretion: (1) The law is indeterminate: it doesn't form only one legal solution because of the inherent ambiguity of language and because a text cannot foresee and address all the possible future circumstances⁴¹ (2) Often there are several conflicting rules relevant to the same problem⁴² (3) Applying rules to factual situations requires construing the facts according to legal categories, an act that involves discretion because the facts can be classified in several ways.⁴³

⁴⁰ See James L. Gibson, *Judges' Role Orientations, Attitudes and Decisions: An Interactive Model*, 72 AMER. POL. SCI. REV. 911 (1978).

⁴¹ See H. L. A. HART, *THE CONCEPT OF LAW* (1961) 124–126.

⁴² See Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 266 (Dennis Patterson ed., 1996); Hanoch Dagan, *The Realist Conception of Law*, 57 U TORONTO LJ 607, 614–615 (2007).

⁴³ See Leiter, *supra* note 42 at 266–267; Dagan, *supra* note 42 at 616.

Some scholars have argued that international law involves an even greater discretion than domestic law because it harbors no illusions of coming together to form one harmonious system. In international law, every rule is motivated by contradictory goals. Therefore, even if only one clear rule applies, it is always based on reasons that conflict with each other. Because following the rule isn't preferable to following any of the contradictory reasons behind it, judicial discretion always remains.⁴⁴

Other scholars disagree. They claim that in some cases international law is clear and doesn't leave any room for judicial discretion.⁴⁵ Such cases are known as "easy cases". A common example is the number of permanent judges at the ICJ. This number is 15 according to article 3(1) of the court's statute—a provision that leaves no room for interpretation.⁴⁶

Both sides of the debate would probably agree that courts are destined to deal with cases that are more complicated than most manifestations of the law. Cases that reach a court usually get there because parties disagree about the proper legal interpretation. In contrast, in most cases people understand the law and settle their disputes in accordance with its provisions.⁴⁷ Nevertheless, even in cases where judicial discretion exists, it isn't absolute. The law draws certain boundaries that judges cannot cross without transgressing the limits of the text.⁴⁸ Therefore, even an attitudinal judge is limited by the provisions of the law and cannot fully surrender to her national bias.

So much for the ideal view of judges who feel committed to follow the law even if it conflicts with their preferences. But what if the judge doesn't mind overstepping the boundaries of the law so long as she isn't caught? Or what if the judge doesn't know the full details of the law and needs to be reminded of her duty? These possibilities give rise to a curious phenomenon scholars call "the whistleblower effect".

The whistleblower effect is one potential explanation for an empirical finding that arises again and again in judicial panels: Judges tend to vote less according to their preferences when they sit with judges who hold different preferences. This finding remains even if the judge with the opposing preferences is a minority vote that cannot affect the result. According to those who believe in the whistleblower effect, judges act in this way because

⁴⁴ See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 590–591 (2005).

⁴⁵ See EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 21–22 (2014).

⁴⁶ See *id.* at 21.

⁴⁷ AHARON BARAK, JUDICIAL DISCRETION 58–66 (1987) (Hebrew).

⁴⁸ See *id.* at 35–41.

they are willing to ignore their preferences when another judge proves to them that their preferences contradict legal doctrine.⁴⁹ The whistleblower judge is motivated to investigate legal doctrine and confront her colleagues when the law is on her side. The other judges become informed of the legal situation and cannot hide the fact that their preferences contradict the law. At least some of the time, they would give up their preferences and conform to their legal obligations.

The upshot of all this is that even attitudinal judges will not always follow their preferences and are not always susceptible to national bias. If judges believe their role mandates that they behave differently than what their policy goals dictate, they may do so. If an attitudinal judge is confronted with doctrine that clearly opposes her ideology, she may decide to conform to the doctrine. Furthermore, even if all that fails, attitudinal judges cannot collaborate with other judges to form a majority that suits their biased view. This means that a diverse panel effectively remedies the problem of national bias among attitudinal judges. But that cannot be said about strategic judges, the subject of the next sub-part.

