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# Understanding the Behaviour of International Courts

## An Examination of Decision-Making at the *ad hoc* International Criminal Tribunals

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### I. Introduction

International courts (ICs)<sup>1</sup> play a key role in a number of regimes and institutional frameworks in international law and policy. Despite the remarkable increase in their prominence in the last twenty years,<sup>2</sup> the literature on the behaviour of ICs remains particularly undeveloped, especially when compared to the voluminous and diverse scholarship developed by North American political scientists on the behaviour of

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<sup>1</sup> By ICs, I refer to the organ or unit of an IC that makes judicial decisions; for instance, in the context of the *ad hoc* international criminal tribunals, IC refers to the Chambers and not to the Registry or Prosecution. By behaviour, I mean the judicial decisions adopted by ICs in cases as opposed to other administrative or diplomatic decision-making that ICs also engage in.

<sup>2</sup> Cesare P.R. Romano, "Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts" in Russell A. Miller & Rebecca M. Bratspies, eds., *Progress in International Law* (Leiden: Martinus Nijhoff, 2008) 433.

domestic courts and judges.<sup>3</sup> Most of the current scholarship on ICs focuses on their creation and design,<sup>4</sup> or on how they interact with their environments.<sup>5</sup> The literature that does focus on the behaviour of ICs mostly discusses the extent of their independence from the interests of powerful states.<sup>6</sup>

This literature is unsatisfactory for a number of reasons. First, while scholars have produced accounts of the external factors that influence the decision-making of ICs, they have paid little attention to internal dynamics of IC decision-making. Second, much of this scholarship assumes that ICs behave strategically in response to the interests of various actors involved in a regime. Other perspectives on the nature of judicial decision-making, most notably the attitudinal model,<sup>7</sup> have received little attention.<sup>8</sup> Third, much of the empirical work produced by scholars has focused on a few courts—the International Court of Justice (ICJ), the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ)—leaving unexamined the decision-making of many different types of ICs.

In this article, I seek to address these lacunae by focusing on the internal dynamics of decision-making processes within ICs, and by drawing on models of judicial behaviour developed for domestic courts. In this way, I

<sup>3</sup> Lawrence Baum, *The Puzzle of Judicial Behaviour* (Ann Arbor: University of Michigan, 1997) [Baum, *Puzzle*]; Richard A. Posner, *How Judges Think* (Cambridge, Mass.: Harvard University Press, 2008) [Posner, *How Judges Think*].

<sup>4</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts" (2000) 54 *Int'l Org.* 137; Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 *Int'l Org.* 457; Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" (2001) 55 *Int'l Org.* 655.

<sup>5</sup> Anne-Marie Burley & Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration" (1993) 47 *Int'l Org.* 41; Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1993-1994) 29 *U. Rich. L. Rev.* 99; Laurence R. Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997-1998) 107 *Yale L.J.* 273; Andrew T. Guzman, "Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms" (2002) 31 *J.L.S.* 303.

<sup>6</sup> Geoffrey Garrett & Barry R. Weingast, "Ideas, Interests, and Institutions: Constructing the EC's Internal Market" in Judith Goldstein & Robert Keohane, eds., *Ideas and Foreign Policy* (Ithaca, NY: Cornell University Press, 1993) 173; Geoffrey Garrett, "The Politics of Legal Integration in the European Union" (1995) 49 *Int'l Org.* 171; Geoffrey Garrett, Daniel Kelemen & Heiner Schulz, "The European Court of Justice, National Governments and Legal Integration in the European Union" (1998) 5 *Int'l Org.* 149; Karen J. Alter, *Establishing the Supremacy of European Law: The Making of International Rule of Law in Europe* (Oxford: Oxford University Press, 2001) [Alter, *Establishing*]; Adam M. Smith, "'Judicial Nationalism' in International Law: National Identity and Judicial Autonomy at the ICJ" (2005) 40 *Tex. Int'l L.J.* 197; Eric A. Posner & Miguel F.P. de Figueiredo, "Is the International Court of Justice Biased?" (2005) 34 *J.L.S.* 599; Erik Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights" (2008) 102 *Am. Pol. Sci. Rev.* 417 [Voeten, "Impartiality"].

<sup>7</sup> The attitudinal model posits that the ideas, attitudes and values of judges are key variables for understanding decision-making by courts. See section II.1, below.

<sup>8</sup> Exceptions include James Meernik, Kimi King & Geoff Dancy, "Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National and International Factors" (2005) 86 *Soc. Sci. Q.* 683; Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights" (2007) 61 *Int'l Org.* 669 [Voeten, "Politics"]; Fred J. Bruinsma, "The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)" (2008) *Ancilla Iuris* 32.

seek to build further bridges between the work of political scientists on judicial decision-making and that of international relations and international law scholars on ICs.<sup>9</sup> My main contention is that the ideas and interests of judges in ICs account for variations in their decision-making.

In order to test competing models for understanding the behaviour of ICs, I examine decision-making at the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These ICs were created by the Security Council in 1993 and 1994, respectively, to try the persons most responsible for the commission of international crimes in the conflicts in these two regions.<sup>10</sup> Despite the limits to their lifespan and jurisdiction, the decisions of the *ad hoc* tribunals have been very influential in developing the field of international humanitarian law and in reviving the field of international criminal law.<sup>11</sup>

My approach to understanding the judicial decision-making of these ICs is characterized by three main assumptions. First, I assume that traditional theories of international organizations (IO), based on variants of Principal-Agent theory, are ill-equipped for understanding the behaviour of ICs. The relationship between states and ICs is actually more akin to a Principal-Trustee relationship than a Principal-Agent relationship.<sup>12</sup> In order to ensure their judicial independence, ICs are endowed with a high level of formal and structural autonomy.<sup>13</sup> In addition, the act of delegation to an IC implies a mandate that is premised on autonomous decision-making, such that ICs are

<sup>9</sup> Another possible avenue of fruitful bridge-building would be to look at the largely unacknowledged links between the models of judicial decision-making developed for understanding the behaviour of international judges and ICs, with those developed in an earlier period of international relations scholarship dealing with decision-making in foreign policy analysis.

<sup>10</sup> See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted by SC Res. 827, UN SCOR, 48th Sess., 3217th Mtg., UN Doc. S/RES/827 (1993) [ICTY Statute]; *Statute of the International Criminal Tribunal for Rwanda*, adopted by SC Res. 955, U.N. SCOR, 49th Sess., 3453d Mtg. at 3, U.N. Doc. S/RES/955 (1994) at 3 [ICTR Statute]. See generally William A. Schabas, *The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006).

<sup>11</sup> Allison Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War" (2006) 59 Vand. L. Rev. 1.

<sup>12</sup> Karen J. Alter, "International Courts are not Agents! The Perils of the Principal-Agent Approach to Thinking about the Independence of International Courts" (2005) 99 Am. Soc. Int'l L. Proc. 138; Karen J. Alter, "Agents or Trustees? International Courts in their Political Context" (2008) 14 Eur. J. Int'l Rel. 33 [Alter, "Agents or Trustees?"]. Principal-Agent theory involves the delegation of authority by a Principal to an Agent whereby the Principal retains influence over decision-making by the Agent by virtue of its authority to write and change the delegation contract. On the other hand, Principal-Trustee theory involves the delegation of authority with the purpose of producing independent and high quality decision-making. As explained by Alter, *ibid.* at 35, "Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgement or professional criteria, and (3) empowered to act on behalf of a beneficiary" and are thus "less manipulable via recontracting tools".

<sup>13</sup> Dinah Shelton, "Legal Norms to Promote the Independence and Accountability of International Tribunals" (2003) 2 Law & Prac. Int'l Courts & Trib. 27; Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge" (2003) 44 Harv. Int'l L.J. 271.

expressly not meant to serve or be seen to serve as the agents of states.<sup>14</sup>

Second, I assume that judicial decision-making is not reducible to the objective application of pre-existing legal rules and principles. I recognize instead that the law is often ambiguous and leaves space for opinion, discretion and innovation.<sup>15</sup> This is especially the case in international law, given the imprecise and incomplete nature of treaty law and the flexibility of customary international law.<sup>16</sup> Judicial decision-making is not however merely political. Rather, within certain boundaries shaped by law and the exigencies of the judicial function, judges in ICs exercise a measure of discretion that can only be explained by non-legal factors.

Third, I adopt an individual-level perspective<sup>17</sup> that focuses on the specific individuals who are personally invested with the authority and independence to make judicial decisions—i.e. judges, panellists or adjudicators. Of course, the influence and involvement of individual judges varies with the personal philosophy of the judge in question.<sup>18</sup> Nonetheless, given that most judges take their roles seriously and retain control over the ultimate outcomes of their individual votes, my individual-level perspective accords analytical priority to variables derived from the ideas and interests of judges. This perspective is based on the “professional” model of judicial authority,<sup>19</sup> which is broadly similar to the one found in ICs.<sup>20</sup>

However, as I point out in the conclusion, an individual-level perspective is not necessarily best placed to explain all forms of decision-making, or decision-making in all ICs. An institutionalist perspective may be more appropriate for certain aspects of judicial decision-making or for certain ICs.<sup>21</sup> Likewise, it is important to stress at the outset that this article

<sup>14</sup> Jose Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005) at 635.

<sup>15</sup> Yosaf Rogat, “Legal Realism” in Paul Edwards, ed., *The Encyclopaedia of Philosophy* (New York: Macmillan, 1972) vol. 8.

<sup>16</sup> Alvarez, *supra* note 14.

<sup>17</sup> Baum, “Puzzle”, *supra* note 3 at 7 (explaining that “[s]tudents of judicial behaviour generally focus on individual judges, building explanations of collective choices from the individual level.”).

<sup>18</sup> Wayne W. McIntosh & Cynthia L. Cates, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas* (Westport, CT: Greenwood Press, 1997), specifically at 14, 108.

<sup>19</sup> Héctor Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Portland, OR: Hart Publishing Ltd., 2004); Mitchel de S.-O.-l’E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004).

<sup>20</sup> The career of an international judge is a second career for individuals who have distinguished themselves in other professions. There is no specific training for becoming an international judge, and international judicial posts are not part of an organized and hierarchical career: see Daniel Terris, Cesare P.R. Romano & Leigh Swigart, *The International Judge. An Introduction to the Men and Women who Decide the World’s Cases* (Oxford: Oxford University Press, 2007). In addition, the practice of producing and publishing individually signed decisions, which is common in many ICs, creates “an environment and expectation of individual judicial responsibility for the judicial opinion and for its reasoning”: de S.-O.-l’E Lasser, *supra* note 19 at 312).

<sup>21</sup> Cornell W. Clayton, “The Supreme Court and Political Jurisprudence: New and Old Institutionalisms” in Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999) 15.

adopts a methodologically conventional approach to studying the causal effects of ideas and interests on decision-making.<sup>22</sup>

The ICTY and the ICTR form natural case studies for this approach to understanding the behaviour of ICs. They are a unique kind of Trustee IC: they are not dispute resolution mechanisms set up by a collection of states for use by or within these states, but rather criminal courts created by the Security Council to address crimes primarily relevant to another group of states. Accordingly, the Principal states in this context do not directly benefit from, nor are directly affected by, the decisions taken by the IC on behalf of the Beneficiary states and populations. In addition, judges at the ICTY and ICTR are able to issue separate and dissenting opinions, making it possible to study their voting behaviour through an individual-level perspective. Finally, a comparison of the decision-making at the ICTY and ICTR can serve to isolate the roles played by different non-legal variables relating to differences in the political context in which they operate, since the two ICs have similar institutional structures and norms, as well as shared legal rules and principles. The statute and structure of the ICTR were modelled after those of the ICTY and the same judges sit on the Appeals Chambers of both ICs. Legal officers in Chambers also frequently migrate from one to the other. Notwithstanding some differences in the types of charges that have been brought and legal issues that have arisen, there is a high level of consistency between legal developments in both ICs.

