

# INTERNATIONAL COURTS AND THE POLITICS OF LEGITIMATION AND DE-LEGITIMATION

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## ABSTRACT

How might states damage the reputation of international courts (ICs)? What can ICs do to counteract threats to their legitimacy? This article explores how the legitimacy of ICs is constructed through ongoing political interactions that ICs have with states, legal communities, and society. It argues that while states have various means of de-legitimizing ICs, two main channels exist for states to undermine an IC. States can use institutional channels to manipulate and undercut an IC's reputation. Institutional channels in particular allow states to affect a court's pedigree, processes, and outcomes through a variety of court-curbing mechanisms. The other channels are extra-institutional and rely on states' capacities to defy and publicly shame an IC and thereby harm its pedigree, processes, and outcomes. Moreover, this article argues that ICs are capable of counteracting states' de-legitimation efforts. ICs have interpretive, procedural, and "off-the-bench" possibilities to enhance their legitimacy in regard to their pedigrees, processes, and outcomes. This article contributes to research on the legitimacy of ICs, showing how legitimacy is strategically shaped through political interactions that affect the pedigree, processes, and outcomes of ICs.

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## I. INTRODUCTION

Kenya's rebuke of the International Criminal Court (ICC),<sup>1</sup> the Trump administration's actions to thwart the World Trade Organization's (WTO) Appellate Body,<sup>2</sup> and Russian defiance of the European Court of Human Rights (ECtHR)<sup>3</sup> illustrate how states can defy or undermine an international court (IC). In some instances, these actions may bring ICs to the brink of what some might call a legitimacy crisis. Yet, ICs are not entirely helpless in the face of state reproach. ICs, and the judges that sit on them, will often recognize that their ability to fulfill their mandates and successfully exercise authority hinges on their legitimacy. Without adequate acceptance by relevant audiences, ICs might lack the political capital necessary to ensure compliance with court-ordered remedies, their judgments are respected, and their interpretations of the law are accepted. In recognition of the importance of their legitimacy and need to have a deep reservoir of diffuse support, ICs can act in ways that improve their social standing and reputation. In other words, the legitimacy of ICs is shaped both by actions of reproach taken by states and efforts by ICs to boost their reputation.

This article explores the legitimation and de-legitimation of ICs. It asks: how might states damage the reputation of ICs? Conversely, how can ICs counteract such threats to their legitimacy? In answering these questions, I argue that legitimacy is *political*, as it is constructed through ongoing political interactions. In particular, legitimacy develops through the interactions that ICs have with states, legal communities, and society. Any grouping of these actors can actively seek to weaken an IC's legitimacy and, conversely, can act to legitimize it. This article examines the possible forms of interactions between ICs and states, legal communities, and society that are involved in the (de)construction of IC legitimacy.

My argument is two-fold. First, I argue that states can play a large role in the de-legitimation of ICs. While states have various means of de-legitimizing ICs, I suggest two main channels exist for states to undermine an IC. States can use institutional channels to manipulate and undercut an IC's reputation. Institutional channels in particular allow states to affect a court's pedigree, processes, and outcomes through a variety of court-curbing mechanisms. The other channels are extra-institutional and rely on states' capacities to defy and publicly shame an IC and thereby harm its pedigree, processes, and outcomes. Second, I argue that ICs are capable of counteracting states' de-legitimation efforts. ICs have interpretive,

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1. John Aglionby, *Kenya Refuses to Hand Suspects to International Criminal Court*, FIN. TIMES (Apr. 21, 2016), <https://www.ft.com/content/961b9eb6-07af-11e6-96e5-f85cb08b0730>.

2. John Brinkley, *Trump is Close to Shutting Down the WTO's Appeals Court*, FORBES (Sept. 27, 2018), <https://www.forbes.com/sites/johnbrinkley/2018/09/27/trump-is-close-to-shutting-down-the-wtos-appeals-court/#575aad197ab6>.

3. *Russia Passes Law to Overrule European Human Rights Court*, BBC NEWS (Dec. 4, 2015), <https://www.bbc.co.uk/news/world-europe-35007059>.

procedural, and “off-the-bench” possibilities to enhance their legitimacy in regard to their pedigrees, processes, and outcomes.

This article makes several contributions to the discussion on ICs and legitimacy. It develops a perspective on legitimacy that builds on existing approaches that highlight the significance of the pedigree, processes, and outcomes of ICs. I suggest that ICs’ legitimacy can be strategically shaped through political interactions because they contribute to and have bearing on pedigree, processes, and outcomes. In addition, this article examines how states’ ability to curb courts is important not only for understanding the independence of courts, but their legitimacy. For this reason, this article has implications for the debate on the political constraints of courts. It suggests that the consequences of court-curbing are broader than previously recognized. This article also considers ICs in their political context. While much of the literature on ICs focuses on their judicial function, this article contributes to thought on the political context of ICs. As such, it suggests that future research should pay closer attention to why states pursue de-legitimation, through what actions, and with what effect. Conversely, more research is needed to better understand how ICs identify legitimation strategies, which ones are more effective, and under what circumstances.

Part II begins by briefly reviewing existing research on the legitimacy of ICs. It then introduces an alternative perspective on the legitimacy of ICs and argues that legitimacy can be shaped by the strategic behavior of states and ICs themselves. Next, Part III discusses how states can strategically work to de-legitimize ICs through both institutional and extra-institutional channels. Part IV then proceeds to consider how courts can use legitimation strategies themselves through their interpretive and procedural methods and “off-the-bench” activities. Finally, the article concludes with a discussion of the implications for future research.

## II. LEGITIMACY AND INTERNATIONAL COURTS

In recent decades, the authority of international institutions in global and regional governance has expanded. At times, their authority has been challenged, contested, or undermined. Against this backdrop, a vast body of scholarship has sought to understand the legitimacy of international institutions.<sup>4</sup> The authority of

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4. See, e.g., Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 321 (Jeffrey Dunoff & Mark Pollack eds., 2012) (exploring the increased interest in the legitimacy of international institutions); JONATHAN G. S. KOPPELL, WORLD RULE: ACCOUNTABILITY, LEGITIMACY, AND THE DESIGN OF GLOBAL GOVERNANCE (2010) (discussing broad implications of legitimacy); Steven Bernstein, *Legitimacy in Intergovernmental and Non-State Global Governance*, 18 REV. INT’L POL. ECON. 17, 17 (2011) (analyzing intergovernmental and non-state institutions under a framework which balances communal acceptance); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405–06 (2006) (articulating a middle ground standard for the legitimacy of global institutions by suggesting that legitimacy is neither derived from state consent nor requiring that institutions apply democratic standards upon states); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 379 (1999) (arguing that the international system is neither Hobbesian in nature nor functions solely out of the self-interest of each state); Michael Zürn, *Global Governance and Legitimacy Problems*, 39 GOV’T &

ICs has similarly been called into question, and, in response, scholars have turned their attention to the legitimacy of ICs.<sup>5</sup> This research explores legitimacy both as a normative concept and a sociological concept.<sup>6</sup> As a normative concept, legitimacy refers to the justifiability of an institution based on moral values and principles, and thus whether it has the *right to rule*. The sociological concept, in contrast, refers to social acceptance of the institution and whether it is *perceived to have the right to rule*. For the purposes here, I concentrate on legitimacy as a sociological concept. I refer to legitimacy as whether an institution's "authority is accepted by relevant audiences, such as states and civil society groups; whether it enjoys a reservoir of support that makes people willing to defer even to unpopular decisions and helps sustain the institution through difficult times."<sup>7</sup> The relevant audiences of ICs include states, legal communities—consisting of lawyers, national court judges, legal scholars, etc.—potential litigants, as well as the public at large. It is the perceptions of these audiences that matter for understanding the legitimacy of ICs.

Although I focus on sociological legitimacy, normative and sociological

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OPPOSITION 260, 273 (2004) (asserting that new international institutions are more intrusive than older institutions).

