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Shai Dothan

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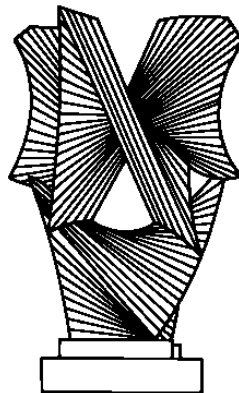
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JUDICIAL TACTIS IN THE EUROPEAN COURT OF HUMAN RIGHTS

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Judicial Tactics in the European Court of Human Rights

Shai Dothan*

Abstract

The European Court of Human Rights (ECHR) has been criticized for issuing harsher judgments against developing states than it does against the states of Western Europe. It has also been seen by some observers as issuing increasingly demanding judgments. This paper develops a theory of judicial decision-making that accounts for these trends. In order to obtain higher compliance rates with the judgments that promote its preferences, the ECHR seeks to increase its reputation. The court gains reputation every time a state complies with its judgments, and loses reputation every time a state fails to comply with its judgments. Not every act of compliance has the same effect on the reputation of the court, however. When the judgment is costlier, the court will gain more reputation in the case of compliance. In an effort to build its reputation, in some cases the court will issue the costliest judgment with which it expects the state to comply. Since the ECHR receives high compliance rates, its reputation increases, which leads it to issue costlier judgments. The court restrains itself when facing high-reputation states that can severely damage its reputation by noncompliance or criticism, so it demands more from low-reputation states.

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I. INTRODUCTION

In recent years, critics have accused the European Court of Human Rights (ECHR) of bias because it issues harsher judgments against developing states than against the states of Western Europe. Critics have also observed that the ECHR has, over time, issued increasingly demanding judgments, judgments that require states to take increasingly costly actions to comply with its dictates. This paper develops a theory of judicial decision-making that may help to account for these two trends.

The ECHR does not have an effective mechanism to enforce its judgments. It cannot impose pecuniary or injunctive sanctions for noncompliance. As a consequence, when a state chooses to comply with its judgments, it does so primarily out of concern about the reputational loss (“reputational sanction”) associated with noncompliance. The magnitude of this reputational sanction is, in turn, influenced by the court’s reputation. The higher the reputation of the court, the more all member states expect compliance with its judgments; hence, the greater the reputational sanction to noncompliant states.

In order to obtain higher compliance rates with its judgments, including those that enable it to promote its preferences,¹ the ECHR seeks to increase its reputation. The court gains reputation every time a state complies with one of its judgments. A state’s decision to comply with a judgment signals that the state foresees a high reputational sanction for noncompliance. This, in turn, contributes to the perception of member states that the court has a high reputation. Yet not every act of compliance has the same effect on the reputation of the court. When the judgment is more demanding, and therefore

¹ This article assumes that the ECHR has policy preferences it wants to promote regarding the behavior of states under its jurisdiction. This is a central assumption in the literature about judicial behavior, discussed in note 22. The court’s reputation can serve as a tool to increase its potential to promote its preferences in the future.

more costly to comply with, the court gains more reputation from a state's decision to comply with it—since the decision to comply suggests that the state views the reputational sanction as being higher than the material cost of compliance.

This Article posits that in some cases where the court has judicial discretion and its judges do not have other motivations, the court, in deciding how to act, may attempt to assess the costs to the state of various different potential judgments. In an effort to build its reputation, it will opt to issue the costliest judgment with which it expects the state will actually comply. Over time, if the court implements this strategy cautiously, its reputation is likely to increase, which in turn will enable it to issue increasingly costly judgments with which states are likely to comply.

Over the fifty years since the ECHR was formed, it has enjoyed, by most accounts, consistently high compliance rates with its judgments.² As a consequence, its reputation has increased, which has, in turn, enabled it to issue increasingly costly judgments. As this strategy has emerged over time, however, states have developed their own set of strategic responses. When a state has a repeated interaction with the court, the state may threaten not to comply with costly judgments, even when the immediate reputational sanction it will incur is higher than the material cost of compliance. The reason for this strategic response is simple: the state seeks to send a credible signal to the court that it will not comply with more costly judgments. This signal, however, is only credible when sent by a high-reputation state, that is, a state that is widely expected to comply and therefore can, through noncompliance, cause serious reputational damage to the court. A high-reputation state may also respond by complying with a judgment while simultaneously criticizing the court in order to damage the court's reputation without incurring the reputational sanction that would result from noncompliance. In contrast, low-reputation states, that is, states whose noncompliance is widely expected and therefore not terribly damaging to the court, cannot employ this type of counter-strategy because the harm to the court from a low-reputation state's noncompliance is too small to deter the court. For that reason, the court can issue especially costly judgments or try new doctrines that increase its maneuverability in judgments issued against low-reputation states. After such doctrines are introduced incrementally in judgments against low-reputation states and gain legitimacy, they can be used even against high-reputation states with lower risk of noncompliance.