I proceed in the following manner. In section II, I discuss two kinds of models for understanding the decision-making of ICs: 1) attitudinal models, which emphasize the ideas of judges; and 2) strategic models, which emphasize their interests. On the basis of these models, I then develop hypotheses that are appropriate to the particular contexts of decision-making in the ICTY and ICTR. My attitudinal hypothesis posits that the most appropriate conceptualisation of the ideational preferences of judges in ICs is whether they are aligned with “international activism” or “statist conservatism”. My strategic hypothesis is that judges in ICs are committed to advantageously extending the authority, standing, independence and influence of their institution.

In section III, I test these hypotheses through a quantitative analysis of decisions taken by the Trial Chambers and Appeals Chambers of the ICTY and ICTR.<sup>23</sup> I conclude that both ideas and interests can account for variations in the decision-making of ICs: judges pursue their preferences on certain matters while also taking into account, for strategic reasons, the preferences of relevant actors on other matters. While I agree that external interests may influence judicial decisions, I argue that they do so largely because they have a basis in the ideas and interests of judges.

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<sup>22</sup> The possible contributions of constructivist approaches will be discussed below, in the conclusion.

<sup>23</sup> Throughout this article, I also draw on confidential interviews conducted with current and former judges and staff members at the ICTY and ICTR, as well as on my own professional experience working in the Chambers of both these ICs.

In sum, judicial decision-making in ICs amounts to a form of autonomous decision-making undertaken by judges who pursue certain objectives and who, like other actors, react and adapt to their environments in the pursuit of their objectives. The theoretical position advanced here is ultimately an eclectic one that combines insights from rationalism and liberalism, with the aim of understanding the relationship between international politics and judicial decision-making in ICs by moving beyond simple conceptualizations of transcendence or subjugation, and recognizing and accepting that they are necessarily intertwined.

## II. Models of decision-making in international courts

### *Attitudinal Models*

In this section, I provide the theoretical underpinnings of the attitudinal hypotheses that will be tested below, in section III.2., I begin by reviewing various approaches to modelling the nature and origins of the preferences of individual judges in the context of ICs. I argue that the most fundamental policy preference for an international judge is whether he or she is an international activist or a statist conservative in his or her approach to international law. I discuss a number of potential explanations for these preferences, but identify as most critical the independent variable of professional background: whether an international judge is a former academic, diplomat, or judge or practitioner.

The attitudinal model has been the pre-eminent approach in the political science literature on judicial behaviour for much of the last thirty years.<sup>24</sup> It posits that the ideas, attitudes and values of judges are key variables for understanding decision-making by courts. Some scholars emphasize policy preferences, arguing that judges “base their decisions on the merits on the facts of the case juxtaposed with their personal policy preferences.”<sup>25</sup> These scholars adopt a rational model of decision-making in which judges seek case outcomes that best approximate their stable policy preferences on specific issues.<sup>26</sup> Other scholars stress the beliefs that judges hold about their judicial roles in terms of what constitutes appropriate and inappropriate judicial behaviour.<sup>27</sup> One of the key distinctions in this regard concerns the extent to which judges stress judicial restraint over judicial activism.<sup>28</sup>

In an ideal type attitudinal model, judicial decision-making is not influenced by external preferences and pressures or by long-term considerations, but instead by a judge’s preferences about policy or the

<sup>24</sup> Sarah C. Benesh, “Harold J. Spaeth: The Supreme Court Computer” in Nancy Maveety, ed., *The Pioneers of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2003) 116.

<sup>25</sup> Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002) at 312 [Segal & Spaeth].

<sup>26</sup> *Ibid.* at 91-92.

<sup>27</sup> James L. Gibson, “Judges’ Role Orientations, Attitudes and Decisions: An Interactive Model” (1978) 72 Am. Pol. Sci. Rev. 911; G. Alan Tarr, *Judicial Process and Judicial Policy Making* (Belmont, CA: Wadsworth, 2003) at 267-268.

<sup>28</sup> *Ibid.* at 268.

judicial role. While the attitudinal model recognizes that judicial decisions are not unconstrained by the rules and structures of decision-making, it posits that these rules and structures nonetheless allow judges to engage in decision-making reflective of their preferences on the merits of a case.<sup>29</sup> In the context of the US Supreme Court, justices “can further their policy goals because they lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload.”<sup>30</sup>

The principal challenge for scholars interested in adapting the attitudinal model to the context of international judicial decision-making is developing categories of judicial preferences. It is important to note that the attitudinal literature focusing on ICs is still in its infancy and that the assumptions and implications of many early studies of the behaviour of ICJ judges conducted in the 1960s and 1970s and cited below are of limited import to the current context. The traditional left-right categories along which judicial preferences are aligned at the domestic level may need to be modified when moving from the domestic to the international context. In the context of international criminal law for example, in a complete reversal of the situation present at the domestic level, the left has been the strongest proponent of international prosecution while the right has been more recalcitrant.<sup>31</sup> Likewise, the categories of activism and conservatism through which judicial roles at the domestic level are often understood may also not translate to the international level. As explained by Erik Voeten,

National judges who enjoy a high degree of independence may find that activism by an international court constitutes undesirable interference whereas judges from countries where courts are less secure from political interference may view an activist court as a potential ally.<sup>32</sup>

In addition, unlike domestic judges, international judges operate within specialized and often self-contained legal regimes and structures. Judicial preferences are therefore likely to vary according to the regime to which the IC belongs. Preferences held by ECJ judges about the proper scope of EU trade regulation may not have much salience for ECHR judges dealing with human rights issues.

On the other hand, just as domestic judges are assumed to have preferences regarding the relationship between the state and its citizens, international judges are assumed to have preferences about the relationship between international law and state sovereignty.<sup>33</sup> The international-national interface can also be seen as reflecting an international judge’s conceptions of their role as judges in terms of activism or restraint. I argue that an

<sup>29</sup> Segal & Spaeth, *supra* note 25 at 92-97, 114.

<sup>30</sup> *Ibid.* at 92.

<sup>31</sup> Jared Wessel, “Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication” (2005-2006) 44 Colum. J. Transnat’l. L. 377 at 446-447.

<sup>32</sup> Voeten, “Politics”, *supra* note 8 at 681.

<sup>33</sup> Terris, Romano & Swigart, *supra* note 20.

international judge's position on the relationship between international law and state sovereignty represents his or her fundamental policy preference—and therefore hypothetically the most powerful dependent variable in the attitudinal model.

The international activist judge thus favours the development of a strong international legal system and accords limited deference to state sovereignty. Such a judge is more likely to adopt an expansive approach to the interpretation, application, and development of international law. This would include, for instance, recognising new norms of customary international law or interpreting treaties in a teleological manner. Conversely, the statist conservative judge favours the assertion of state sovereignty and its associated prerogatives against the expansion of the authority of international law. Such a judge is more likely to adopt a restricted methodology in international law, emphasizing the role of state consent in the creation and interpretation of international norms.

A number of previous studies demonstrate that understanding the preferences of judges along these lines captures a key aspect of the political nature of decision-making in ICs. Early qualitative studies of decision-making at the ICJ found that the most important attitudinal differences between judges related to issues such as the flexibility of international law and the role of the ICJ in judicial innovation.<sup>34</sup> A quantitative study of ECHR decision-making concluded that judges varied in the flexibility that they accorded to respondent states in the performance of their human rights obligations, and in their conception of the proper reach of the ECHR.<sup>35</sup> Likewise, a qualitative study of separate opinions at the ECHR distinguished between judges who adopted a "lawyer statesmen" perspective and those who adopted a "human rights activist" perspective.<sup>36</sup> Examining the decision-making of the Dispute Settlement Body of the World Trade Organization (WTO DSB), Colares found that WTO DSB panellists "have consistently deployed interpretive methods that produce a consistent outcome: restricting Respondent discretion to adopt otherwise trade-restrictive measures, and thus furthering the promotion of an unfettered version of trade."<sup>37</sup>

My and other qualitative research on the ICTY and ICTR reveals that many judges occupy a consistent place along the international activist-statist conservative spectrum.<sup>38</sup> For example, ICTY and ICTY Appeals Chambers

<sup>34</sup> Lyndel V. Prott, *The Latent Power of Culture and the International Judge* (Abingdon, UK: Professional Books, 1979) at 220-227; Smith, *supra* note 6 at 225. On the other hand, looking at voting by ICJ judges in the 1945-1967 period, Terry concludes that while a few ICJ judges were consistent in their approach to international law, the votes of the majority of judges varied from case to case: G.J. Terry, "Factional Behaviour on the International Court of Justice: An Analysis of the First and Second Courts (1945-1951) and the Sixth and Seventh Courts (1961-1967)" (1975) 10 Melbourne U.L. Rev. 59.

<sup>35</sup> Voeten, "Politics", *supra* note 8.

<sup>36</sup> Bruinsma, *supra* note 8.

<sup>37</sup> Juscelino F. Colares, "A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development" (2009) 42 Vand. J. Transnat'l L. 383 at 435.

<sup>38</sup> Wessel, *supra* note 31 at 389-396. Confidential interviews with select staff and judges at the



Judge Shahabuddeen is often identified as being a more international activist judge, due to his numerous dissents in cases such as *Stakić*, where he adopted an expansive approach to interpreting the scope of application of genocide and deportation as a crime against humanity.<sup>39</sup> The salience of these preferences is hardly surprising, given that ICTY and ICTR judges have had to address numerous issues regarding the reach of their powers and authority and the scope of application of international humanitarian law and international criminal law generally.<sup>40</sup> The judges faced an example of the first kind of issue in a decision at the ICTR on whether they had the power to award financial compensation for rights violations to an accused person despite the absence of an express provision to this effect in the ICTR Statute;<sup>41</sup> an example of the second kind is a decision by judges at the ICTY on whether military reprisals against civilians are prohibited in customary international law.<sup>42</sup>

Attitudinal scholars assume that the attitudinal commitments of judges have been shaped by the independent variable of the backgrounds and attributes of judges before their arrival on the bench.<sup>43</sup> For example, Tate shows that US Supreme Court justices who were prosecutors before being named as judges have a tendency to vote conservatively in civil liberties cases.<sup>44</sup> A focus on the backgrounds of judges thus enables scholars to develop base-line predictions about the voting behaviour of judges, avoiding the circularity of deriving a judge's preferences from their voting record.<sup>45</sup> Again, it is important to stress that much of the data and studies on the backgrounds and attributes of international judges are not very developed.

Several potential explanations for the policy preferences of international judges have not been supported by qualitative analysis. One posited independent variable lies in judges' national origins and cultures: in explaining the prevalence of national voting at the ICJ, a number of scholars have speculated that national bias could be explained by unconscious

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ICTY and ICTR evince commonly shared perceptions that certain judges are indeed activist while some are more conservative in their approach to international law.

