

# **Borrowing and non-Borrowing among International Courts**

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## **First Draft!**

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### **Abstract**

Why do some international courts and judges extensively borrow from other international courts while others do not? Answers to this question have important implications for debates on transjudicial communication, the diffusion of international legal norms, and international judicial behavior. Judges may use external sources because they help improve decisions or because it fits their ideological outlook. They may also use them purposively to achieve a desired effect with a particular audience. First, judges may want to influence other courts, creating incentives to engage in reciprocity. Second, judges may consider the effect of external citations on state parties. External citations could lead to costly charges that judges are exceeding their delegated authority. They also have potential benefits as a persuasive tool, especially in interactions with developing democracies. An in-depth analysis of ECtHR citations reveals that while the court is reluctant to formally acknowledge the influence of other courts, external case-law does play a larger role in separate opinions and deliberations. Moreover, judicial ideology shapes the decisions of judges to borrow or not to borrow from other courts. Interestingly, the arguments advanced by judges for and against reliance on external sources are not unlike those used in the US Supreme Court. A preliminary global analysis of cross-court citations confirms that courts whose membership is dominated by emerging democracies and whose decisions have few direct consequences for state parties are much more likely to rely on external sources. The resulting network of courts is not horizontal and not characterized by reciprocal relationships. Instead, there are a few courts who are the sources of most cases cited by others and who rarely use case-law developed elsewhere.

## **BORROWING AND NON-BORROWING AMONG INTERNATIONAL COURTS**

National and international judges increasingly communicate with each other and influence each other's interpretations of legal issues (e.g. Glendon 1991; Lester 1987; Slaughter 1994, 2003, 2004). According to Anne-Marie Slaughter, such "transjudicial communication" has become an integral part of a "new world order" (Slaughter 2004) leading to an emerging "global jurisprudence" created by a "global community of courts" (Slaughter 2003). While the concept of transjudicial communication has attracted a great deal of interest,<sup>1</sup> most of the literature has sought to advance normative claims for or against the practice, especially with regard to the usage of foreign citations by the U.S. Supreme Court. Consequently, there is little comparative evidence of just how common reliance on external decisions is and what may explain variation in this practice (Black and Epstein 2007).

I address these issues in the context of international courts. International courts issue judgments that serve as a source of inspiration for domestic courts. They also borrow from each other and from domestic constitutional courts. These practices are by no means uncontroversial. Most international courts are delegated the task of interpreting a specific treaty or convention and are often explicitly discouraged from developing broader precedent. On the other hand, without transjudicial communication the proliferation of international tribunals may lead to inconsistent international legal norms given the decentralized and non-hierarchical nature of international law. There are complaints aplenty that international courts rely either too much or too little on each other's decisions. A former president of the International Court of Justice (ICJ) stated in a speech before the UN General Assembly that inter-judicial dialogue is insufficient to resolve

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<sup>1</sup> An indicator of the importance of this concept in the legal academy is that the term "transjudicial communication" or "transjudicialism" has now appeared in 128 U.S. Law Review articles (based on a Lexis Nexis search on January 23, 2009).

inconsistencies between international courts as every institution “[..]has a tendency to go its own separate way” (Guillaume 2000). Consistent with this sentiment, some argue that the World Trade Organization’s (WTO) Dispute Settlement Body (DSB) and Appellate Body (AB) should be more willing to rely on public international law and engage sources other than its founding treaties (e.g. Pauwelijn 2001). By contrast, the Inter-American Court of Human Rights (IACHR) has been accused for being too creative in its use of external judicial decisions, thus undermining political support for the court (Neumann 2008). The extent to which the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) can, do, and should engage each other’s jurisprudence has also been the subject of considerable debate (e.g. Wetzel 2003).

So far, however, there has not been a systematic effort to examine why and how often international judges and courts rely on the judgments of others. This is unfortunate as these issues have broader theoretical implications. The assertion that international legal norms may spread due to semi-autonomous interactions between judges (Slaughter 2004) suggests a mechanism for the diffusion of norms different from but complementary to those discussed in the social science literature (e.g. Elkins and Simmons 2005; Keck and Sikkink 1998; Kelley 2004; Risse et al. 1999; Simmons et al. 2006). Slaughter stresses the reciprocal character of transjudicial relations and the horizontal nature of the resulting network. Yet, our understanding of (international) judicial behavior and the operation of networks more generally suggest that ideology, authority relations, and strategic behavior may well shape the transmission of legal norms in important ways (e.g. Carrubba et al. 2008, Voeten 2008). While this general point is acknowledged by Slaughter and other scholars of transjudicial communication, little effort has been exerted towards systematically analyzing its consequences.

Proponents of foreign citation tend to argue that judges primarily use external case-law in

order to improve the quality of their decisions. In addition, judges may vary in their propensities to rely on external sources depending on their judicial ideologies. Following Black and Epstein (2007), I find that these two arguments are unlikely to account for the variation among courts. Instead, I suggest that judges use external citations purposively in order to achieve a desired effect with a particular audience. First, following Slaughter, judges may be interested in influencing other courts; giving them incentives to include external citations and to engage in reciprocity (i.e. cite other courts who cite them). Second, judges may take the effect of external citations on state parties into account. External citations may lead to costly charges that judges are exceeding their delegated authority. They also have potential benefits as a persuasive tool, especially in interactions with state parties that are sensitive to arguments that they are non-compliant with international standards. I argue that the expected costs are higher the more consequential decisions are to states and when compliance is not guaranteed but non-compliance is costly. The anticipated benefits are higher when interacting with new or unstable democracies than with authoritarian states or established democracies.

The empirical component of this paper starts with an in-depth analysis of citations to and from the ECtHR followed by a more global analysis of citation patterns between other international courts. The ECtHR is an interesting focal point for several reasons. The court has issued more judgments than all other standing international tribunals. It allows public separate opinions, thus permitting an analysis of the influence of judicial ideology (Voeten 2007, 2008). Moreover, the ECtHR draws the most obvious comparisons with the US Supreme Court in terms of the legal issues that come before it. Many of the most controversial foreign citations by the US courts were to ECtHR jurisprudence, so much so that David Zaring (2006) concluded in an empirical survey that those worried about the influence of foreign courts on U.S. law “. . .

shouldn't be worried about foreign citation as much as citation to the European Court of Human Rights." Finally, the ECtHR is frequently heralded as the Court that has overtaken the US Supreme Court in terms of international influence, partially because of the US Court's reluctance to cite foreign sources (e.g. Liptak 2008).

The analysis of ECtHR citations reveals that while the court is reluctant to formally acknowledge the influence of other courts, external case-law does play a role in its deliberations. This is especially apparent in the many separate opinions that explicitly refer to external court decisions. Judicial ideology plays an important role in the decisions of judges to borrow or not to borrow from other courts. Moreover, the arguments advanced by judges for and against reliance on external sources are not unlike those used in the US Supreme Court. The global analysis of cross-court citations, while preliminary, confirms that courts whose membership is dominated by emerging democracies and courts whose decisions have few direct consequences for state parties are much more likely to rely on external sources. The resulting network of courts is not horizontal and not characterized by reciprocal relationships. Instead, there are a few courts that are the sources of most cases cited by others and who rarely use case-law developed elsewhere.