Section II briefly describes the operation of the ECHR. Section III explains the interaction between the ECHR and the states subject to its jurisdiction. It also considers the court's motivation to increase its reputation. Section IV considers how states might respond to the court's reputation-

² For a discussion of ECHR compliance rates, see note 13.

building strategy and how the court can employ counter-strategies against states with which it has an iterated relationship. Section V concludes by demonstrating how this theory can explain previously under-explained patterns in the court's behavior.

II. THE ECHR

The ECHR is located in Strasbourg, France. Its jurisdiction covers forty-seven European states, members of the Council of Europe that are signatories of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), which founded the court.³ Each member state has one permanent judge on the court.⁴

Either individuals or member states can apply to the court and seek a finding of a violation of the Convention against a member state.⁵ However, almost all the cases the court has heard have been triggered by individual applications.⁶ Once the court determines that a member state violated the Convention, remedial action must be taken. In the past, the court permitted the state to choose the means of remediation, which ranged from individual measures such as re-opening unfair proceedings to general measures such as changing legislation to prevent future violations.⁷ More recently, in certain cases the court has begun requiring states to take particular actions to remedy the violations, most commonly when only one course of action is feasible or when the state needs to remedy a systemic problem.⁸ Complying with the court's judgments, whether individual or general in scope, requires the state to undertake costly actions. In addition, the ECHR may also award monetary

³ Convention for the Protection of Human Rights and Fundamental Freedoms (1953), 213 UN Treaty Ser No 221 (hereinafter "Convention"). For further information on the court, see European Court of Human Rights, Council of Europe, *The ECHR in 50 Questions*, *5 (Provisional Ed 2010), online at http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG.pdf (visited Mar 15, 2011). Most of the important judgments of the court were issued by a Chamber of seven judges or by a Grand Chamber of seventeen judges. Chambers can relinquish jurisdiction of the case in favor of the Grand Chamber before issuing a judgment; in exceptional cases parties can also ask to refer a case decided by a Chamber to the Grand Chamber. See Convention, Arts 30–31, 42–44.

⁴ Convention, Arts 20, 22.

⁵ Convention, Arts 33, 34.

⁶ Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 Creighton L Rev 361, 372 (2009) ("[I]ndividual applications represent more than ninety-five percent of the Court's work.").

⁷ See Convention, Art 46. For further information on execution of judgments, see also *Scorzari and Giunta v Italy*, 35 Eur Ct HR 12, ¶ 249 (2000).

⁸ See *Bronionski v Poland*, (2005) 40 Eur Ct HR 21, ¶¶ 193–94 (ECHR Grand Chamber 2004); notes 84–86 (discussing amending systemic problems).

damages termed “just satisfaction.”⁹ However, these monetary damages are usually low compared to the costs of complying with the court’s declaratory judgments.

The ECHR cannot enforce its judgments; it is up to the Committee of Ministers of the Council of Europe to monitor the correction of violations by member states.¹⁰ The only coercive sanction that can be used against a recalcitrant state is expulsion from the Council of Europe.¹¹ This measure has never been used against noncompliant states, rendering ineffective the threat of its use.¹² Despite this, by most accounts, states usually comply with the court’s judgments.¹³

III. THE COURT’S STRATEGY

In order to understand the court’s strategy it is first important to understand the incentives of states to comply with the court. States comply with the court’s judgments despite the lack of substantial material sanctions. This suggests that states may comply with the court’s judgments because they fear a reputational sanction resulting from noncompliance. The reputation of the state determines whether it is expected by other states to comply with the court in the future. All else being equal, a high-reputation state is expected to comply with a

⁹ Convention, Art 41.

¹⁰ See id at Art 46(2).

¹¹ See Statute of the Council of Europe (1949), Arts 3, 8, 87 UN Treaty Ser No 103.

¹² The Committee came close to using that measure against the military dictatorship in Greece in 1970. Greece, however, denounced the European Convention and left the Council of Europe without being expelled, following the decision of the European Commission of Human Rights in *The Greek Case*, 1969 YB Eur Conv on HR 1 (1969). See Clare Ovey and Robin White, *Jacobs and White, The European Convention On Human Rights* 504 (Oxford 4th ed 2006). See also notes 71–72.