<sup>39</sup> Dissent of Judge Shahabuddeen in *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement (22 March 2006) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <<http://www.icty.org/>> [*Stakić*].

<sup>40</sup> Danner, *supra* note 11; Alexander Zahar & Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2007) at 14-35, 79-105.

<sup>41</sup> See *Prosecutor v. Rwamakuba*, ICTR-98-44C, Decision on Appropriate Remedy (31 January 2007) (International Criminal Tribunal for Rwanda, Trial Chamber III), online: <<http://www.icty.org/>>; *Prosecutor v. Rwamakuba*, ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy (13 September 2007) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: <<http://www.icty.org/>>.

<sup>42</sup> See *Prosecutor v. Kupreskić*, IT-95-16-T, Appeal Judgement (14 January 2000) at paras. 527-533 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) online: <<http://www.icty.org/>>.

<sup>43</sup> Tarr, *supra* note 27 at 266.

<sup>44</sup> C. Neal Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978" (1981) 75 Am. Pol. Sci. Rev. 355.

<sup>45</sup> Benesh, *supra* note 24.

psychological, cultural, or philosophical biases.<sup>46</sup> However, scholars have generally failed to show that state interests may be transmitted to or inculcated in international judges. For instance, a study of sentencing outcomes at the ICTY found no evidence that French, British and American judges were more likely to sentence convicted Serbian war criminals to longer sentences due to their potential identification with their national interests.<sup>47</sup> A more convincing explanation of national voting is that states may select judges that hold policy preferences similar to their own: Voeten showed that states aspiring to join the EU and EU member states favourably disposed to integration are significantly more likely to appoint activist judges to the ECHR.<sup>48</sup> However, the effect of such appointment politics and of national voting generally will only be felt in situations where states have clear interests or preferences. Accordingly, Thomas R. Hensley showed that ICJ judges are more likely to vote with their states in contentious cases than in advisory opinions where state interests are more ambiguous.<sup>49</sup>

Another posited explanation of international judicial policy preferences relates to the national legal systems of judges. A number of scholars have tested variables such as domestic standards of judicial independence and experiences with human rights, with no significant results to report.<sup>50</sup> Voeten thus concluded that “judges did not so much transport their role conceptions to the international level, but rather thought strategically about how interference by an international court would affect a domestic situation.”<sup>51</sup> Scholars have also examined the role played by the type of national legal system from which an international judge originates—whether they hail from a common law, civil law or another legal tradition.<sup>52</sup> However, previous empirical studies have concluded that judges’ domestic legal systems had no observed impact on their behaviour in ICs in terms of levels of agreement at the ICJ,<sup>53</sup> levels of activism or impartiality at the ECHR,<sup>54</sup> and sentencing outcomes at the ICTY.<sup>55</sup> In the end, these results are hardly surprising: although they may influence the form and sensibility of legal reasoning with respect to international legal issues, types of legal systems contain few, if any, specific attitudinal commitments in terms of the relationship between

<sup>46</sup> Prott, *supra* note 34 at 155-157; Terris, Romano & Swigart, *supra* note 20 at 68-70; Thomas R. Hensley, “National Bias and the International Court of Justice” (1968) 12 Midwest J. Pol. Sci. 568 at 585 [Hensley, “National Bias”]; Posner & de Figueiredo, *supra* note 6 at 624-625 (see also section II.2, below, on strategic motivations for national voting).

<sup>47</sup> Meernik, King & Dancy, *supra* note 8 at 691-692, 698-700.

<sup>48</sup> Voeten, “Politics”, *supra* note 8 at 693-694.

<sup>49</sup> Hensley, “National Bias”, *supra* note 46 at 575.

<sup>50</sup> Voeten, “Impartiality”, *supra* note 6 at 427-430; Meernik, King & Dancy, *supra* note 8 at 690-692, 698.

<sup>51</sup> Erik Voeten, “The Impartiality of International Judges: Evidence from the European Court of Human Rights” (Paper presented to the annual meeting of the Midwest Political Science Association, April 2007) at 14, online: <[http://www.allacademic.com/meta/p197493\\_index.html](http://www.allacademic.com/meta/p197493_index.html)>.

<sup>52</sup> Terris, Romano & Swigart, *supra* note 20; Prott, *supra* note 34; Terry, *supra* note 34.

<sup>53</sup> Thomas R. Hensley, “Bloc Voting on the International Court of Justice” (1978) 22(1) J. Confl. Res. 39 at 55 [Hensley, “Bloc Voting”].

<sup>54</sup> Voeten, “Politics”, *supra* note 8 at 694-695; Voeten, “Impartiality”, *supra* note 6 at 428-429.

<sup>55</sup> Meernik, King & Dancy, *supra* note 8 at 698.

international law and state sovereignty.<sup>56</sup>

Professional background, as an independent variable, provides the most promising account of the origins of international judges' preferences. Limited qualitative evidence shows that background may be significant in the way in which international judges decide cases: former diplomats are more likely to be responsive to national interests and political realities and thus be restrained in their approach to international law; former academics are less likely to be responsive to these influences and more likely to be activist in their approach to international law; and former national judges and practitioners are more likely to focus on the facts of a case and less likely to focus on international issues as a whole.<sup>57</sup> One quantitative study of decision-making at the ECHR suggests that professional backgrounds may indeed be useful proxies for policy preferences: former private practitioners were found to be about 14% more likely than non-private practitioners and non-diplomats to find a human rights violation and former diplomats and bureaucrats were about 13% more likely to favour the respondent governments.<sup>58</sup> My own professional interactions and confidential interviews with select staff and judges at the ICTY and ICTR also revealed that judges hold similar opinions about themselves or their colleagues.

The above discussion evinces two key variables for applying the attitudinal model to international judicial decision-making. The dependent variable is IC judges' approach to international law: whether they are international activists or statist conservatives. The independent variable is the professional backgrounds of international judges: whether they are former academics, diplomats or judges or practitioners. I derive the following hypotheses from this relationship:

*Attitudinal Hypothesis 1:* Former academics are more likely to be international activist in their decision-making. (AH1)

*Attitudinal Hypothesis 2:* Former diplomats are more likely to be statist conservative in their decision-making. (AH2)

*Attitudinal Hypothesis 3:* Former judges or practitioners are less likely than former academics to be international activist in their decision-making, and less likely than former diplomats to be statist conservative in their decision-making. (AH3)

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<sup>56</sup> The applicability of international law within a domestic legal system does not depend on whether that system is common law, civil law or another legal tradition, but rather by whether that system is governed by a monist or dualist constitution. To be sure, an international judge's training in a particular legal tradition may condition their reflexes in the use of international legal sources and the structure of legal reasoning, although they would still be bound by the particular sources and methodology of international law.

<sup>57</sup> Terris, Romano & Swigart, *supra* note 20 at 64; Prott, *supra* note 34 at 199; Bruinsma, *supra* note 8. On the other hand, a study of ICTY decision-making finds no statistically significant relationship between the previous backgrounds of ICTY judges and sentencing outcomes: Meernik, King & Dancy, *supra* note 8 at 692-694, 698-700. That said, there are good reasons to think that sentencing outcomes in an international criminal tribunal are not likely to reflect the sincerely held attitudes of international judges. See section II.3, below.

<sup>58</sup> Voeten, "Impartiality", *supra* note 6 at 430.

*Strategic Models*

In this section, I provide the theoretical underpinnings of the strategic hypotheses to be tested below, in section III.3., I will discuss the literature that has developed in domestic political science and in international relations around the nature and impact of judges' strategic objectives on their decision-making. Although I accept the principal insight in this literature that international judges are focused on organizational self-interest—on expanding their power and standing—I argue that their strategies for doing so are not necessarily directed at states, but may also focus on transnational and non-state actors. As such, I posit that the particular targets of strategies pursued by international judges will depend on the context within which they operate as well as on their specific strategic objectives.

The strategic model of judicial behaviour posits that judicial decision-making is rational and goal-oriented, and therefore “whenever strategic judges choose among alternative courses of action, they think ahead to the prospective consequences and choose the course that does most to advance their goals in the long term.”<sup>59</sup> On the whole, the strategic model is flexible. It can accommodate a focus on a number of different goals, including the pursuit of policy preferences, the expansion or strengthening of authority and influence, the advancement of professional career objectives, the enhancement of standing with particular audiences, or the minimization of intra-court conflicts and judicial workloads.<sup>60</sup> Of these various objectives, I will consider two that have been considered to be particularly relevant by scholars in the context of ICs: personal career self-interest and organizational self-interest.

The personal career self-interests of judges normally encompass avoiding a removal from the bench or seeking promotion up the ranks of the judiciary. While most international judges have little fear of removal or expectation of advancement, many authors nonetheless posit that they are subject to pressures emanating from their respective national governments, which “may refuse to support them for reappointment and also refuse to give them any other desirable government position after the expiration of their term.”<sup>61</sup> This literature thus connects to older international organization (IO) scholarship on conflicts of loyalty between an international civil servant's national affiliation and his or her obligations to the IO to which he or she is attached.<sup>62</sup>

In contrast to the attitudinal scholarship discussed above positing that national bias results from unconscious psychological, cultural or philosophical factors, a strand of strategic scholarship identifies personal

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<sup>59</sup> Lawrence Baum, *Judges and their Audiences* (Princeton: Princeton University Press, 2006) at 6 [Baum, *Judges*].

<sup>60</sup> Baum, *Puzzle*, *supra* note 3 at 16-19; Posner, *How Judges Think*, *supra* note 3; *Ibid.* at 11-14.

<sup>61</sup> Posner & de Figueiredo, *supra* note 6 at 608. See also Paul B. Stephan, “Courts, Tribunals and Legal Unification – the Agency Problem” (2002) 3 *Chicago J. Int'l L.* 333 at 7-8.

<sup>62</sup> Bob Reinalda & Bertjan Verbeek, “The Issue of Decision Making within International Organizations” in Reinalda & Verbeek, eds., *Decision Making within International Organizations* (London: Routledge, 2004) 9 at 33-34.

career self-interest as a factor conducive to national bias in decision-making. In particular, scholars have evaluated whether national bias influences the decision-making of judges at the ICJ<sup>63</sup> and the ECHR.<sup>64</sup> Although these studies suggested that judges tend to protect national interests in cases where these interests are at stake, there is little evidence that decision-making is influenced by national affiliation in contexts where home states have no clear interests.<sup>65</sup> In fact, the factor of national affiliation is often absent from decision-making in ICs: in the ICJ, nationality was found to be relevant in 81 votes as compared to 1,277 where it was not relevant;<sup>66</sup> and in the WTO DSB, no national of the disputing parties may serve as a panel member, unless the parties agree otherwise.<sup>67</sup> Likewise, in the context of the *ad hoc* international criminal tribunals, none of the judges have any affiliation with parties to the conflicts in the former Yugoslavia and Rwanda. While some of the judges may be affiliated with a state with regional interests in these conflicts, such interests are unlikely to be so clear or so significant as to have any profound influence on decision-making. Accordingly, a study of sentencing outcomes at the ICTY found no relationship between the voting of judges on sentencing and the plausible policy preferences of the states with which they are affiliated.<sup>68</sup> For these reasons, it is therefore sensible to conclude that national affiliation is not a likely factor in judicial decision-making at the ICTY and ICTR.

