

# The Politics of International Judicial Appointments

Erik Voeten\*

## I. INTRODUCTION

How, if at all, do governments influence the choices that international judges make? This question has justly received ample attention in the literature. Unlike in the study of American judicial politics, however, relatively few of these scholarly efforts have been devoted to the question of how governments use the appointment process to shape the international judiciary. There are some good reasons for this. International courts cannot easily be stacked with like-minded judges by a single government. Moreover, (threats of) noncompliance and withdrawal of institutional support are more credible mechanisms for influencing judicial behavior in most international settings than in established liberal democracies.

Yet the politics of the appointment process does shape the composition of the international judiciary in interesting ways. International judges are much more diverse in their backgrounds and preferences than is commonly assumed. To some, the prototypical international judge is a committed professional with exceptional moral standards who cares deeply about the advancement of international law and is largely unresponsive to material incentives or political pressures. To others, international judges are more like diplomats who use legal reasoning as a guise for making decisions that fit the national interests of the governments that appointed them.<sup>1</sup> To the extent that empirical research exists, it appears to show that the international judiciary contains examples of both these ideal types as well as many others. More interestingly, this research suggests that this variation can be understood reasonably well by examining the

---

\* Peter F. Krogh Assistant Professor of Geopolitics and Global Justice at Georgetown University's School of Foreign Service. I thank Eric Posner for several valuable comments.

<sup>1</sup> These ideal types are sometimes referred to as "trustee" or "agent." For a general discussion, see Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 *Eur J Intl Rels* 33 (2008).

motivations of governments and the institutional details of the appointment process.

This Article evaluates what we know about the politics of international judicial appointments and identifies some areas for future research. Although the conclusion offers some discussion of the normative implications of this research, this is deliberately not an attempt to identify how the appointment process *should* work, but rather an exploration of if and how governments do use the appointment process to shape the international judiciary. Theoretically, the Article draws from the broad framework of principal-agent theory, in which governments are the multiple principals and judges the multiple agents. This framework does not assume that the agents always do what the principals want them to do. In fact, the incentives that governments have for delegating a task to agents typically imply that the agents should have at least some leeway in how they will execute this task. The precise manner in which governments do affect judicial behavior through the appointment process depends on the motivations of judges and governments, as well as on the institutions that govern the appointment and retention process.

Theoretically, governments can use the appointment process to influence judicial behavior in two ways. First, they can select judges whom they expect to make decisions that match their perceived interests. For example, in the American context, liberal administrations tend to appoint more liberal judges than conservative administrations. Similar selection behavior is also common in other liberal democracies and, presumably, in less liberal states. An obvious difficulty with this strategy is that governments have imperfect ex ante information about how judges will behave while on the bench. Yet, governments may be able to make reasonable inferences from past behavior, interviews, or the political and professional backgrounds of prospective international judges.

Second, governments may use (threats of) ex post sanctions and rewards to provide incentives to judges. There is a large body of evidence in the American context that shows that the method of retention is an important source of influence on judicial behavior. For example, trial judges who are retained through popular elections are much more punitive in their sentencing behavior than appointed trial judges, presumably because the electorate favors tough sentences.<sup>2</sup> More generally, there is considerable evidence that domestic judges, like everyone else, are at least partially motivated by material or career incentives.<sup>3</sup> It is at least plausible that reappointment processes have effects on

---

<sup>2</sup> Gregory A. Huber and Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 Am J Pol Sci 247, 250 (2004).

<sup>3</sup> For a general discussion, see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 S Ct Econ Rev 1 (1993).

international judges as well, given that their prospects for prestigious international judicial careers depend in large measure on the willingness of national governments to advance their candidacies for high international judicial office.

It is not entirely clear if and how governments are actually willing and able to use the international judicial selection process in this way. First, while in the American context we may reasonably presume that liberal governments prefer liberal judges, a similar link between ideology in the political and judicial arenas is much less obvious in international affairs. As such, we need to examine the motivations that governments have when they appoint judges. I argue that past research has made overly simplistic and homogenous assumptions about what motivates governments when they interact with international courts, including when they appoint judges. Governments are neither simply picking the best qualified candidate nor are they singularly obsessed with limiting sovereignty costs, although both motivations are sometimes important. There are also circumstances under which governments would like to use judicial appointments to signal a credible commitment to a certain cause or to advance norms of liberal internationalism. At other times, judicial appointments appear motivated by concerns about the distributional consequences of international court rulings. Finally, and not unimportantly, governments frequently pick candidates for international judgeships to reward political loyalty rather than merit. Section II discusses the consequences of these governmental motivations for the functioning of the international judiciary.

Second, international courts are, by definition, formed by multiple governments. As such, the influence of any one government is inherently limited. There is important variation in institutional details across international courts that shape the ability of governments to influence judicial behavior. On some courts, all or some governments have a *de jure* or *de facto* right to appoint a judge. On other international courts, votes in multilateral institutions determine whether a country will have a national serving on the court. Some international judges are appointed on a case-by-case basis, others for relatively short renewable terms, and again others for long nonrenewable terms. Sometimes the behavior of international judges may not be easily observable since the decisionmaking process is shrouded in secrecy (that is, there are no public minority opinions). The extent to which these and other institutional details affect what types of judges are appointed and how well national governments are able to influence them is the topic of Section III.