#### EXTERNAL SOURCES, PERSUASIVE AUTHORITY, AND DELEGATED AUTHORITY

The willingness of courts to cite each other's decisions is one of the phenomena that best exemplifies transjudicial communication (e.g. Slaughter 1994) and more generally the diffusion of international legal norms (e.g. Jackson 2003). External citations are the predominant form of anecdotal evidence used by scholars of transjudicial communication. Thus, it is reasonable to ask how representative the examples given in the literature are of international court judgments. Yet, it is also essential not to equate transnational citations with transnational influence. Citations are public acknowledgements of the relevance of another court decision. The purpose of citations is

not simply to reflect the thought processes of judges but also to communicate something to an audience. As J.H. Merryman (1977, 381) put it “Presumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to the reader.” As such, a study of formal citations may well underestimate the extent to which judges are influenced by external decisions. For example, Slaughter (1994, 106) suggests that the UN Human Rights Committee has adopted similar styles of reasoning to the ECtHR without acknowledging its influence. At the same time, some citations to foreign courts may be window dressing; attempts to make a decision more persuasive to an audience even if the true motivations for reaching a decision were entirely unrelated to the external sources.

From the perspective of judicial behavior, there are two factors that differentiate citations to courts outside of a court’s formal jurisdiction from other citations. First, the chain of delegation that allows judges to rely on external court decisions tends to be implicit at best,<sup>2</sup> thus opening up judges to charges that they are abusing their delegated authority.<sup>3</sup> This is especially so if a court uses external citations to interpret the domestic or treaty law that it was authorized to interpret.<sup>4</sup> Second, judges cite external opinions not as binding legal authority but as a source of persuasive authority (e.g. Glenn 1987, L’Heureux Dubé 1998, Slaughter 1994, 2003). This means that judges have considerable discretion in picking the case-law that they wish to ignore, follow, or reject.

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<sup>2</sup> An exception is South Africa, whose constitution explicitly instructs judges to consider developing international legal norms.

<sup>3</sup> I am not making an argument here about the merits of such charges. Rather, I simply claim that external citations can be used to delegitimize the justification underlying a judgment.

<sup>4</sup> Zaring (2006) shows how many citations by US courts to foreign decisions do not serve the purpose of aiding the courts in interpreting domestic law but rather are used to interpret foreign law, for example to settle jurisdictional disputes. Such uses are generally not challenged by critics of foreign citations. I will discuss the equivalent of this in the international arena later in the paper.

Both of these distinctions are fluid. In practice, judges almost always have some discretion in what to cite and follow. In most common law legal systems, the principle of *stare decisis* dictates that judges should follow precedents established in prior cases. Yet, *stare decisis* is itself a norm developed by the courts. It binds lower courts to a considerable degree but on the Supreme Court it operates as a meaningful normative constraint on the behavior of justices that does not fully determine what cases they cite and follow (e.g. Knight and Epstein 1996). Judges on federal courts of appeal have considerable discretion in what cases they cite from other jurisdictions, rendering their citation patterns suitable for analyses of the influence of judges (e.g. Landes et al. 1998) and courts (e.g. Caldeira 1985). Thus, the persuasive authority of a decision matters for cross-citations among federal courts of appeal even though no questions of delegated authority arise.

There is no formal principle of *stare decisis* in international law. Most international tribunals are asked to limit their focus to the dispute at hand. For example, article 59 of the ICJ's Statute proclaims that "The decision of the Court has no binding force except between the parties and in respect of that particular case" (ICJ Statute, Article 59). Yet, *de facto* norms of *stare decisis* are operative at the WTO (e.g. Bhala 1999a, 1999b, and 2000; Busch 2007).<sup>5</sup> Similarly, the ECJ and the ECtHR rely heavily on their past decisions, have no trepidations in referring to these decisions as "precedent," and have developed elaborate systems to keep track of their case-law.<sup>6</sup> Even the ICJ motivates its resolution of disputes with extensive references to its past opinions.<sup>7</sup>

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<sup>5</sup> For example, the WTO's Appellate Body slapped a panel that had ignored precedent by stating that: "It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports that have been adopted by the DSB" (AB-2008-1).

<sup>6</sup> For example, the ECtHR's case law on-line system Hudoc documents the "Strasbourg law" each decision relies on. Similarly, EUR-Lex documents the case-law for the ECJ.

<sup>7</sup> An amusing illustration is the following reference in which the WTO's Appellate Body takes strength from the ICJ experience: "It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article

That norms resembling *stare decisis* have developed on international courts should not be surprising. Like domestic courts, international courts are designed to resolve disputes between parties. In so doing, they need to tell the losing parties why they lost. In all modern societies, judges tell the loser: "You did not lose because we the judges chose that you should lose. You lost because the law required that you should lose" (Shapiro 1994). Such justifications are essential to establish the perception that a tribunal is impartial. Demonstrating the consistency of a decision with the past decisions may alleviate the losing party's potential to claim that a decision was whimsical or motivated by non-legal considerations. Concerns about justification are perhaps even stronger on international courts, which generally operate in a more uncertain compliance environment than domestic courts.<sup>8</sup>

The notion that international courts strive for consistency matters greatly for the present topic.<sup>9</sup> It implies that the judgments of courts on a particular dispute have consequences for how future disputes are resolved. So, governments have a stake in the reasoning of courts even if a dispute has no direct bearing on them. That governments are aware of this is evidenced by the large number of third party participation in tribunals such as the ECJ, ECtHR, and the WTO. Moreover, there is evidence that states strategically file trade disputes in the forum where they believe the precedent will serve them best (Busch 2007).

The citation of court opinions outside the formal jurisdiction of a court is both entirely at the

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59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible." (Japan - Alcoholic Beverages II, pp. 12-15, DSR 1996:I, 97, at 106-108).

<sup>8</sup> At least in comparison to domestic courts in developed democracies. There are, of course, numerous domestic courts who operate in a weaker compliance environment than, say, the ECJ.

<sup>9</sup> There may also be reasons that norms to adhere to past precedent are not quite as strong in international courts. For example, the ECtHR has developed a "margin of appreciation" doctrine, which posits that countries should have some leeway in how they implement their Convention obligations into their specific domestic contexts (e.g. Yourow 1996). This leaves judges some room to motivate deviations from case-law with reference to specific national circumstances.

discretion of judges *and* may invite challenges that judges are exceeding their delegated authority. One can debate the wisdom of the Supreme Court's citation of a 1981 ECtHR case (*Dudgeon v. United Kingdom*) in delivering the majority in *Lawrence v. Texas* (539 U.S. 558 (2003))<sup>10</sup> but no one would argue that Justice Kennedy was compelled to refer to ECtHR jurisprudence. Kennedy and the other justices who joined his majority opinion chose to do so at their discretion, perhaps because they believed that the citation enhanced the persuasiveness or legitimacy of a ruling. They did, however, open themselves up to charges that they were exceeding their delegated authority.<sup>11</sup> Theoretically similar issues arise when an IACHR judge motivates a decision by referring to the jurisprudence of the ECtHR (see Neumann 2008). This, then, immediately leads one to wonder why some judges and courts believe such citations to be persuasive to their targeted audience while others do not.

#### WHY DO INTERNATIONAL JUDGES AND COURTS CITE EXTERNAL SOURCES?

##### A. *Learning*

The law literature suggests that judges primarily cite external opinions in order to improve the quality of their decisions. As Anne-Marie Slaughter puts it in a discussion of why US Supreme Court Justices cite foreign cases:

"For these judges, looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. [...] It provides a broader range of ideas and experience that makes for better, more reflective opinions. This is the most frequent rationale advanced by judges regarding the virtues of looking abroad" (Slaughter 2003, 201).