In comparison to personal career self-interests, organizational self-interest is a much more promising avenue for applying the strategic model to decision-making in ICs. Like other IOs,<sup>69</sup> ICs are concerned with issues relating to staffing and budgeting. Like other scholars, I assume however that when it comes to judicial decision-making, ICs are most concerned with extending their authority, standing, independence and influence in the

<sup>63</sup> William Samore, "National Origins v. Impartial Decisions: A Study of World Court Holdings" (1956) 34 Chicago-Kent L. Rev. 193; Hensley, "National Bias", *supra* note 46; Il Ro Suh, "Voting Behaviour of National Judges in International Courts" (1969) 63 Am. J. Int'l L. 224; Edith Brown Weiss, "Judicial Independence and Impartiality: A Preliminary Inquiry" in Lori Damrosch, ed., *The International Court of Justice at a Crossroads* (Dobbs Ferry, NY: Transnational Publishers, 1987); Smith, *supra* note 6; Posner & de Figueiredo, *supra* note 6.

<sup>64</sup> Martin Kuijer, "Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice" (1997) 10 Leiden J. Int'l L. 49; Bruinsma, *supra* note 8; Voeten, "Impartiality", *supra* note 6.

<sup>65</sup> Terry, *supra* note 34; Hensley, "Bloc Voting", *supra* note 53; Kuijer, *ibid.*; Bruinsma, *supra* note 8; Voeten, "Impartiality", *supra* note 6.

<sup>66</sup> Posner & de Figueiredo, *supra* note 6 at 615.

<sup>67</sup> *Dispute Settlement Understanding, being Annex 2 to the Marrakesh Agreement Establishing The World Trade Organisation*, 15 April 1994, 33 I.L.M. 1125 (entered into force 1 January 1995), Art. 8(6).

<sup>68</sup> Meernik, King & Dancy, *supra* note 8 at 691-692, 698-700 (Judges hailing from France, the UK and the United States, states which most strongly conceived of Serbs as the aggressor states, were not more likely than judges from other countries to sentence convicted Serbian war criminals to longer sentences).

<sup>69</sup> Bertjan Verbeek, "International Organizations: The Ugly Duckling of International Relations Theory?" in Bob Reinalda & Bertjan Verbeek, eds., *Autonomous Policy Making by International Organizations* (London: Routledge, 1998) 11 at 22; John Mathiason, *Invisible Governance. International Secretariats in Global Politics* (Bloomfield, CT: Kumarian Press, 2007) at 226-235.

particular regime or region in which they operate.<sup>70</sup> The notion of organizational self-interest advanced here is not focused on the mere survival of an organization, but instead on its non-material interests in terms of ideational commitments, reputation, and effectiveness.<sup>71</sup>

The most prominent strategy in this vein is that of a court acting in accordance with public expectations, with the long-term objective of improving its standing in a community, and thereby enhancing compliance with its judgements.<sup>72</sup> This strategy is at the heart of positive political theory, which asserts that “the actions of courts are fundamentally ‘political’ in that they must anticipate the possible reactions of other political actors in order to avoid their intervention.”<sup>73</sup> More so than domestic courts, ICs remain fragile institutions in many respects and their authority may be diluted or resisted through non-use of their jurisdiction, non-participation in their proceedings, non-compliance with or legislative override of their decisions, and recontracting of their statutes. In the context of ICs, positive political theory therefore predicts that international judges will be especially sensitive to the political constraints with which they are faced, and thus will be responsive to the interests of relevant political actors, namely those actors whose compliance or participation they seek to secure and whose intervention they seek to avoid.

Although scholars have studied the political constraints on both the ICJ<sup>74</sup> and the WTO DSB,<sup>75</sup> scholars have most often used the strategic model in studies of the ECJ. These studies have indicated that strategic considerations related to political constraints play a role in judicial decision-making. These scholars note that the ECJ is constrained by the EC’s broader institutional structure, thus ensuring that the delegation of authority to the ECJ remains within the interests of state members. They have argued that the ECJ is faced with two principal political constraints: the threat of legislative override through treaty revision or the adoption of secondary rules by member states and the threat of non-compliance by the states involved in a particular case. In order to maintain its credibility and legitimacy, the ECJ purportedly

<sup>70</sup> Walter Mattli & Anne-Marie Slaughter, “Revisiting the European Court of Justice” (1998) 52 *Int’l Org.* 177 at 180; Alter, *Establishing*, *supra* note 6 at 45-46.

<sup>71</sup> Hans Mouritzen, *The International Civil Service: A Study of Bureaucracy: International Organizations* (Brookfield, VT: Dartmouth Publishing Company, 1990) at 12-14; Bob Reinalda & Bertjan Verbeek, “Autonomous Policy Making by International Organizations: Purpose, Outline and Results” in Reinalda & Verbeek, eds., *supra* note 69, 1 at 7; Bob Reinalda & Bertjan Verbeek, “Patterns of Decision Making within International Organizations” in Reinalda & Verbeek, eds., *Decision Making within International Organizations* (London: Routledge, 2004) 231 at 234.

<sup>72</sup> Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998) at 163-177.

<sup>73</sup> Garrett & Weingast, *supra* note 6 at 200.

<sup>74</sup> Jonathan Charney, “Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance” in Lori Damrosch, ed., *supra* note 63, 288; Eric A. Posner, “The Decline of the International Court of Justice” (John M. Olin Program in Law and Economics Working Paper No. 233, University of Chicago Law School, 2004), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=629341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629341)> [Posner, “Decline”].

<sup>75</sup> Richard H. Steinberg, “Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints” (2004) 98 *Am. J. Int’l L.* 247.

anticipates the reactions of powerful states to its decisions, chooses not to rule against their interests and decides cases among a range of outcomes acceptable to them. Through quantitative analysis of ECJ case-law and government and EC legal briefs, these scholars have concluded that ECJ decision-making is systematically influenced by political constraints.<sup>76</sup>

There are however a number of problems with the existing literature on the strategic model of decision-making in ICs. First, much of this literature tends to overstate the importance of the political constraints confronting ICs. Recontracting and override are generally unlikely in an international legal context where the processes for the adoption of secondary legislation and for treaty revision are costly, complex and lengthy.<sup>77</sup> This is all the more true when ICs interpret foundational treaties such as the UN Charter and when they adjudicate on the basis of norms of customary international law—situations where the odds of overriding by states are very low. In many ways, the context in which most ICs operate thus resembles that of a constitutional court, where the difficulty of amending a constitution makes it unlikely that an unpopular decision could trigger recontracting or override.<sup>78</sup> It is not surprising therefore that strategic scholarship finds that threats of non-compliance are more influential than threats of override.<sup>79</sup> But the threat of non-compliance may also be overestimated given that there are numerous examples of states complying with decisions of ICs that they do not agree with.<sup>80</sup> Ultimately, the relevance of the political factors that constrain ICs varies with the credibility of threats of override and non-compliance, which in turn depend on the formal features of ICs and regimes<sup>81</sup> as well as the sovereignty costs implied by particular decisions or regime issues.<sup>82</sup>

Second, this literature presumes that international judges are able to obtain perfect and complete information about the reaction and possible response of relevant actors.<sup>83</sup> However, the ability of international judges to ascertain whether state interests are threatened by a particular decision is not always obvious. This is especially the case in relation to decisions that deal with the interpretation and creation of international law:

<sup>76</sup> Garrett & Weingast, *supra* note 6; Garret, *supra* note 6; Garrett, Kelemen & Schulz, *supra* note 6; Clifford J. Carrubba, Matthew Gabel & Charles Hankla, "Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice" (2008) 102 Am. Pol. Sci. Rev. 435.

<sup>77</sup> Mark Pollack, "Delegation, Agency, and Agenda Setting in the European Community" (1997) 51 Int'l Org. 99 at 119-120; Darren G. Hawkins *et al.*, *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006) at 312.

<sup>78</sup> Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) at 24-25 [Stone Sweet, *Governing with Judges*]; Segal & Spaeth, *supra* note 25 at 106-107.

<sup>79</sup> Carrubba, Gabel & Hankla, *supra* note 76.

<sup>80</sup> Karen J. Alter, "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice" (1998) 52 Int'l Org. 121 [Alter, "Masters of the Treaty"] (pointing to the ECJ's decisions on the supremacy and direct effect of European Community law); Alter, "Agents or Trustees?", *supra* note 12 at 48-54.

<sup>81</sup> Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004) at 23-27.

<sup>82</sup> Alvarez, *supra* note 14 at 479.

<sup>83</sup> Segal & Spaeth, *supra* note 25 at 106.

The legal impact of a decision on the disputants and, even more, on the international community, may not become evident for a considerable period of time in part because of the absence of a direct reference to the decision or any acknowledgement that it is being complied with by the parties to the decision or by others.<sup>84</sup>

Strategic scholars themselves thus acknowledge that threats of override and non-compliance are more credible when governments are litigants and when other governments signal their support for a particular government.<sup>85</sup>

Third, this literature generally assumes that ICs pursue one particular kind of strategy, one that is aimed at avoiding sanctions from states and gaining state acquiescence to their decisions. But ICs may employ an incremental approach to extending their authority or powers that does not raise the spectre of override or non-compliance.<sup>86</sup> They may also engage in forward-looking behaviour not because of the fear of punishment, but “in order to enhance their own reputations for fairness, their own flexibility in present and future cases, and the centrality of constitutional review as a mode of governance.”<sup>87</sup> Conversely, they may also consider that it is preferable for their legitimacy and credibility to rule against powerful interests.<sup>88</sup> Most importantly, international judges may not see states as the only audience relevant to their credibility, authority and effectiveness. Like many IOs, the crucial actors for an IC are not simply its creators, but also its clients, sympathizers, opponents and rivals.<sup>89</sup> Many scholars have thus argued, for instance, that the ECJ’s credibility and effectiveness depends on its standing with national courts and therefore that ECJ judges “have recognized an audience beyond the parties to the case at hand and have crafted their opinions to encourage additional cases by appealing to both material interests and professional ideals of prospective litigants or referring courts.”<sup>90</sup> As such, depending on the context and their own strategic thinking, international judges may be concerned with a variety of target audiences, including particular non-state constituencies, such as domestic interests, epistemic communities, and transnational advocacy networks.

Accordingly, while the strategic model remains convincing in many respects, it must be adapted to take into account the strategic objectives of international judges and the particular institutional context in which they pursue these objectives. Of special importance will be the actors that an international judge identifies as a key constituency for extending the authority, standing, independence and influence of the judge’s specific IC.

My qualitative research in the ICTY and ICTR has revealed that many judges are most concerned with the objectives of ensuring justice for victims

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<sup>84</sup> Alvarez, *supra* note 14 at 463.

<sup>85</sup> Carrubba, Gabel & Hankla, *supra* note 76.

<sup>86</sup> Helfer & Slaughter, *supra* note 5 at 308, 314-317.

<sup>87</sup> Stone Sweet, *Governing with Judges*, *supra* note 78 at 90.

<sup>88</sup> Alter, “Agents or Trustees?”, *supra* note 12 at 42-43.

<sup>89</sup> Mouritzen, *supra* note 71 at 10-11.