## II. WHAT MOTIVATES GOVERNMENTS WHEN THEY APPOINT INTERNATIONAL JUDGES?

Treaties that establish international courts typically stipulate that “judges shall be of high moral character” and possess the required qualifications for appointment to high judicial office.<sup>4</sup> These criteria leave considerable room for discretion. That such discretion is exercised can be inferred from the remarkable variation in the backgrounds of international judges. For example, a recent study showed that about one-third of the judges on the European Court of Human Rights (“ECtHR”) had experience as judges on high national courts.<sup>5</sup> Around one-fourth of the judges were recruited from the corps diplomatique or domestic bureaucracies of states. The remainder of the judges were academics, politicians (including former ministers of justice and parliamentarians), and private lawyers with experience in human rights litigation. Another study revealed a similar distribution for the international criminal tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”).<sup>6</sup> At the time of election, about half of the new judges held a high national judgeship and about one-fourth of the new judges held a nonjudicial governmental position (mostly as diplomats), whereas the remainder were academics, international judges on other courts, or human rights lawyers. About 70 percent of international criminal judges held an official nonjudicial governmental function at some point before accessing their international judgeships, whereas about 20 percent of the judges had held a significant official position with an activist non-governmental organization.

These different career backgrounds have predictable behavioral implications. For example, in previous research I showed that ECtHR judges who were former diplomats show a much greater respect for the *raison d'état* than do ECtHR judges who spent the majority of their careers in private practice or who were academics.<sup>7</sup> This means that diplomats were more likely both to favor their

---

<sup>4</sup> See, for example, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 21, 213 U.N. Treaty Ser 221; Rome Statute of the International Criminal Court (1998), art 36(3), U.N. Doc No A/CONF.183/9, reprinted in 37 ILM 999 (1998) (“Rome Statute”).

<sup>5</sup> For more details on data collection, see generally Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 Intl Org 669 (2007). Data is available from Erik Voeten, *European Court of Human Rights*, available online at <[http://www9.georgetown.edu/faculty/ev42/ICdata\\_files/Page364.htm](http://www9.georgetown.edu/faculty/ev42/ICdata_files/Page364.htm)> (visited Dec 5, 2008).

<sup>6</sup> Allison Danner and Erik Voeten, *Who Is Running the International Criminal Justice System?* 12–13 (unofficial pagination) (unpublished article) (on file with the author).

<sup>7</sup> See Voeten, 61 Intl Org at 696–97 (cited in note 5). See also Fred J. Bruinsma, *Judicial Identities in the European Court of Human Rights*, in Aukje van Hoek et al, eds, *Multilevel Governance in Enforcement and Adjudication* 203, 203 (Intersentia 2006).

own government in a dispute and to grant a wide margin of appreciation to states more generally. There are also other ways in which governments may glean how judges will likely behave once elected. Richard Steinberg found that both the EU and the United States Trade Representative conducted extensive interviews with candidates for the World Trade Organization's ("WTO") appellate body with an explicit focus on the degree to which the candidate can be expected to have an expansive view of judicial decisionmaking.<sup>8</sup>

The rationale underlying international judicial appointments remains mostly implicit in both the law and political science literatures. The law literature is concerned that governments may not always advance the most qualified candidates for international judgeships,<sup>9</sup> but little is known about what does motivate governments in selecting international judges. Most political science theories assume that governments are predominately motivated by limiting the extent to which judges are activist in their rulings, although these theories vary in their assessment of how successful governments are likely to be at reining in judges.<sup>10</sup> The assumption that governments desire restraint implies that governments should seek to appoint diplomats or others who can be expected to exercise restraint on the bench.

A plausible explanation for the apparent variety in the activist tendencies of international judges is that governments may have other motivations than preventing sovereignty costs or selecting the "best" candidate when appointing judges. The following subsections examine four such motivations and their implications for judicial behavior. In the order in which they will be discussed, these motivations are that governments: (a) may want to appoint independent judges to increase the credibility of their commitments to a certain cause; (b) may be motivated by the distributive implications of court judgments; (c) may be influenced by norms of what an appropriate judge should be; and (d) may use international judicial appointments as a form of patronage.

---

<sup>8</sup> Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 Am J Intl L 247, 264 (2004).

<sup>9</sup> The most systematic empirical overview that examines the characteristics of international judges across courts is Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford 2007). For an assessment that the appointment process can generally be expected to be politicized, see generally Ruth Mackenzie and Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv Intl L J 271 (2003).

<sup>10</sup> For an overview of these debates, see Alter, 14 Eur J Intl Rels at 34–35 (cited in note 1).

## A. JUDICIAL APPOINTMENTS AND CREDIBLE COMMITMENTS

First, some governments prefer delegation to an independent international court because they want to make a credible commitment that they will adhere to a certain set of goals. Following this line of reasoning, the primary function of international courts is that they constrain government behavior by limiting the types of policies governments can implement. Such constraints are credible only when judges are truly independent from governmental pressures and dedicated to the policies to which a government wishes to commit.<sup>11</sup> Incentives to create these constraints are analogous to the well-known incentives governments may have to appoint conservative and independent central bankers if they want to limit inflation in the long run.