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<sup>10</sup> And legal scholars have not disappointed on this front. See for instance Alford (2004) and Koh (2004) for contrasting perspectives. Justices, too, differ starkly. See for instance the transcript of a debate between justices Breyer and Scalia at American University.

<http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>

<sup>11</sup> For example, from Justice Scalia's dissenting opinion: "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court ... should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida*, [537 U.S. 990](#), n. (2002) (Thomas, J., concurring in denial of certiorari)."

Harold Koh (2004) posits that citing foreign sources may serve three functions in informing judicial opinions: they help inform the interpretation of parallel rules, they shed empirical light on legal issues, or they may be used to illustrate how common standards should be applied. Stephen Calabresi and Stephanie Zimdahl developed a not altogether dissimilar typology that (amongst others) also includes “logical reinforcement cases,” in which “in which the Court looks to foreign law and practice to demonstrate that its opinions are logical and are supported by reason” (2004, 864).

While these typologies are a useful tool for classifying the different roles that external citations play in judicial opinions, they provide little guidance into why judges or courts may feel that they should or should not include external sources in their opinions,<sup>12</sup> aside from some rather general statements. First, courts that deal with similar legal issues should cite each other more frequently as it allows for more valid comparisons. Second, the presence of prestigious external courts with reputations for high quality decisions should enhance the likelihood of cross-citations. This conception also fits with the image of international judges as professionals to whom states delegate authority in order to benefit from their expertise. This judges as “trustees” model has recently gained traction in the political science literature (Alter 2008). Third, the “learning hypothesis” by itself implies no reason to expect resistance to the explicit usage of external citations. Quite to the contrary, judges should reinforce that their decisions are rooted in external case-law in order to demonstrate the quality of their reasoning.

### *B. Judicial Ideology*

The role of ideology as a motivating force for the use of external sources is frequently

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<sup>12</sup> Unless, of course, we wished to subscribe to the thesis that intelligent judges use foreign opinions and less intelligent ones do not. Aside from the merit of this thesis, to paraphrase Stephen Krasner: “stupidity is not a very interesting analytical category.”

suggested in the U.S. context. As Robert Bork puts it:

“Perhaps it is significant that the justices who [borrow] are from the liberal wing of the Court. This trend is not surprising, given liberalism’s tendency to search for the universal and to denigrate the particular” (Bork 2003, 22)<sup>13</sup>

On the current U.S. Supreme Court, the most vocal proponents of using foreign decisions indeed come from the liberal camp while the openly skeptical Justices are generally thought to be more conservative. On the other hand, there are also examples of more conservative Justices relying on foreign jurisprudence, including former Chief Justice Rehnquist and former Justice Frankfurter (Black and Epstein 2007). It is not inconceivable that conservative Justices may find it useful to appeal to foreign law in cases where the domestic status quo is more liberal than the international one.<sup>14</sup> More generally, there is evidence that the ideology of judges matters for their citation practices in the sense that federal judges appointed by Democrats tend to cite other judges appointed by Democrats (Choi and Gulati, n.d.).

A difficulty with extending the ideology hypothesis to the international realm is that much less is known about the sources and role of judicial ideology on international courts. Recent research on the ECtHR shows that the main source of variation among international judges is the desired degree of deference that should be granted to states in how they implement their international obligations (Voeten 2007). The ECtHR’s margin of appreciation doctrine permits states some leeway in how they adjust Convention rights to national customs and interests (e.g. Yourow 1995). The judges who believe that this margin should be small (“activists”) tend to interpret human rights in a universalistic manner and may be more likely to consider global

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<sup>13</sup> Also cited in Black and Epstein (2007).

<sup>14</sup> An example is the exclusionary rule, where the US status quo is probably more liberal than in the majority of other liberal democracies. There is an obvious credibility issue here. Decrying the use of foreign citations as illegitimate probably pre-empts justices from later relying on foreign sources, at least publicly. On the other hand, it is an opportunity to accuse the liberal justices of being hypocritical for not taking the foreign sources into account (perhaps in deliberations rather than in public opinions).

sources for their decisions. Judges on the self-restraint side of this spectrum show more deference to the *raison d'état*. These judges are more likely to be diplomats and are more likely to be appointed by governments skeptical of supranational integration (Voeten 2007, 2008). As such, they may well have a more narrow view of treaty interpretation that makes them less likely to rely on external sources. Similar divisions among judges have also been suggested on the ECJ and WTO (e.g. Steinberg 2004).

The role of ideology in transjudicial communication has been virtually unexplored, which is unfortunate given what we know about judicial behavior and the spread of information in networks more generally. Yet, there are also some inherent limits to the judicial ideology hypothesis. First, data limitations prevent a test on courts other than the ECtHR. Many international courts either do not allow separate opinions or have too few decisions to allow for reliable measurement of ideological variation among justices. Second, the thesis does not provide for a compelling explanation for variation across courts, unless we argue that one court tends to have more “activist” judges than another. This may be so because the state parties to some treaties are more willing to embrace global sources of international law or because the appointment procedures are skewed towards more internationalist judges (Voeten 2009). For example, courts where the appointment and re-appointment of judges is controlled by individual states (one state, one judge) may be less likely to contain many judges that are internationalist in their orientation than courts whose judges are appointed through competitive elections in multilateral bodies. For example, judges on international criminal tribunals are much less likely to be diplomats and show much less variation in their background profiles than ECtHR judges

(Danner and Voeten n.d.).<sup>15</sup> Nevertheless, it is unlikely that this type of explanation can account for the wide observed differences in citation patterns among international courts.

### *C. Strategic Uses of External Citations*

Several scholars have suggested that there may be a political or strategic logic underlying constitutional borrowing and the use of foreign law in domestic courts (e.g. Benvenuti 2008; Black and Epstein 2007; Epstein and Knight 2003; Schauer 2000). Slaughter (2003; 2004) also points at various points to the possibility that transjudicial communication is shaped by strategic considerations of the participants. The strategic model of judicial decision-making starts from the premise that judges have goals, such as to see the law reflect their policy preferences, to advance their careers, or to enhance the institutional authority of the court on which they serve. Judges operate in an environment in which their ability to achieve these goals depends on the behavior of others, such as other judges and other institutions of government. They therefore behave in ways that takes the anticipated actions of others into account.<sup>16</sup> As argued earlier, citations to external sources are included in decisions not because judges are compelled to do so but because judges believe that they signal something meaningful to an audience. I distinguish three different audiences that judges may aim at: other courts, state parties, and their colleagues.

#### **I. Influencing other Courts**

A first strategic account assumes that judges are motivated by influencing other courts.

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<sup>15</sup> ECtHR judges are elected by the Council of Europe's Parliamentary Assembly from a list of three judges submitted by each government. The Assembly has the right to send back a list of candidates for want of gender parity or qualifications but the decision to nominate candidates remains squarely with state parties. Judges on international criminal tribunals and the ICJ are usually elected by the UN General Assembly with no assurance that any national will be elected. The exception tends to be the five members of the UN Security Council, whose candidates rarely if ever fail to be elected. There is some evidence that P-5 judges differ in systematic ways from non P-5 judges (Danner and Voeten n.d.).

<sup>16</sup> The strategic model has been employed with great frequency in the U.S. context (e.g. Epstein and Knight 2000; Epstein, Knight, and Martin 2001; Eskridge 1991a, 1991b; Johnson, Spriggs, and Wahlbeck 2005; Maltzman, Spriggs, and Wahlbeck 2000; Murphy 1964) and to a lesser extent in comparative and international judicial behavior (e.g. Carubba et al 2008, Helmke 2005, Staton 2006).