II. Strategic Models

There are multiple ways to think about strategic judges. Strategic models—sometimes referred to as models of the positive political theory of law⁵⁰—are only committed to the idea that judges act rationally to reach certain goals and make choices that depend on their expectations about the behavior of other actors as well as the institutional settings in which they act. Unlike the attitudinal model, which is committed to the idea that judges pursue policy, a strategic judge may pursue multiple possible motivations in conformity with these guidelines.⁵¹

If a strategic judge pursues a certain policy, for example if she harbors a bias in favor of her state, there must be at least some situations in which her decision would not sincerely

⁴⁹ See Cross & Tiller, *supra* note 36 at 2174. Another potential explanation for the same empirical finding is that even a minority judge can threaten to write a dissent which would increase the chances of appeal or legislative overruling and the other judges act strategically to preempt this by changing their judgments, *see id.* at 2173–2174. An alternative reason for why judges tend to lower their ideological commitments when sitting in a panel with judges who have other attitudes could be that judges negotiate a compromise to align the decision to the preferences of all panel member. Judge may even have a long-term strategy and consider the willingness of their panel members to compromise as part of an ongoing relationship where concessions are repaid in future cases, *see* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 64–66 (2006).

⁵⁰ See POSNER, *supra* note 35 at 29.

⁵¹ See Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L. J. 783, 798 (2003).

reflect her policy preference. Instead, she would act strategically to promote that preference, changing her decision conditioned on the expected behavior of others.

Imagine a simple example: A judge who prefers result A over result B and result B over result C. If this judge were attitudinal, her vote would be clear: she would always decide for result A. If this judge is strategic, however, she may sometimes make a compromise. She could vote for result B if she thinks this would affect other judges on the panel and lead to a majority judgment upholding result B, instead of result C—her least favorite outcome.⁵²

Judges may also think strategically about what happens after they issue their judgment, for example whether their judgment will be complied with or not. This possibility involves a collective strategy of the court as a whole and will be discussed in Part E below. For now, the strategic choice of judges is completely intuitive: A judge may decide to put forth exactly the position she prefers, or she may offer some compromise solution that may be accepted by other judges in the panel and become a binding judgment.

To make this analysis more concrete, assume a case in the ECHR about a salient political issue such as prisoners' right to vote. If the United Kingdom is accused of violating the right to vote, as it was in the famous *Hirst* case,⁵³ theory suggests there is some possibility that the British judge will be biased and prefer to allow a blanket ban on prisoners' voting. In a large panel of seven judges (Chamber) or seventeen judges (Grand Chamber), the chances that the British judge will cast the pivotal vote are very small indeed. But if ECHR judges are strategic, the British judge may offer a compromise position: for example, requiring countries to allow only prisoners with very short sentences to vote. If the British judge promises to join a majority opinion which includes this concession, other judges may be convinced and decide to tone down their judgment and accept this deal. Other judges may want to avoid a dissent that can damage the legitimacy of the judgment or they may view the compromise position as an easy focal point they can agree on, which explains their willingness to negotiate a bargain. While in this case the biased judge would not get a decision that fully conforms to her preferences, she would change the majority judgment, and with it the law.

How dangerous is this possibility? It all depends on how much leverage one judge has on the other judges in the panel. Can one judge change the behavior of many other judges? Do some judges have more power than others? Can judges make promises about their future behavior to increase their bargaining power in specific cases? These possibilities will be discussed in the following sub-parts.

⁵² See Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead*, 53 POL. RES. Q. 625, 632; LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 1–9 (1998).

⁵³ *Hirst v. The United Kingdom (No. 2)*, judgment of 6 October 2005, 2005-IX EUR. Ct. H.R. 187.

1. *Small groups dynamics*

The section of Judicial Behavior studies that deals with small groups dynamics is dedicated to investigating how judges can shape the behavior of other judges. Studies in the field have checked, for example, how "voting blocs"—groups of judges who vote together—emerge and how susceptible they are to influence by other judges on the same panel.⁵⁴

In order to gauge the danger that a biased national judge would carry enough judges from the minority voting block to form a new majority and shape the result, more must be known about the small groups dynamics in international courts. Relevant questions include: whether judges that form a substantial majority can still be convinced to alter their decision by minority judges? are there specific judges on the panel that usually decide together and form a more stable voting block? and most importantly: do some judges have a greater influence on the panel than others? This last question naturally calls for an investigation of who are the leaders among international judges.

2. *Patterns of leadership*

Scholars have discovered that in some settings judges with more prestige and experience write more opinions and receive greater support for their positions.⁵⁵ This result is hardly surprising. Everyone who reads judgments can easily discern that some judges have a much greater influence than others on the practice of their court and on the development of legal doctrine. The question is who are these judges?