The credible-commitment argument is most often made in the context of international human rights courts. New and unstable democracies may want to commit to an international human rights court to lock in future governments that may be less inclined to protect human rights<sup>12</sup> or to send a costly signal to other states that they are committed to protecting human rights.<sup>13</sup> Such a signal may be especially valuable in the context of regional integration, such as in the European Union. The implication is that different governments may have different incentives to appoint judges who are likely to be activist. In earlier research, I indeed found that new democracies that aspired to EU membership were more likely than other democracies to appoint ECtHR judges with an activist streak, including a willingness to vote against their own governments.<sup>14</sup> Older democracies already had a credibly established human rights record, and were thus more concerned about sovereignty costs. New democracies not in the picture for EU membership did not have the same incentives as others to appoint more activist judges.

International criminal tribunals are other plausible examples of credible commitment. Independent tribunals that are not subject to state intervention plausibly help states credibly signal that they are interested in bringing war criminals to justice and deterring future war crimes rather than the politicized exercise of victor's justice. If the former were the primary aim of governments,

---

<sup>11</sup> Note the analogy to the argument that governments voluntarily erected checks and balances on their behavior in order to credibly commit to policies that advanced economic development, most notably refraining from expropriation of private property. See Douglas C. North and Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J Econ Hist 803, 803–32 (1989).

<sup>12</sup> Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Intl Org 217, 220, 222 (2000).

<sup>13</sup> Voeten, 61 Intl Org at 670–71 (cited in note 5).

<sup>14</sup> Id.

then the grant of discretion to judges would have a fiduciary character, with little use for oversight or ex post accountability to states. In fact, any perception that judges or prosecutors could be removed for failing to implement the wishes of their principals would undermine the purpose for which the tribunal was created.

An examination of retention decisions shows some evidence for this. While there are examples of international judges who were not retained, this only rarely appears to be because of the content of the decisions that they took while on the court. The General Assembly has sanctioned ICTY and ICTR judges for lethargy and other evidence of incompetence,<sup>15</sup> but not because of their interpretations of war-crimes law or their decisions to acquit or convict individuals. On the ECtHR, I found three instances where there was some suggestion that judges were removed because of decisions they made, although in each instance the decision was also accompanied by a change in domestic government.<sup>16</sup> The most notable was the Moldovan judge Pantiru, who was ousted by the newly elected Communist government, which vowed to only “send real patriots” to Moldova’s “diplomatic missions.”<sup>17</sup> Similarly, four governments allegedly replaced activist judges on the European Court of Justice (“ECJ”) following the controversial 1994 *Codorniu* judgment.<sup>18</sup> Again, these decisions were accompanied by changes in government.

There is therefore no evidence that governments systematically sanction permanent judges who make unfavorable decisions, although it does occur at times. As explained later in this article, this may well be different for ad hoc or ad litem judges.<sup>19</sup> Moreover, the threat of post hoc removal does not need to be exercised to be effective. I found that ECtHR judges from countries with lower income per capita were less likely to find violations against their own governments than judges from wealthier countries.<sup>20</sup> Presumably the former judges were more worried about losing their jobs as the opportunity costs were

<sup>15</sup> See, for example, the discussion of Judge Adolphus Karibi-White in Section II.D.

<sup>16</sup> This concerned Moldovan judge Pantiru, Bulgarian judge Gotchev, and Slovakian judge Straznicka. See Erik Voeten, *What Motivates International Judges? Evidence from the European Court of Human Rights*, 2007 Am Pol Sci Assn Ann Meetings 12, available online at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=705363](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=705363)> (visited Dec 5, 2008).

<sup>17</sup> *Communists Announce Possible Recall of ECHR [sic] Judge Tudor Pantiru*, Moldova Azi, April 6, 2001, available online at <<http://www.azi.md/news?ID=1415>> (visited Dec 5, 2008). Judge Pantiru did not dissent from a finding of a violation in *Metropolitan Church of Bessarabia and Others v Moldova*, no 45701/99, Eur Ct HR 2001-XII, one of only two judgments on Moldova during his judgeship.

<sup>18</sup> Olivier Costa, *The European Court of Justice and Democratic Control in the European Union*, 10 J Eur Pub Poly 740, 757 n 15 (2003).

<sup>19</sup> See Section III.A.

<sup>20</sup> See Voeten, 2007 Am Pol Sci Assn Ann Meetings at 22–23 (cited in note 16).

larger. (Salaries for international judges are much higher than judicial salaries in the poorer European countries.)

## B. JUDICIAL APPOINTMENTS AND THE DISTRIBUTIVE EFFECTS OF COURTS

A second rationale for the creation of independent international courts is that they serve as mechanisms for resolving disputes between states. In this view, courts are not so much established to constrain governments but to help enforce contracts (treaties) between governments. Disputes over the terms or interpretation of treaties may be settled through diplomatic means or through delegation to a third party. The latter solution reduces transaction costs, but also has distributional consequences. In a diplomatic resolution, relative power should matter much more than when disputes are settled through legal means. As such, less powerful states should be much more likely to favor less political control and more independence of judges. Moreover, active enforcement of treaties that establish free trade or regulate access for foreign investors is more desirable to states that are net exporters of goods and capital. So, in the EU context we should see that small exporting economies are most favorably disposed towards a court that actively seeks to enforce a common market.