Anne-Marie Slaughter (2004) argues that the key difference between old modes of legal transplantation and new transjudicial communication is that there is now a true dialogue between judges. The current system should be thought of not as a centralized hierarchy in which a few courts exert disproportionate influence but as a community of courts who exchange ideas. Influence within this system is determined by a willingness to engage others and an ability to reflect an international consensus. Indeed, Slaughter (2004, 74-75) suggests that judges who are unwilling to participate in the transjudicial dialogue will undermine their ability to influence other courts:

“.. appellate judges around the world are engaging in self-conscious conversation. This *awareness* of constitutional cross-fertilization on a global scale --- an awareness of who is citing whom among judges themselves and a concomitant pride in a cosmopolitan judicial outlook – creates an incentive to be both lender and borrower.” (emphasis in original).

Such reciprocity is also suggested by others, including some foreign judges who argue that the US Supreme Court is losing its international influence at least partially because of its unwillingness to engage foreign decisions (Barak 2002, L’Heureux-Dubé 2002). Schauer (2000) argues that Canadian Supreme Court judgments have gained influence internationally because of their perceived reflection of international norms. At the level of federate appellate courts, there is evidence that judges indeed tend to cite other judges who cite them frequently (Choi and Gulati n.d.).

While these arguments have mostly been applied to domestic appellate courts, international courts are also important actors in the theories of Slaughter and others. Reciprocity implies that there should be no large asymmetries in citation patterns between pairs of courts. Moreover, at the system level, it implies that we should not find a hierarchy in which a few courts are the source of external citations but are themselves unwilling to rely on the decisions of others. For example, we should not only see the IACHR refer to ECtHR decisions, but we should also see

the ECtHR take note of IACHR decisions as that court's jurisprudence matures. Similarly, given the status of the U.S Supreme court as the preeminent constitutional court and the similarities between many provisions of the European Convention on Human Rights and the U.S. Bill of Rights, one would expect that the ECtHR would regularly consult U.S. jurisprudence. For example, Lester (1988, 541) claimed that "When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg<sup>17</sup> as they are in Washington D.C."

## **II. Influencing Other State Parties**

Citing external sources has potential downsides and upsides when communicating with state parties. It may signal that the judges did not reach a decision by mere reference to their personal preferences but that the legal reasoning underlying a judgment is shared by others, preferably others whose esteem is sought by the state parties at whom the judgment is targeted. On the other hand, it opens up judges to charges that they are exceeding their authority, potentially granting state parties arguments to disregard a ruling. A strategic model posits that judges are more likely to use external citations when the expected benefits are large and the expected costs small.

Monitoring international court decisions is costly. For example, very few states had permanent observers who monitored the decisions of the International Criminal Tribunals for Rwanda and the Former Yugoslavia (ICTR and ICTY) and they rarely submitted amicus briefs (Danner and Voeten n.d.). Other than a general interest in having suspected war criminals prosecuted in an efficient way that is perceived as fair, most states had little at stake in the decisions of these tribunals. This left these tribunals relatively free to interpret international

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<sup>17</sup> Strasbourg is the seat of the ECtHR.

criminal law and develop new legal norms (ibid). Similarly, if non-compliance is not costly, states have few reasons to monitor justifications closely. If compliance were near automatic, judges would have fewer reasons to worry about how their justifications are received with state parties. This line of reasoning suggests that courts should be most careful about external citations when their judgments have serious consequences to states and non-compliance is costly but not prohibitively so. This is a situation that best characterizes the WTO and the ECtHR. Unlike the ECJ, the ECtHR is not embedded in a strongly integrated political system (the EU vs the Council of Europe).<sup>18</sup> If states fail to abide by WTO decisions, they can be punished through retaliatory sanctions. Those sanctions are often costly both to the target states and to the states implementing them, and they are generally seen as a less desirable outcome than compliance.<sup>19</sup>

The expected benefits of external citations are likely to increase with the extent to which state parties are sensitive to international standards. Based on Hirschl (2004) and Slaughter (2004), Black and Epstein (2007, p. 803) suggest that judges may be more willing to cite foreign court decisions as the legislature and executive are relatively more cosmopolitan or outward looking. If relevant political actors in a country are more nationalistic, then judges should be more likely to exercise restraint in their acknowledgement of foreign influences. The effect may not just be on preferences of domestic political elites but also, and perhaps more strongly, the incentives of these elites. For example, Voeten (2007) showed that governments who aspired EU membership appointed judges with more activist inclinations. Moravcsik (2000) and Mansfield

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<sup>18</sup> There are no sanctions for non-compliance in the ECtHR other than possible removal from the Council of Europe. Compliance tends to work because countries have adopted the Convention into national law but there are still considerable difficulties in getting state parties to execute judgments timely and to provide more than individual solutions (see: [http://www.coe.int/T/E/Human\\_rights/execution/](http://www.coe.int/T/E/Human_rights/execution/)).

<sup>19</sup> CITE.

and Pevehouse (2006, 2008) show that leaders in democratizing states enhance the credibility of their commitment to liberalize by joining new international organizations that are composed of other democratic states. A straightforward extension of this argument is that judgments that point out the consistency of a ruling with prevailing practices in established democracies raise the cost of non-compliance to democratizing state parties. A similar effect does not exist for advanced liberal democracies who already have credible rights protections domestically. This argument contrasts sharply with the reciprocity claim in that it suggests highly asymmetric citation patterns, in that courts whose state parties are predominantly advanced liberal democracies should be the sources of external decisions but not their recipients. To some extent, one could argue that this thesis also predicts within-court variation in the usage of external citations. However, as argued earlier, international court rulings generally have precedential consequences for other states, although there may be cases where this is less of an issue.

If judges are concerned about delegated authority, they may also be sensitive to subtle differences in the extent to which delegated authority to use external sources can be inferred. First, some courts operate within overlapping jurisdictions. For example, all European Union member states have accepted the compulsory jurisdiction of the ECtHR. There are implicit and perhaps even explicit chains of delegation that allow the ECJ to follow ECtHR precedent, explicitly following the Nice Charter.<sup>20</sup> The reverse is, of course, not necessarily so given that twenty countries that are subject to the ECtHR's jurisdiction are non-EU members. So, the ECtHR should be more careful in citing the ECJ than vice-versa. Moreover, the ECJ should increase its reliance on ECtHR case-law following the Nice Charter. A similar situation exists in the area of trade, where several regional dispute settlement mechanisms interpret treaty

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<sup>20</sup> Wetzel (2003) argues that: "The [Nice] Charter obligates the ECJ to honor the case law precedent of the European Court of Human Rights without making the Luxembourg Court subordinate to the Strasbourg Court."

provisions that are similar to the WTO, raising opportunities for forum shopping (Busch 2007). The delegation argument suggests that the WTO should not cite regional dispute resolution forums but it is plausible that NAFTA and other tribunals refer to WTO case-law.

Second, international courts frequently apply general rules of international law. For example, the Vienna Convention on the Law of Treaties codifies international customary law with regard to the formation and effect of treaties. Courts may find it useful to refer to ICJ opinions regarding the interpretation of the Vienna Convention. Such a use of external opinions is not necessarily controversial from a delegation point of view, as most countries have either ratified or otherwise accepted the Vienna Convention. By contrast, the delegation argument suggests that the ICJ will exercise caution in citing other courts. An additional grey area is that many international legal conventions stress the need for uniform application. References to how external courts have interpreted a convention obligation may be justified from the implicit delegation inherent in ratifying such a convention.

