How International Courts Enhance Their Legitimacy

*Shai Dothan**

International courts strive to enhance their legitimacy, that is, they would like the members of the international community to perceive their judgments as just, correct and unbiased even if they do not agree with their specific content. This Article argues that international courts take into account the actors they interact with, the norms they apply, and the conditions they operate under as they try to enhance their legitimacy. It demonstrates strategic behavior towards that end in the judgments of two prominent international courts — the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR). International courts interact with states under their jurisdiction and with their national courts. International courts try to preserve their legitimacy vis-à-vis states; at the same time, they want to signal that states will comply with them even if they issue judgments states disagree with. International courts can cooperate with national courts and gain legitimacy from interacting with legitimate national courts. The norms that international courts apply constrain their ability to maneuver their judgments in ways that can help their legitimacy, but at the same time help legitimize their judgments. International courts use various tactics to shape their reasoning in order to improve their legitimacy. The behavior of international courts is scrutinized by the domestic public within each state. That public has certain agendas, priorities and preferences. The domestic public's agenda is a condition that the court must respond to, but sometimes courts can also shape that agenda to their benefit.

---

* Post-Doctoral Fellow, Hebrew University of Jerusalem Faculty of Law at the Research Group on Effective International Adjudication directed by Prof. Yuval Shany and funded by a European Research Council Starting Grant for Frontier Research. PhD, LLM, LLB, Tel Aviv University Faculty of Law. I wish to thank Eyal Benvenisti, Lisa Bernstein, Rotem Giladi, Henry Lovat, Yonatan Lupu, Yuval Shany, Yahli Shereshevsky, Sivan Shlomo and Maria Varaki for many instructive comments and discussions.

Introduction

International courts try to enhance their legitimacy and behave strategically to pursue this goal. They seek legitimacy both for its own sake and as a way to fulfill other goals, such as improving compliance with their judgments.[1] International courts may have other goals that they seek to fulfill and some of them may compete with the effort to enhance their legitimacy, but at least some of their judgments can be explained as an attempt to build their legitimacy. This Article investigates the strategies used by international courts to enhance their legitimacy and provides examples from the judgments of two prominent international courts, the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), to demonstrate these strategies. Similarly positioned international courts can use similar strategic behavior to increase their legitimacy.

The legitimacy of international courts discussed in this Article is a measure of the support for the courts' judgments in the international community (the public). This type of legitimacy is often termed "diffuse support" because it measures whether the public is generally inclined to accept a court's judgments, even if they disagree with a specific judgment.[2] This Article argues that the public will view a court's judgments as legitimate if they view them as generally just, legally correct, and unbiased. "Specific support," in contrast, is a measure of whether the public supports the content of an individual judgment. If a court is considered legitimate the public will accept and not criticize its judgment, even if they do not support its specific content. If a court consistently ignores the public preferences and issues judgments that do not have specific support, however, it will lose some of its legitimacy.

In the international community different actors — states and their leaders, private individuals, academics, judges, and interest groups — form different views about the quality of a court's judgments. A court's legitimacy describes

---

1 Yuval Shany argued that most international courts are tasked by the states and organizations that created them with four main goals: promoting compliance with the governing international norms, resolving problems and disputes, supporting the relevant international regime, and legitimizing the regime and its norms. Under this framework legitimacy can also serve to support other goals and aid the court in fulfilling them. *See* Yuval Shany, *Assessing the Effectiveness of International Courts — A Goal-Based Approach*, 106 Am. J. Int'l L. 225, 244-47 (2012). This framework shows that courts have to undertake tradeoffs between different goals, *see id.* at 262.

2 *See* James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 Pol. Res. Q. 187, 188 (2005).

the prevailing view of this public about the quality of the court's judgments. This prevailing view aggregates the views of all the different actors within the public. The aggregation of the views within the public must, however, give the views of different actors varying weight depending on their power to affect the court's interests and the intensity of their beliefs. Different members of the public may also adopt opposing or even contradictory views about a court. A general treatment of the prevailing view within the public is still useful, however, since it can capture big differences between the legitimacy of different courts, or of the same court in different periods. Instead of breaking up the public into its individual members, the Article discusses the general public support as the court's legitimacy and focuses separately on the different actors, which, through their interaction with a court, affect its legitimacy.

A court can try to increase its legitimacy by issuing judgments that are well reasoned, appear constrained by the law, and require actions that the public views as acceptable. The legitimacy of a court evolves slowly as the public develops a perception of the nature of its judgments. The legitimacy of a court depends not only on its behavior, but also on the prestige of individual judges who sit on it. If judges are highly respected the public is more likely to view a court's judgments as impartial and legally correct and this will increase its legitimacy.

International courts interact with states that are subject to their judgments.[3] They must increase their legitimacy in order to improve the chances that states will comply with their judgments and not respond to their judgments in ways that might damage their interests. A key way to do that is by showing states that the court is impartial. International courts also interact with national courts and can collaborate with them to ensure compliance with their judgments. Some authors have argued that international courts can serve as substitutes for national courts by letting states credibly commit to upholding certain norms.[4] Erik Voeten suggests this means that international courts can gain

---

3 The actions of states in the international arena are primarily directed by their executive branches ruled by the government in power. However, the behavior of a state is ultimately determined by all government branches, including the judiciary. The state may also have enduring characteristics that a government in charge of the executive does not possess such as its reputation for compliance with the international courts. For these reasons in Part I states will be treated as unitary actors that strategically interact with international courts. In Part II the analysis goes deeper inside the state and looks only at the way the national court, which is one of its organs, can interact with an international court.

4 *See* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

legitimacy from a decline in the legitimacy of national courts.[5] This Article argues, however, that international courts can actually gain legitimacy by interacting with legitimate national courts.

International courts issue reasoned judgments and must therefore rely on legal norms. Those norms constrain a court's ability to shape its decisions and therefore limit its ability to maneuver and gain the cooperation of the actors mentioned above. At the same time, however, the norms used by a court help it to gain support for its judgments and therefore protect them from criticism by different audiences. The norms a court refers to and its methods of reasoning can affect the way its judgments are received and shape its legitimacy.