<sup>90</sup> Damian Chalmers, “Judicial Preferences and the Community Legal Order” (1997) 60 Mod. L. Rev. 164 at 173-174; Helfer & Slaughter, *supra* note 5 at 308-312.



and facilitating the process of reconciliation in the Balkans and the Great Lakes region.<sup>91</sup> They have moreover pursued these objectives in highly politicized environments where they have often been accused by key constituencies of being partial to the interests of some and unresponsive to those of others.<sup>92</sup> As such, the audiences that ICTY and ICTR judges are most likely to care about are the various ethnic groups that are directly connected to the conflicts at the centre of their respective subject-matter jurisdictions. Official statements released by governmental and non-governmental spokespeople and media coverage ensure that ICTY and ICTR judges are aware that these ethnic groups are interested in case outcomes, particularly the conviction rates and average sentences of members of their groups and of those of other groups.<sup>93</sup> I therefore conceive of these constituencies as the true Beneficiaries of the mandate of Trusteeship with which ICTY and ICTR judges are endowed and expect that they will be responsive to the interests of these Beneficiaries.

The situation in the former Yugoslavia is one where the ICTY has to be responsive to the interests of multiple Beneficiaries: Serbs, Croats, Muslims, and Kosovar Albanians. Each of these groups has victims and accused persons in cases before the ICTY; their views matter equally in the overall process of reconciliation, and their cooperation is required in order for the ICTY to function.<sup>94</sup> In addition, each has a government or other representatives who voice their displeasure with specific decisions. I posit therefore that ICTY judges will be equally responsive to the preferences of all four groups as this is most likely to enhance the ICTY's standing and effectiveness, and to foster the process of reconciliation in the region. Accordingly, ICTY judges will convict defendants from all four groups at a relatively similar rate and will, *ceteris paribus*, hand them relatively similar sentences.

The situation in Rwanda is wholly different as the ICTR has essentially

<sup>91</sup> These objectives are also frequently referred to in judgements: see e.g. *Prosecutor v. Anton Furundija*, IT-95-17/1-T, Judgement (10 December 1998) at para. 288 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <<http://www.icty.org/>>; *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-T, Trial Judgement (1 December 2003) at para. 945 (International Criminal Tribunal for Rwanda, Trial Chamber), online: <<http://www.ictcr.org/>>.

<sup>92</sup> James Meernik & Kimi King, "The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis" (2003) 16 *Leiden J. Int'l L.* 717 at 730-731; Ralph Zacklin, "The Failure of Ad Hoc International Tribunals" (2004) 2 *J. Int'l Crim. Just.* 541; Emily Haslam, "Law, Civil Society and Contested Justice at the International Criminal Tribunal for Rwanda" in Marie-Bénédicte Dembour & Tobias Kelly, eds., *Paths to International Justice* (Cambridge: Cambridge University Press, 2007) 57.

<sup>93</sup> Based on my time working in the Trial Chambers of the ICTR and the Appeals Chamber of the ICTY, I know that judges and staff members at both the ICTR and the ICTY receive regular summaries of press coverage of their respective courts as well as security advisories that refer to the security risks associated with certain case outcomes in particular regions.

<sup>94</sup> An alternative hypothesis is that ICTY judges might be inclined to judge Serbs more harshly, as they are generally acknowledged in the West as the aggressors in the conflict. However, a past study shows that judges hailing from France, the UK and the United States, states which most strongly conceived of Serbs as the aggressor states, were not more likely than judges from other countries to sentence convicted Serbian war criminals to longer sentences: see Meernik, King & Dancy, *supra* note 8 at 691-692, 698-700.

only one Beneficiary: the current government of Rwanda, which is composed of the Tutsis and Hutu moderates who came to power in the aftermath of the Rwandan genocide. The Rwandan government initially called for the creation of the ICTR; the ICTR could not function without its cooperation in providing access to victims, witnesses and crime locations within the country. The ICTR has not tried any Tutsis or former RPF members for crimes they are alleged to have committed in responding to the genocide. At the same time, the Rwandan government has also been one of the ICTR's most vocal critics, censuring the ICTR for acquittals or low sentences and requesting the right to try certain accused persons itself. Finally, the reconciliation process is essentially run by the Rwandan government itself, with heavy emphasis placed on the prosecution of Hutu génocidaires and the elimination of the relevance of ethnicity within society.

In this context, I posit that since ICTR judges will be more responsive to the preferences of the Rwandan government than any other constituency, a strategic model predicts that *ceteris paribus* they will therefore convict defendants at a higher rate and hand down higher sentences than those at the ICTY.

I derive the following two hypotheses from this discussion:

*Strategic Hypothesis 1:* All other variables being equal, the conviction rates and average sentences at the ICTY will be relatively similar for Serb, Croat, Muslim, and Kosovar Albanian defendants. (SH1)

*Strategic Hypothesis 2:* All other variables being equal, the conviction rates and average sentences for defendants at the ICTR will be higher than those for defendants at the ICTY. (SH2)

### *The Interaction of Attitudes and Strategies*

In developing the attitudinal and strategic hypotheses, I have emphasized the importance of recognizing the heterogeneous nature of the international judiciary. International legal scholars tend to stress that international judges are part of an epistemic community that generally favours an internationalist set of preferences.<sup>95</sup> Given their varying professional backgrounds, it is far from obvious that international judges are unanimous in their attitudes and values. Meanwhile, international relations scholars often assume that ICs are monolithic institutions that develop uniform preferences in response to external dynamics and pressures.<sup>96</sup> However, the multiple objectives of an IC and its multifaceted strategic landscape can give rise to differences between international judges on the preferences and strategies that should guide an IC in its decision-making.

Far from amounting to a process governed by the preferences and interests of unitary institutional actors, I argue that judicial decision-making is driven, in significant part, by variations in the ideas and interests of

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<sup>95</sup> See e.g. Terris, Romano & Swigart, *supra* note 20 at 63. International lawyers are also conceived as being part of such a community: David Kennedy, "The Disciplines of International Law and Policy" (1999) 12 Leiden J. Int'l L. 9 at 83.

<sup>96</sup> Mattli & Slaughter, *supra* note 70 at 187.

international judges. In doing so, I take an eclectic position regarding the attitudinal-strategic debate, acknowledging that ideas and interests will matter on different terms and in different contexts. In particular, I predict that attitudinal factors are more likely to matter in decisions on issues where the preferences of judges are salient and the preferences of other actors are not; for instance, the aspects of decisions that act as precedents in ways that are not obvious to the actors most concerned with the legal issue resolved by this precedent. Conversely, I predict that strategic factors will matter more in decisions where the interests of relevant actors are obvious and where judges have no or few substantive commitments; for instance, the aspects of decisions that deal with the specific outcome that is most relevant to the parties of a case.<sup>97</sup>

In the context of the ICTY and ICTR, a confluence of factors determines the salience of the attitudinal and strategic models in any particular decision. While most judges at these institutions will have set ideas about the interpretation and application of international law, few judges will have biases regarding case outcomes in specific cases.<sup>98</sup> On the other hand, victim groups and their governments will have strong preferences about the latter and weak preferences, if any, regarding the former.<sup>99</sup> This enables judges to behave attitudinally with respect to issues concerning the interpretation and application of international law (as posited by AH1, AH2, and AH3) and to behave strategically with respect to case outcomes (as posited by SH1 and SH2).

### III. Empirical Analysis

#### 1. *Data, Coding, and Variables*

##### Attitudinal Hypotheses: AH1, AH2, and AH3

In order to test the relationship between the professional backgrounds of judges and their attitudes about international law, I created an original dataset comprising all of the judgements and decisions issued by the Appeals Chambers of the ICTY and ICTR from their inception to 1 June 2009 (N=58). Unlike the Trial Chambers, the Appeals Chambers exhibit the features, generally associated with appellate-level courts at the domestic level, required for application of the attitudinal model: judicial independence, lack of aspiration for higher office, finality of decisions and, to

<sup>97</sup> In fact, Alter has argued that the ECJ, playing off differences in time horizons between different actors in a regime, consciously pursues a strategy of rendering decisions where the case outcomes favour the interests of powerful states, but which nonetheless extend the reach of the ECJ's authority and powers in the long term in ways that are not obvious to states. See Alter, "Masters of the Treaty", *supra* note 80 at 130-133.

<sup>98</sup> See *supra* note 57 and accompanying text.

<sup>99</sup> As for states that might be concerned with decisions that expand the scope of application of international humanitarian law, their limited engagement with the *ad hoc* international criminal tribunals does not enable them to monitor the sovereignty costs of decisions, nor to signal their preferences in relation to these decisions.

some extent, docket control.<sup>100</sup> Due to the limited sample size, I decided to restrict my testing to the voting behaviour of judges who have participated in at least 10% of these judgements and decisions. Without this restriction, the voting behaviour of certain judges might be established on the basis of their participation in one or two judgements only.

I coded the independent variable of the professional backgrounds of judges on the basis of the public biographies of judges. Consistent with earlier work,<sup>101</sup> I assigned judges to a single category based on the prominence of their former position as diplomats, academics and judges/practitioners. Of course, peak coding may not be the most appropriate way of capturing the professional background of international judges and as further work develops in this area, other coding paths may prove more useful.

I coded for two dependent variables that feature prominently in broader debates regarding the proper scope of international law.<sup>102</sup> The first variable, customary international law, captures the number of times a judge has recognized a norm of customary international law. A norm of customary international law results from the constant and uniform practice of states and their belief that this practice amounts to law.<sup>103</sup> Although such norms are meant to reflect state practice and opinion, the methodology and reasoning employed by international judges for the identification and recognition of these norms is often criticized as lacking in consistency and rigour and supporting expansive interpretations of international law. International judges at the ICTY and ICTR, in particular, have been criticized for vagueness in methodology and for creating rather than discovering customary international law.<sup>104</sup>

The second variable, inherent powers, captures the number of times a judge has recognized that his or her IC possessed inherent powers. An application of the interpretive doctrine of effectiveness, the concept of inherent powers enables an IC to claim powers not expressly granted to it by statute, but which are necessary to guarantee the full effect of their statute or which are essential to the performance of their duties.<sup>105</sup> I then added these two variables together and adjusted the sum in accordance with a judge's level of participation in Appeals Chamber judgements to create an International Activism score. A high number in this score suggests that a judge is an international activist while a low number suggests that a judge is a statist conservative.

This dataset also captures three control variables: a judge's legal system

<sup>100</sup> This follows the approach set by Segal & Spaeth, *supra* note 25 at 92.

<sup>101</sup> 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* (Antwerp, Belgium: Intersentia, 2006) 203.

<sup>102</sup> Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007) at 284-285; Jan Klabbbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002) at 72.

<sup>103</sup> Boyle & Chinkin, *ibid.* at 278-285.

<sup>104</sup> Zahar & Sluiter, *supra* note 40 at 79-105.

<sup>105</sup> Klabbbers, *supra* note 102 at 67-73.

of origin, which tests an alternative account of the formation of attitudinal preferences; a judge's home state, which tests both the attitudinal model of appointment signalling and the strategic model of personal self-interest; and whether a judge's votes were in the ICTY or ICTR Appeals Chamber, which tests the strategic model of organizational self-interest and the period of their tenure at the Appeals Chamber.

In addition to the above, I also captured the rates at which judges issued dissenting and separate opinions, which I combined to produce an "individuation" score, and the subjects on which they issued dissents. These two variables promise to provide a better picture of the dynamics of decision-making at the ICTY and ICTR Appeals Chambers and thus enable me to identify judges whose voting behaviour may not reflect their individual preferences, but rather those of the majority in a given case.