### **III. The Collegial Game**

Finally, if justices have policy preferences, they need to convince their colleagues of the merit of their viewpoints. External decisions could be useful in the collegial game if others, or at least the “swing voter,” care about conformance with international standards (or the standards set by the particular court that is cited). Conversely, they could be to the detriment of the judge trying to persuade her colleagues if there is active resistance among the pivotal judges to transnational influences. Moreover, if a viewpoint is already carrying the day, there would be no need to include foreign references if only a single judge object to such use. The collegial perspective thus suggests that the role of foreign decisions could be greater in deliberations among judges than is reflected in majority judgments. It does not generate strong predictions

about variations among courts.

## EXTERNAL CITATIONS BY THE EUROPEAN COURT OF HUMAN RIGHTS

### *A. Overview*

The European Court of Human Rights (ECtHR) is by far the most active international court, having issued more than 10,000 judgments over a fifty year period. Aside from a handful of inter-state cases, the court resolves disputes between an individual<sup>21</sup> and a government about alleged violations of the European Convention on Human Rights (ECHR). Individuals have to exhaust domestic remedies before they can appeal to the ECtHR.<sup>22</sup> The ECHR protects a wide variety of rights, including the right to a fair trial, freedom from torture, freedom of speech, privacy, and property rights. ECtHR judgments regularly deal with politically controversial issues such as abortion rights, extradition of terrorism suspects to countries where they might be tortured, the rights of gays to serve in the military, voting rights for prisoners, privacy rights of celebrities, disappearance cases, and the behavior of governments in conflict zones (most notably Russia in Chechnya and Georgia). The Court's judgments are binding in all 47 Council of Europe member states, including Russia, Turkey, and all European Union member states.<sup>23</sup> The Court has 47 judges, one from each member state, who make decisions in Chambers of seven judges. Appeals are decided by the Grand Chamber of 17 judges.

The similarity between the legal disputes that emerge before the US Supreme Court and the ECtHR has been recognized by citations in four different Supreme Court opinions and at least 29 federal court of appeals judgments, most of which used ECtHR case-law to help federal courts

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<sup>21</sup> Or better: "legal person" given that NGOs and businesses also have standing.

<sup>22</sup> It should be noted that more than 95% of all applications are declared inadmissible either by the registry (on procedural grounds) or by unanimous decision of a committee of three judges.

<sup>23</sup> The 27 EU members and Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Norway, Russia, San Marino, Serbia and Montenegro, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, and Ukraine.

interpret U.S. law (Zaring 2006). I thus examine whether the ECtHR also recognizes US jurisprudence. For comparative purposes, I also searched for references to two other domestic constitutional courts that are allegedly disproportionately influential internationally: the Supreme Court of Canada and the South African Constitutional Court (Slaughter 2004, 74).<sup>24</sup> In addition, I included the most prominent international bodies that have interpreted international human rights and criminal law: the IACHR, the United Nations Human Rights Committee (UNHRC),<sup>25</sup> and the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR). The ECtHR regularly interprets general rules of international law, so I also look for citations to the ICJ and its predecessor: the Permanent Court of International Justice (PCIJ). Finally, I looked for citations to the ECJ.

I evaluated all 7319 judgments made before October 30<sup>th</sup> 2006. In all, I found only 29 majority judgments (.4%) that cited one or more decisions of the aforementioned foreign constitutional courts or international courts. There were 46 cases in which one or more separate opinions referenced an external decision. This finding is all the more remarkable given that only 17% of all cases were accompanied by a separate opinion. Many ECtHR judgments are straightforward applications of case law for which external citations may be superfluous for legal and other reasons. All but two of the external citations come in one of the 1163 judgments that are assigned the “high importance level” by the Court.<sup>26</sup> In all, 2.3% of highly important judgments referred to an external decision. Figure 1 plots the total number of important

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<sup>24</sup> The search is based on the notices published for each case in the on-line case-law system Hudoc. These notices explicitly identify “External Sources.” I also searched the full text of opinions to find instances that may have not been recognized in the External Sources. I used multiple search terms to account for irregularities in citation styles.

<sup>25</sup> The UNHRC evaluates compliance with the International Covenant on Civil and Political Rights.

<sup>26</sup> In the case-law system Hudoc, importance level 1 is defined as: “Judgments which the Court considers make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State.”

judgments and the number of judgments that cite an external decision, either as a majority opinion or as a separate opinion. As can easily be discerned from the graph, there has been a slight increase in the number of external citations over time but this increase has not kept pace with the overall increase in judgments.

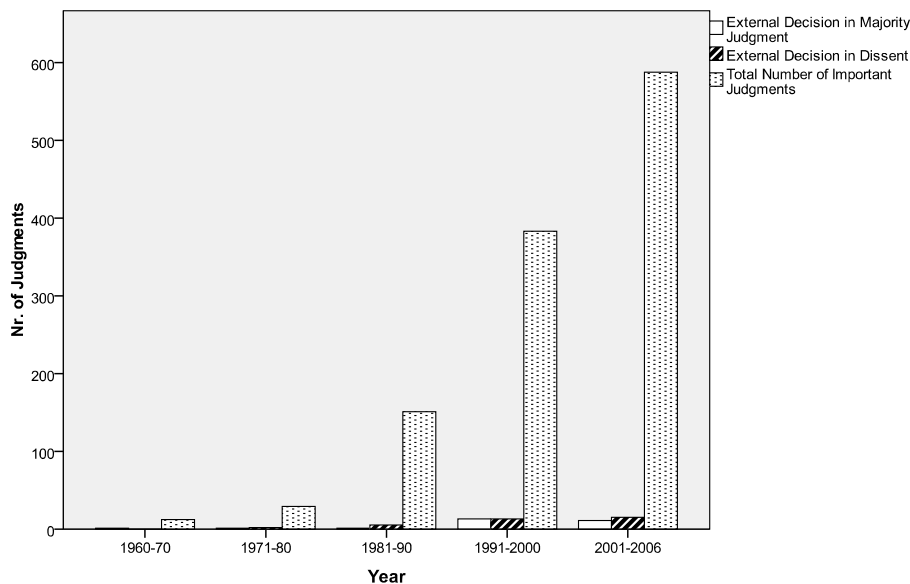


Figure 1: Number of External Citations and Number of Important Judgments over Time

The remainder of this section evaluates the use and non-use of external citations in greater detail, focusing on citations to domestic constitutional courts, international courts, and the use and non-use of external citations in separate opinions.

### B. The ECtHR and Domestic Constitutional Courts

In all, 38 ECtHR judgments made references to U.S. Supreme Court case law. More than half of these (21) occurred in separate concurring or dissenting opinions rather than in the majority judgments of the court. Most of the others were interpretations of U.S. law or were cases where the parties (or a third party, usually an NGO) introduced U.S. case law but the judges did not deem these decisions relevant. Only twice is a judgment of the U.S. Supreme Court explicitly listed in the ECtHR's case-law system (Hudoc) as one of the external sources

on which an ECtHR judgment relied.<sup>27</sup> Both of these cases involved the United Kingdom as the respondent government, perhaps recognizing the similar historical roots. In both (unanimous) judgments the U.S. Supreme Court citations served a minor role supporting the finding of similar developing legal norms within the ECtHR's contracting states.<sup>28</sup> Moreover, in both cases the U.S. precedent already featured in the UK courts from which the decisions emerged.