The domestic public within the states under an international court's jurisdiction has certain agendas, preferences and priorities. The agenda of the public determines the salience of the court's judgments and their impact on its legitimacy. The court may be able to shape the salience of the judgment, however, by manipulating the remedy, the timing of the judgment, its reasoning, or the way the issues are framed.

The Article proceeds as follows. Part I describes the interaction between international courts and states. Part II studies the interaction between international and national courts. Part III discusses the ways in which international courts can apply norms and use legal reasoning to build their legitimacy. Part IV investigates how the agenda of domestic publics within the states under a court's jurisdiction serves as a condition that the court must take into account. The last Part concludes.

I. Interaction with States

Some international courts, such as the ICJ, decide contentious cases between two states. Other international courts, such as the ECtHR, decide mainly cases arising between an individual and a state (these courts are often also termed supranational courts). In both types of courts the state is the subject of the court's judgment and is legally obliged to comply with it. In order to shape the behavior of states, the court must ensure that they will comply with its judgments.

If a court is considered legitimate, the public will demand compliance with its judgments and criticize a state if it fails to comply. Therefore, a court's legitimacy increases the chances of compliance with its judgments. If states have complied with its judgments in the past, a court will acquire a high

---

5 Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries L. 411, 416-17 (2013).

judgment-compliance reputation (reputation), i.e., states will be expected to comply with its judgments. States that fail to comply with a high-reputation court will suffer greater reputational damage than states that fail to comply with a low-reputation court because they are acting against the expectations of the international community. States that do not follow the expectations of the international community signal that they are willing to give up future benefits in return for immediate gains (a quality often termed a high discount rate),[6] because instead of valuing their reputation as reliable partners, which could lead to future benefits, they follow their immediate needs. This will cause the state reputational harm.

By contrast, compliance with judgments that do not have specific support creates an expectation that this and other states will comply with a court's judgments in the future as well, because it indicates that states foresee a high reputational sanction for noncompliance and have chosen to comply not just because they agree with the content of the judgment. Therefore, compliance with judgments that do not have specific support will increase a court's reputation more than compliance with judgments that have specific support. Judgments that demand substantial efforts from a state or that use discretionary reasoning are less likely to win specific support from that state than judgments that demand little or appear legally constrained. For that reason, compliance with demanding and discretionary judgments increases a court's reputation more than compliance with judgments that are not demanding and legally constrained. This means that when courts issue judgments without specific support it can potentially damage their legitimacy, but at the same time may increase their reputation, if these judgments are complied with.[7]

International courts try to enhance both their reputation and their legitimacy in order to ensure compliance with their future judgments. The strategies used by courts to build their reputation may sometimes damage their legitimacy, but they will not be discussed further in this Article. A court should try to convince the international community that its judgments are just, legally correct and unbiased. This will increase its legitimacy and lead to greater criticism against a state that fails to comply with its judgments and thereby increase the chances of compliance.

---

6 *See* Andrew Guzman, How International Law Works — A Rational Choice Theory 34-35 (2008).

7 I discuss how courts attempt to build their reputation elsewhere, *see* Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 Chi. J. Int'l L. 115 (2011); Shai Dothan, Reputation and Judicial Tactics (forthcoming Cambridge Univ. Press).

States may threaten to damage a court's legitimacy as a way of persuading it to be more restrained. States can damage a court's legitimacy by criticizing its judgments. Criticism does not necessarily indicate that a state will not comply with a court's judgments in the future. It therefore causes less damage to a court's reputation than would noncompliance. At the same time, criticism can expose the weaknesses in a court's judgment and make the international community perceive it as wrong, unjust or biased and thereby damage the court's legitimacy. Criticism can be also voiced by journalists, academics or jurists, either within this state or abroad. Individuals that are not affiliated with the state can rely on their personal prestige or on the force of their arguments to rebuke the court. They will not damage the court's reputation since they do not represent the state, but can certainly damage its legitimacy by denigrating the quality of its judgments.

Criticism can be directed primarily at an international audience and target other states, or it can be directed at the domestic public. If a state marshals the domestic public against a court, this may allow it to fail to comply in the future without being criticized by its own public. Once the executive criticizes a court it is impossible to predict how domestic public opinion will evolve. Therefore a state can hold the threat of tampering with domestic public opinion in a way that creates a potent risk for the court that future public opinion will look favorably upon noncompliance. This threat may convince international courts to serve the interests of the state and lower their demands from it.[8]

High-reputation states, i.e., states that are usually expected to comply with a court's judgments, are in a better position to threaten a court with criticism compared to low-reputation states. If a high-reputation state criticizes a court, the court's legitimacy will suffer more damage than if a low-reputation state criticizes it, because the criticism will be viewed by the international community as more credible. If a high-reputation state convinces its own public to resist a court, it may also fail to comply with the court, causing greater damage to the court's reputation than noncompliance by a low-reputation state. One way a court can respond to the greater risk posed by the criticism of high-reputation states is to show greater restraint towards these states and be cautious not to damage their interests. Elsewhere I have argued that the ECtHR adopted this strategy and showed greater restraint towards high-reputation states such as the United Kingdom than towards low-reputation states such as Russia

---

8 *See* Dothan, *supra* note 7, at 135. For an example of an attempt by a state to shift public opinion against the international court, consider the criticism of public officials in the United Kingdom of the ECtHR's judgments regarding prisoners' right to vote, *see* Voeten, *supra* note 5, at 418-19.

or Poland.[9] Greater restraint towards high-reputation states, however, may indicate that a court is biased against certain states. This can cause significant damage to a court's legitimacy, which relies partly on the image of the court as impartial. The court will therefore use any rhetorical method it can to prove it is independent of any state's interests and views all cases equally. If rhetoric doesn't work, the court may even have to issue some demanding judgments against high-reputation states or show special restraint towards low-reputation states in other judgments to signal that it is unbiased.[10]

For international courts that decide contentious cases, such as the ICJ, it is especially important to prove their impartiality towards states' interest. In these courts the losing party may try to expose any form of bias and use it to criticize the judgment. Bias is also more visible in contentious cases than in the routine judgments of supranational courts. In contentious cases the interests of two states are involved in the same case, which makes it easier to compare the effects of the judgment on the interests of the two contending states than to weigh the effects of separate judgments issued under different circumstances by a supranational court. One way the ICJ tries to show its impartiality, discussed by Yuval Shany, is to issue judgments that are a compromise between the interests of the two states.[11] Thus neither state has an interest in going against the court and neither views the court as biased against it. Shany claims this also increases the chances of reaching consensus between the judges, which may also increase support for the judgment.