An obvious place to look would be the judges' backgrounds. Judges with a stronger international reputation or more legal and judicial experience, may naturally be more powerful than other judges. The presidents of international courts have a special role in this regard. Beyond the formal powers which their title entails, it also puts them in a special position of leadership within the court. Scholars who investigated types of leadership of Chief Justices in the United States Supreme Court argued that to lead effectively, the Chief Justice has to combine the capacity to guide other judges in fulfilling their tasks with the social skills necessary to foster harmony on the court.⁵⁶ This clearly applies to presidents of international courts as well. Presidents who possess these two qualities will exert a large influence on the practice of their courts.

⁵⁴ See e.g. S. Sidney Ulmer, *Toward a Theory of Sub-Group Formation in the United States Supreme Court*, 27 THE JOURNAL OF POLITICS 133.

⁵⁵ See Thomas G. Walker, *Behavioral Tendencies in the Three-Judge District Court*, 17 AMER. J. POL. SCI. 407 (1973).

⁵⁶ See David J. Dannelski, *Social Psychology and Group Choice*, in THE PIONEERS OF JUDICIAL BEHAVIOR 248, 252 (Nancy Maveety ed., 2003).

This implies that powerful judges, and especially presidents, could have a disproportionate weight within their panel and change the result even against the resistance of several less powerful judges. If an especially powerful judge suffers from a national bias, there is a risk that the court's decision will be biased as well.

One could suspect that more powerful countries may be able to select more powerful judges. This problem may arise because a richer and more populated country may have access to better judicial candidates. A more ominous possibility is that judges would be able to stake the reputation and the clout of their home countries behind their legal position. If a judge from a powerful country threatens that her country will fail to comply with certain judgments, for example, her threat may carry some weight. To the extent that this danger occurs in international courts, it significantly increases the risk of biased results that favor the strongest countries.

3. Long-term strategy

A judge can try to convince other judges to accept her point of view. She can argue with judges on the panel, try to cajole them, and offer compromise solutions that may be acceptable to them. But can she offer other judges something in return for their help? If judges are not only concerned about the result of a specific case but about their long-term ability to sway the court in the direction they choose, they may strike deals with other judges. A judge could agree to vote with her colleague on one issue in exchange for the colleague's willingness to compromise in future cases. Furthermore, judges who think about the long-term may be motivated to preserve the credibility of their threat to issue a dissenting opinion. This means that a judge could issue a dissent knowing that she skips an opportunity to reach a compromise and allows a decision unfavorable to her to pass, only in the hope of getting more leverage vis-à-vis other judges in future cases. Qualitative studies of judicial behavior indicate that such complicated forms of strategy are indeed possible.⁵⁷

To the extent that international judges practice such long-term strategy, the risk that a committed judge with a national bias will get her way some of the time looms even larger. This judge may have to compromise in some cases to build goodwill with her colleagues. She would have to build a reputation for resolve in other cases. But in issues that are really important to her, a judge with a long-term strategy may force the court to steer in a certain direction.

⁵⁷ See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 90 (1964).

D. People Who Are Not Judges

I. Legal Staff

It is easy to adopt the misleading view that judges are the only people who really matter in international courts. After all, judges are the ones who sign judgments, and therefore it is natural to assume that it is only judges who make important policy decisions. But this imaginary view is probably mistaken with regards to many international courts.

Scholars have noted that the ECHR has a very influential legal staff, partly because judges who are not proficient in English and French, the two official languages of the court, must rely very closely on staff members.⁵⁸ In many international courts, especially criminal courts, the staff can number hundreds of experienced professionals.⁵⁹ It is naïve to think that these experts do not affect judicial policy.

To the extent one believes the legal staff is diverse and unbiased, the substantial impact of this staff may be a blessing. It could mitigate the influence that biased judges have on the practices of the court. But if the legal staff is hierarchically controlled, the people on the top of the pyramid may form a danger of an entirely different magnitude. In the ECHR, for example, all the staff members answer directly to the Registrar. The Registrar, in turn, is under the authority of the court's President. If either the Registrar or the President are biased, this bias could echo throughout the entire legal staff.

If the staff or the people controlling it are biased, they may direct the entire court to suit their preferences. This suggests that empirical research should not stop at investigating the selection of international judges. It should also study the selection and promotion of other legal staff within international courts, and it should put special emphasis on the positions in the court that control the legal staff.