The primary examples in international law are the ECJ, the WTO dispute-settlement understanding ("DSU"), and various arbitration mechanisms. There is considerable evidence for the general claim that increasing trade flow led to a more activist ECJ.<sup>21</sup> In the WTO context, there is also substantial confirmation that the most powerful players, the EU and US, are most active in their attempts to influence the DSU, especially its appellate body.<sup>22</sup> However, little is known about which governments are most likely to appoint what types of judges. There is virtually no research on judicial appointments and judicial behavior on these courts. This is primarily due to data limitations, especially the absence of public dissenting opinions, making it difficult to assess heterogeneity on the court.

In research on the ECtHR, I found that governments with open economies and those more favorably disposed towards European integration tended to advance candidates for ECtHR judgeships with a more activist orientation. Governments that were more skeptical towards supranationalism appointed judges who exercised more self-restraint on the bench. Thus, governments that

---

<sup>21</sup> See, for example, Alec Stone-Sweet and Thomas Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 Am Pol Sci Rev 63, 69 (1998).

<sup>22</sup> Steinberg, 98 Am J Intl L. at 274 (cited in note 8).



appeared to have more to gain from an activist court appointed more activist judges.<sup>23</sup>

Another implication is that geopolitics may matter, in that judges may favor respondent states that are political, military, or economic allies of their national governments in dispute resolution. I did not find such an effect in the context of the ECtHR.<sup>24</sup> Yet, in the ICJ context, which involves direct disputes between governments, Eric Posner and Miguel de Figueiredo found that judges do tend to be more favorable towards disputants at similar wealth levels and from similar regime types as their home countries.<sup>25</sup> Both variables can be thought of as proxies for similar geopolitical interests.

Finally, the distribution of nationalities of judges on courts may be an indication that governments do worry about the distributional outcomes of international courts' decisions. For example, if making a credible commitment to refrain from victor's justice were the only motivation for appointing ICTY judges, then we would have expected an overrepresentation of judges from liberal countries who were not engaged in the conflict. However, judges from NATO countries were vastly overrepresented on the ICTY, even in comparison to non-NATO liberal democracies.<sup>26</sup> It may thus be that NATO members wanted some reassurance that their national interests were guarded.

### C. NORMS AND INTERNATIONAL JUDICIAL APPOINTMENTS

Third, international norms may play a role in whom governments wish to advance for international judgeships. Two types of norms may be important. First, governments may create international courts because they wish to establish a liberal international order, in which the rule of law plays a greater role. Such motivations may be strongest for liberal democracies. Liberal democracies have generally been most active in creating international courts, especially international human rights courts and criminal tribunals. It is plausible that governments more inclined towards liberal internationalist norms would advance candidates for international judgeships that are likely to advance these norms on the court. Although there is no direct support for this, there is some evidence that liberal internationalist governments are more active in advancing their candidates for judgeships. Countries with high levels of civil liberties at home were more likely to have their candidates for international judgeships elected on

<sup>23</sup> Voeten, 61 *Intl Org* at 670–71 (cited in note 5).

<sup>24</sup> Voeten, 2007 *Am Pol Sci Assn Ann Meetings* at 4 (cited in note 16).

<sup>25</sup> Eric A. Posner and Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 *J Legal Studies* 599, 616–17 (2005).

<sup>26</sup> Danner and Voeten, *Who Is Running the International Criminal Justice System?* at 10 (unofficial pagination) (cited in note 6).

international criminal tribunals than were other countries.<sup>27</sup> Moreover, more internationalist countries (as measured by their participation in UN peacekeeping operations) were more likely to get their judges elected.<sup>28</sup> If liberal internationalist governments are more successful in advancing their judicial candidates, it would seem likely that the median international judge on a court is more liberal-internationalist than the median member state of that court. This result may not hold for courts that are less motivated by liberal internationalist norms, such as the ICJ.

Second, there may be professional norms that emerge about what the appropriate qualifications are for an international judge on a particular court. In studying judicial appointments to international criminal tribunals, Allison Danner and I found that the variation in professional backgrounds of successful candidates decreased over time.<sup>29</sup> There appeared to be a convergence towards high-level national judges as appropriate candidates for judgeships.<sup>30</sup> The model of the academic as international criminal judge decreased dramatically in popularity as concerns about the efficiency of the tribunals increased. (Academics were frequently accused of lengthening proceedings and writing long dissents.) After the first round of ICTY elections, only three academics were newly elected onto the court. All three were citizens of permanent UN Security Council (P-5) members: US law professor Theodor Meron (ICTY, 2001), Russian professor Sergei Egorov (ICTR, 2003), and Chinese professor Tieya Wang (ICTY, 1997). That only P-5 members, who were relatively assured of success, would propose academics as International Criminal Tribunal judges suggests that academics generally do not fare as well in elections as candidates with other qualifications. We confirmed this intuition through a multivariate analysis of election results.<sup>31</sup> As discussed below, the influence of such professional norms is likely to be greater in the context of competitive judicial elections than when each state has a right to appoint a national.