Even if the court cannot reach a compromise between the interests of the two states, it can try to appease the losing party by resorting to a rhetoric that partly accepts its positions.[12] The ICJ judgment in the *Oil Platforms* case, for example, seems like an effort to balance rhetoric critical of the United States and supportive of the Iranian claims with a decision that suits the interests of the United States.[13] In this case, the ICJ decided that the attacks of U.S. forces against Iranian oil installations do not pass the test of necessity or constitute self-defense under international law, and therefore cannot be justified under

---

9 Dothan, *supra* note 7.

10 *Id.* at 138.

11 Yuval Shany, *Bosnia, Serbia and the Politics of International Adjudication*, 45 JUST. 21, 24 (2008). For the claim that greater consensus among the judges can lead to a perception that the judgment is legally constrained, see *infra* Part III.

12 *Cf.* Alon Harel, *Batei Ha'mishpat ve-Homosexsualiot — Kavod o Savlanot?* [*The Courts and Homosexuality — Dignity or Tolerance?*], 4 MISHPAT UMIMSHAL [LAW & GOVERNANCE] 785, 789-90 (1998) (Isr.) (describing similar behavior by the Israeli Supreme Court).

13 Oil Platforms (Iran v. U.S.), 2003 I.C.J. 38, 161 (Nov. 6).

the treaty between Iran and the United States,[14] which Iran claimed the United States had breached by the attack.[15] The ICJ also decided, however, that at the time there was no relevant commerce between the United States and Iran and consequently no breach of the freedom of commerce protected by that treaty, and therefore the request for reparations by Iran was denied.[16]

Judges of international courts may be biased, or appear to be biased, in favor of their home state and this can damage a court's legitimacy.[17] To prevent this harm, mechanisms are put in place in international courts to ensure that judges will not be controlled by their countries. For instance, Protocol 14 to the European Convention[18] amended the Convention to prevent the reelection of judges. In contrast to the previous regime, judges now are elected for a period of nine years and cannot be reelected.[19] This change makes it impossible for states to reward judges that suit their interests by proposing them for reelection. More importantly, international courts include judges from different states and different legal systems in an attempt to balance their national loyalties. In the ICJ there are fifteen judges: no two judges may be nationals of the same state and the judges should represent "the main forms of civilization" and "the principal legal systems of the world."[20] In the ECtHR one judge from each member state is elected from a list of three candidates submitted by that state.[21] Thus, even if individual judges may be biased in favor of their home states, the final judgment will usually be as impartial as possible.[22]

---

14 Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899.

15 *Id.* ¶ 78.

16 *Id.* ¶¶ 98-99.

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

18 Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, C.E.T.S. 194.

19 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 23, Nov. 4, 1950, 213 U.N.T.S. 222.

20 Statute of the International Court of Justice, arts. 3(1), 9, June 26, 1945, 33 U.N.T.S. 993.

21 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, arts. 20, 22.

22 *See, e.g.*, Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 Am. Pol. Sci. Rev. 417, 426 (2008) (finding that although judges in the ECtHR are biased in favor of their states, this bias helped states avoid a declaration of violation in very few cases because the national judge only rarely casts the pivotal vote).

II. The Interaction with National Courts

This Part investigates how international courts can use their interaction with national courts to improve support for their judgments by the international community, their legitimacy, and the chances of compliance by states. National courts can increase support for the judgments of an international court by issuing judgments that the international court can rely on. For example, the ECtHR in the case of *A. v. the United Kingdom* discussed the detention of foreign nationals suspected of terrorist activities who could not be deported because they might be ill-treated in their states of origin.[23] It found that the United Kingdom had violated the right to liberty of the detainees and, although an emergency situation existed at the time, the restriction of liberty was a disproportionate derogation that was impermissible. The ECtHR could issue such a controversial judgment without damaging its legitimacy because it followed all the legal decisions made by the House of Lords in a judgment issued on the same case.[24]

National courts can similarly gain certain benefits from cooperating with an international court. A judgment of an international court against the executive can damage the executive's support in international audiences. This increases the executive's dependence on the national court, which can partly rebuild its support by issuing a judgment that the executive can comply with. Such a judgment might require the executive to undertake only some of the actions required by the judgment of the international court, rendering compliance easier for the executive.

National courts can also credibly commit to withstanding pressure from the executive if they are bound by the judgments of an international court and their own legitimacy in the eyes of the international community may be damaged if they digress from them. For example, the Israeli Supreme Court

---

23 A. v. United Kingdom, App. No. 3455/05, 2009 Eur. Ct. H.R., http://hudoc.echr.coe.int/webservices/content/pdf/001-91403?TID=egbzyubiaf.