II. Lawyers and NGOs as Repeat Players

Courts do not work in isolation. They constantly interact with lawyers who bring cases to the court, argue before it, and significantly affect the content of its decisions. Research has shown that many of the lawyers who appear before international courts are "repeat

⁵⁸ See Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 26–31 (2005).

⁵⁹ See Stéphanie Cartier & Cristina Hoss, *The Role of Registries and Legal Secretariats in International Judicial Institutions*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 712, 713–14 (Cesare P.R. Romano et al. eds., 2013).

players"—they litigate before the same court numerous times.⁶⁰ These repeat players gain legal expertise and connections that give them a unique influence on the policy made by the court. Just like with the legal staff on the court, this influence may either mitigate or exacerbate the biases of the judges depending on the nature of the legal community surrounding the court.

There are also Non-Governmental Organizations (NGOs) that have made it their explicit goal to shape policy-making by international courts. Such NGOs render crucial help to international courts by providing them with cases to decide and with legal arguments which they submit as litigants or friends of the court. They can also help international courts' public relations and assist them in monitoring compliance with their judgments.⁶¹ In return, NGOs get a real chance to shape the behavior of the court, or at least to change the long-term repercussions of the court's judgments on society, after these judgments are issued.

There is a potential danger in subjecting international courts to substantial influence by NGOs. Even collaborating with NGOs in the struggle to ensure compliance with judgments may be dangerous because it empowers NGOs to use potent reputational sanctions against certain countries. Some may fear that these reputational sanctions will be used unfairly. However, empirical research suggests that, at least in some settings, these fears are unmerited. NGOs that assist the ECHR in enforcing its judgments tend to focus their energies on the most severe violations and the most legally important cases. They do not pick on states that are considered by the international community to have weak reputations and focus instead on countries with good reputations that are expected to work hard to preserve them and to change their practices for the better following the efforts of NGOs.⁶² Of course, these findings do not necessarily apply to all international courts. They only suggest that to make a true assessment of the combined impact of international courts and the civil society organizations that cooperate with them, careful empirical study is needed.

E. From Individuals to the Court

So far, this paper focused on the behavior of individual judges, their biases, and their interactions with each other. But there is another way to investigate judicial behavior: studying the strategic behavior of the court as a whole.

⁶⁰ See Antoine Vauchez, *Communities of International Litigators*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 655, 657 (Cesare P.R. Romano et al. eds., 2013).

⁶¹ See Shai Dothan, *Luring NGOs to International Courts: A Comment on CLR v. Romania*, 75 HEIDELBERG J. INT'L L. 635, 642–650 (2015).

⁶² See Shai Dothan, *A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States*, 27 DUKE J. COMP. & INT'L L. 141 (2017).

Judges are human beings, but they do not act as individuals. They are selected for a certain purpose and undergo decades of education and training. They are charged with fulfilling a very specific task under a complicated set of procedural constraints.⁶³ The institutional structure that judges are embedded in affects the way they decide cases, even the way they think.⁶⁴ Judges may not be aware of the goals of the institution they work in, and still be pressured in numerous subtle ways to serve these goals.

Take a simple example: Certain times in a court's life call for presenting a united front and suppressing dissents. When the court is under attack or when it is faced with extremely controversial issues, it needs to project unity in order to garner compliance and to preserve its legitimacy. This doesn't mean that individual judges suddenly start to think about controversial issues the same way. In fact, these may be exactly the issues that divide the judges just like they divide society.⁶⁵ But it does mean that judges will be subjected to significant social pressures to silence their opposition. The result: The court as a whole will tend to issue more judgments unanimously.⁶⁶ Scholarship on the United States Supreme Court indicated that the Chief Justice is usually especially responsible for the pressures exercised on judges to suppress dissent.⁶⁷ The Presidents of international courts, because of their special position of leadership, may exercise the same function.

The strategic interest of the court puts a constant pressure on individual judges, shaping their decisions, sometimes unconsciously. This influence may mitigate the biases each judge harbors in favor of her country, but they may introduce other biases as well. This part focuses on strategic behavior of courts, either to achieve a specific result or to shape their long-term goals and powers. The court's strategic interest doesn't always translate to

⁶³ See Felix S. Cohen, *Transcendental nonsense and the functional approach*, 35 COLUM. L. REV. 809, 843 (1935).