5. See, e.g., Başak Çalı et al., *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 HUM. RTS. Q. 955, 956 (2013) (analyzing the legitimacy of the ECtHR in the context of social legitimacy); Andreas Føllesdal, *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory*, 14 THEORETICAL INQUIRIES L. 339, 340 (2013) (discussing some of the continued disagreement surrounding the legitimacy of international human rights courts); James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 460–61 (1995) (showing that the ECJ does not have much goodwill with ordinary citizens of Europe); Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L L. 43, 44 (2012) (discussing the criticisms of courts as undemocratic); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 109–10 (2009) [hereinafter Grossman, *Legitimacy and International Adjudicative Bodies*] (critiquing the legitimacy of international adjudicative bodies); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 62–65 (2013) [hereinafter Grossman, *Normative Legitimacy*] (attempting to encourage conversation around ICs, specifically in relation to outmoded assumptions about their role and impact); Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479, 480 (2013) (addressing the legitimacy of ICs and expansive judicial lawmaking); Emilia Justyna Powell, *Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts*, 9 FOREIGN POL'Y ANALYSIS 349, 349 (2013) (contextualizing the difference in support among the states who have ratified the Rome Statute); Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 8 (2012) (developing an understanding of international adjudication as an exercise of public authority). See generally THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS (Robert Howse et al. eds., 2018) (providing experts' critiques of international trade courts and tribunals); THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017) (investigating key issues in the legitimacy of criminal tribunals).

6. The sociological concept of legitimacy is sometimes referred to as empirical or descriptive legitimacy. See, e.g., Bernstein, *supra* note 4, at 19 (identifying an empirical-normative divide).

7. Bodansky, *supra* note 4, at 327.

concepts of legitimacy are interrelated.<sup>8</sup> Some conceptions of normative legitimacy may require that the institution be perceived as legitimate by a certain portion of society or its subjects. Conversely, social acceptance may hinge on whether the institution meets some normative criteria. Despite being interrelated, I keep the two concepts separate here for analytical clarity.

Legitimacy is consequential for ICs in three main ways. First, legitimacy is crucial to compliance.<sup>9</sup> As Franck described, legitimacy “has the power to pull toward compliance those who cannot be compelled.”<sup>10</sup> For courts, legitimacy is especially important because they do not have the power of the purse or the sword—in other words, they lack the means to compel. Thus, an IC’s ability to elicit compliance hinges on its legitimacy. Second, a court’s legitimacy may have an impact on whether actors petition it and its overall relevance as a site of contestation. States and individuals are unlikely to turn to a court for recourse when it lacks sufficient levels of acceptance by states and/or society. Third, a court that exercises significant authority yet lacks sufficient legitimacy can become highly politicized, meaning it attracts greater attention and public contestation.<sup>11</sup>

Existing literature points to various factors that influence the legitimacy of international institutions, in general, and ICs, in particular. While this literature is vast and contains many nuanced, complex accounts for what shapes legitimacy, we can nonetheless find three common threads of argumentation. The first concerns the *pedigree* of an institution, attributing legitimacy to its historical origins and how it came into being—whether it was created through the “right” processes. State consent is often viewed as the crucial aspect of pedigree that endows international law and courts with legitimacy. However, as Steffek explains,

What creates legitimacy is less the fact of having consented, but rather having consented to a certain normative reasoning, linking shared values and principles to practice type norms. Thus, legitimacy is created by the fact that negotiators have consented to a rule for the *same* reasons. They have decided that a certain political goal shall be pursued by the international community for a particular reason, and therefore pursue a certain policy at the international level.<sup>12</sup>

Thus, I adopt a broader understanding of pedigree, which includes the founding principles, shared values, or political objectives upon which an IC is established. By

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8. Silje Aambø Langvatn & Theresa Squatrito, *Conceptualising and Measuring the Legitimacy of International Criminal Tribunals*, in *THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS* 44 (Nobuo Hayashi & Cecilia Bailliet eds., 2017).

9. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (hypothesizing that legitimacy validates international compliance); Hurd, *supra* note 4, at 380 (describing compliance as a function of rules’ legitimacy).

10. FRANCK, *supra* note 9, at 24.

11. Michael Zürn et al., *International Authority and Its Politicization*, 4 *INT’L THEORY* 69, 82 (2012).

12. Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 *EUR. J. INT’L REL.* 249, 264 (2003) (citing JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 105 (Thomas A. McCarthy trans., Polity Press 1988) (1973)) (“The validity of claim of norms is grounded not in the irrational volitional acts of the contracting parties, but in the rationally motivated recognition of norms, which may be questioned at any time.”).

several accounts, the pedigree of ICs contributes to their legitimacy.<sup>13</sup> For instance, Çalı et al. find that the political purpose and state consent are crucial to individuals' assessments of the ECtHR's legitimacy.<sup>14</sup>

A second line of arguments suggests that *processes*, or the procedures by which an institution operates, shape legitimacy. For example, some scholars suggest that the presence or absence of procedures allowing for societal participation or representation and transparency affect an institution's legitimacy.<sup>15</sup> Similar accounts have been applied to ICs and processes that allow for amicus curiae participation in international adjudication.<sup>16</sup>

Third, other accounts suggest that *outcomes* are key determinants of legitimacy. Whether international institutions produce the effects they were intended to or if they deliver good outcomes has been shown to influence the acceptance of an international institution.<sup>17</sup> Similar arguments have been made about ICs.<sup>18</sup> For instance, Helfer and Alter argue that legitimacy challenges arise from the domestic political effects of their rulings.<sup>19</sup> Some accounts of legitimacy privilege either pedigree, process, or outcome at the exclusion of the others, while other accounts are complex—adopting the perspective that legitimacy is linked to some combination of pedigree, processes, and outcomes.<sup>20</sup>

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13. YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS, 146–49 (2014) (explaining how ICs build legitimacy capital, including inherent symbolism, perceptions of fairness, and performance).

14. Çalı et al., *supra* note 5, at 964–65.

15. See Martin Binder & Monika Heupel, *The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates*, 59 INT'L STUD. Q. 238, 247 (2015) (showing that one of the most significant sources of the UN Security Council's legitimacy deficit concerns transparency); Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7, 16–17 (2002) (arguing that greater societal representation could address the WTO's legitimacy crisis).

16. See Grossman, *Normative Legitimacy*, *supra* note 5, 71–75 (outlining ICJ and other tribunal cases that did or did not allow amicus briefs and its effect on the courts' perceived legitimacy).

17. Esty, *supra* note 15, at 9; see also Lisa Maria Dellmuth & Jonas Tallberg, *The Social Legitimacy of International Organisations: Interest Representation, Institutional Performance, and Confidence Extrapolation in the United Nations*, 41 REV. INT'L STUD. 451, 458–59, 466 (2015) (finding that institutional performance is positively correlated to public confidence in international organizations).

18. See, e.g., Çalı et al., *supra* note 5, at 977–78 (comparing acceptance of ECtHR by countries with high and low human rights violations); Grossman, *Legitimacy and International Adjudicative Bodies*, *supra* note 5, at 150–52 (examining effects of appellate mechanisms added to adjudicative international bodies); Helfer & Alter, *supra* note 5, at 482, 501–02 (asserting that domestic impact has the biggest effect on a court's legitimacy); SHANY, *supra* note 13, at 148–49 (assessing performance related factors to court legitimacy).

19. Helfer & Alter, *supra* note 5, at 482.

20. Some scholars divide these elements into two categories, instead of the three-fold division of pedigree, process, and outcomes. See, e.g., MICHAEL N. BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 166–70 (2004) (noting the distinction of procedural and substantive legitimacy); FRITZ W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 6–12 (1999) (drawing the distinction between “input”

Overall, this literature sheds light on the various factors shaping the legitimacy of ICs. Nevertheless, these approaches generally undervalue the ways in which the legitimacy of an institution is constructed and shaped through strategic political behavior. While states have clear long-term interests for an IC to be respected and perceived as legitimate, short-term interests may cause a state to strategically undermine the court. In other words, states may at times have interests in de-legitimizing an IC. At the same time, ICs can act strategically to boost their own legitimacy, either to build a reservoir of support or to counteract the de-legitimizing actions of states. When states have interests in de-legitimizing a court, what actions can they take to undermine the court? Moreover, how might an IC be able to counteract attempts to undermine it by its adversaries?

The remainder of the article considers these questions and aims to provide an account of the legitimation and de-legitimation of ICs by identifying strategies available to states and courts that have an impact on their acceptance. In particular, I derive a typology of strategies of de-legitimation by drawing upon previous research and various empirical observations of ICs in general. I specify how these strategies are linked to pedigree, processes, and outcomes, based on the assumption that these three aspects of ICs have bearing on how their audiences view them.