24 A. v. Sec'y of State for the Home Dep't [2004] UKHL 56 (U.K.). The ECtHR even stressed at paragraph 157 of its judgment that it is a unique situation when a government contests a judgment of its highest court before the ECtHR. Wojciech Sadurski describes a similar situation regarding the cooperation between the ECtHR and the Polish Constitutional Court that led to *Hutten-Czapska v. Poland*, 2006-VIII Eur. Ct. H.R. 57, *see* Wojciech Sadurski, *Partnering with Strasburg: Constitutionalisation of the European Court of Human Rights, The Accession of Central and East European States to the Council of Europe and the Idea of Pilot judgments*, 9 Hum. Rts. L. Rev. 397, 414-20 (2009).

judgments in the cases of *Beit Sourik*[25] and *Mara'abe*,[26] which demanded changes to the route of the separation barrier in the occupied West Bank, were issued shortly before and shortly after the ICJ advisory opinion stating that the entire barrier built within the occupied territory is illegal.[27] The ICJ advisory opinion allowed the Israeli court to withstand the pressure of the executive, since it could credibly commit not to digress too far from the decision of the ICJ for fear of losing its international legitimacy. At the same time, the executive had to comply with the Israeli court to rebuild the international support that it had lost due to the ICJ judgment and thereby secured the interest of the Israeli court in achieving compliance.

Legitimate national courts are supported by their domestic public, which is likely to accept their judgments. Such courts increase the chances of compliance with the judgments of international courts: on the one hand international courts can rely on national courts' judgments to legitimize their own decisions, and on the other hand national courts can rely on the judgments of international courts to withstand the pressure of the executive and force it to amend at least some of the violations discovered by the international court. The implementation of international judgments by national courts helps to enforce those judgments and increases the chances of compliance with them. International courts often rely on national courts as the main vehicle to enforce their judgments.[28] A legitimate national court can therefore help international courts secure compliance with their judgments.

When a national court relies on a judgment of an international court it indicates that it accepts the judgment and believes it is legally correct. This increases the legitimacy of the international court. Even when a national court cites an international court that has no jurisdiction over it, the international court can gain legitimacy as a result. Reference to the judgment of an international court shows an appreciation of the quality of the court's judgments that can shape public opinion in favor of it. Such reference can also increase the visibility of the international court and help it mobilize support.

---

25 HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC 58(5) 807 (Isr.).

26 HCJ 7957/04 Mara'abe v. The Prime Minister of Israel (Sept. 15, 2005), Nevo Legal Database (by subscription) (Isr.).

27 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

28 *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am. J. Int'l L. 241, 248-49 (2008). Benvenisti also argues that the application of international norms and judgments by national courts helps them shield their governments from foreign pressures by other states and interest groups, *id.* at 241-42.

The greater the legitimacy of the national court *vis-à-vis* domestic and international audiences, the more it is able to help the legitimacy of international courts. The ECtHR, for instance, is increasingly being cited by national courts that are not bound by its decisions.[29] Consider the judgment of the American Supreme Court in *Lawrence v. Texas*.[30] The majority found that a Texas law that forbids sodomy between members of the same sex is unconstitutional because it violates the right to liberty protected by the due process clause in the American Constitution. This judgment overrules a former precedent of the Supreme Court — *Bowers v. Hardwick*.[31] In order to contradict the claim in *Bowers* that protecting the rights of homosexuals is foreign to Western civilization, the court referred to the ECtHR judgment in *Dudgeon v. United Kingdom*,[32] which ruled that proscribing homosexual conduct violates the European Convention.[33] A decision by the American Supreme Court to refer to an international court as a source for the interpretation of the Constitution is very rare and controversial.[34] Because it was such a unique step and attracted so much attention, it increased the visibility of the ECtHR both within the United States and around the world. This exposure may have gained the ECtHR many supporters internationally and within the United States, especially among the people who supported the decision in *Lawrence*. The judgments of the American Supreme Court have an impact on the legal community across the world, including in Europe, and may accord the ECtHR important publicity even regarding the European audience, which is probably more familiar with its judgments than other international audiences. Furthermore, supportive interest groups in the United States can also influence public opinion in Europe and help the ECtHR gain more legitimacy *vis-à-vis* the European audience.

An important strand in the literature suggests that states need international courts primarily to make up for the absence of a legitimate national judiciary. When a legitimate national judiciary is lacking, an international court can allow the state to bind its own hands and make its commitments to the international community and to its own citizens credible. Erik Voeten suggests that this implies that the national public should show greater support for an international

---

29 *See* Anne-Marie Slaughter, A New World Order 80-81 (2004).

30 Lawrence v. Texas, 539 U.S. 558 (2003).

31 Bowers v. Hardwick, 478 U.S. 186 (1986).

32 Dudgeon v. United Kingdom, Eur. Ct. H.R. (ser. A) 45 (1981).

33 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19.

34 *See* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 Mich. L. Rev. 431, 439 (2005). Justice Antonin Scalia, the dissenting judge, criticized this mode of reasoning, *see* Lawrence v. Texas, at 598.

court when they do not support their own national court.[35] However, this hypothesis is not supported by Voeten's data; in fact, the opposite seems to be the case — in states where the public shows higher support for the national court, it also shows higher support for international courts, and individuals that show higher support for their national court also show higher support for international courts.

Voeten's findings do not necessarily conflict with the theory that views international courts as providing states with a means of making a credible commitment. The domestic public may possibly be more supportive of an international court if the respective national court enjoys lower support at the time the state joins the treaty that grants that court jurisdiction. This may be reflected in the empirical finding of Andrew Moravcsik[36] and of Beth A. Simmons and Allison Danner,[37] who show that states that are not established democracies are more likely to join international courts. Some time after a state has joined an international court's jurisdiction, however, that court is already serving its purpose of binding the state and constraining its national judiciary. The public may increasingly support the national judiciary, either because they know it is bound by the international court and is therefore unlikely to stray from its policies that they support, or because they appreciate its decisions, which result from the invisible constraint of the international court. This may be reflected in an increase in support for the national court, especially when the state is bound by an international court that enjoys high support — a legitimate international court. Therefore, some time after a state has joined an international court that is supported by its public, the same public may also support its national court, leading to Voeten's findings.

Another reason for the apparent discrepancy between Voeten's findings and the credible commitment theory is that the main proponents of the credible commitment theory did not measure support for the national court. Moravcsik checked how many years the state had been democratic,[38] and Simmons and Danner checked whether the state complies with basic rule of law standards according to international scales.[39] The public in an established democracy may not support the national court. This may be because the national court is especially liberal compared to the courts of less democratic states, and the public disagrees with its decisions. Furthermore, the extremely liberal public

---

35 Voeten, *supra* note 5.

36 Moravcsik, *supra* note 4.

37 Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 Int'l. Org. 225 (2010).