⁶⁴ See generally on the way institutional structure affect behavior: JAMES MARCH AND HERBERT SIMON, *ORGANIZATIONS* (1958) chapter 6.

⁶⁵ See P. S. ATIYAH & ROBERTS SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW – A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS* 288 (1987).

⁶⁶ See SHAI DOTHAN, *REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS* 39–45 (2015) (expanding on the theoretical analysis of dissents in strategic courts and providing multiple examples of judges who were pressured not to dissent to serve the court's strategic interest).

⁶⁷ See Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 228, 243 (2009) (arguing that Chief Justice Marshall directed the United States Supreme Court to use more unanimous decisions when the status of the court was relatively low); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1314–1319 (2001) (showing how in the first half of the 1920s the United States Supreme Court under Chief Justice Taft suppressed dissents because the court came under heavy criticism. When the criticism subsided, the court became less unanimous. After the court's strategic analysis, pages 1319–1328 present alternative reasons for this phenomenon such as changes in the composition of the court and in Taft's leadership).

matching judicial behavior by every one of the judges. It is entirely possible that judges would put their own interest over that of the court, or even that they would use the delicate position of the court to boost their leverage vis-à-vis other judges. Nevertheless, long-term patterns in the court's behavior would largely conform to the court's strategic goals, as the idiosyncratic behaviors of individual judges balance themselves out.

Another perspective on judicial behavior zooms out even further than the court as a unit. Institutional theories of judicial behavior study the court as an institution embedded in a larger political context.⁶⁸ While rational choice institutional theories share the premises of this part and view the court as navigating strategically within a complicated political arena, historical institutional theories view the permutations of the political context over time, and social institutional theories analyze the court in light of general social structures such as class, race, gender, or religion.⁶⁹ These institutional theories require a much broader investigation than the one attempted here.

1. Short-Term Strategy of Courts

Short-term strategic models of courts are concerned with what happens after the court issues its judgment: is the judgment complied with? What is the impact of the judgment on society? These models argue that the potential reactions to the court's judgment shape the behavior of the court itself. In other words, the court as a whole changes its behavior in light of the expected responses of other actors.

Models of short-term strategy of national courts can get pretty complicated. They try to think a few steps ahead and see how the interaction of multiple actors would play out and what this means for the actual implications of the court's judgments. For example, a strategic court may decide differently than the combined policy preference of the judges as a group in order not to give a legislative committee an incentive to initiate a legislative process, opening up the possibility for the legislator to set policy far away from the court's preferences.⁷⁰ Other actors could be added to this strategic game, each with its own incentives and powers.⁷¹

⁶⁸ See Cornell Clayton & Howard Gillman, *Introduction*, in *THE SUPREME COURT IN AMERICAN POLITICS – NEW INSTITUTIONALIST INTERPRETATIONS* 1, 2 (Howard Gillman & Cornell Clayton ed., 1999).

⁶⁹ See Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING – NEW INSTITUTIONALIST APPROACHES* 1, 6–7 (Cornell W. Clayton & Howard Gillman ed., 1999).

⁷⁰ See Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 *AMER. POL. SCI. REV.* 28 (1997).

⁷¹ See e.g. William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 *CAL. L. REV.* 613 (1991); William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*,

Multiple actors can certainly appear in the international arena as well, but to keep it simple let's imagine that each international court is faced with one state found in violation of international law that can either comply or fail to comply with its judgment. Assuming that the court wants the state to comply, it might offer a compromise solution that is more likely to garner compliance than the sincere preferences of the judges. Even if a majority of ECHR judges, for example, would prefer to grant transsexuals the right to marry partners of their opposite current sex, the judges may suspect that states would fail to comply with such a judgment. Consequently, they may decide to defer to the states and adjust their judgment in such a way that most European states would comply with it.

Clearly, a short-term strategy offers new possibilities of bias. If a certain state is reluctant to comply, it may receive more lenient judgments than more cooperative states, in the hope that it would make some small concessions to the court. Judges may consider that as they vote or write their opinions. They may change the tenor of their conduct as a result.