### III. DE-LEGITIMATION OF INTERNATIONAL COURTS BY STATES

In this Part, I explore the ways in which states might strategically de-legitimize an IC. Before proceeding, it is worth noting that a court's decision may be the trigger for strategic de-legitimation, but the causes behind extensive, strategic de-legitimation efforts on the part of states are most likely complex. For example, the Trump administration's efforts to undermine the WTO Appellate Body are not only a consequence of specific Appellate Body decisions. If this were the case, the United States would have previously thwarted all appointments, as there have been adverse judgments for the United States. Rather, the broader political context—including the rise of populism, political leadership, ideology, etc.—is crucial to understanding these actions. While the causes of strategic de-legitimation are beyond the scope of this article, I simply note that they arise in complex political and legal environments. These complexities are likely to have a bearing on which actions states take to de-legitimize a court.

My aim here, however, is not to establish the links between actions and the motivations or causes behind state rebuke of an IC. Rather, my purpose is to identify possible types of action and their bearing on pedigree, processes, and outcomes of ICs, and thus their likely effects on legitimacy. In particular, I discuss how states rely on two main channels of strategic de-legitimation: institutional and extra-institutional channels. Each channel includes several possible tactics that states utilize. However, not all tactics are equally viable options for states. The discussion that follows, therefore, also gives some preliminary thought to the conditions under which the various types of strategic de-legitimation are likely to be utilized.

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and “output” legitimacy). For a complex account, see IAN HURD, *AFTER ANARCHY : LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL 66–70* (2007) (presenting an account based on outcomes, fairness, and procedures).

### A. *De-legitimation Through Institutional Channels*

Scholars have long recognized there are a variety of institutional mechanisms that states might use to curb courts or rein in their authority.<sup>21</sup> Court-curbing may have an impact on the legitimacy of ICs by affecting their pedigree, processes, and outcomes. Depending on the form that court-curbing takes, backlash from states may affect the ability of a court to adjudicate disputes efficiently and effectively. For example, if states were to withdraw or restrict funding to a court, the court's ability to process cases could be hindered. Fewer resources might translate into shorter court hearings or fewer law clerks, among other things. If judges were concerned that states might override a decision, they may exercise restraint, issuing less intrusive remedies, for instance. Worse, judges might avoid addressing key legal questions or not call out a state's violation. Likewise, if states refuse to appoint new judges, as occurred in the instance of the Southern African Development Community (SADC) Tribunal, the review of disputes may come to a halt if there is not a sufficient number of sitting judges.<sup>22</sup> Overall, a variety of court-curbing actions can undermine the pedigree, processes, and outcomes of ICs, all of which can have a negative impact on its legitimacy.

The court-curbing mechanisms that are likely to have an impact on a court's legitimacy are five-fold. First, adversary states can de-legitimize a court through judicial appointments. States can threaten or attempt to prevent or derail the *appointment or reappointment* of a judge. They can also attempt to *remove a judge* from the bench and/or a particular case. Specific judges who are targeted by states may incur costs to their individual reputation, but if they are appointed or do not recuse themselves, despite state criticism, the public's view of the court might suffer. For example, a judicial appointment that was highly politicized may foster sentiments that the court is tainted by said appointment. This may have a negative impact on the process and outcomes of an IC, calling into question whether the judicial process is independent and impartial, or the rulings are fair. Similarly, states may delay or derail the appointment of judges, causing seats on the bench to go unfilled. For example, the SADC Summit declined to reappoint judges as an attack on the Tribunal for its decision in a case against Zimbabwe.<sup>23</sup> Such efforts by states to target judicial appointment procedures strike at the process and outcome legitimacy of a court, by perhaps stalling judicial proceedings if not hindering judicial outputs.

Two types of formal rules can condition whether states might de-legitimize a court by targeting judges. First, selection and tenure rules will determine if states

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21. See, e.g., Tom Ginsburg, *Political Constraints on International Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 483, 483 (Cesare P.R. Romano et al. eds., 2013) (using several case studies to analyze constraints placed on ICs).

22. Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. Q. 870, 878 (2013).

23. *Id.* at 878–79. This is a similar concern arising in the WTO Appellate Body. See Brinkley, *supra* note 2 (discussing the Trump administration's actions hindering the Appellate Body of the WTO).

use this de-legitimation strategy individually or collectively. States are likely to have unilateral control over reappointment if they have veto power over an appointee, which occurs anytime unanimity is required for judicial appointments or when states have the ability to control the appointment of the judicial seat allotted to their country. Otherwise, this strategy will require a group of states who are willing to target a judge. Additionally, the removal of a judge as a de-legitimation strategy is only likely to apply when formal rules permit states to decide on the removal of a judge from office.<sup>24</sup> This mechanism is applicable in few instances because judges, rather than states, have the authority to decide on the removal of one of their own at most ICs.<sup>25</sup> Second, de-legitimation by targeting particular judges may be more likely for those ICs whose decisions record information about how individual judges vote. Some courts are transparent about the voting of individual judges. For example, the Rules of the Tribunal for the International Tribunal for the Law of the Sea (ITLOS) provide that decisions must contain “the number and names of the judges constituting the majority and those constituting the minority.”<sup>26</sup> It is with this sort of information that a state might be able to target an individual judge. Another IC where such information is available is the ECtHR. Conversely, targeting specific judges is more difficult when there is a practice of unanimous judgments, when separate opinions are not permitted or used,<sup>27</sup> or if judgments do not record how each judge voted.

Second, adversary states can de-legitimize a court by *overriding a decision* of the court. In some instances, overriding a decision of a court may require an international organization’s governing body to enact secondary legislation—a resolution or directive—and, in other instances, it could require an amendment to the international organization’s treaty. Formal rules governing how an international organization adopts legislation or how a treaty is amended will condition how likely it is that states will use this tactic for strategic de-legitimation. Alternatively, overriding a decision of an IC can occur through domestic channels.

States could use, in some instances, domestic legislation or constitutional

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24. See, e.g., Rome Statute of the International Criminal Court art. 46(2), July 17, 1998, 2187 U.N.T.S. 90 (“A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot; (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges; (b) in the case of the Prosecutor, by an absolute majority of the States Parties; (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.”).

25. For example, judges of the African Court of Human and Peoples’ Rights can only be removed by a decision of the Court. E.g., Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights art. 19(1), June 10, 1998, OAU/LEG/MIN/AFCHPR/PROT.1 rev. 2 (“A judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.”).

26. International Tribunal for the Law of the Sea, Rules of the Tribunal art. 125(1)(l), Oct. 28, 1997, ITLOS/8 (amended Mar. 17, 2009).

27. See Jonathan W. Kuyper & Theresa Squatrito, *International Courts and Global Democratic Values: Participation, Accountability, and Justification*, 43 REV. INT’L STUD. 152, 171 (2016) (explaining that separate opinions are only permitted in half of all ICs).

reform to try to override an IC. For example, the Dominican Republic amended its constitution to deny citizenship to children born in the Dominican Republic to parents who were in the country illegally.<sup>28</sup> This constitutional reform came following a judgment of the Inter-American Court of Human Rights (IACtHR), which ruled that the Dominican Republic had discriminated against two girls of Haitian descent born in the Dominican Republic by refusing to issue birth certificates to them and recognize their Dominican nationality.<sup>29</sup>

Domestic courts can similarly adapt domestic law to override an IC. This sort of attempt most famously occurred with the European Court of Justice (ECJ) in the *Solange* cases.<sup>30</sup> A more recent example of similar efforts includes Russian resistance to the ECtHR. In this instance, Russia adopted legislation empowering domestic courts to rule on the enforcement of the decisions of international human rights bodies, like the ECtHR.<sup>31</sup> An IC's support may suffer significantly from these sorts of actions, as its constituents may question its ability to issue judgments that will elicit compliance or be recognized as authoritative interpretations of the law. In other words, these tactics of strategic de-legitimation are most harmful to how people view the outcomes of courts.