38 Moravcsik, *supra* note 4, at 231-32.

39 Simmons & Danner, *supra* note 37, at 238.

of a highly democratic state may not support the national court even when it is more liberal than other national courts in less democratic states. An established democracy may not need the international court for commitment purposes and, according to one interpretation of the credible commitment theory, the public will therefore not support it. At the same time, in the situations described above, the public will not support the national court, leading to the correlation observed by Voeten.

Democratic states may also join the jurisdiction of an international court because they know, or believe, there is very little chance the court will find them in violation. Simmons and Danner found that many democratic states that were not involved in conflicts joined the jurisdiction of the International Criminal Court (ICC) because they did not expect to commit any international crimes and therefore had nothing to lose from doing so.[40] It seems reasonable that the public in states that are not involved in conflict is more likely to support its national court since the court does not need to confront the executive on matters of national security. If the public in states that experience no conflicts is also more likely to support the international court since they do not have to fear its intervention, this may also explain the correlation found by Voeten.

In conclusion, this analysis implies that while states may need international courts as a mechanism for making credible commitments, the legitimacy of the national court does not necessarily come at the expense of the legitimacy of international courts. It is possible for the public to support both its national court and international courts under plausible conditions. This Part argued that an international court can gain from its interaction with a legitimate national court. Eyal Benvenisti and George Downs argue that international courts generally can profit from collaboration with a group of national courts that enjoy independence from their executive branches and cooperate with each other. These national courts can use their collective power to help international courts improve the coherence of international obligations.[41] The existence of a consistent body of international norms will facilitate substantially the ability of international courts to gain support for their judgments. Therefore strong and legitimate national courts can produce systematic effects that benefit international courts generally, but these are beyond the scope of this Article, which is focused on actions individual international courts can take to enhance their legitimacy.

---

40 *See id.* at 240.

41 Eyal Benvenisti & George Downs, *National Courts, Domestic Democracy and the Evolution of International Law*, 20 Eur. J. Int'l L. 59, 68 (2009).

III. The Use of Norms and Legal Reasoning

Legal norms constrain the ability of international courts to make policy decisions. However, norms are usually indeterminate, their application to the facts is never straightforward, and often different and contradictory norms apply to the same case; this gives rise to judicial discretion.[42] Judicial discretion is never absolute, the norms applicable to the case make some decisions impossible to justify and leave the court with a limited set of options. The strategic actions described above as a way to improve a court's legitimacy are only possible if they lie within the zone of judicial discretion. This means that judges must avoid issuing certain judgments that could help the court's legitimacy only because the norms would not support these judgments. The duty to issue reasoned and reasonable judgments further limits the results that judges can reach.[43] The reasoning is a tool judges can use to serve their strategic goals and improve the court's legitimacy, but the choice of reasoning is also limited by the constraints of norms.

If judges wish to increase the court's legitimacy, greater judicial discretion can allow them more options to do so. A court can gain from appearing constrained, however, because the international community is more likely to support a judgment if it appears to be determined by the law. The support for a judgment depends on the combination of the specific support for its content, the legitimacy of the court, and the reasoning used.[44] A certain court will gain more support for its judgments if it uses a certain type of reasoning. This reasoning will not necessarily be optimal for a different court, which may address different issues that call for the application of different norms or tools of interpretation to persuade the public. It is generally true, however, that courts are supposed to apply norms and not their own discretion, therefore an appearance of constraint can usually help international courts gain support for their judgments.

The reasoning used has long-term implications for the court, as explained in Part I.[45] If a court regularly uses reasoning constrained by the law its legitimacy will improve, since the international community will view its judgments as

---

42 *See* Hanoch Dagan, *The Realist Conception of Law*, 57 U. Toronto L.J. 607, 613-16 (2007).

43 Aharon Barak, Shikul Da'at Shiputi [Judicial Discretion] 46-51 (1987) (Isr.).

44 For an attempt to measure these different factors, see Gibson, Caldeira & Spence, *supra* note 2, at 188, 192 (finding that the U.S. Supreme Court has more legitimacy than Congress in the American public. The Supreme Court gets more support for its judgments when it bases them in law, while Congress gains more support for its decisions when they are grounded in fairness).

45 *See* text accompanying *supra* note 7.

legally correct. At the same time, parties' compliance with a judgment that uses constrained reasoning does not improve a court's reputation as much as compliance with a discretionary judgment, because compliance with a constrained judgment may stem from fear of the criticism that would result from ignoring a legally correct decision, and not from acknowledgment of the court's high reputation. A court should thus balance its legitimacy and its reputational interest when it forms the reasoning of its judgments.

The reasoning used also has immediate implications. When a court issues a judgment that appears to be constrained by the law, states are more likely to comply, because noncompliance would lead to severe public criticism of the non-complying state. When judges do not appear constrained by the law, states can take a variety of measures against the court besides noncompliance, while incurring less criticism. These measures include lowering the court's budget, exiting the court's jurisdiction, or changing treaties to damage the court's interests.[46] States are better able to criticize a judgment if it does not appear constrained by the law. This criticism is more likely to gain adherents and less likely to lead to criticism against the criticizing state itself than in the case of a judgment that appears constrained by the law. This means that when a court sheds the legal constraints it may come under political constraints that limit its ability to shape policy to an even greater extent.

In order to gain some protection from political constraints, a court must appear constrained by the law. This appearance, however, will not always be genuine — judges may appear constrained when they are, in fact, exercising judicial discretion. Even when the law is unclear and leaves room for judicial discretion, judges will try to indicate that their decision is mandated by the law. For example, the first judgment issued by the ICJ, in the *Corfu Channel* case,[47] shows the court resorting to rhetorical devices to indicate that its decision was mandated by the law. This case concerned two British warships that had struck mines in the Corfu channel near the border of Albania. In response, the United Kingdom launched an operation to clear the channel of mines. The United Kingdom blamed Albania for mining the channel. Even the counsel for Albania accepted that if Albania had been aware of the mines it should have notified the United Kingdom. There was no legal question, then, and after conducting a factual analysis and concluding that Albania had been aware of the mining, the court found Albania responsible and required

---

46 For more information on the political constraints on international courts, see Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 Va. J. Int'l L. 411, 420-26 (2008); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 Va. J. Int'l L. 631, 656-68 (2005).