### Strategic Hypotheses: SH1 and SH2

In order to test the relationship between the ethnicity of accused persons and the outcomes of their cases, I built on and modified the dataset developed by James Meernik, Kimi King, and Geoff Dancy on sentencing by ICTY Trial Chambers<sup>106</sup> and replicated it for sentencing by ICTR Trial Chambers. This dataset is comprised of the cases of all accused persons for whom a judgement by a Trial Chamber has been rendered from the inception of the ICTY and ICTR to 1 June 2009 (N=126). In addition, I created an original dataset comprised of the cases of all accused persons for whom a judgement by an Appeals Chamber has been rendered from the inception of the ICTY and ICTR to 1 June 2009 (N=75).

In both datasets, I coded the independent variable of ethnicity for each accused as Hutu, Serb, Croat, Kosovar Albanian, Muslim and other.

In the trial chambers dataset, I coded the following five dependent variables, capturing the most relevant aspects outcomes of the cases of each individual accused: their plea, their guilt or innocence, the severity of their sentence (in number of months, with 999 representing a life sentence), the number of counts for which they have been indicted and convicted, and the crime(s) for which they have been convicted (war crimes, crimes against humanity and genocide).

In the appeals chamber dataset, I coded the following four dependant variables, capturing the most relevant aspects of the outcomes of the cases of each individual accused: whether the Appeals Chamber overturned Trial Chamber's findings relating to the guilty conduct of an accused and to sentencing factors and whether the Appeals Chamber changed the sentence and by how much.

Both datasets also capture control variables concerning a convicted person's position in military and civilian hierarchies<sup>107</sup> and the presence of

<sup>106</sup> Meernik, King & Dancy, *supra* note 8.

<sup>107</sup> Accused persons were coded 1 if they held top-level civilian and military positions, 2 if they held mid-level civilian and military positions and 3 if they held low-level civilian and military positions. An accused with a high level position might be expected to receive a harsher sentence

mitigating and aggravating factors.<sup>108</sup> Both of these test the influence of factual variables on sentencing.<sup>109</sup>

Results and Discussion

Attitudinal Hypotheses: AH1, AH2, and AH3

Table 1 presents the results regarding the relationship between the professional backgrounds of judges (independent variable) and their international activism scores (dependent variable) in their voting behaviour in judgements at the ICTY and ICTR Appeals Chambers.

Judge	Former Position	International Activism Score
MUMBA	Judge/Practitioner	91.8
WEINBERG DE ROCA	Academic	67.7
NIETO-NAVIA	Academic	58.0
GÜNEY	Diplomat	46.7
SCHOMBURG	Judge/Practitioner	45.6
POCAR	Academic	42.3
JORDA	Judge/Practitioner	32.2
SHAHABUDDEEN	Judge/Practitioner	21.8
VOHRAH	Judge/Practitioner	19.3
MERON	Academic	17.6
VAZ	Judge/Practitioner	13.6
DAQUN	Diplomat	4.5

Table 1: Attitudinal Data for ICTY and ICTR Appeals Chambers Judges having participated in at least 1% of Judgments.

There was little association in these results between the former positions of judges and their international activism scores. The correlation between the two variables in the sample in table 1 was not very significant,  $r=0.29$ ,  $p<0.50$ . These results thus provide little support for any of the attitudinal hypotheses developed earlier.

However, given that these results did not track my qualitative research regarding the attitudinal commitments of certain judges, I decided to refine my sample further by limiting it to judges who had participated in 20% of judgements and with individuation rates of at least 20%.<sup>110</sup> The first

than an accused with a low level position.

<sup>108</sup> Mitigating and aggravating factors are taken into account by judges in the determination of a convicted person's sentence. The most common mitigating factors include a guilty plea; cooperation with the Prosecutor; expression of remorse; voluntary surrender; good conduct prior to the commission of crimes; any assistance given to victims; personal circumstances, including health, age, and family situation; and good conduct after the commission of crimes. The most common aggravating factors include breach of trust; discriminatory intent or zeal; the vulnerability, trauma, or number of victims; and bad conduct after the commission of crimes.

<sup>109</sup> Given the findings of previous studies (Meernik, King & Dancy, *supra* note 8 at 692-694, 698-700), I did not deem it necessary to test the relationship between individual judges and case outcomes. See also *supra* note 8, *supra* note 11 and accompanying text.

<sup>110</sup> The only judge to have an individuation rate of at least 20% to be excluded from this sample is Judge Güney, as his individuation rate was artificially increased by his identical dissents on

refinement provides more reliability to my results by ensuring that judges are coded on a greater number of decisions, and eliminating the role played by chance in the assignment of judges to particular cases. The second refinement ensures that the data is limited to those judges who have strong preferences and have acted on those preferences in their voting.<sup>111</sup> These results are shown in table 2.

Judge	Former Position	International Activism Score
WEINBERG DE ROCA	Academic	67.7
NIETO-NAVIA	Academic	58.0
SCHOMBURG	Judge/Practitioner	45.6
SHAHABUDDEEN	Judge/Practitioner	21.8
VOHRAH	Judge/Practitioner	19.3
MERON	Academic	17.6
DAQUN	Diplomat	4.5

Table 2: Attitudinal Data for ICTY and ICTR Appeals Chambers Judges having participated in 20% of judgments and with Individuation Rates of at least 20%.

The correlation between the two variables in the sample in table 2 was significant,  $r=.67$ ,  $p<.50$ . In fact, the results in table 2 almost perfectly track the attitudinal hypotheses developed earlier, as former academics have high international activism scores (AH1), former diplomats have lower international activism scores (AH2), and former judges or practitioners are somewhere in the middle (AH3). The only outlier in these results is Judge Meron, who has a very low international activism score. However, this is consistent with the view that Judge Meron, like many American international law academics, has adopted a more conservative approach to the development of customary international law.<sup>112</sup> Indeed, if one removed Judge Meron from the sample, the correlation between these two variables rose to  $r=0.91$ .

Notwithstanding the results of this second sample, my results as a whole provide modest support for my attitudinal hypotheses. In my current dataset, the limited sample size does not eliminate the role played by chance in the assignment of judges to particular cases. Further work along these lines on the ICTY and ICTR Appeals Chambers should capture the hundreds of interlocutory decisions issued by the Appeals Chamber, and not just final judgements. In addition, as the example of Judge Meron makes clear, the variable of professional background is probably not linked to attitudinal commitments as straightforwardly as the literature often assumes.

More importantly, my research on individuation in the Appeals Chamber reveals that issues relating to customary international law and

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issues relating to cumulative convictions.

<sup>111</sup> In a way, this eliminates more passive judges in favour of focusing on more active judges. Although this change that may overstate the relevance of the individual-level approach, it makes it possible to focus on attitudinal variables affecting the decision-making of certain judges.

<sup>112</sup> Wessel, *supra* note 31 at 395.

implied powers have very infrequently been the focus of dissents. In fact, I only coded two dissents (less than 4%) centring on a disagreement relating to the interpretation of international law.<sup>113</sup> On the other hand, I coded 21 dissents (close to 41%) focusing on issues relating to the proper scope of liability and the fairness to the accused. This suggests that the most important attitudinal issue at the ICTY and ICTR is not so much the role of international law with regard to states, but rather the role of international criminal law with regard to accused persons.

What is more, these two sets of issues cut across each other in ways that may contradict my attitudinal hypotheses. While I expected academics to be international activists, their concern for the fair trial rights of an accused in an individual case might also lead them to be more conservative on issues where an expansion of international law is likely to encroach on those rights.<sup>114</sup>

Nonetheless, my results do show that the attitudes of individual judges in the Appeals Chamber are largely consistent across cases and, most tellingly, across both of the ICTY and ICTR. This is clear from the top seven ranked judges in the ICTY and ICTR Appeals Chamber in international activism rankings and individuation rankings, as seen below in tables 3 and 4.

Judge	International Activism Ranking (ICTY)	International Activism Ranking (ICTR)
NIETO-NAVIA	1	2
JORDA	2	1
POCAR	3	4
GÜNEY	4	6
SHAHABUDDEEN	5	5
VOHRAH	6	2
MERON	7	7

Table 3 – Rankings of Top Seven Ranked ICTY and ICTR Appeals Chamber Judges as per their International Activism Scores.

<sup>113</sup> See Dissent of Judge Schomburg in *Prosecutor v. Galić*, IT-98-29-A, Appeal Judgement (30 November 2006) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <<http://www.icty.org/>> [Galić]; Dissent of Judge Shahabuddeen in *Stakić*, *supra* note 39.

<sup>114</sup> See e.g. the dissents of Judge Pocar, a former academic, against the Appeals Chamber's power to enter a conviction or increase a sentence on appeal in *Galić*, *ibid.*; *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeal Judgement (26 May 2003) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: <<http://www.ictr.org/>>; *Prosecutor v. Semanza*, ICTR-97-20-A, Appeal Judgement (20 May 2005) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: <<http://www.ictr.org/>>.



Judge	Individuation Ranking (ICTY)	Individuation Ranking (ICTR)
SHAHABUDDEEN	1	2
SCHOMBURG	2	4
VOHRAH	3	7
DAQUN	4	1
SNIETO-NAVIA	4	3
MERON	6	5
WEINBERG DE ROCA	7	6

Table 4 – Rankings of Top Seven Ranked ICTY and ICTR Appeals Chamber Judges as per their Individuation Scores.

It is also of interest to report the tendency for judges to have higher customary international law scores in the ICTY than in the ICTR. A qualitative review of ICTY and ICTR appeal judgements reveals that this is largely the result of the greater role that war crimes have played in the case-law of the ICTY as opposed to the ICTR. Many of the ICTY's most significant instances of the application and interpretation of customary international law have related to war crimes and international humanitarian law.<sup>115</sup> This, in turn, results from the higher number of different types of war crimes that were committed during the conflict in the former Yugoslavia as compared with the crimes committed during the conflict in Rwanda, and the greater emphasis which was placed on customary international law in the ICTY Statute as compared to the ICTR Statute.<sup>116</sup>

While my results only provide modest support for my posited independent variable (professional background) and none of the control variables (country of origin and legal system of origin)<sup>117</sup> yielded significant results in the aggregate, my results do demonstrate that judges have different attitudes that affect their judicial behaviour. With an admittedly limited sample, my results suggest that professional background may affect a judge's policy preferences, although this will not occur in a necessarily straightforward manner given the potential for conflicting preferences in certain cases (*e.g.*, international activism versus a concern for fair trial rights) and for the role of other attitudinal influences (*e.g.*, professional background versus particular ideologies or currents among certain groups of academics). In any case, these results and this discussion certainly evince that applications of the attitudinal model show promise for understanding the decision-making of ICs.

<sup>115</sup> Danner, *supra* note 11.

<sup>116</sup> Indeed, in addition to the Art. 2 jurisdiction over grave breaches of the *Geneva Conventions* provided, Art. 3 of the *ICTY Statute*, *supra* note 10, provides that it "shall have the power to prosecute persons violating the laws or customs of war." The equivalent provision of the *ICTR Statute*, *supra* note 10, is Art. 4, but it only grants jurisdiction over violations of common article 3 of the *Geneva Conventions*.

<sup>117</sup> I do not report these results here, but they are included in the quantitative data for this article.