Third, states can de-legitimize a court by targeting its formal powers. That is, states can *strip the court's jurisdiction* or reform the governing principles of the court. Jurisdiction stripping or reform of an IC is likely to be politically difficult.<sup>32</sup> Yet, attempts to formally restrict the authority of an IC, even when unsuccessful, can have a negative effect on the legitimacy of a court, especially as they may undermine its pedigree by targeting the political objectives of the court. States may use this de-legitimation strategy, in most instances, by attempting to amend an IC's founding treaty. Treaty changes are difficult to negotiate, and they often require ratification to enter into force. In many instances, treaties require ratification by a large proportion of states or necessitate ratification by all states. As this may be quite difficult to achieve and cause a state to expend a high degree of political capital,

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28. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 324–25 (2d ed. 2013).

29. *Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 130, ¶ 260 (Sept. 8, 2005).

30. See BVERFGE, 2 BvL 52/71, May 29, 1974 (demonstrating a conflict between German domestic law and international law); see also BVERFGE, 2 BvR 197/83, Oct. 22, 1986 (reiterating the conflict between German law and E.U. law).

31. *Russia Passes Law to Overrule European Human Rights Court*, BBC NEWS (Dec. 4, 2015), <https://www.bbc.co.uk/news/world-europe-35007059>. For a brief discussion of the post-Yukos saga for the ECtHR, see Iryna Marchuk, *Flexing Muscles (Yet Again): The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case*, EJIL: TALK! (Feb. 13, 2017), <https://www.ejiltalk.org/flexing-muscles-yet-again-the-russian-constitutional-courts-defiance-of-the-authority-of-the-ecthr-in-the-yukos-case/>.

32. See Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33, 34 (2008) (discussing the difficulties of recontracting international agreements) [hereinafter Alter, *Agents or Trustees?*]; see also R. Daniel Kelemen, *The Political Foundations of Judicial Independence in the European Union*, 19 J. EUR. PUB. POL'Y 43, 43–44 (2012) (explaining that the ECJ is protected from court-curbing mechanisms).

states may not often resort to this type of strategy.

That said, there have been some instances where states have succeeded in stripping an IC's jurisdiction or functionality. For instance, led by Kenya, the member states of the East African Community (EAC) reformed the East African Court of Justice (EACJ) after the Court issued its first ruling within its contentious jurisdiction in 2006.<sup>33</sup> The EACJ issued an interim ruling in *Anyang Nyong'o v. Attorney General of Kenya*, which barred the EAC from recognizing Kenya's appointments to the East African Legislative Assembly (EALA) while the Court decided the dispute.<sup>34</sup> The dispute concerned the process by which Kenya nominated candidates for the EALA. The complainants argued that the process violated the terms of article 50 of the EAC Treaty, which requires candidates to be "elected."<sup>35</sup> Disturbed by the Court's interference and interpretation of its mandate, Kenya took prompt action to curtail the Court.<sup>36</sup> Kenya succeeded in pushing through amendments to the EAC Treaty, which restructured the EACJ into a court of first instance and a more conservative appellate division, added new grounds for the removal of judges from offices, and rewrote the rules on the admissibility of individual petitions by adding a restrictive time limit on the filing of petitions.<sup>37</sup> Similarly, the SADC Tribunal was stripped of its authority when the member states, at the initiative of Zimbabwe, suspended the court's operations.<sup>38</sup> Stripping an IC's jurisdiction can both influence how people perceive the pedigree of a court—because of its effects on the political purposes of the court, as well as the outcomes it produces—and thus potentially has significant effects on its legitimacy.

Fourth, states can de-legitimize a court through *resource punishment*, or by restricting the funds available to it. Resource punishment can take two forms: through withholding funds or through denying increased funding, especially when the court is in need of an increased budget. Resource punishment might happen on occasion. For example, "[f]ollowing precautionary measures granted by the Inter-American Commission of Human Rights, directed at Brazil regarding its Belo Monte dam, Brazil suspended its annual contribution and withdrew its ambassador from the Organization of American States."<sup>39</sup> A state can unilaterally use funding as a way to damage an IC's reputation if the court is financed by the direct contributions, assessed or voluntary, of individual states. When an IC's budget is part of an

33. Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 304 (2016) [hereinafter Alter et al., *Backlash*].

34. See *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, Judgment, E.A.C.J. (Feb. 7, 2006) (holding that the judges chosen by Kenya could not sit on the EALA since the EAC mandated an election).

35. Treaty for the Establishment of the East African Community art. 50, Nov. 30, 1999, 2144 U.N.T.S. 255.

36. See Alter et al., *Backlash*, *supra* note 33, at 302 (noting that Kenya strongly protested to the Court's decision because it believed it interfered with domestic politics).

37. *Id.* at 304.

38. Nathan, *supra* note 22, at 877–78; Alter et al., *Backlash*, *supra* note 33, at 294.

39. Thordis Ingadottir, *The Financing of International Adjudication*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 594, 610 (Cesare P.R. Romano et al. eds., 2013).

international organization's overall budget, and contributions are assessed for the entire international organization, a state is unable to unilaterally target the court by withholding funds. It is under these latter circumstances that resource punishment is less viable as a de-legitimation tactic.

Resource punishment can have consequences for an IC's legitimacy because the overall capacity of a court to serve its functions hinges on finances. In particular, it could undermine judicial processes, especially if an IC lacks sufficient resources in the first instance. "[C]utting budgets slows the administration of justice . . . ."<sup>40</sup> As Cavallaro and Brewer argue, funding shortages for the IACtHR had effects such as reducing the number of hearings and witnesses that can be heard.<sup>41</sup> Slimmer budgets are likely to contribute to inefficiencies, dysfunction, and procedural shortcuts, and thus compromise the legitimacy of an IC in terms of process.

Finally, states have the option of changing an IC's *rules of procedure* as a means of de-legitimizing it. The impacts of changing a court's rules of procedure are similar to resource punishment. For example, changing judicial timelines or the rules for filing petitions can have implications for the administration of justice, and ultimately hamper the legitimacy of an IC in terms of process.

The possibilities for states to successfully curb an IC are in many instances limited. In fact, scholarship debates whether court-curbing mechanisms significantly constrain the independence and behavior of ICs.<sup>42</sup> While these mechanisms may not always be effective modes of controlling an IC, they may nevertheless have consequences for the legitimacy of ICs. Court-curbing efforts, especially the five I have discussed above, can have an impact on how the IC is perceived even when they are unsuccessful at constraining a court because they politicize it. States' threats or efforts to constrain an IC's authority make it more salient to the public. It places an IC in news headlines for extraordinary reasons. It not only atypically casts an IC into public discourse, but it publicizes a critical view of the court to constituents. The Trump administration's efforts to disrupt the WTO Appellate Body illustrate

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40. Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 L. & CONTEMP. PROBS. 37, 73 (2008).

41. James 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, 783, 799 (2008).

42. See, e.g., Alter, *Agents or Trustees?*, *supra* note 32, at 36–38 (addressing delegated remedial powers); see Manfred Elsig & Mark Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391, 392 (2012) (discussing the manner in which member states of international organizations, such as the WTO, influence the appointment of international judges); see Darren Hawkins & Wade Jacoby, *Agent Permeability, Principal Delegation and the European Court of Human Rights*, 3 REV. INT'L ORG. 1, 3 (2007) (discussing the efficacy of the controls put in place by principal, or contracting states, on agents); see Kelemen, *supra* note 32, at 44 (evaluating how insulated the ECJ is from court-curbing mechanisms that may affect judicial independence); see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 247 (2004) (discussing the political constraints put on the dispute settlement framework of the WTO).

how such actions politicize and expose an IC.<sup>43</sup> Political leaders' negative attitudes about ICs, conveyed through the press and through public speech or behavior, can be detrimental to an IC's reputation. This is because negative elite communications can have a negative impact on public sentiment regarding international institutions.<sup>44</sup> In other words, states' threats, or efforts to curb a court, when aired publicly, can be detrimental to the generalized public support that an IC enjoys. Court-curbing need not be successful at formally restricting an IC's authority to have important consequences. For this reason, such efforts instead are best perceived as a means of strategic de-legitimation whereby states reconstitute perceptions about the pedigree, processes, and outcomes of ICs. As I have suggested, however, the extent to which these institutional measures are used by states to undermine an IC is most likely conditioned by institutional rules or practices and political factors that make them less credible threats or feasible tactics.

### ***B. Extra-institutional Channels to De-legitimation***

In addition to institutional channels, states also have a range of extra-institutional tactics to employ for the purpose of de-legitimizing an IC. Namely, states might rely upon defiance or shaming to undermine an IC's pedigree, processes, and outcomes. Both defiance and shaming are distinct from tactics employed institutionally because their use is not likely to be conditioned by the official, codified rules governing an IC. Defiance can come in two forms—willful noncompliance and exit.