This relatively sparse use of US Supreme Court precedent is not reflective of a dislike of the United States. For example, there are only 18 mentions of Canadian jurisprudence, only two of which appear in the majority judgments of the Court. Perhaps the clearest case in which any domestic constitutional court decision influenced an ECtHR judgment is *Hirst (2) v. United Kingdom*; an important ruling that invalidated Britain's blanket prohibition on the right of prisoners to vote. In the judgment, the Court acknowledged that there was no consensus among contracting states that prisoners have the right to vote. The judgment relied heavily on a Canadian and to a lesser extent a South African decision, although it should be noted that these decisions were also cited in the original British judgment that was effectively overruled.<sup>29</sup> The *Hirst* judgment invited a pointed dissent from five of the Grand Chamber's seventeen judges, including both the Court's then President Judge Wildhaber and the judge who later replaced him

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<sup>27</sup> The cases are *Welch v. United Kingdom* (17440/90, February 9 1995) which cited *Austin and Alexander v. the United States*, dec. 28.6.1993, 125 LEd 2d 441 and 488, and *James and Others v. United Kingdom*, which cited *Hawaii Housing Authority v. Midkiff* 104 S.Ct.2321 [1984]. A third case in which US Supreme Court precedent plausibly influenced the ECtHR is *Appleby v. United Kingdom*, although the US cases were advanced by the applicants to advance the exact opposite conclusion that the Court reached and the Court explicitly rejected the applicants' interpretations of US Supreme Court case-law.

<sup>28</sup> In *Welch*, the ECtHR highlighted that "that confiscation orders had been recognised as having a punitive character in various domestic court decisions and in several decisions of the Supreme Court of the United States concerning similar legislation." In *James and Others*, the Court argued that "[...] no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties. The same may be said of certain other democratic countries; thus, the applicants and the Government cited in argument a judgment of the Supreme Court of the United States of America, which concerned State legislation in Hawaii compulsorily transferring title in real property from lessors to lessees in order to reduce the concentration of land ownership.

<sup>29</sup> In particular, *Sauvé v. Canada* (no. 1) ([1992] 2 Supreme Court Reports 438.

in that role, Judge Costa. They argued that:

“[...] it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An “evolutive” or “dynamic” interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case. [...]The judgment of the Grand Chamber – which refers in detail to two recent judgments of the Canadian Supreme Court and the Constitutional Court of South Africa – unfortunately contains only summary information concerning the legislation on prisoners’ right to vote in the Contracting States. [...] Our own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little. [...]We are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.”

While less sharply worded, the disagreements in *Hirst* are reminiscent of those in the US Supreme Court when it cited ECtHR decisions in *Roper* and *Lawrence*. Consider, for instance, Justice Scalia’s dissent in *Roper v. Simmons*:<sup>30</sup>

“The Court thus proclaims itself sole arbiter of our Nation’s moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”

In sum, the ECtHR rarely explicitly relies on the judgments of foreign constitutional courts. When it does, it does so only in cases involving the UK and only uses decisions from other common law jurisdictions that were already cited in the UK courts. This still matters, because such usage could set a precedent for other European jurisdictions, which it arguably did in the *Hirst* case. However, as far as I am aware, *Hirst* is the only ECtHR judgment where decisions of external constitutional courts played a similar role to that in *Roper* and *Lawrence*. Moreover, this usage elicited a dissent from prominent court members whose reasoning was not unlike that of Conservative critics of foreign citations in the US.

US Supreme Court decisions do feature more in separate opinions. This signals that at least

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<sup>30</sup> I am not suggesting that these judges share a judicial philosophy with Justice Scalia. Note for example, a clear endorsement in the dissent of the equivalent to a “living constitution” doctrine.

some judges are aware of US jurisprudence and that US case-law may have played a larger role in deliberations. The absence of formal acknowledgement of that role does suggest the presence of a norm against citing featuring external case-law too prominently. Before turning to a more detailed analysis of this issue, I discuss citations in ECtHR rulings to other international courts.

### C. *The ECtHR and Other International Courts*

The ECtHR referred to the case-law of the IACHR in five majority judgments, all concerning Turkey.<sup>31</sup> Three of these dealt with the issue of disappearances, all citing the IACHR's landmark *Velásquez Rodríguez* decision. The IACHR rulings were mentioned only in passing except for the *Kurt* judgment, which elicited some controversy.<sup>32</sup> It is plausible that ECtHR judges felt at liberty to use IACHR cases against Turkey because the country is a developing democracy eager to join the EU and because precedent set in disappearance cases is unlikely to worry the advanced democracies.<sup>33</sup> However, this use is also consistent with the learning hypothesis as *Velásquez Rodríguez* is probably the best-known source of international jurisprudence on disappearances. In the other two cases, the role of the IACHR references in the judgments was minor.<sup>34</sup> By contrast, the IACHR has referred to ECtHR judgments in 60% of its 126 judgments

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<sup>31</sup> *Ergin (no. 6), Akdivar and Others, Kurt, Akkum and Others, Öcalan.*

<sup>32</sup> Judge Petitti criticized this usage in a dissenting opinion, arguing that: "The majority of the Court speculates on the basis of a hypothesis of continued detention relying on their personal conviction. That, to my mind, is "heresy" in the international sphere, since the instant case could have been decided on the basis of the case-law under Article 5 requiring objective evidence and documents that convince the judges beyond all reasonable doubt; but both documents and witnesses were lacking in the present case. In addition, the *Kurt* case occurred in a different context to the one that led to the decisions of the Inter-American Court."

<sup>33</sup> Note that this argument also holds for the IACHR reference in the the *Öcalan* case, which concerns the death penalty.

<sup>34</sup> *Ergin* deals with excluding the criminal jurisdiction of military courts over civilians. It was decided unanimously and IACHR jurisprudence was used amongst other international sources to support the court's reasoning. The final was the *Öcalan* case, a high profile case. IACHR jurisprudence was used among many other sources to make the point that because execution is irreversible, the procedures that guarantee a fair and impartial trial are all the more important.

issues since 2000.<sup>35</sup> It is not unusual for the IACHR to cite a dozen or more ECtHR judgments and discuss their meaning extensively. The case-law that it cites is very diverse in terms of alleged violations and respondent governments. The cited judgments are also often quite recent, suggesting that IACHR judges follow ECtHR jurisprudence closely. While one would expect the IACHR to rely more on the senior court than vice-versa, the observed relationship is unusually asymmetric.

The ECtHR is similarly sparse in citing other international courts. International Court of Justice case-law is cited just 5 times in the main part of majority judgments, two of which came in inter-state cases (*Cyprus v. Turkey* and *Ireland v. United Kingdom*). European Court of Justice case-law was used only 8 times in the majority part of a judgment.<sup>36</sup> Many of these uses were relatively innocuous. For example, In *Cantoni v. France* the ECtHR relied on ECJ case-law to determine whether certain goods fit the description “pharmaceuticals.” All judgments that cited ECJ case-law involved European Union member states. In only 4 of these cases was the ECJ citation made in support of a finding of a violation. The use of ECJ case-law that the most controversy among the judges came in *Pellegrin v. France*, in which four judges wrote a dissenting opinion arguing that applying ECJ standards would inappropriately limit the applicability of the Convention.<sup>37</sup> As expected, the ECJ refers to ECtHR case-law much more regularly (despite its much lower overall number of judgments). Between 1997 and 2003, the ECJ used ECtHR case-law an average of four times a year to help interpret EU law.<sup>38</sup> The

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<sup>35</sup> Based on a search of the full text of the judgments since 2000. This is probably an undercount given the highly irregular citation standards maintained by the IACHR.