47 Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

it to pay compensation. Albania, however, claimed that the United Kingdom had violated international law by its minesweeping operation. The United Kingdom disagreed, claiming that it had to secure the mines as evidence and acted according to the rule of self-help. This time the court was faced with a legal question, but instead of relying on legal sources, it simply stated that in order to ensure respect for international law it had to declare that the United Kingdom's actions violated Albanian sovereignty.[48] This is an example of circular reasoning, since if the United Kingdom had a right to self-help, as its counsel claimed, then its actions were permitted as an exception to the rule that territorial sovereignty must be protected. This reasoning demonstrates an attempt by the ICJ to buttress its decision with legal norms: even though it had failed to discover a norm that determines the case, it used rhetorical tricks instead to indicate that its decision follows from the norms of international law.

All judges, in both international and national courts, must acquire the art of masking their policy decisions as if they have been determined by the law.[49] Judges differ in their ability to do so, but all judges depend to some extent on the norms they use and cannot bend them entirely at will. It could be argued, however, that judges in international courts face a more difficult task when they mask their decisions than national judges. The doctrine used by international courts is usually less clear and definite than the doctrine developed at the national level. In most areas of the law international judgments are fewer than national judgments and therefore international doctrine is less developed. If that is indeed the case, then international judges are less constrained by the law, but exposed to political constraints that national judges can fend off by appearing legally constrained.

One way both national and international courts can project the appearance of legal constraint is to discourage dissent among the judges. If all judges support a decision this signals that the law doesn't leave them any choice. Judges should try to minimize dissent especially over decisions that are controversial in nature. The problem is that judges may also take different sides of a controversy and be more inclined to dissent precisely when it is vital to project a united front.[50] Therefore, in order to establish that international

---

48 *See id.* at 35.

49 *See* Martin Shapiro, *Judges as Liars*, 17 Harv. J.L. & Pub. Pol'y 155, 156 (1994) ("[A]lthough every court makes law in a few of its cases, judges must always deny that they make law. . . . Courts and judges always lie. Lying is the nature of the judicial activity.").

50 *See* P.S. Atiyah & Roberts Summers, Form and Substance in Anglo-American Law — A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions 288 (1987).

courts do indeed discourage dissent when the judgment is controversial, it is not enough to point to individual cases of dissent or even to quantitatively assess the rate of dissent conditioned on the issue. Evidence that judges have been pressured by other judges not to dissent in especially controversial cases can help support the argument. There is some evidence that dissent was repressed in the *Brown* judgment issued by the American Supreme Court,[51] for instance. Similar studies on the decision-making of international courts may also be fruitful. However, this evidence is usually very difficult to find.

Another method judges use to shape their reasoning in a way that increases support for their decision-making is citing previous judgments of the same court. When a court relies on its previous judgments it signals that its decision is determined by norms and not by its discretion. Even courts that are not bound by their own precedents, such as the ECtHR, cite them and try to rely on them as much as possible.[52] For example, the ECtHR committed itself not to digress from its past judgments without good reason in the *Christine Goodwin* case.[53] In this judgment the ECtHR did indicate, however, that it must respond to changing circumstances when interpreting the European Convention. But even if a court does change the content of its decision, it will usually attempt to present its current judgment as consistent with its past judgments by distinguishing the facts of the cases. Judges on international courts sometimes cite judgments of other national and international courts. International courts may use citation of other courts to persuade the international community that their judgment is supported by the law and accepted by other legal communities.[54]

Another part of the judgment that affects a court's legitimacy, besides the reasoning, is the remedy. International courts can manipulate the remedies they issue in an attempt to preserve their legitimacy. The ECtHR, for instance, can

---

51 Brown v. Board of Education, 347 U.S. 483 (1954). For these claims, see Michael J. Klarman, *Brown v. Board of Education: Law or Politics?* 18 (Univ. of Va. Sch. of Law, Public Law Research Paper No. 02-11, 2002), *available at* http://ssrn.com/abstract_id=353361.

52 *See* Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 Brit. J. Pol. S 413, 438 (2011) (finding evidence that ECtHR judges cite previous ECtHR judgments to legitimate their judgments and persuade national courts to support them).

53 Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 26.

54 *See* Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. Legal Stud. 547, 572-73 (2010) (finding evidence that international courts cite other courts in order to persuade certain audiences).

require states to pay reparations named "just satisfaction."[55] Those reparations are usually low compared to the costs of taking the specific and general measures required by the court. Even the highest instances of just satisfaction are not a financial burden for most states, and for that reason states usually pay them in time. Just satisfaction, however, can also serve another goal — to express how severely the court views the violation. If the court issues very low just satisfaction, even compared to its other judgments, it signals that it doesn't view the violation as particularly severe. This may help reduce the resistance to a judgment and ensure its acceptance by a state which is found in violation of the Convention.

In the *A. v. United Kingdom* ECtHR judgment discussed above, for instance, the ECtHR issued extremely low just satisfaction to all the applicants, the highest award being €3900.[56] The *Von Hannover* judgment is another illustrative example.[57] This case concerned several paparazzi pictures of the princess of Monaco, which were taken outside her home without her knowledge and published by the tabloid press in Germany. After several German courts discussed the issue it reached the German Federal Constitutional Court, which decided that some of the photos were publishable under German law. The ECtHR decided in this case that the German courts did not provide sufficient protection of the applicant's private life, violating Article 8 of the European Convention. This judgment stands in direct confrontation with the highly respected German Constitutional Court on an issue of balancing important rights. The judges must have foreseen that it would create a stir, and indeed news organizations in Germany criticized the decision and wanted Germany to appeal to the ECtHR Grand Chamber.[58] In its judgment the ECtHR deliberately did not decide the issue of just satisfaction and invited the parties to agree on this point, thus reducing resistance to the judgment and increasing the chances of a friendly settlement. Germany finally decided not to appeal the case and reached a friendly settlement, which led to the case being stricken from the ECtHR's pending cases. Similarly, in the *Corfu Channel* case discussed above the ICJ did not require the United Kingdom to take any action, even though it ruled that the United Kingdom had violated international law.[59] This may

---

55 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 41.