II. Long-Term Strategy of Courts

Judges internalize the court's concern for compliance with specific cases, but if they do that, why wouldn't they be concerned with the court's long-term ability to garner compliance with all of its judgments? The scholarship in the field has realized long ago that international courts are strategic actors with a particular interest in their ability to ensure their judgments are complied with.⁷² Scholars have debated whether judicial independence harms the courts' potential to ensure compliance with demanding judgments,⁷³ or instead whether a limited amount of independence actually helps the court.⁷⁴ The prevailing view seems to be that international courts must take into account a series of political constraints as they set out to make policy.⁷⁵ They should also consider other goals besides compliance with their judgments, because the states and organizations that created them assigned them a wider role.⁷⁶

101 YALE L. J. 331 (1991); Omri Yadlin, *Judicial Activism and Judicial Discretion as a Strategic Game*, 19 BAR ILAN UNI. LAW REV. 665 (2003) (Hebrew).

⁷² See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

⁷³ See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

⁷⁴ See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

⁷⁵ See Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005).

⁷⁶ See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AMER. J. INT'L L. 225 (2012).

The question is, how should courts do that? How should they set their long-term strategy to achieve their goals? Naturally, there could be many answers to such a broad question, but this paper focuses on one answer on which I elaborated elsewhere at some length.⁷⁷

International courts regularly require states to change their practices in ways that are financially and politically demanding. States comply with such judgments because they calculate that failing to comply would portray them as having a bad reputation for compliance with international law, damaging their relationships with other states. The key for exerting a real influence on states is to increase the potential reputational sanction on states that do not comply. International courts use a series of judicial tactics to build their own reputational capital so that when they order a state to do something, this order will be accompanied with a threat of a serious reputational sanction.

The judicial tactics used by courts are complicated and context-specific. An interesting, perhaps counter-intuitive result, is that courts build their reputation by deliberately issuing demanding judgments and using reasoning techniques that expose their discretion. Compliance with such judgments is harder and more unexpected and that is why when states do comply, they send a potent signal that boosts the court's reputation.

Importantly for the purposes of this paper, international courts are also advised to treat different states differently. States that enjoy a high-reputation for compliance with international law pose a greater threat to the court. Their non-compliance or even their criticism can significantly harm the court's reputation. To counter this threat, international courts treat high-reputation states more leniently than they do low-reputation states. They will reserve their most demanding judgments—especially those that are based on doctrinal novelties—to states that have a low-reputation.

Obviously, this form of behavior is a threat to judicial objectivity. To the extent that individual judges are pressured to serve the court's long-term interest in this way, it may make them far more biased than any personal incentive discussed above. Judges may use ingenious ways to profess evenhandedness even as they pursue the dangerous course that promises their court greater power in the future.

Greater power for the court implies greater power for each of the judges, a fact which may motivate at least some judges to consciously pursue the tactics that are beneficial for the court. Other judges may follow as a result of peer pressure, or simply copy judicial practices of others without deconstructing the motivations behind them. Either way, the

⁷⁷ See DOTHAN, *supra* note 66, Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115 (2011).

strategic interest of international courts shapes their judgments and the conduct of judges within them in ways that could bias the court's decision for or against certain states.

F. Conclusion

The reader clearly realized by this point that this paper offers more questions than answers. The power of Judicial Behavior studies—at least for the purpose of this paper—is that it allows scholars of international courts to ask the *right* questions.

The finding that international judges are biased in favor of their home countries is incredibly robust. But to go from that finding to observations about the level of independence of international courts as a whole requires answering a series of complicated queries: are judges attitudinal or strategic? How much can judges influence each other? What is the influence of other actors besides judges on judicial policy? And how do judges internalize the strategic calculations of the court as a whole? To answer these queries, numerous empirical studies can be devised drawing inspiration from generations of scholarly work done mostly on national courts.

Some of these quantitative empirical investigations may seem too complicated, even unfeasible at this point. There may be other ways to go around the problem though, such as conducting serious qualitative work, including interviews with judges that can help uncover their motivations. Another possibility is to attack the problem from a different angle, for example by trying to study the politics of judicial selection in the hope that officials who choose the future international judges know more about their practices than scientific research can currently reveal.⁷⁸ Studies of these kinds may actually bring to light the best way to address the problem of national bias: through institutional design directed at improving judicial self-government. A clear example is allowing judges or Presidents of international courts greater influence on the appointment of their future peers. The jury is still out on the question of national bias by international courts, but each new study brings us closer to the truth.

⁷⁸ See e.g. David Kosař, *Selecting Strasbourg Judges: A Critique*, in SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 120 (Michal Bobek ed., 2015); Cosette Creamer & Zuzanna Godzimirska, *The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice*, 30 LEIDEN J. INT'L L. 947 (2017).