#### D. JUDICIAL APPOINTMENTS AS PATRONAGE

Fourth, governments may have more parochial motives for international judicial appointments. For some international courts, governments may simply not care all that much about decisions. They may want representation more for prestige than out of a desire to influence decisions. International judicial

---

<sup>27</sup> Id at 11 (unofficial pagination).

<sup>28</sup> Id at 13 (table 1) (unofficial pagination).

<sup>29</sup> Id at 13–14 (unofficial pagination).

<sup>30</sup> Id.

<sup>31</sup> Id.

appointments may be an opportunity for governments to reward loyal functionaries. International judgeships are often well-compensated, prestigious, and located in reasonably attractive locations.<sup>32</sup> For example, the annual salary of ECtHR judges was about 189,000 Euro, free from income tax.<sup>33</sup> This salary is high in comparison to what legal practitioners earn in many European countries. For example, the estimated annual salaries of constitutional court justices in Moldova and Slovakia were only 9,000 and 28,000 Euro respectively.<sup>34</sup>

That patronage is a factor is suggested by an independent evaluation of the ECtHR appointment process conducted by Interights, which concluded that “[e]ven in the most established democracies, nomination often rewards political loyalty more than merit.”<sup>35</sup> A change in party control of government is the most frequently mentioned reason for why ECJ judges are not renewed.<sup>36</sup> There are many examples of this phenomenon in the ECtHR as well. The Austrian judge Führman, a former Social-Democratic parliamentarian, was replaced after his party lost domestic elections. Similarly, in 1998 Bulgaria did not put its sitting judge Gotchev on the nominee list after the Socialists lost in elections.<sup>37</sup> Such shifts could of course be motivated by ideology but, as the Interights report suggests, it appears that pure patronage matters as well.

If political loyalty rather than merit are reasons for appointment and retention, this raises concerns both about the quality of international judges and the effort they put into their work. Especially problematic in the early years of

<sup>32</sup> Arusha is a notable exception and the ICTR has had great difficulties attracting and keeping the highest-quality judges.

<sup>33</sup> Based on 2004 data. On July 26, 2008, this was equivalent to US\$ 296,141. The President of the Court receives an additional € 12,092 and the Presidents of Sections an additional € 6,046. *On the Status and Conditions of Service of Judges of the European Court of Human Rights*, Committee of Ministers Res (2004) 50 (Dec 15, 2004).

<sup>34</sup> Based on 2000 data. World Bank, *Worldwide Legal and Judicial Indicators*, available online at <<http://www4.worldbank.org/legal/database/Justice/Pages/jsIndicator1.htm>> (visited Dec 5, 2008). These salaries were not tax-free.

<sup>35</sup> Jutta Limbach et al, *Law and Practice of Appointments to the European Court of Human Rights* 4 (Interights 2003).

<sup>36</sup> See generally Karen J. Alter, *Who Are the Masters of the Treaty? European Governments and the European Court of Justice*, 52 Intl Org 121 (1998).

<sup>37</sup> But see generally Jean-François Flauss, *Radioscopie de l'élection de la nouvelle Cour européenne des droits de l'homme*, 9 Revue Trimestrielle des Droits de l'Homme 435, 440 (1998), English translation available in Limbach et al, *Law and Practice of Appointments to the European Court of Human Rights* at 67–83 (cited in note 35). Flauss alleges that this occurred because of Gotchev's refusal to dissent in *Lukanov v Bulgaria*, no 21915/93, Eur Ct HR 1997-II, no 34. More likely, however, Gotchev was the victim of changing domestic political circumstances. He was removed from office shortly after the Bulgarian Socialists lost domestic elections. After the Socialists regained control in 2002, Gotchev was advanced as a candidate for the ICC. He currently serves on Bulgaria's Constitutional Court.

international criminal tribunals was the absence of judges with experience in running a criminal trial. Criminal judges are less likely to climb the political ladder than academics, legal experts in bureaucracies, or judges engaged in administrative review. As a result, only one-third of the judges elected to the ICTY and ICTR had criminal trial experience as a judge, prosecutor, or defense lawyer. This absence of trial experience among judges is widely perceived to have reduced the efficiency of the court. Perhaps the most notorious example of poor trial management is the behavior of judges in the *Celebici* trial (the first trial that charged Muslims with war crimes).<sup>38</sup> According to one NGO report:

[T]he uninterested judges—led by the presiding Judge Adolphus Karibi-White from Nigeria, sometimes assisted by Judge Jan—are falling asleep more and more often, only to be woken after the third or fourth cry from defence or prosecution lawyer: “Objection, Your Honour!”<sup>39</sup>