<sup>36</sup> There were 51 judgments that mentioned the ECJ. Most of these considered the involvement of the ECJ in some step of the proceedings in a case.

<sup>37</sup> Dissenting opinion judges Tulkens, Fischbach, Casadevall, and Thomassen in *Pellegrin v. France* (28541/95). The issue concerns the applicability article 6-1 to civil servants.

<sup>38</sup> Based on a search in [http://curia.europa.eu/jcms/jcms/Jo1\\_6308/curia](http://curia.europa.eu/jcms/jcms/Jo1_6308/curia). The search did not include Court of First Instance judgments.

average number of citations doubled after 2003, suggesting that the Nice Treaty indeed had the expected effect. This includes extensive references in the *Kadi* judgment (9/3/2008), widely hailed as one of the most path breaking decisions the ECJ has taken in years.<sup>39</sup>

#### D. *The Use of External Decisions in Separate Opinions*

The observation that citations to external decisions appear more frequently in separate opinions than in the majority part of a judgment warrants further attention. It suggests that at least some judges are well aware of jurisprudence developed elsewhere and perhaps wish that the ECtHR would more explicitly build on that. First, it is necessary to distinguish *de novo* uses of external citations in separate opinions from responses to perceived misuses of an external decision by the majority. For example, judges Caflisch, Türmen and Kovler argued in a dissenting opinion to *Mamatkulov and Askarov v. Turkey* (46827/99, February 4, 2005) that the Court's reliance on the ICJ's *LaGrand* decision was "misguided." (At stake is the binding effect of interim measures initiated by the Court). They stated that:

"In *LaGrand* the ICJ was called upon to interpret a provision of its own constitutive treaty, that is, Article 41 of its Statute. [...] By contrast, *no such provision* can be found in the European Convention on Human Rights. [...] What the Court's Grand Chamber has done, and the Chamber before it, in *Mamatkulov and Askarov* is to exercise a *legislative function*, for the Convention as it stands nowhere prescribes that the States Parties to it must recognise the binding force of interim measures indicated by this Court." (Italics in original).

In ten of the forty cases in which a separate opinion referred to external case-law, it was an explicit response to the majority judgment. In the dissent cited above as in the earlier quoted dissent in *Hirst*, the dissenting opinion argued that the Court had overstepped the bounds of its

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<sup>39</sup> The *Kadi* judgment held that the EU regulation implementing a Security Council Resolution that had placed Kadi on the list whose funds were to be frozen on suspicion of financing terrorism did not sufficiently respect fundamental rights of the appellant. For examples of statements on the significance of this ruling, see the NYU symposium (<http://globaladminlaw.blogspot.com/2008/10/nyu-kadi-panel-discussion-in-full.html>).

delegated authority.<sup>40</sup> Yet, there are also examples where the dissenting judges believe that reliance on the external source leads the Court to be overly restrained. This is especially so when the ECtHR relied on ECJ judgments to find against a finding of a violation (as in the example given in the previous section). An illustration is a dissenting opinion in which the Cypriot judge Loucaidis argued that the Court should have found a violation in *Stec and Others v. United Kingdom* (65731/01):

“Finally, I must state that I do not find the judgment of the European Court of Justice in the present case an obstacle to my approach. That judgment examined the question of discrimination in a different legal context and in any case it is not binding on us.”

On the other hand, instances in which the separate opinion brings up external case-law *de novo* almost always argue in favor of a more expansive ruling. There are only two exceptions to this claim. First, in a 1978 judgment, the Austrian Judge Matscher referred to an ECJ judgment in order to advocate a more restrained approach to Convention interpretation.<sup>41</sup> Second, and more interesting, the Irish Judge Walsh argued in a partially dissenting opinion in *Dudgeon v. United Kingdom* that the ECtHR should have followed U.S. Supreme Court precedent. *Dudgeon* was cited prominently in *Lawrence v. Texas* (539 U.S. 558 (2003)), which overruled a previous decision (*Bowers v. Hardwick* (478 U.S. 186 (1986))) that had failed to find a constitutional protection of sexual privacy that would invalidate an anti-sodomy law. Justice Kennedy writes that:

“To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*” (539 U. S. 558 (2003), p.576).”

Judge Walsh argued that the ECtHR should have followed *Bowers*, noting that the U.S.

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<sup>40</sup> Another interesting instance is *Ireland v. United Kingdom*, in which the British judge Sir Gerald Fitzmaurice refers to his own dissenting opinion in the ICJ case cited by the majority (the *Northern Cameroons* case).

<sup>41</sup> *Konig v. Germany* (6232/73, 28 June 1978).

Supreme Court had “[..] refused to extend the constitutional guarantee of privacy which is available to married couples to homosexual activities or to heterosexual sodomy outside marriage.” There is, however, no reference to *Bowers* in the majority judgment.

In most separate opinions, judges used external case-law to advance a claim that the Court should have been more receptive to the individual complaint. Often, external case-law plays a large and sometimes even exclusive role in these arguments. For example, Judge De Meyer’s dissenting opinion in *Imbrioscia v. Switzerland* (13972/88 November 24, 1993) consists of a brief summary of the U.S. Supreme Court’s *Miranda v. Arizona* judgment, followed by the statement that: “These principles, then clearly defined, belong to the very essence of fair trial. Therefore I cannot agree with the present judgment, in which our Court fails to recognise and apply them.” Thus, without any reference to ECtHR jurisprudence, ECHR provisions, or developing practices within Council of Europe member states, Judge De Meyer refers to the standards developed in *Miranda* as a global precedent that the court ought to apply. (*Miranda* appears in four dissenting opinions written by different judges, indicating that whether its standards should be applied in the ECtHR context are a source of controversy among judges).<sup>42</sup>

Similarly, the Maltese judge Bonello stated in a dissenting opinion in *Anguelova v. Bulgaria* (38361/97) that: “It is cheerless for me to discern that, in the cornerstone protection against racial discrimination, the Court has been left lagging behind other leading human rights tribunals.” He continued to quote the IACHR’s *Velásquez Rodríguez* decision at length.

In another set of instances, judges wrote concurring opinions that pointed out that the reasoning of the court should have referred to international jurisprudence. For example, in a

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<sup>42</sup> These cases are *O’Halloran and Francis v. The United Kingdom* (15809/02), *John Murray v. The United Kingdom* (18731/91), and *Galstyan v. Armenia* (26986/03).

concurring opinion in *Çicek v. Turkey* (25704/94), Judge Maruste pointed out that the Court should have based its justification on the IACHR's *Velásquez Rodríguez* ruling, stating that: "I do not see serious obstacles to the application of that doctrine in this particular case." There are several other examples where judges wrote a concurring opinion simply to stress the consistency of the majority reasoning with ICJ or ECJ jurisprudence.<sup>43</sup> For example, the Finnish judge Pekkanen wrote several concurring (and sometimes dissenting) opinions noting that the reasoning of the Court bared undesirable inconsistencies with an ECJ judgment.