First, states can use *willful noncompliance* to de-legitimize an IC. States have been known at times to purposely ignore the decisions of ICs. One notable act of willful noncompliance occurred when Zimbabwe rebuffed the SADC Tribunal. The Tribunal found Zimbabwe was in breach of the SADC Treaty for expropriating the land of white Zimbabwean farmers and denying the farmers access to a fair hearing. Zimbabwean President Mugabe openly defied the Tribunal's decision, refusing to comply with the order that the state protect the farmers' land possession and not evict them or interfere with their residence on the property. Further rulings by the Tribunal went unheeded, and Zimbabwe used violence and intimidation against the farmers.<sup>45</sup> Trinidad and Tobago similarly defied the IACtHR in relation to petitions concerning the death penalty. The Court issued provisional measures requiring Trinidad and Tobago to stay the execution of five individuals on death row while the case was under review.<sup>46</sup> Trinidad and Tobago proceeded to issue the death

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43. See Brinkley, *supra* note 2 (“Trump seems to think the majority of its [WTO’s] judges should be American.”); see also Tom Miles, *Trump’s Bonfire of the Treaties Sweeps Towards the WTO*, REUTERS (May 18, 2018, 8:34 AM), <https://uk.reuters.com/article/uk-usa-trade-wto-analysis/trumps-bonfire-of-the-treaties-sweeps-towards-the-wto-idUKKCN1I1K1KG> (discussing President Trump’s veto of all WTO judges).

44. Matthew Gabel & Kenneth Scheve, *Estimating the Effect of Elite Communications on Public Opinion Using Instrumental Variables*, 51 AM. J. POL. SCI. 1013, 1022 (2007) (providing empirical evidence of the effect of negative communication on public opinion).

45. Nathan, *supra* note 22, at 875–76.

46. In the Matter of the Republic of Trinidad and Tobago, Provisional Measures, Order of the President of the Court, “Having Seen,” ¶ 2 (Inter-Am. Ct. H.R. May 27, 1998),

warrants and execute two individuals in open defiance of the IACtHR.<sup>47</sup> Another example is Russia's response to the provisional measures ordered by ITLOS in *Arctic Sunrise*.<sup>48</sup> In this instance, Russia delayed the release of the sea vessel, in clear defiance of the ITLOS order to promptly release it.<sup>49</sup> Such instances of defiance can harm an IC's reputation, leading key audiences to see the court as incapable of producing decisions that are respected. Thus, willful noncompliance can delegitimize an IC in terms of its outcomes.

It should be noted that not all noncompliance is deliberate. In fact, some compliance failures are unintentional and caused by managerial problems, such as a lack of state capacity.<sup>50</sup> Even so, these instances of noncompliance can be detrimental to an IC's legitimacy because of their effect on how audiences view an IC's outcomes. I do not view unintentional noncompliance as *strategic* delegitimation.

Second, states can strategically de-legitimize an IC by *exiting its jurisdiction*. Most treaties establishing courts provide formal procedures for a state to withdraw from the treaty. Exit has occurred in some instances. For example, Zimbabwe withdrew from the jurisdiction of the SADC Tribunal following an initial decision of the Tribunal.<sup>51</sup> In 2012, Venezuela denounced the American Convention and exited the jurisdiction of the IACtHR, following a series of decisions that placed Venezuela at odds with the Court. The exit was precipitated by the *Case of Díaz Peña v. Venezuela*, in which the IACtHR found that Venezuela had violated the American Convention by failing to provide adequate medical treatment to detainees.<sup>52</sup> In 1998, Trinidad and Tobago also withdrew from the IACtHR in anticipation of the Court's decision on the death penalty.<sup>53</sup> France and the United States withdrew their acceptance of the compulsory jurisdiction of the International

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[http://www.corteidh.or.cr/docs/medidas/james\\_se\\_01\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/james_se_01_ing.pdf).

47. Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1882–83 (2002) (defying June 14, 1998 IACtHR provisional measures directing the government to stay the execution of the defendants until after the Court's review).

48. *Arctic Sunrise* (Neth. v. Russ.), Case No. 22, Provisional Measures, Order of Nov. 22, 2013, 13 ITLOS Rep. 230.

49. James Harrison, *The Arctic Sunrise Arbitration* (Netherlands v. Russia), 31 INT'L J. MARINE & COASTAL L. 145, 155 (2016).

50. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 13–14, 22 (1995).

51. Nathan, *supra* note 22, at 876.

52. *Díaz Peña v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 244, ¶4 (June 26, 2012) (asserting that the Commission asked the Court to conclude that Venezuela had violated the American Convention on Human Rights partly for denying detainees humane treatment); see Alexandra Huneus & René Uruña, *Treaty Exit and Latin America's Constitutional Courts*, 111 AJIL UNBOUND 456, 456 (2017) (“[T]he IACtHR ruled that Venezuela had violated the American Convention on Human Rights when it removed three judges from the bench.”).

53. Gisella Gori, *Compliance*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 918 (Dinah Shelton ed., 2013); Helfer, *supra* note 47, at 1881.

Court of Justice (ICJ). France withdrew from the ICJ's jurisdiction in 1974 following the Court's decision in the *Nuclear Test* cases in 1974,<sup>54</sup> and the United States did the same following the ICJ's decision in the *Nicaragua* case in 1995.<sup>55</sup> More recent, and highly controversial, are the withdrawals by Burundi and the Philippines from the ICC. Although not quite the same as exit, there are also instances where states refuse to participate in proceedings, like when Russia did not participate in the *Arctic Sunrise* proceedings before ITLOS.<sup>56</sup>

Exit by a member state and refusals to participate can be harmful to the pedigree of an IC because it signals either a state's repudiation of the political objectives upon which the court is founded or suggests that the court has failed in its fidelity to those political objectives. States that share similar preferences, or are potential allies of the exiting state, may be emboldened to follow. Concerns of a domino effect arose following Venezuela's exit from the IACtHR.<sup>57</sup> Recent withdrawals from the ICC also suggest that the exit of one state may spur other exits. South Africa, in the aftermath of its failure to apprehend Omar al-Bashir, notified the ICC of its intention to withdraw from the Court in October 2016.<sup>58</sup> A few days later, facing preliminary investigations, Burundi also notified the ICC of its withdrawal.<sup>59</sup> The Gambia followed shortly after in November 2016.<sup>60</sup> The Philippines, also subject to preliminary investigation, notified the ICC of its withdrawal in March 2017, which became effective one year later.<sup>61</sup> The costs to an IC's legitimacy, however, are likely to vary depending on which state exits. If the exiting state has significant political sway, power, or the esteem of others, the consequences for the court may be severe. On the other hand, the exit of a state that has a reputation for being non-law-abiding may have less impact on the IC's pedigree. All in all, exit potentially

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54. See *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, ¶¶ 60–62 (Dec. 20) (holding that because France announced its intention to cease testing after completion of the 1974 tests, Australia no longer had a claim on which the Court could render a decision).

55. Ginsburg, *supra* note 21, at 490–91; *Text of U.S. Statement on Withdrawal from Case Before the World Court*, N.Y. TIMES (Jan. 19, 1985), <https://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html> (addressing the United States' withdrawal following proceedings initiated by Nicaragua before the ICJ upon belief that the Court lacks jurisdiction to hear the case because it involves matters of security and self-defense).

56. Harrison, *supra* note 49, at 147 (noting that the Russian Federation's refusal to participate in ITLOS proceedings resulted in the Netherlands requesting the President of ITLOS to appoint Tribunal members under the terms of Article 3 of the United Nations Convention on the Law of the Sea).

57. Huneus & Urueña, *supra* note 52, at 457.

58. The governments of The Gambia and South Africa rescinded their notifications of withdrawal from the Rome Statute on February 10, 2017 and March 7, 2017, respectively, while Burundi's withdrawal from the Rome Statute became effective on October 27, 2016. See U.N. Treaty Collection: Status of Treaties: Chapter XVIII Penal Matters: 10: Rome Statute of the International Criminal Court, Endnote 2, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=XVIII-10&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&clang=_en).