¹³ The exact compliance rates of the ECHR are very hard to measure, both because data on the implementation of judgments can be hard to collect and because compliance can be delayed or partial (such as paying just satisfaction while neglecting to implement general measures). Some scholars contend that the ECHR has very high compliance rates. For instance, see R. Ryssdal, *The Enforcement System Set Up under the European Convention on Human Rights*, in M.K. Bulterman and M. Kuijer, eds, *Compliance With Judgments Of International Courts* 49, 67 (“[T]o date judgments of the European Court of Human Rights have, I would say, not only generally but always been complied with by the Contracting States concerned. There have been delays, perhaps even some examples of what one might call minimal compliance, but no instances of non-compliance.”). See also Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 Eur J Intl Rel 157, 171 (1995); Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L J 273, 296 (1997). However, Posner and Yoo refer to further claims by other commentators about the court’s high compliance rates but claim they cannot find data to prove high compliance. See Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal L Rev 1, 65–66 (2005).

judgment more often than a low-reputation state.¹⁴ The past compliance behavior of a state shapes other states' expectations as to whether it will comply with judgments in the future. The state will be expected to continue behaving similarly unless significant internal changes alter its incentives.¹⁵ Therefore, this

¹⁴ This Article distinguishes between high- and low-reputation states. Low-reputation states are less expected to comply with the court; therefore, states that have a lower rate of compliance with the court will be considered low-reputation states. The bare rate of compliance, however, is a very rough proxy because it does not take into account the relative cost, type of reasoning, and ex ante reputation of the state for each act of compliance or noncompliance. Furthermore, it is hard to assess a state's rate of compliance because some cases of compliance can be delayed for many years. See Posner and Yoo, 93 Cal L Rev at 28 (cited in note 13). When compliance is delayed for a long time in cases that demand new general measures, however, this may indicate that the state is less likely to comply with the court's judgments. The following states have had the highest number of leading cases (cases demanding new general measures) pending before the Committee of Ministers (which supervises their execution) for more than two years: Turkey (53), Italy (31), Bulgaria (28), Romania (23), Russia (22), and Poland (19). Council of Europe, *Supervision of the Execution of Judgments of the European Court of Human Rights* *66 (Annual Report 2009), online at http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Source/Publications/C_M_annreport2009_en.pdf (visited Feb 13, 2011).

Another way to learn about the rates of compliance is to assess the levels of compliance with the Convention, as there should be a correlation between the compliance of states with the Convention and with the court. States will not damage their reputation for compliance with the Convention by violating it if they are going to forgo the material benefits of this conduct by complying with the court. Therefore, the states that are responsible for most of the cases before the court will probably also have lower reputations for compliance with the court. Another reason for this phenomenon is that many cases appearing before the court are repetitive cases. If a systemic problem which leads to many individual violations is not amended despite the violations found by the court in past cases, the same systemic problem may lead to new cases being filed, thus increasing the number of cases lodged against that state. Repetitive cases composed about 60% of the admissible cases in 2003. See Joshua L. Jackson, Note, *Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court*, 39 Conn L Rev 759, 784-785 (2006). Russia, Turkey and other Eastern European states are consistently responsible for most of the cases appearing before the court; they are therefore typical low-reputation states. In contrast, the states of Western Europe are usually higher reputation states. See Luzius Wildhaber, *The European Court of Human Rights: The Past, The Present, The Future*, 22 Am U Intl L Rev 521, 527 (2007). For current statistics, see European Court of Human Rights, *Annual Report 2009*, *11, online at http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual_Report_2009_Final.pdf (visited Feb 13, 2011) ("2009 Report") ("[A]t the end of 2009, 119,300 allocated applications were pending before the court, four states account for over half (55.7%) of its docket: 28.1% of the cases are directed against Russia, 11% of the cases concern Turkey, 8.4% Ukraine and 8.2% Romania.").

¹⁵ The reputation of a state for compliance with the court can be affected by changes occurring within the state, such as the election of a new government or a regime change, because such changes might alter the state's incentives and make it more or less likely to comply. Since the state's reputation is affected by factors other than its compliance

Article explains how the compliance of states affects their reputation, bearing in mind that the actual change in the state's reputation is a result of a shift in the beliefs of other states about future compliance.

States are concerned with their reputation for compliance with judgments of the ECHR. This reputation, in turn, is said to be a signal of the value they ascribe to compliance with international law and to membership in the European and international communities.¹⁶ A state gains reputation when it

behavior, states may possess different degrees of reputation even at the point they join the treaty regime. Before the state begins its encounter with the court, other states have prior beliefs about the state's future compliance behavior, based on its actions in other arenas; those beliefs determine the state's preliminary reputation. The limited life span of the governments that determine the state's behavior might lead to a focus on short-term gain while discounting long-term benefits like acquiring reputation. The model brackets those possible effects on the state's reputation and compliance behavior. Similar effects distorting states' reputation for compliance with international law are analyzed in Rachel Brewster, *Unpacking the State's Reputation*, 50 Harv Int'l L J 231, 249 (2009).