56 A. v. United Kingdom, App. No. 3455/05, 2009 Eur. Ct. H.R.

57 Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 41.

58 For a petition to appeal this judgment, see A Proposal to Petition the German Government to Exercise Its Right Under Article 43 of the European Convention on Human Rights to Request That the Case Be Referred to the Grand Chamber, http://www.olswang.com/pdfs/hanover_petition.pdf (last visited Mar. 15, 2013).

59 Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

have reduced the risk of criticism against that part of the judgment which, as suggested above, rested on shaky legal grounds.

Norms determine not only the way judges decide cases, but also which cases a court can decide. Courts have limited jurisdiction, and when a case reaches them they must first decide whether they have jurisdiction to decide the case. Any such decision is partly constrained by norms, since if the norms clearly maintain the court has jurisdiction it is obligated to take the case. If the norms or the facts they are applied to are unclear, however, there may be room for judicial discretion that a court can apply when it decides whether or not it has jurisdiction over the case. This discretion can be used strategically and the court can deliberately try to avoid certain cases that are politically inconvenient for it to decide.

Furthermore, even if a court has jurisdiction it may decide that the case is inadmissible, for instance because deciding it doesn't serve the interests of justice. When courts apply the rules of admissibility they have greater room for discretion than when applying the rules of jurisdiction, hence greater opportunity for strategy.[60] Some authors have claimed that the ICJ has avoided cases where its judgment would probably lead to noncompliance by finding it has no jurisdiction.[61] Similarly, if a court knows that its judgment will not be accepted by the public and may damage its legitimacy it can decide not to exercise its jurisdiction in order to avoid this risk.

IV. Responding to the Agendas of Domestic Publics

The previous Parts argued that courts can enhance support for their judgments and their legitimacy by taking into account the actors they interact with and the norms and reasoning they apply. Support for a court's judgments also depends, however, on the agendas of the relevant audiences of the court, that is, the issues these audiences view as important and central. So far this Article

---

60 Yuval Shany, *Jurisdiction and Admissibility*, *in* Oxford Handbook of International Adjudication (Karen J. Alter, Cesare Romano & Yuval Shany eds., forthcoming 2013).

61 *See* W. Michael Reisman, Nullity and Revision — The Review and Enforcement of International Judgments and Awards 641-42 (1971). Reisman provides two examples where the ICJ manipulates the norms and uses reasoning that differs from what it uses in other cases to avoid a decision that the losing party (Iran and Bulgaria respectively) would fail to comply with: Anglo-Iranian Oil Company (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93 (July 22); Aerial Incident of 27 July, 1955 (Isr. v. Bulg.), Preliminary Objections, 1959 I.C.J. 127 (May 26).

has treated the international community as the public with which a court interacts. This public may contain opposing groups and organizations, which are extremely different from each other. Contrarily, the domestic public within the states under a court's jurisdiction is a smaller and more coherent group that includes the individuals within a certain state.[62] The agenda of such domestic publics is more easily verified and will be specifically addressed in this Part.

The domestic public views certain issues as important and central: if an international court issues a judgment that affects one of these issues, that judgment will be more salient.[63] A salient judgment is more likely to incur criticism and resistance if its result does not suit the preferences of the domestic public. Such criticism can weaken the court's domestic public support more than criticism against a less salient judgment. On the other hand, a salient judgment that suits the public's preferences gains the court more support than it would gain if it issued a less salient judgment. If the domestic public in influential states becomes hostile to the court, it may influence the international community to view the court's judgments as wrong or biased and lower the court's legitimacy in the international community. For that reason, international courts should strive to ensure their support by domestic publics in order to preserve their international legitimacy. A court can improve its domestic support by showing that its judgments regularly suit the preferences of the domestic public. If domestic publics approve of the court's judgments, they can influence the international community to view them as just and correct and improve the court's legitimacy.

Domestic support for a court is always in danger of being damaged if the court issues a judgment that contradicts the domestic public's preferences. If the court and its actions are visible to the domestic public, then public support is based on acquaintance with the court's judgments and acceptance of their contents. This suggests that the court can withstand criticism of future judgments without a substantial damage to its support since the public already has a settled view of the court based on their past acquaintance and this view cannot be changed easily. For that reason, Voeten's finding that the ECtHR is well known to the European domestic publics suggests that its support by these publics is relatively stable and resilient.[64]

---

62 Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 Theoretical Inquiries L. 437, 452 (2013).

63 *Cf.* Frederick Schauer, *Forward: The Court's Agenda and the Nation's*, 120 Harv. L. Rev. 4 (2006) (studying the differences between the agendas of the general U.S. public and the U.S. Supreme Court and their effect on the salience of the court's judgments).

64 Voeten, *supra* note 5, at 419-22.

Nevertheless, the strength of a court's domestic support also depends on whether it issues judgments on issues that are high on the domestic publics' agenda. If most of the ECtHR's past judgments dealt with issues that were not high on the agendas of domestic publics, then, despite the high levels of support it currently enjoys, this support could be seriously damaged if it issues a salient judgment that goes against the preferences of the domestic publics in the future. It is therefore possible that the ECtHR cannot withstand a substantial backlash against a salient judgment, as Voeten suggests, if most of its past judgments dealt with issues that were low on the agenda of the public in European states. To compare the agendas of domestic publics and the ECtHR, it would be necessary to verify them empirically. The agendas of the domestic publics can be extracted from polls that measure what issues the public views as important or from studying the issues that the popular media is focused on.[65] The agenda of the ECtHR is reflected in the types of issues it discusses and the types of violations it usually finds.