59. *Id.*

60. *Id.*

61. *Id.*

risks the pedigree of the institution and thus could function as a form of strategic de-legitimation.

Another extra-institutional channel for the de-legitimation of an IC is *naming and shaming*, or public condemnation. Criticizing an IC publicly is likely to affect how constituents view it. Kenya's recent interactions with the ICC illustrate how a state can create a legitimacy crisis for a court through shaming. When the ICC authorized investigations into Kenya's post-election violence in 2007, Kenyan President Uhuru Kenyatta began a public campaign against the ICC.<sup>62</sup> The campaign mobilized public opinion, as well as fellow African nations throughout the African Union, against the ICC.<sup>63</sup> On a smaller scale, states can use strong rhetoric to condemn a court following a decision. For example, following the ICJ's decision regarding U.S. sanctions against Iran, the National Security Advisor to President Donald Trump, John Bolton, used strong condemnatory language against the ICJ.<sup>64</sup> Other attempts to condemn can come in the lead-up to a judicial decision, appearing to be public threats to an IC. For example, Bolton publicly condemned the ICC recently in response to preliminary investigations in Palestine.<sup>65</sup> Similarly, the Deputy Prime Minister of Poland admonished the Court of Justice of the European Union (CJEU) before it ruled on the Polish judicial reforms that would force the retirement of judges, among other things.<sup>66</sup> In all, public condemnation of these sorts can do damage to perceptions of a court's pedigree by calling into question the court's fidelity to its political purpose, and ultimately undercut an IC's legitimacy.

While states can take a variety of actions to undermine ICs, they might alternatively seek to improve the legitimacy of ICs. A thorough discussion of legitimation by states is beyond the scope of this article, but it is worth mentioning that several of the strategies mentioned above have direct inverses by which states might improve the reputation of a court. For example, states might provide voluntary funding to ICs to enhance judicial process and outcomes. Similarly, they might publicly campaign in support of an IC and encourage other states to become members. Their compliance can have legitimizing effects. In sum, states are key to the (de)construction of IC legitimacy.

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62. Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the Election and the Law*, 8 J. E. AFR. STUD. 25, 37 (2014).

63. *Id.*

64. Roberta Rampton et al., *U.S. Withdraws from International Accords, Says U.N. World Court 'Politicised'*, REUTERS (Oct. 3, 2018, 6:32 PM), <https://uk.reuters.com/article/uk-usa-diplomacy-treaty/u-s-withdraws-from-international-accords-says-u-n-world-court-politicised-idUKKCN1MD2TF>.

65. Owen Bowcott et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, GUARDIAN (Sept. 10, 2018, 2:49 PM), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

66. James Shotter et al., *Poland Warns European Court of Justice to Stay out of Judicial Reforms*, FIN. TIMES (Aug. 27, 2018), <https://www.ft.com/content/034718fe-a9dd-11e8-89a1-e5de165fa619>.

#### IV. STRATEGIC LEGITIMATION BY INTERNATIONAL COURTS

Challenges to the legitimacy of an IC, such as those discussed above, put pressure on the IC to adapt. Previous research has shown that international organizations adopt various strategies to legitimate their actions.<sup>67</sup> The question, however, remains how ICs can develop, maintain, and repair their legitimacy. What are the strategies, tools, or behavioral adaptations that ICs can use to boost their reputation and support? In this section, I identify strategies available to ICs to enhance their pedigree, processes, and outcomes, and thus their legitimacy.

##### A. Legitimation of Pedigree

An IC may try to boost its legitimacy by reinforcing its pedigree. One possible way of doing so is to demonstrate a *respect for its mandate*, or political objectives and founding principles, essentially validating its decisions by linking them to the court's origins. In judicial decisions, ICs may illustrate loyalty to their mandate especially through their assessments on jurisdiction, admissibility, and justiciability. Well-reasoned arguments that reveal how certain cases or issues do or do not fall within the jurisdiction of a court, for example, signal to the court's audiences that the judges take seriously the confines of their authority. In other words, courts can demonstrate their respect for the mandates through their "awareness of political boundaries,"<sup>68</sup> potentially even disposing "of contentious issues on grounds of jurisdiction (admissibility) and justiciability."<sup>69</sup> A court's decision and reasoning on jurisdiction, admissibility, and justiciability might be especially important to legitimation when it is addressing matters that are politically sensitive or involve states that have shown contempt for judicial intervention. Ultimately, jurisdictional and admissibility questions offer an opportunity for an IC to exhibit regard for its mandate.

This is not to say that ICs working to demonstrate respect for their mandates will always avoid expanding their jurisdiction. For example, the EACJ has experienced "mission creep," asserting its authority to review questions related to human rights and environmental policies.<sup>70</sup> However, ICs seeking legitimacy will most likely prefer incrementalism when they do expand their jurisdictions. In fact, the effectiveness of the ECJ (now the CJEU) and the ECtHR as supranational

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67. BARNETT & FINNEMORE, *supra* note 20, at 156–73; see LEGITIMATING INTERNATIONAL ORGANIZATIONS 9–12 (Dominik Zaum ed., 2014) (discussing three beliefs that give rise to legitimacy in international organizations: ends towards which power should be exercised, ways in which power is exercised, and identity of an organization contributing to structural legitimacy).

68. Laurence R. Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 314 (1997).

69. *Id.* at 316.

70. See, e.g., James Thuo Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249 (2013) [hereinafter Gathii, *Mission Creep*] (tracing the rise of the EACJ's human rights jurisprudence); James Thuo Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHI. J. INT'L L. 386 (2016) (describing an EACJ decision barring Tanzania from constructing a road across the Serengeti National Park on environmental protection grounds).

adjudicators has in part been attributed to their successful use of incrementalism.<sup>71</sup> Helfer and Slaughter argue that incrementalism is a way in which these two courts strategically controlled the pace of legal change, fulfilling their mandate without overstepping it.<sup>72</sup>

ICs can make decisions that expand their jurisdiction incrementally by bringing other sources of law in through the back door. The ECJ, for instance, found human rights to be within its mandate by recognizing “respect for fundamental rights forms an integral part of the *general principles* of law protected by the Court of Justice.”<sup>73</sup> The Caribbean Court of Justice (CCJ) recently adopted a similar strategy. In *Myrie v. Barbados*, Shanique Myrie petitioned the CCJ, claiming she was wrongfully detained, harassed, and denied entry by Barbados, a member state of the Caribbean Community.<sup>74</sup> She argued that as a national of Jamaica—also a member of the Caribbean Community—Barbados had violated her right to free movement within the Caribbean Community, which was provided by the Community’s secondary legislation.<sup>75</sup> In addition, she claimed that Barbados had violated fundamental rights accorded by international human rights law.<sup>76</sup> The CCJ carefully navigated the jurisdictional questions in this case. It clearly asserted that: “The Court has no jurisdiction to adjudicate violations of international human rights treaties and conventions. Those instruments generally provide for their own dispute resolution mechanism which must be the port of call for an aggrieved person who alleges a breach of those treaties.”<sup>77</sup> Nonetheless, the Court articulated a pathway by which it could take human rights into consideration, arguing:

It should be noted, however, that the Court is an international court authorised to apply ‘such rules of international law as may be applicable’ of which human rights law is an inextricable part. It stands to reason therefore that, in the resolution of a claim properly brought in its original jurisdiction, the Court can and must take into account principles of international human rights law when seeking to shape and develop relevant Community law.<sup>78</sup>

A gradual assertion of court authority through incrementalism could help an IC to gain favor of states, legal audiences, and the public while demonstrating respect for their mandates, and thereby re-enforce its pedigree.

ICs can also develop and present narratives that portray how they are loyal to

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71. Helfer & Slaughter, *supra* note 68, at 314–17.

72. *Id.*

73. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1126, 1134 (emphasis added). For a general discussion of the ECJ and promotion of human rights, see Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *THE EU AND HUMAN RIGHTS* 859–897 (Philip Alston, ed. 1999).

74. *Myrie v. Barbados*, No. 002/2012, Caribbean Court of Justice, ¶¶ 2–3 (Oct. 26, 2012).

75. *Id.* ¶¶ 3, 8.

76. *Id.* ¶¶ 3, 9.

77. *Id.* ¶ 10.