The allegation that Judge Karibi-White slept through large parts of the trial also featured in the appeal by the defendants, who argued that the tapes of the trial “clearly and unambiguously paint a disturbing picture of a Judge prone to fall asleep during all phases of the trial, at almost any time when he was not speaking, examining a document, or otherwise being actively engaged.”<sup>40</sup> The Appeals Chamber, however, held that “his sleeping was only of secondary concern.”<sup>41</sup> The three judges, Saad Saood Jan (Pakistan), Karibi-White (Nigeria), and Odio Benito (Costa Rica) failed in their bids for reelection in 1997 even though they were advanced as candidates by their national governments. This highly unusual outcome suggests both that the UN membership at large is concerned with the quality and efficiency of judges and that individual governments do have incentives to reward loyal service. Moreover, the ICC explicitly requires that a subset of its candidates have extensive criminal-law experience (list A candidates). Judges with academic or broader international law backgrounds have generally been appointed to the appeals chamber rather than the trial chambers.

---

<sup>38</sup> *Prosecutor v. Delalić*, Case No. IT-96-21-T (ICTY 1998). See also Danner and Voeten, *Who Is Running the International Criminal Justice System?* at 15–16 (unofficial pagination) (cited in note 6).

<sup>39</sup> Institute for War and Peace Reporting, *Tribunal Update 36: Last Week in The Hague* (July 7–12, 1997), available online at <[https://www.iwpr.net/index.php?apc\\_state=hen&cs=o&o=p=tri&l=FN&s=f&o=180467](https://www.iwpr.net/index.php?apc_state=hen&cs=o&o=p=tri&l=FN&s=f&o=180467)> (visited Dec 5, 2008).

<sup>40</sup> United Nations, *Selective Prosecution*, available online at <<http://www.un.org/icty/celebici/appeal/judgement/ccl-aj010220e-10.htm>> (visited Dec 5, 2008).

<sup>41</sup> *Id.*

### III. INSTITUTIONAL VARIATION IN THE SELECTION AND RETENTION PROCESS

The previous section examined the extent to which government motivations shape the judicial selection process. That section assumed that governments are generally able to advance their preferred choice. Whether governments are able to shape the international judiciary in this manner depends on how the judicial selection process is organized. The following sections discuss three aspects of institutional variation that are important for understanding the extent to which governments can influence judicial behavior: the term of appointment for judges, the extent to which the appointment process is delegated to a multilateral institution (and thus is beyond the control of individual governments), and the extent to which judicial choices are observable. In this discussion, it is important to remember that governments themselves have designed these institutional features. Thus, if they designed the process such that they have less potential for affecting judicial behavior, this may well be for one of the reasons discussed in the previous section.

#### A. TENURE

First, some judges are appointed on an ad hoc basis, whereas others receive renewable or nonrenewable fixed terms. On many international tribunals, at least some of the judges are appointed by states parties for the purpose of resolving a particular dispute or case. This is especially common in the context of arbitration where disputing states parties may each appoint arbiters who jointly appoint a third arbiter. However, it also occurs on regular international courts. For example, the ECtHR allows a respondent government to appoint an ad hoc judge to a panel in case the regular national judge cannot sit for some reason. Similarly, the ICJ allows any party to a “contentious” case to nominate a judge of its choice (usually of its nationality), if a judge of its nationality is not already on the bench.

Eric Posner and John Yoo call these judges “dependent” in that they can easily be rewarded or punished by national governments based on whether they please these governments in the case at hand.<sup>42</sup> While these judges are not officially representatives of their governments, one can expect that they reliably favor the governments that appointed them. This is certainly true in the ICJ.<sup>43</sup> It also holds in the ECtHR. On “important” cases, when a ruling favored the respondent government, 100 percent of ad hoc judges and 95 percent of regular

---

<sup>42</sup> Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal L Rev 1, 26–27 (2005).

<sup>43</sup> Posner and de Figueiredo, 34 J Legal Studies at 615 (cited in note 25).

judges from the respondent's country voted with the majority.<sup>44</sup> This compared to 81 percent of other judges. When the ruling went against the respondent state, 33 percent of ad hoc judges and 16 percent of regular national judges dissented compared to only 8 percent of other judges.<sup>45</sup>

Thus, nationality matters for all judges but even more so for ad hoc judges. This gives incentives for governments to assure that ad hoc rather than regular judges are assigned to the most sensitive cases. I found some evidence for this in the ECtHR context. While ad hoc judges are supposedly assigned only when the regular judge has to recuse himself or herself, I found that ECtHR Article Three (torture) cases were somewhat more likely to have an ad hoc judge than were other cases, even while including fixed effects and relevant controls. An alternative explanation for this finding is that judges were more likely to excuse themselves from sensitive cases, perhaps anticipating a decision that they would prefer not to make.

The general rationale for allowing ad hoc judges and nationals is twofold. First, from a legal perspective, it may help to have a judge with an understanding of a nation's law and legal system while discussing a case. This is especially important for a court such as the ECtHR, which engages in complex interpretations of domestic law, including determinations of whether all domestic remedies have been exhausted. However, it is somewhat questionable how credibly ad hoc judges can communicate this knowledge to the other panel members given their presumed bias. If other panel members second-guess the motives of the national judge, this may reduce the quality of judicial deliberations. A second motivation is more political. The guarantee that a national will serve on any panel may give some assurance to states parties that their side of the story will be heard in judicial deliberations. This may encourage governments to submit disputes and accept the compulsory jurisdiction of an international court.