This anecdotal evidence suggests that the usage of external citations may be motivated by judicial ideology. This hypothesis can be tested more formally by employing a measure of judicial ideology that is based on an identical methodology to that used by Supreme Court scholars to estimate variation in levels of liberalism or conservatism among Supreme Court Justices (for details, see Voeten 2007). The measure discriminates judges by their levels of activism as estimated from all votes by judges on cases other than their home governments. The variable has mean zero and a standard deviation of one, with lower values representing more activist judges.

Figure two plots the difference in mean levels of activism between judges who referred to an external decision in their separate opinion and judges on the same panels who joined the majority or who wrote a separate opinion that did not refer to an external decision. The data for this graph is restricted to separate opinions that cite an external opinion *de novo*.

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<sup>43</sup> Note examples.

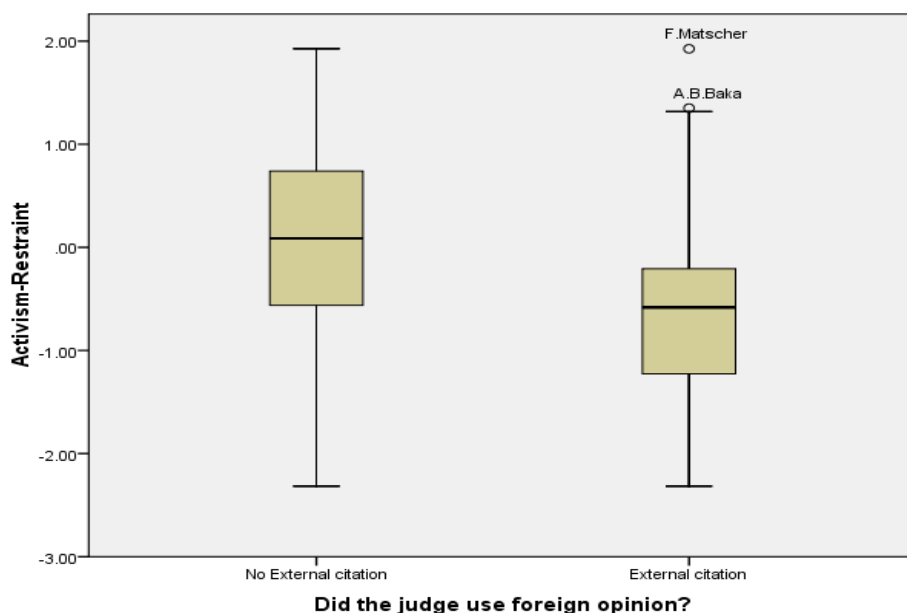


Figure 2: Mean Levels of Activism for Judges That Did and Did Not Cite External Opinions

The graph illustrates that judges who refer to external decisions in their separate opinions are different ideologically from the judges that refrain from doing so on the same cases. The difference in means is large (.63 standard deviations) and significant ( $F=18.561$ ,  $p=.000$ ). The effect also holds in a probit analysis with fixed effects for cases.<sup>44</sup> The effect is robust to including other characteristics of judges in the equation, including their past careers (whether they were diplomats, academics, or former judges).<sup>45</sup> It is also robust to including characteristics of the home states of judges, including their legal origins, levels of civil liberties, and GDP per capita. None of the other variables approached conventional levels of statistical significance in any of the specifications that I estimated, while the effect of activism on using external decisions remained robust and significant.

<sup>44</sup> Coefficient is -.41, z-value -4.12, p-value .000 The marginal effect of activism is -.06. N=406.

<sup>45</sup> For details on the data, see Voeten (2007).

### *E. Conclusions*

The ECtHR has not scanned the globe for developing norms but it has remained focused on European norms and values.<sup>46</sup> Compared to the ECtHR, then, the US Supreme Court is not as provincial as it seems when compared to the South African or Canadian courts. It is interesting to note that while scholars and judges attribute the new reluctance of foreign courts to cite U.S. precedent to the unwillingness of the U.S. Supreme Court to cite international sources; such critiques are not aimed at the ECtHR, the body that is supposedly overtaking the US Court in terms of international influence (see Liptak 2008). It may very well be that the debate in the US has been more public or that the ECtHR gets a free pass as an international court. Moreover, it is noteworthy that some of the internal debates within the ECtHR are not dissimilar to debates among Supreme Court justices. Observers often motivate the reluctance of US judges to engage foreign law with reference to American exceptionalism. As Steven Calabresi put it: “Like it or not, Americans really are a special people with a special ideology that sets us apart from all the other peoples of the Old and New Worlds” (Calabresi 2006, 1373). It seems like at least some Europeans believe that they are a special people with a special ideology too.

A second observation is that judicial ideology matters for the willingness of ECtHR judges to engage international jurisprudence. Ideology is a potentially important consideration for the study of transnational judicial networks as it may introduce bias. For example, it could be that judges who participate in international conferences have systematically different ideologies than those that do not. The finding in this paper is a mere suggestion of larger potential impact of ideology but does suggest that it is a fruitful research avenue.

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<sup>46</sup> Note that this is consistent with law literature on ECtHR, which stresses that the ECtHR has expressly rejected global universalist ambitions and has focused on its role in the European integration project. (ADD REFERENCES)

Third, the limited use of external citations in the majority part of decisions compared to their much more common use in separate opinions suggests that external case-law plays a role in deliberations and that there is a perception amongst many judges that this role should not be acknowledged in majority judgments, perhaps out of fear that this would lead to charges that the judges are exceeding their delegated authority.

#### A GLOBAL OVERVIEW OF EXTERNAL CITATION PATTERNS\*\*\*(INCOMPLETE)

This section reports on some initial findings with respect to global citation patterns. The findings reported here are based on secondary sources (Busch 2007, Miller 2002, Neumann 2008) and searches in the case-law databases of the ECJ, ECtHR, ICJ, ICTY, WTO, NAFTA, and IACHR. Only the main conclusions are reported here, a more detailed report on the evidence will follow later. These findings are preliminary and should be interpreted with caution.

First, the evidence is consistent with the hypothesis that courts whose judgments carry direct consequences to states and where compliance is not assured but non-compliance is costly are least likely to use external citations. Aside from the ECtHR, this characterization best reflects the WTO. The WTO regularly cites ICJ rulings but never to interpret the WTO treaties. It virtually never cites other international courts and has never cited any of the regional trade dispute mechanisms (Busch 2007). NAFTA occasionally refers to WTO interpretations of legal issues. The characterization also applies reasonably well to the ICJ, which is also historically reluctant to engage external case-law (Miller 2002), although such usage may be on the rise.

Second, there is evidence that external citations appear especially attractive to courts whose membership consists mostly of new or less stable democracies. The IACHR is the prime example here (see Neumann) but some initial searches of the case-law of the Andean Tribunal of Justice and the African regional courts suggest a similar pattern.

Third, the evidence suggests that judges are sensitive to subtleties in chains of delegation. ICJ interpretations on the Vienna Conventions are widely cited by international courts. The ECJ is much more likely to cite the ECtHR than vice versa. Moreover, the ECJ has increased its citations to the ECtHR following the Nice Charter.

Fourth, there is no strong evidence for reciprocity. At least at first glance there seems to be no strong relationship that suggests that Courts respond to each other's citations. More concerning is that at the system-level there is evidence of a hierarchy that resembles old modes of legal transplantation more than the supposedly new horizontal forms of transjudicial communication. The most developed courts are the sources of external citations but themselves rarely use them. Note that they also do not cite each other, so the evidence cannot be easily explained away with reference to the "quality" of legal judgments. As such, it appears that the community of international courts does not (yet?) reflect the horizontal network ideal posited by Slaughter.

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