The salience of issues changes over time as public attention is directed to different topics. The preferences of the domestic public also change over the years. International courts can delay their intervention in delicate cases where they expect their judgment would go against public opinion on a salient issue until a shift in public opinion occurs and the public becomes either more favorable to the decision the court wishes to reach or simply less interested in the subject. For example, on July 7, 2011 the ECtHR issued its judgments in the cases of *Al-Skeini*[66] and *Al-Jedda*.[67] The *Al-Skeini* judgment found the United Kingdom in violation of Article 2 of the European Convention, which protects the right to life, because it had failed to investigate properly the killing of civilians in occupied Iraq by British forces. The *Al-Jedda* judgment found the United Kingdom in violation of Article 5 of the European Convention, which protects the right to liberty, because of the administrative detention of a British and Iraqi citizen in British-occupied Iraq. These judgments adopted a bold interpretation of the ECtHR's jurisdiction, which applied the protection of the court to an area under the effective control of a state party to the European Convention, even though that area is not in the territory of another state party. Furthermore, the judgments seem to contradict the ECtHR's 2001 decision in the *Bankovic case*[68] that it would apply its jurisdiction over areas under the effective control of a state party only when the territory originally belonged to another state party. The ECtHR may have calculated that the attitudes of the

---

65 Similar methods are used in Schauer, *supra* note 63, at 14-20.

66 Al-Skeini v. United Kingdom, App. No. 55721/07, 2011 Eur. Ct. H.R.

67 Al-Jedda v. United Kingdom, App. No. 27021/08, 2011 Eur. Ct. H.R.

68 Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333.

domestic publics in Europe were much more hostile to military intervention in 2011 than in 2001, which saw the beginning of the international war on terror. Specifically, European public opinion in 2011 probably viewed the war in Iraq much more negatively than public opinion in 2001 viewed NATO's intervention in the former Yugoslavia. For these reasons, the public may have been more favorable to findings of violations of the European Convention in cases of international military intervention in 2011. The public agenda in European states may have also changed over this period, and the public now views international military intervention as less salient and important.

The salience of a judgment is determined not only by the subject that the court deals with and its place on the public agenda. Often the salience is determined mostly by the remedy the court issues. A court can render a judgment salient even though the issue itself is not viewed as important by the public if it requires demanding actions as the remedy. A court can also render a judgment less salient even if it touches on an issue that is high on the public's agenda by not requiring a demanding remedy. Frederick Schauer suggests that the American Supreme Court issues an aggressive decision only when the topic itself is not very salient and thereby limits the overall salience of the judgment.[69] International courts may employ a similar strategy.

The agenda of the domestic public is a condition the court must respond to, but to a certain extent the court can also behave as an agenda-setter. A court can render certain issues salient and push them up on the agenda of the domestic public by issuing important judgments on these issues. Courts can also shape domestic public agendas by other means besides their judgments. International courts can hold public hearings that target a wide audience; they can offer positions as clerks or legal advisers at the court to young professionals in an effort to increase the visibility of the court to social elites; and they can issue press statements and publish reports that advance the values of the court. The ECtHR invests substantial resources in such activities.[70]

---

69 Schauer, *supra* note 63, at 59-62.

70 The ECtHR regularly publishes press releases on its internet HUDOC database. On the ECtHR's website there are numerous fact sheets in many languages, *see Press Realeses*, ECHR, http://www.echr.coe.int/ECHR/EN/Header/Press/News/Press+releases/ (last visited Mar. 15, 2013); *cf.* James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 Am. J. Int'l. L. 768, 786, 792-95 (2008) (arguing that an investment in publicizing the court's proceedings may be even more crucial for other courts, such as the Inter-American Court of Human Rights (IACHR) that has a bad compliance record and therefore cannot easily shape policy by its decisions alone).

Other parties besides the court can shape the agenda of the domestic publics in ways that impinge on a court's legitimacy. States that want to damage a court's legitimacy can do so by rendering the topic of its decisions especially salient and then criticizing them to shape domestic public opinion against the court. Politicians in the United Kingdom, for instance, successfully drew significant media attention to the previously obscure issue of prisoners' voting rights as a way of making their criticism of the ECtHR's demands to allow prisoners to vote more damaging to its support in the British public.[71] Some individuals, such as academics, lawyers, politicians and reporters, possess much more power to affect the agenda of the domestic public than other members of the public. These individuals can also issue more damaging criticism or provide more potent support to the court than others. A court that is concerned about its legitimacy should know how to target its efforts in a way that keeps these powerful individuals on its side.

Conclusion

International courts strive to maintain and improve their legitimacy. To do that they act strategically with regard to states and to national courts, use legal reasoning and develop legal norms, and respond to conditions such as the agenda of domestic publics. The attempt to increase a court's legitimacy may conflict with its other interests; for instance, sometimes courts must behave differently to increase their legitimacy and to improve their reputation for compliance. In such cases international courts may have to compromise their legitimacy to serve another interest. Courts may also have immediate policy preferences about the cases they decide. Sometimes these preferences conflict with the preferences of the public. In such cases a court must decide whether it wants to promote its preferences at the risk of losing some of its legitimacy, or neglect its preferences and conform to the views of the public.

Legitimacy is a currency that a court can spend. When a court enjoys high legitimacy the public may support compliance with its decisions even if they object to their content, but if a court regularly digresses from public preferences it risks losing its legitimacy in the long run. Courts take these considerations into account and respond to them strategically. Some practices of the ECtHR and the ICJ can be explained as such a form of strategic behavior. Some of the judges on these courts probably practice this strategy with open eyes and are aware of the myriad considerations they must take into account. Other judges follow their lead as they learn the doctrine they have created and the

71 *See* Voeten, *supra* note 5, at 418-19.

judicial practices they have been implementing. Other international courts with similar features can use similar practices and gain legitimacy as a result.