Second, among permanent judges, there is some variation in the length of terms and whether terms are renewable. In general, governments have more opportunities to influence behavior through ex post sanctions and rewards if terms are short and renewable. There is some evidence that this matters. In the ECtHR context, I found that judges approaching the compulsory retirement age of seventy were somewhat more likely to find a violation against their own governments than were other judges, controlling for a host of other relevant factors.<sup>46</sup> Presumably, these judges are perceived as less dependent on their own government for future job prospects than are other judges.

---

<sup>44</sup> For more details, see Voeten, 2007 *Am Pol Sci Assn Ann Meetings* at 19 (cited in note 16).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 23, 34–36.

That short, renewable terms could be a problem has received recognition in the creation of new courts and attempts to reform existing courts. For example, most pre-existing courts and tribunals have renewable terms, while ICC judges are appointed for a nine-year nonrenewable term.<sup>47</sup> Protocol XIV proposed to replace six-year renewable terms with nine-year nonrenewable terms in the ECtHR.<sup>48</sup> The Russian Duma, however, rejected the proposal, making it the only Council of Europe member state that has failed to ratify the protocol.<sup>49</sup> This again illustrates the earlier point that governments vary in the extent to which they would like to see international judges be independent.

## B. ELECTION AND APPOINTMENT PROCESSES

Another important source of variation is whether national governments are entitled to appoint a permanent judge to a court or whether competitive elections are held in multilateral institutions. Obviously, in the second instance national governments have a much-reduced opportunity to freely select candidates *ex ante* and to sanction judges *ex post*, although governments generally maintain control over candidate lists.

On some international courts, like the ECJ, all governments have the right to appoint a national judge.<sup>50</sup> Although appointments are by common accord of all governments, national candidates are rarely, if ever, second-guessed. In the post-Protocol XI ECtHR, governments can propose a list of three judges from which the Council of Europe's Parliamentary Assembly elects one.<sup>51</sup> Governments can rank the candidates and the Assembly generally, but not always, elect the government's favorite. The Assembly has also occasionally sent back a list of candidates for lack of qualifications.<sup>52</sup> The most important impact of this system of shared control between national governments and a multilateral body has been to increase the number of female judges, as most instances where the Assembly voted for a different candidate than the government's preferred candidate involved female candidates.<sup>53</sup>

---

<sup>47</sup> Rome Statute, art 36(9).

<sup>48</sup> Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (2004), ETS No 194.

<sup>49</sup> Joshua Rozenburg, *Stalemate in Strasbourg*, Law Society Gazette, available online at <<http://www.lawgazette.co.uk/opinion/comment/stalemate-strasbourg>> (visited Dec 5, 2008).

<sup>50</sup> See Mackenzie and Sands, 44 Harv Intl L J at 278 (cited in note 9).

<sup>51</sup> For an overview and assessment of the ECtHR's appointment procedures, see Limbach et al, *Law and Practice of Appointments to the European Court of Human Rights* (cited in note 35).

<sup>52</sup> Id at 23, 77.

<sup>53</sup> Id at 78.

In the cases of the ICJ, ICTY, ICTR, and ICC, governments retain control over nomination lists, but judges are elected by the UN General Assembly (or in the case of the ICC, the Assembly of States Parties).<sup>54</sup> This is a constraint especially on governments that are not guaranteed that their candidate will win. (Candidates from one of the five Security Council permanent members have a de facto guarantee of being elected). Although we found that nationality was the biggest factor determining whether or not a candidate for an international criminal tribunal judgeship was elected, we did find that countries did better when they advanced candidates that fit a certain professional profile.<sup>55</sup> As noted earlier, this means primarily that a candidate has held a high national judgeship, has international experience, and is not a full-time academic. In all, it appears that professional norms or norms to promote gender balance have a greater impact when judges are selected through competitive elections.

In the case of the WTO, panel members and members of the appeals chamber are appointed by a multilateral institution, the Dispute Settlement Body (“DSB”). Panel members are appointed on a case-specific basis in consultation with the parties to the dispute.<sup>56</sup> The seven-member appellate body has four-year terms. The US and the EU are de facto assured of a seat on the body and are widely thought to set the acceptable boundaries for candidates from other countries as well.<sup>57</sup>

There are few examples of nomination procedures where international organizations do not have to rely on national governments for nomination lists. An example is the transitional court system in Kosovo, which was essentially run by international organizations. The availability of such judgeships may be important as they provide opportunities for international judges that take decisions that are unfavorable to their national governments. For example, the Moldovan judge Tudor Pantiru, who was ousted by his government after one term as an ECtHR judge, was appointed as an international judge at the Supreme Court of Kosovo by the United Nations.

---

<sup>54</sup> See Danner and Voeten, *Who Is Running the International Criminal Justice System?* at 9 (unofficial pagination) (cited in note 6).

<sup>55</sup> *Id.* at 14–15.

<sup>56</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations—Results of the Uruguay Round vol 1 (1994), 33 ILM 1125 (1994). For another view, see Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minn J Global Trade 1 (1999).