78. *Id.*

the political objectives and shared values upon which they are founded. An IC's judgment can expound how their decision protects community interests or values.<sup>79</sup> "Off-the-bench" activities offer ICs alternative pathways to portray fidelity to their founding principles. In fact, "off-the-bench" activities are ideal for presenting an IC's own narrative about its mission. For example, international criminal tribunals run outreach programs.<sup>80</sup> These programs are crucial to countering the weakened public image that they might suffer as a consequence of shaming by states. For instance, officials of the International Criminal Tribunal for Rwanda

hoped that making the court's work better known in Rwanda through the development of public relations initiatives under the banner of a so-called 'outreach programme' would counter government and survivor group allegations of Tribunal indifference to the needs of victims and survivors. Thus, from the start, some officials at the Tribunal envisioned an outreach programme not only to keep Rwandan citizens abreast of the court's goals and accomplishments, but as a strategy to repair the institution's deteriorating image.<sup>81</sup>

While international criminal tribunals have more formalized outreach programs, other ICs have used fewer formal strategies for developing their public image through "off-the-bench" activities. For example, the judges and registrar of the EACJ "cultivated an extensive network of users and supporters" through strategies such as opening sub-registries in member states, campaigning for usages, and participating in workshops to inform citizens about the Court's work.<sup>82</sup> Likewise, the African Court on Human and People's Rights carried out twenty-eight "sensitization" visits to member states of the African Union between 2010 and 2017.<sup>83</sup> Generally, these types of "off-the-bench" activities offer ICs the opportunity to present narratives about how their work accords with their founding political objectives and values, and thus improve their legitimacy.

### ***B. Legitimation of Process***

ICs have some tools available to them to build their legitimacy in relation to their processes. First, courts can demonstrate *coherence*. Coherence refers to the treatment of "like cases alike," or that rules "be applied uniformly in every 'similar' or 'applicable' instance."<sup>84</sup> Coherence therefore depends on the consistent application of rules. Maintaining a court's reputation for coherence is an important

79. Helfer & Slaughter, *supra* note 68, at 277.

80. See Janine Natalya Clark, *International War Crimes Tribunals and the Challenge of Outreach*, 9 INT'L CRIM. L. REV. 99, 100 (2009) (describing how the Special Court for Sierra Leone and the ICC set up their own outreach programs).

81. Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT'L CRIM. JUST. 950, 951 (2005).

82. Gathii, *Mission Creep*, *supra* note 70, at 271–77.

83. Press Release, African Court on Human and People's Rights, African Court Successfully Concludes Three-Day Sensitization Mission to Cape Verde (Dec. 21, 2017), <http://www.african-court.org/en/index.php/news/press-releases/item/213-african-court-successfully-concludes-three-day-sensitisation-mission-to-cape-verde>.

84. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 38 (1995); see RONALD DWORKIN, LAW'S EMPIRE 176 (1986) (referring to coherence as "integrity").

way by which international adjudicators can boost an IC's legitimacy, especially with legal audiences.<sup>85</sup> The consistent application of the law improves an IC's reputation with legal audiences because it increases adherence to the law.<sup>86</sup> Coherent adjudication also advances the view that the law is neutral or "fair."<sup>87</sup> Empirical research reveals that evaluations about courts as institutions, or whether the public trusts and has confidence in a court, is influenced by the consistent application of legal rules.<sup>88</sup> Judges at ICs do generally aim to have coherence in their decision-making.<sup>89</sup> Yet, in efforts to legitimize process, ICs can aim to make their coherence more evident or clear to their audiences.

Improving *transparency* might be another mode by which ICs boost legitimacy through process. Scholars often cite transparency as an essential criterion for legitimate authority.<sup>90</sup> Transparency enables actors to scrutinize the exercise of authority. In other words, it is necessary for accountability. While most ICs are required to keep their deliberations secret, they still have some leeway to make aspects of their operations more transparent. For example, they can find ways to improve the accessibility of their judgments, such as hosting an online searchable database. They can reveal what cases they are considering, provide information on their meetings, and even make hearings, so long as they are formally permitted to do so, accessible to the public. For example, the IACtHR uses webcasts and video links to hearings.<sup>91</sup> Social media may also enable an IC to keep its observers attuned to its work. ICs' representatives—e.g., judges and personnel—can also institute a travelling court. The IACtHR has "begun to hold its sessions, including public hearings, in various States rather than only at the seat of the Court in San Jose, Costa Rica."<sup>92</sup> Cavallaro and Brewer argue that public hearings at the IACtHR are important to generating media attention, which "may help to generate popular support . . ."<sup>93</sup> Jo Pasqualucci similarly argues that "[p]ublic hearings generate international publicity and are, therefore, more likely to put pressure on offending States and their supporters."<sup>94</sup> Overall, transparency offers more public insight into

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85. R. Daniel Kelemen, *The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU*, 34 COMP. POL. STUD. 622, 625 (2001).

86. See FRANCK, *supra* note 84, at 41 (arguing that coherent rules motivate compliance).

87. See *id.* at 38 (pointing out that inconsistently applied rules are perceived as unfair); see also DWORKIN, *supra* note 84, at 219 (explaining that integrity demands rules that are coherent, just, and fair).

88. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30 (2007) (drawing upon research from U.S. courts to argue that consistent rule applications contribute to the public perception that a court is neutral).

89. James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2 WORLD TRADE REV. 65, 75 (2003); Theresa Squatrito, *Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?*, 17 WORLD TRADE REV. 65, 75 (2018).

90. Buchanan & Keohane, *supra* note 4, at 427–29.

91. PASQUALUCCI, *supra* note 28, at 274.

92. *Id.*

93. Cavallaro & Brewer, *supra* note 41, at 793.

94. PASQUALUCCI, *supra* note 28, at 160.

the operations of an IC, while also being a generally valued process trait for international courts. Findings ways to make a court more transparent can thus function as a legitimation strategy.

### C. Legitimation of Outcomes

ICs have additional tools available to them that enable them to shape perceptions about the outcomes they produce. Using these tools can help to improve public confidence in ICs. Almost all courts are required to give reasoned judgments,<sup>95</sup> and they all have moral authority as guardians of “the law” and expert authority based on their expertise.<sup>96</sup> Beyond this, ICs can use their legal reasoning and style of argumentation to enhance the beliefs that their judgments are justified. As Stone Sweet and Brunell argue, ICs “have constructed deliberative practices that have served to bolster their political legitimacy.”<sup>97</sup>

First, ICs may be able to legitimize their outcomes through their *citation practices*. Citations can be a means by which judges can communicate to external audiences, including states and legal communities.<sup>98</sup> Research on the ECJ documents shows that when facing more adverse political environments, the Court takes greater effort to embed its decisions in case law.<sup>99</sup> Citations make the judgment of an IC more compelling by suggesting how authoritative sources endorse its reasoning. Citations also convey how a court considered various perspectives and/or conducted a thorough analysis. References to external jurisdictions can also help to boost the credibility of a judgment by showing that there is broader consensus on the interpretation of the law. Overall, citations make explicit that shared understandings of law and thorough review of perspectives underpin a court’s decision and legal reasoning.

Second, ICs can garner support for their decisions by *speaking with a single voice*, even when not formally required to do so. Dissent has the potential to affect individuals’ perceptions about a court and its decision. Empirical research has shown that unanimous decisions are associated with greater acceptance of a court’s decision.<sup>100</sup> Unanimous decisions might convey greater impartiality or the idea that

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95. Kuyper & Squatrito, *supra* note 27, at 170-171 (explaining that 96% of ICs are required to give reasoned opinions).

96. Alter, *Agents or Trustees?*, *supra* note 32, at 39.

97. See Alec Stone Sweet & Thomas Brunell, *Trustee Courts and the Judicialization of International Relations: The Politics of Majoritarian Activism in the European Convention of Human Rights, the European Union, and the World Trade Organization*, 1 J. L. & CTS. 61, 63 (2013) (discussing the concerns of judicial supremacy).

98. Olof Larsson et al., *Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union*, 50 COMP. POL. STUD. 879, 881 (2017); Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRIT. J. POLIT. SCI. 413, 413 (2012); see Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. LEGAL STUD. 547, 569-71 (2010) (citing examples of using citations to articulate a position from both ICs and the U.S. Supreme Court).