Strategic Hypotheses: SH1 and SH2

Table 5 presents the results regarding the relationship between the ethnicity of accused persons (independent variable) and the outcomes of their cases (dependent variable) in judgements rendered by the Trial Chambers of the ICTY and ICTR.

	Serb	Croat	Muslim	Kosovar	Hutu
Number of Defendants	51	15	9	6	42
Conviction Rate	93.9%	92.3%	77.8%	33.3%	82.9%
Conviction Rate per Count (without acquittals)	54.0%	50.4%	42.3%	25.0%	44.8%
Average Sentence	220.9	198.4	93.4	114	676.1
Median Sentence	240	180	60	114	999
Percentage of Convictions for Genocide	5.9%	0.0%	0.0%	0.0%	82.9%
Average Sentence for Genocide	384	NA	NA	NA	676.1
Percentage of Convictions for Crimes Against Humanity	82.3%	66%	0.0%	0.0%	74.3%
Average Sentence for Crimes Against Humanity	230.4	224.4	NA	NA	676.1
Percentage of Convictions for War Crimes	66.7%	80.0%	77.8%	33.3%	11.4%
Average Sentence for War Crimes	227.2	199.5	93.4	114	830.25
Average Sentence for Hierarchy Level 1	205.2	202.5	NA	72	871.2
Average Sentence for Hierarchy Level 2	248	540	37.5	NA	513.5
Average Sentence for Hierarchy Level 3	180.9	123.6	168	156	434.6
Number of Aggravating Factors	2.06	1.1	2	2	1.7
Number of Mitigating Factors	2.4	0.6	3.6	1.5	0.8

*Table 5 – Case Outcomes in the ICTY and ICTR Trial Chambers for Accused Persons by Ethnic Group (without guilty pleas).*

These results provide tentative support for SH1 and strong support for SH2. With respect to SH1, the results demonstrate that the case outcomes for Serbs and Croats are remarkably similar in terms of conviction rates and conviction rates per count. Although Serbs tend to have received harsher

sentences in general than Croats, the results suggest that this may have more to do with the types of crimes for which Serbs have been convicted (as more convictions for genocide and crimes against humanity have been entered against Serbs than against Croats) and their positions in relevant hierarchies (the average hierarchy level (from 1 to 3) of convicted Serbs is 2.04 as opposed to 1.78 for Croats) than any sustained bias against them. As for Muslims and Kosovars, while the results appear to indicate that they have received preferential treatment from the ICTY trial chambers, the dataset is too limited to draw any reliable conclusions.

When Muslims and Kosovars were excluded from the sample in table 5, the correlation between ethnicity (Serb, Croat) and sentence was not significant,  $r=.01$ ,  $p<.50$ . This finding of an absence of relationship between ethnicity and sentencing at the ICTY supports SH1 and is consistent with the findings of earlier studies.<sup>118</sup> In the end, these findings suffer from an important methodological weakness in that they may not adequately capture the gravity of the underlying conduct for which defendants have been charged and convicted. Other studies have reported that different factors relating to the gravity of the offence, most notably the number of offences and the rank of the accused are strong predictors of the length of sentences.<sup>119</sup> Future work could therefore compare sentences for killings by Croats with sentences for killings by Serbs as opposed to comparing sentences in terms of similar types of crimes. On the other hand, a focus on the underlying conduct may obscure the fact that strategically relevant constituencies and actors consider that almost all of the crimes committed against them or the groups with they are affiliated in cases before the ICTY and the ICTR are grave and should warranting the harshest sentences available under law.

With respect to SH2, the results show that while Hutu accused persons have lower conviction rates, either in general or by count, than Serbs or Croats, they have received much harsher treatment from ICTR trial chambers in terms of their overall sentences, the types of crimes for which they were convicted and their positions in relevant hierarchies. Indeed, the correlation between ethnicity (Serb, Croat, Hutu) and average sentence in the sample in table 5 was significant,  $r=.54$ ,  $p<.50$ . When the sample was divided between Serbs and Croats on one hand and Hutus on the other, the correlation rose to  $r=.58$ . Of course, these results could in large part be explained by the greater gravity of the crimes committed by Hutus during the Rwandan genocide, a point which as noted above could be further explored by comparing the underlying conduct of convicted persons. However, although life sentences are permitted in both tribunals, only one convicted person has ever received a life sentence at the ICTY.<sup>120</sup> Seventeen accused persons—close to 46% of all convicted persons—have received life sentences at the ICTR. Given the overall seriousness of the crimes committed by Serbs, Croats and Hutus on

<sup>118</sup> Meernik & King, *supra* note 92 at 747.

<sup>119</sup> See, e.g., Barbara Hola, Alette Smeulders & Catrien Bijeveld, "Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice" (2009) 22 Leiden J. Int'l L. 79.

<sup>120</sup> Galic, *supra* note 113.

the whole, it seems unlikely that differences in the underlying conduct of convicted persons could fully account for this discrepancy. Strategic considerations appear to be playing a role.

In order to further isolate the role played by the strategic context in explaining case outcomes at the ICTY and ICTR, it is of interest to look at the relationship between these two variables in the decision-making of the Appeals Chamber, which is presented in table 6. Since judges in the Appeals Chamber make decisions on appeal after key constituencies have expressed their views regarding the sentences handed out by the Trial Chamber, it is reasonable to expect that strategic considerations will have greater salience at the appellate level.

	Serb	Croat	Muslim	Kosovar	Hutu
Number of Defendants	30	13	7	2	27
Average Sentence	269.3	149	81.4	78	679.9
Median Sentence	240	120	42	NA	999
Average Sentence when changed by AC	319.36	124.8	22	NA	533.3
Rate of increase of sentence at AC	13.8%	7.7%	0.0%	0.0%	14.3%
Average increase of sentence at AC	189.0%	180%	NA	NA	224.2%
Rate of decrease of sentence at AC	31.0%	30.8%	42.8%	0.00%	23.8%
Average of decrease of sentence at AC	-17.2%	-47%	-50%	NA	-46.4%
Average change of sentence when changed by AC	46.3%	-1.6%	-50%	NA	55.1% <sup>121</sup>
Rate of increase of guilty conduct at AC	20.6%	7.7%	0.0%	0.0%	14.3%
Rate of decrease of guilty conduct at AC	37.9%	69%	42.8%	0.0%	47.6%

Table 6 – Case Outcomes in the ICTY and ICTR Appeals Chambers for Accused Persons by Ethnic Group.

The results in table 6 provide little support for SH1, but the data is too limited, save for cases involving Serb accused persons, to draw any reliable conclusions. On the other hand, a comparison of case outcomes for Serbs and Hutus yields strong support for SH2. Once again, results for accused from the other three ethnic groups have been excluded due to the low sample size. When the sample is limited to these two groups only, the correlation between ethnicity and severity of sentence is significant,  $r=.67$ ,  $p<.50$ .

<sup>121</sup> This percentage rises to 69.5% if one excludes the *Kajelijeli* Appeals Judgement, where the Appeals Chamber reduced the convicted person's sentence by a significant margin as a result of the violations of his human rights: *Prosecutor v. Kajelijeli*, ICTR-98-44A, Appeal Judgement (23 May 2005) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: <<http://www.icttr.org/>>.

In sum, the results presented in table 5 provide only tentative support for SH1 in terms of the outcomes of cases involving Serbs and Croats. Ethnicity does not appear to have been an independent factor in the sentencing of convicted individuals at the ICTY. There are some observable variations between ethnic groups, however, and a variable that more accurately captures the gravity of the charged conduct may provide stronger support for SH1. The results in tables 5 and 6 provide strong support for SH2 in terms of the sentences given to Hutu convicted persons (but not in terms of conviction rates). Convicted Hutus are on average given more severe sentences than Serbs who have been convicted for the same offence.

Of course, my findings cannot prove that any strategic considerations actually influence the sentencing decisions of judges at the ICTY and ICTR in individual cases, and cannot exclude the possibility that such decisions reflect the proper assessment of the facts and sentencing determinants in these cases. It is important to note that the same factors in sentencing must be considered by judges at the ICTY and ICTR; these factors include the sentencing practice that has developed in the tribunals' respective case-law<sup>122</sup> as well as the general practice regarding prison sentences in the former Yugoslavia or Rwanda.<sup>123</sup> But to the extent that these factors affect sentencing practice, they can in fact be seen as institutionalized expressions of the strategic objectives pursued by the tribunals' judges. The former factor ensures consistency between groups in sentencing outcomes within an IC, reflecting SH1. The latter factor expresses the tribunals' underlying strategic goal of ensuring that sentencing outcomes speak to their particular Beneficiary or Beneficiaries.

My findings also do not exclude the possible influence of prosecution bias, whereby prosecution decisions in terms of allocation of resources and indictment may have a significant impact on case outcomes. Nonetheless, the apparent similarity in sentencing outcomes within the ICTY and the significant differences in the sentencing outcomes between the ICTY and ICTR are suggestive. What I have shown with respect to the strategic hypotheses is that there are significant discrepancies between the sentencing practices of the ICTY and ICTR. These practices suggest that differences in sentencing trends may depend, in large part, on the strategic context that judges are faced with, particularly whether they are dealing with one or

<sup>122</sup> See *Prosecutor v. Krstić*, IT-98-33-A, Appeal Judgement (19 April 2004) at para. 248 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <<http://www.icty.org/>>.

<sup>123</sup> See International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.7 (1996), rule 101(B)(iii); International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, U.N. Doc. ITR/3/REV.1 (1995), rule 101(B)(iii). It should be noted that sentencing practices in Rwanda tend to be harsher than sentencing practices in the former Yugoslavia: see *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Trial Judgement (22 February 2001) at paras. 829-835 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) (summarising the sentencing practices in the former Yugoslavia); *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Trial Judgement (25 February 2004) at paras. 810-811 (International Criminal Tribunal for Rwanda, Trial Chamber) (summarising the sentencing practices in Rwanda).

more Beneficiaries among the constituencies that they identify as most relevant to their work.

#### IV. Conclusion

This is the first study to quantitatively examine the decision-making of the ICTR Trial Chambers and of the ICTY and ICTR Appeals Chambers.<sup>124</sup> As my article has shown, the similarities and differences between these ICs have created a rich empirical environment rife with natural experiments.

In terms of the attitudinal hypotheses, a comparison of decision-making in the ICTY and ICTR Appeals Chambers demonstrated that the judges in these two ICs displayed stable patterns of judicial behaviour—patterns that reflected their attitudinal commitments regarding international law and their conception of the judicial role. Former academics tended to be more international activist, former diplomats tended to be more statist conservative and former judges/practitioners did not appear to tend towards either preference. The results also suggested that another powerful attitudinal issue to model may be a judge's position on the appropriate emphasis to be placed on the fair trial rights of the accused.