<sup>57</sup> See Steinberg, 98 Am J Intl at 264 (cited in note 8).



### C. OBSERVABILITY OF JUDICIAL BEHAVIOR

Third, on some courts judicial behavior is easily observable whereas on others it is not. The ECJ traditionally does not allow public dissenting opinions. On the WTO, public dissents are discouraged and rare. On the ICJ, ECtHR, and the international criminal tribunals, public minority opinions are relatively common. A consequence of secrecy is, of course, that governments cannot observe whether the ECJ judges they advanced indeed voted in accordance with national interests. This reduces the ability of governments to use *ex post* punishments and rewards.

I am not aware of any systematic research into the causes and consequences of the presence and absence of dissenting opinions. On the ECJ, it appears to be a matter of tradition. When the court was founded, all participating states had civil-law legal systems in which public minority opinions on courts of review were generally not allowed. Such rules are generally hard to change. On the WTO, it is plausible that public dissents are discouraged out of fear that they may encourage noncompliance. After all, governments could use a minority dissent supported by foreign judges as evidence that reasonable disagreement about the legality of a certain action persists. This may be used as an argument for legitimizing defection. However, I am not aware of any evidence for such an effect.

### IV. CONCLUSION

Understanding if and how governments influence judicial behavior requires an understanding both of government motives and of the institutional opportunities to act upon these motives. Past research has made overly simplistic and homogenous assumptions about what motivates governments when they interact with international courts, including when they appoint judges. Governments are not simply picking the best candidates nor are they stacking courts with diplomats well-versed in the *raison d'état*. Limiting sovereignty costs and the effectiveness of judges are sometimes motivations, but there are also others. Sometimes governments use appointments to signal that they are committed to an international court that may take costly negative decisions against them. At other times, appointments are motivated by distributive concerns or by a desire to promote a set of international norms. Patronage is another important and potentially disruptive motivation for international judicial appointments.

The precise institutional mechanisms that govern the appointment and retention process greatly influence the ability of governments to affect judicial behavior. This Article highlights in particular the impact of different tenure arrangements, the extent to which appointments are delegated to multilateral institutions or remain within the direct control of national governments, and the

extent to which judicial choices are observable. Given that governments generally create these institutional mechanisms, the variation in institutional mechanisms is again testament to the different motivations governments may have when they create courts.

The arguments in this Article rely quite strongly on empirical evidence from only a few international courts, especially the ECtHR, the ICJ, and the international criminal tribunals. Most studies of international courts study these courts as unitary actors rather than as committees of individuals. This is partially driven by the lack of data, either too few cases and/or no public minority opinions. Yet, it would be useful to systematically examine the professional backgrounds of judges on other courts, most notably the ECJ and the WTO's DSB. In addition, remarkably little is known about international arbitrators.

As explained in Section I, this Article examines the politics of the appointment process from a positive rather than a normative perspective. Space constraints prevent a full discussion of normative issues, but there are important ways in which the empirical findings may well prove informative for normative debates. Most authors have stressed the importance of impartial and independent judges,<sup>58</sup> although some prefer dependent judges.<sup>59</sup> The preference for dependence stems largely from a desire to ensure that international judges are accountable in some transparent manner to democratically elected representatives. From a perspective of accountability, the notion that governments seek to influence the overall ideological direction of an international court may well be desirable. So if governments respond to an activist international court by collectively appointing judges who are more inclined toward self-restraint, then this would seem a legitimate exercise of democratic accountability. Such behavior would help counter criticisms that international courts remain unchecked and engage in "wayward activism."<sup>60</sup> Concerns about transparency and accountability are also strong arguments in favor of the use of public minority opinions, which may yield concerns from the perspective of judicial independence as it allows politicians to make reappointment conditional on decisions.

This type of accountability to political leaders may well violate some notions of impartiality and independence, although political leaders exercise a similar influence in many domestic judicial systems, including the United States. A more serious potential violation of judicial independence would occur if international

---

<sup>58</sup> Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 284 (1997).

<sup>59</sup> See Posner and Yoo, 93 Cal L. Rev. at 27 (cited in note 42).

<sup>60</sup> See, for example, Jason Allardyce and Brian Brady, *Thatcher's Final Blow*, *The Scotsman* 2 (Mar 24, 2002).

judges feel pressured to favor the national interests of their national governments in specific cases. If such incursions were to occur with regularity, the differences between resolving disputes by legal and diplomatic means would be rendered moot. The empirical research reported here suggests that nonrenewable terms of medium length, limits to the use of ad hoc or ad litem judges, and competitive judicial elections all contribute to shielding judges from such pressures.

A full normative analysis of how concerns about independence and accountability should be weighted is beyond the scope of this Article. The suggestion from the preceding paragraphs is that such a trade-off may be achieved through appointment procedures that facilitate opportunities for governments to shape the overall direction of the court, but minimize opportunities for governments to influence judges on individual cases. More empirical research on how institutional details shape judicial behavior on international courts would be a most welcome contribution for future normative debates on how the burgeoning international judicial system can best achieve its potential.