99. Larsson et al., *supra* note 98, at 879.

100. James R. Zink et al., *Courting the Public: The Influence of Decision Attributes on Individuals’ Views of Court Opinions*, 71 J. POL. 909, 910 (2009). *But see* Michael F. Salamone, *Judicial Consensus and Public Opinion*, 67 POL. RES. Q. 320, 324 (2014) (finding that when a

judgments are not the product of ideological preferences or individual loyalties. Speaking with one voice indirectly illustrates to various audiences that there was no dissent among the judges, and that the position of the court holds across the various national, political, and legal identities of the judges. For this reason, issuing more unanimous decisions may be a way in which an IC legitimizes its outcomes.

Third, ICs might strategically legitimize their outcomes by applying “judicial minimalism.”<sup>101</sup> This is a mode of judicial decision-making in which a court “settles the case before it, but it leaves many things undecided.”<sup>102</sup> Minimalism brackets fundamental debates and leaves them undecided while settling the dispute on narrow grounds. Sunstein argues judicial minimalists

seek to rule narrowly rather than broadly. In a single case, they do not wish to resolve other, related problems that might have relevant differences. They are willing to live with the costs and burdens of uncertainty, which they tend to prefer to the risks of premature resolution of difficult issues. [M]inimalists seek to rule shallowly rather than deeply, in the sense that they favor arguments that do not take a stand on the foundational debates in law and politics.<sup>103</sup>

Judicial minimalism, rather, leaves broad rule-setting to legislative processes.

A similar approach is “judicial economy,” or the “practice by which [courts] rule not to rule on certain of the litigants’ legal arguments, deeming these unnecessary to solving the dispute at hand.”<sup>104</sup> Judicial economy has been an important practice used by the WTO’s dispute panels in attempts to manage their political environment.<sup>105</sup> An IC can aim to decide a case on narrow grounds and avoid setting broad rules. Such efforts to exercise judicial minimalism can be legitimacy-enhancing for a court. According to Alexander Bickel, such “techniques of ‘not doing’”<sup>106</sup> help to preserve a court. Judicial minimalism, in its different forms, may offer courts a mode of self-legitimation because it provides a legally sound method for avoiding politically and legally charged issues that are likely to produce state backlash or be highly criticized by legal or political communities. It is a way by which ICs can produce outcomes that settle disputes, while deferring broad rule-making to states.

Fourth, ICs might legitimate their outcomes by anticipating how their rulings will be received by states. In particular, they can aim to issue decisions that will align with the preferences of some states, under the assumption that these states will

decision addresses a salient issue, dissent has a positive impact on attitudes, not a negative impact).

101. For a review of judicial minimalism, see Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1459–78 (2000).

102. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME* ix (Harvard Univ. Press rev. ed. 1999).

103. Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 123 (2005).

104. Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 INT’L ORG. 257, 257 (2010).

105. *Id.*

106. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 169 (Yale Univ. Press rev. ed. 1986).

provide backing to the court in the face of political resistance. This strategy recognizes diversity in state preferences can be advantageous to an IC. One version of this strategy is what Stone Sweet and Brunell call “majoritarian activism,” which “refers to the disposition of judges to produce rulings that reflect outcomes that states might adopt under majoritarian, but not unanimity, decision rules.”<sup>107</sup> In other words, the court shields itself behind a majority of states whose preferences are reflected in the decision of the court.<sup>108</sup>

How might an IC know the preferences of states? There is a possibility that states may make their preferences known when they take advantage of their third-party privileges or, where applicable, through the submission of observations. However, not all states are likely to serve as third-parties or observers in any given dispute. The IC may instead be able to identify state preferences through official statements made in the context of a legislative body of international organizations. For example, the WTO’s Appellate Body may infer state preferences from their statements in the General Council. Judges might also infer state preferences from domestic law and policy, assessing “aggregate state practice in order to arrive at some measure of the extent of regime consensus on a relevant policy issue; the degree of policy consensus is then treated as an important fact bearing on the case at hand.”<sup>109</sup> ICs can look to see if there is some consensus among member states through a comparative analysis of domestic laws or policies. Stone Sweet and Brunell argue that this strategy can help an IC “mitigate the legitimacy problems associated with judicial lawmaking under supremacy, and render efforts at curbing the growth of their authority improbable or ineffective.”<sup>110</sup> Dzehtsiarou similarly argues that such a tool of interpretation, or “European consensus,” enhances the legitimacy of the ECtHR.<sup>111</sup>

Relying on the majority of states may not always be necessary or could even be impossible when preferences are more wide-ranging. Instead, an IC might be able to secure support for its decision by aligning the ruling with preferences of a smaller number of *crucial* states. As Ginsburg argues, “courts need the support of particular audiences . . . [s]ometimes this will be a particular state or set of states powerful enough to insulate the court from attacks and pressure.”<sup>112</sup> These states may be crucial because of their prominence within the organization or on the particular issue. Alternatively, they may be core veto players, which could counterweigh any criticism against the court or veto attempts to curtail the court.

## V. CONCLUSION

This article aims to theorize the politics of legitimation and de-legitimation of ICs. It has three broader implications for research on ICs and legitimacy. First, this

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107. Stone Sweet & Brunell, *supra* note 97, at 63–64.

108. *Id.*

109. *Id.* at 63.

110. *Id.* at 64.

111. KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 1 (2015).

112. Ginsburg, *supra* note 21, at 494.

article develops a perspective on legitimacy that differs from existing approaches. While the legitimacy of ICs is shaped by their pedigree, processes, and outcomes, I suggest that legitimacy is the product of politics. The actions of states as well as the courts influence the legitimacy of ICs. Legitimacy from this perspective is constructed and deconstructed through the interactions between ICs and states, legal communities, and society, especially when these interactions have an impact of judicial pedigree, processes, and outcomes. When it is politically expedient, states may seek to de-legitimize an IC, using either institutional channels or defiance and shaming to undermine ICs. On the other hand, ICs are capable of self-legitimation. They can use a variety of interpretative, procedural, or “off-the-bench” tactics to enhance how they are perceived.

Second, I have taken a new approach to thinking about court-curbing mechanisms by placing them in the context of debates on legitimacy. I argue that states’ ability to curb courts is important not only for understanding judicial independence, but also legitimacy. For this reason, this article has implications for the debate on the political constraints of courts. It suggests that the significance of court-curbing is broader than previously argued by scholars.

Third, this article is a theoretical piece about the political interactions that may have a bearing on the legitimacy of ICs. It suggests there are opportunities for future research to further explore the politics of legitimation and de-legitimation in greater detail. Here, I briefly identify two main avenues for continued exploration. In this article, I begin with the assumption that states are the most prominent actors who will try to de-legitimize an IC. Consequently, I exclude from my discussion those actions that might be taken by nonstate actors to de-legitimize ICs. I also start with the premise that ICs are the key actors who work to boost an IC’s legitimacy, and from there, I derive possible legitimation strategies. However, legitimation of ICs may come from other camps, such as state proponents, legal communities, and societal actors. For example, actions by supranational actors or civil society were important to understanding whether an IC was secure in the face of “backlash.”<sup>113</sup> These two points suggest that the strategies of legitimation and de-legitimation that I identify and discuss should not be seen as exhaustive. Rather, further research can shed light on the range of actors and interactions that construct legitimacy.

Also, my efforts have been to identify types of legitimation and de-legitimation strategies and how they are linked to the pedigree, process, and outcomes of ICs. I did not examine the relative viability or effectiveness of these various strategies. This article, however, raise questions about if and when legitimation and de-legitimation strategies are likely to occur and be effective. Not all strategies are equally viable. As I suggest, there are some conditions that can affect their uses. A more thorough empirical assessment of the factors shaping their usage is merited. Moreover, the strategies available are likely to vary in their effectiveness. One possible factor that might shape their effectiveness is resources. For example, strategies to legitimize the pedigree through “off-the-bench” activities can be

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113. Alter et al., *Backlash*, *supra* note 33, at 318–26.

resource-intensive for ICs. Without such resources, this strategy may not be a viable option. Similarly, writing judgments that extensively cite external jurisdictions can be resource-intensive, requiring extensive knowledge of a very broad range of jurisprudence. Writing decisions that will align with the preferences of a critical mass of states depends on judges having sufficient information on state preferences or domestic law. In all instances, the viability and success of the discussed legitimization strategies are likely to be shaped by a variety of factors. Future research is necessary to address these remaining questions. This article thus provides a springboard for such inquiries.