Meanwhile, in terms of the strategic hypotheses, a comparison of decision-making between the ICTY and ICTR suggested that judges within these two ICs evinced divergent patterns of judicial behaviour in terms of sentencing practices, reflecting dissimilarities in their environments. Indeed, the results show that ICTY conviction rates and sentence lengths tended to be relatively similar for Serbs and Croats while Hutus tended to receive harsher sentences than either Serbs or Croats. Although my approach and methodology can serve as a possible template for studying decision-making in other ICs, my results are not necessarily generalisable for a number of reasons. First, my dataset, especially with respect to the attitudinal hypotheses, is too limited to draw any reliable conclusions. As mentioned above, further work on decision-making at the ICTY and ICTR would gain from coding the hundreds of interlocutory decisions produced by the Appeals Chambers, refining the coding approach adopted with respect to professional background and sentencing outcomes and applying multivariate regression analysis for testing the control variables identified above. Nonetheless, my findings are suggestive and are also consistent in many respects with the findings of previous qualitative and quantitative studies of the decision-making of other ICs.<sup>125</sup>

Second, the *ad hoc* international criminal tribunals represent an other-binding, as opposed to self-binding, form of delegation,<sup>126</sup> one that comes

<sup>124</sup> For the first quantitative study of the decision-making of the ICTY Trial Chambers, see Meernik, King & Dancy, *supra* note 8.

<sup>125</sup> See sections II.1 and II.2, above.

<sup>126</sup> Karen J. Alter, "Delegating to International Courts: Self-binding vs. Other-binding Delegation" (2008) 71 *Law & Contemp. Probs.* 37 at 37. Alter defines "other-binding" delegation as delegation through which "states primarily bind other actors (citizens, businesses, government employees, administrative agencies, police, et cetera) to follow the interpretation and application of legal rules by courts" and "self-binding" delegation as delegation through

with low, or at least unapparent, sovereignty costs for its creators. If the *ad hoc* tribunals were able to significantly develop and broaden the scope of international humanitarian law and international criminal law, it is in part because the sovereignty costs of their decisions were not immediately obvious to concerned states and because these states did not signal their preferences on these issues.<sup>127</sup> This may, in some ways, reflect the particular mandate of international criminal tribunals, which focus on the individual criminal responsibility of individuals. The other-binding nature of international criminal tribunals stands in sharp contrast with the nature of ICs operating in the fields of regional integration, human rights or international trade, where sovereignty costs for many states (and powerful states) are higher and more obvious. Indeed, such ICs exercise judicial oversight authority over state compliance with international provisions implemented at the domestic level. That said, as the experience of the ECJ shows,<sup>128</sup> other ICs have managed to expand the scope of international law in ways that go against state preferences in the long term by deciding case outcomes in accordance with state preferences in the short term.

Third, the individual-level perspective employed in this article may not be appropriate to the study of some ICs. Decisions in ICs are generally made by panels of three or more judges and can thus be influenced by small group dynamics of conformity, deviance and leadership,<sup>129</sup> as well as the norms of collegiality that have been found to structure deliberative decision-making.<sup>130</sup> In addition, the legal support staff found in most ICs play varying roles in the decision-making process,<sup>131</sup> which may be more or less bureaucratic as a result.<sup>132</sup> Finally, ICs can be seen as social systems in which judicial decision-making will be inter-subjective, driven by the socialization of judges and legal staff.<sup>133</sup> Accordingly, as table 7 shows, the individual-level perspective may be more appropriate to the study of certain ICs than others, depending

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which states bind themselves, "subjecting their decision-making authority to judicial oversight so as to enhance their own credibility as a 'rule of law' political system." She notes that while self-binding delegation comes with significant sovereignty costs, other-binding delegation does not.

<sup>127</sup> It is important to note that this observation need not be limited to tribunals with the circumscribed jurisdictional mandate of the ICTY and ICTR. The ICC also has the potential to expand the scope of international humanitarian law and international criminal law in ways that may frustrate the interests of powerful Western states, even if its focus in terms of prosecutions is largely on crimes committed by non-Western leaders in the developing world.

<sup>128</sup> Alter, "Masters of the Treaty", *supra* note 80 at 130-133.

<sup>129</sup> S. Sidney Ulmer, *Courts as Small and not so Small Groups* (Morristown, NJ: General Learning Press, 1971); Lewis Kornhauser & Lawrence Sager, "The One and the Many: Adjudication in Collegial Courts," (1993) 81 Cal. L. Rev. 1; Jonathan Matthew Cohen, *Inside Appellate Courts. The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals* (Ann Arbor: The University of Michigan Press, 2002); Posner, *How Judges Think*, *supra* note 3 at 31-35.

<sup>130</sup> Harry T. Edwards, "The Effects of Collegiality on Judicial Decision-Making," (2003) 151 U. Pa. L. Rev. 1639.

<sup>131</sup> Terris, Romano & Swigart, *supra* note 20 at 203-204.

<sup>132</sup> Elizabeth A. Thompson & Robert S. Thompson, "Research Staff at Appellate Courts: Function, Personalities and Ethical Constraints" in Shimon Shestret, ed., *The Role of Courts in Society* (Dordrecht: Martinus Nijhoff, 1988) 244; Wolf Heydebrand & Carroll Seron, *Rationalizing Justice: The Political Economy of Federal District Courts* (Albany: SUNY Press, 1990).

<sup>133</sup> Clayton, *supra* note 21 at 32.

on the extent to which decision-making in an IC is essentially individual or organizational in nature.<sup>134</sup>

IC	Level of Collegiality	Level of Bureaucratization	Appropriate Perspective
ICJ	Unanimity rate of 7.5%. <sup>135</sup>	Limited involvement of legal staff in decision-making. <sup>136</sup>	Individual-level
ICTY/ICTR	Unanimity rate of 48.3%.	Involvement of legal staff in decision-making.	Individual-level
ECJ	Decisions often made by consensus. <sup>137</sup> No individual opinions allowed.	Judiciary organized in a hierarchical manner. <sup>138</sup>	Organizational
WTO AB	Consultation with the entire roster of panellists. <sup>139</sup> No individual opinions allowed.	Legal staff highly involved in decision-making.	Organizational

Table 7 – The Individual-level Organizational Perspectives.

Ultimately, the eclecticism of the approach advanced in this article, embracing as it does both ideas and interests, has its limits. To be sure, further work on the ways in which institutionalist and constructivist accounts may both complement and compete with the account of decision-making in ICs presented here would be useful. There is little doubt that constructivist research setting out the constitutive pathways through which international judges or ICs as a whole may develop certain social norms and structures would be a useful competing avenue for research on the behaviour of ICs. Of greater interest still would be research combining the individual-level insights developed in this article with broader ideational influences in a structurationist perspective, conceiving of international judges and the broader social structures as mutually constitutive of one another.<sup>140</sup>

<sup>134</sup> Although this point is not considered here in any depth, it may also be of interest to reflect on the locus of organisational influence itself. For certain ICs, the IO within which they are embedded may be a more relevant unit of analysis than the IC itself. Both the ECJ and the WTO AB, for instance, are perhaps more committed to protecting and extending the legitimacy of the WTO or the EU than their own legitimacy as an IC.

<sup>135</sup> Kuijer, *supra* note 64 at 64.

<sup>136</sup> Connie Peck & Roy S. Lee, eds., *Increasing the Effectiveness of the International Court of Justice. Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court* (Leiden: Martinus Nijhoff, 1997) at 207-232; Alvarez, *supra* note 14 at 609; Terris, Romano & Swigart, *supra* note 20 at 203-204.

<sup>137</sup> Chalmers, *supra* note 90 at 168.

<sup>138</sup> *Ibid.*; de S.-O.-l'E Lasser, *supra* note 19 at 303-307.

<sup>139</sup> Terris, Romano & Swigart, *supra* note 20 at 60-61.

<sup>140</sup> Moshe Hirsch, "Sociology of International Law" (2005) 55 U.T.L.J. 891 at 904.



Notwithstanding these limits to my study's generalizability, future work on the decision-making of the International Criminal Court (ICC) could build on the approach adopted in this article. The attitudinal model employed here could certainly be extended to the ICC, since the tension between internationalism and statism is and will continue to be a dominant theme in judicial decision-making at the ICC. Although the strategic context of the ICC will shift from case to case, making such analysis more difficult, this will provide a natural testing ground for different models of judicial strategic behaviour.

My results also do intimate two conclusions that are interesting for the study of ICs and international relations generally. First, my results tend to show that both the ideas of individual judges, and their perceptions of their organization's strategic interests, can account for variations in the decision-making of ICs. The posited attitudinal and strategic models, taken together with the data presented in this article, imply that the way in which institutional actors are influenced by ideas and interests will vary with changing contexts and issues. My attitudinal model is most closely connected with rationalism, to the extent that it focuses on the causal role of ideas and conceives of judges as rational and pre-social actors. My strategic model is most closely connected with liberalism, to the extent that it emphasizes the preferences of non-state actors and interest groups. Judicial decision-making in ICs may thus constitute an exercise whereby judges rationally pursue their own attitudinal preferences on certain matters, while on other matters conforming to liberal theory by strategically taking into account the preferences of relevant actors. In the specific contexts of the ICTY and ICTR, I have argued that the rationalist/attitudinal model is most relevant when judges adjudicate questions of law, and that the liberal/strategic model is most relevant when judges make decisions on the guilt of an accused, or on the quantum of sentencing. This conclusion is not only of interest for further rationalist or liberal work on ICs, but also a useful starting point or counterpoint for constructivist and institutionalist research.

Second, my results suggest that while external interests can influence judicial decisions, they are only able to do so in circumstances where they have a basis in the ideas and interests of judges. Unlike much of the strategic literature, I have conceived of an IC's strategy in non-material terms, focusing on the relevance of external actors to the IC's aims and objectives, rather than the actors' threats of sanction or override. Accordingly, I have assumed that the relative role in decision-making of the ideas of judges and the interests of external actors will depend on the particular objectives of judges as well as the context in which they operate. ICs are not therefore simply responsive to state interests as assumed by realists and institutionalists, nor is their behaviour as consistent with overall regime aims as assumed by functionalists. In sum, ICs are not an escape from international politics, nor are they completely consumed by them. Judicial decision-making in ICs may instead amount to a form of autonomous decision-making undertaken by judges who pursue certain objectives and who, like other actors, react and adapt to their environments in the pursuit of their objectives. Perhaps it is more helpful to think about the modes and

structure of international courts' decision-making, like all law, as necessarily existing within a dynamic interplay of institutional interests and jurisprudential norms—forever suspended somewhere in between apology and utopia.<sup>141</sup>

Ultimately, understanding the decision-making of ICs has obvious implications for institutional design. Different models of judicial behaviour predict that decision-making will be influenced by different variables, which in turns affects how an IC will function within a given regime and how effective it will be in addressing different regime objectives and challenges. My approach advocates understanding the array of preferences that animate the decision-making of ICs from the perspective of the attitudinal and strategic thinking of judges. In this way, it may be possible for policy-makers to move beyond the idea that the inherent institutional structure of some ICs makes them more likely than others to act as agents than trustees, and to begin understanding in which circumstances ICs may or may not do so. In this way, policy-makers could design regimes in accordance with how the preferred outcome for IC behaviour—agency or trusteeship—enhances the overall effectiveness of the regime.

Likewise, quantitative studies of trends in decision-making can be of use to the judges in ICs. They can use studies such as this to revisit their assumptions and commitments and reflect upon some of the trends and associations that tend to emerge in their decision-making. This latter process of judicial self-examination will probably meet with more resistance than the less personal policy insights that could be offered to institutional designers: not only because of the entrenched nature of the norms that animate judicial decision-making, but also because of the norms of judicial independence that are meant to govern it. In either case, both sets of actors stand to gain from better understanding, or even acknowledging, the complex relationship that binds them to one another.

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<sup>141</sup> Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 1989).