¹⁶ States benefit from their reputation for several reasons. First, a high reputation signals that the state has a low discount rate; it is willing to suffer immediate costs, such as complying with the judgment, in order to gain long-term benefits, such as increasing its reputation. A low discount rate makes the state a more credible treaty partner and improves its bargaining position against other states. A similar argument is presented regarding reputation for compliance with international law in Andrew Guzman, *How International Law Works: A Rational Choice Theory* 35 (Oxford 2008). Second, as Section IV shows, the court will be more restrained when facing high-reputation states. Third, a high-reputation state can manipulate the reputation of the states interacting with it by criticizing or praising their actions; therefore, a high-reputation state has more power in its interaction with other states.

The state's reputation for compliance with the court is one of the factors affecting the state's reputation for compliance with international law ("compliance reputation"). The state's compliance reputation is affected by several other aspects of the state's behavior besides complying with the court's judgment. Signing the Convention and adhering to the jurisdiction of the court can signal the state's commitment to international law and increase its compliance reputation. This is one reason that states join human rights treaties. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 Yale L. J 1935, 2002 (2002). An application lodged against the state can harm its reputation by signaling that an applicant believes the state broke its commitments. If the state cooperates with the court's proceedings, it may somewhat improve its compliance reputation. When the final decision of the court is published, if the state is found not to have violated the treaty, this rebuilds its compliance reputation. The court's power to exonerate states from blame is another reason states join its jurisdiction. On the other hand, if the state is found to violate the treaty, its compliance reputation will be damaged. In the final stage, if the state complies with the demands of the court in the judgment against it, it may partly rebuild its compliance reputation, but if it disobeys the court, its compliance reputation will be further damaged. This Article focuses only on the effect on the state's reputation in this final stage, which forms the state's reputation for compliance with the court. The ability of the state to partly rebuild its reputation by complying with the court's demands also increases the state's interest in joining the court system and provides a general reason for referring disputes to courts or arbitrators. See Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J Legal Stud 115, 126 (1992).

complies with an ECHR judgment and loses reputation when it fails to comply. A state will comply if the reputational payoff (the reputational gain for compliance plus the avoided reputational loss the state would have incurred for noncompliance) is higher than the material costs of complying with the judgment.¹⁷

When compliance or noncompliance is unexpected, it creates a stronger signal, since it requires a greater revision of other member states' prior beliefs. Therefore a high-reputation state, which is expected to comply with judgments, will earn a smaller reputational benefit from compliance than a low-reputation state, which is viewed as less likely to comply with judgments. However, a high-reputation state would suffer a greater reputational loss from noncompliance than a low-reputation state would suffer from noncompliance. States are generally expected to comply with international law, and states in the European Council are especially expected to comply with ECHR judgments.¹⁸ Therefore, states will generally lose more reputation for noncompliance than they will earn for compliance. The total reputational payoff is higher for high-reputation states because of the greater impact of losses associated with noncompliance compared to the gains for compliance. States will comply if their reputational payoffs are higher than the material costs of compliance with the judgment. Because high-reputation states have higher reputational payoffs, they have a stronger incentive to comply, making the expectation that they will comply in more cases a reasonable one.

When the material cost of compliance with the judgment is higher, states are less likely to comply than when facing less costly judgments. States must balance the financial costs of compliance against the reputational costs of noncompliance. The least costly response to a high-cost judgment is likely noncompliance; the lower the cost of the judgment, the more likely it is that a state's efficient response will be to comply with the judgment. No one but the state can know precisely the true cost of the judgment. Costs can include not

¹⁷ Notice that this calculation is slightly more complex than the one attempted by Guzman in Guzman, *How International Law Works* at 74–75 (cited in note 16). According to Guzman, at least one action, either compliance or noncompliance, will generate a change in the reputation of the state because at least one of these actions is not expected. According to my theory, both compliance and noncompliance will always generate a change in the reputation of the state. I therefore need to compute both the reputational gain from compliance and the reputational cost from noncompliance. The reason for building the theory this way is that I assume it is impossible for the observing states to know the exact cost of the judgment for the state; therefore, observing states have only assessments of expected probabilities of compliance.

¹⁸ Regarding states in general, see the famous stipulation in Louis Henkin, *How Nations Behave: Law And Foreign Policy* 47 (Council on Foreign Relations 2d ed 1979) (“[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”). States are especially likely to comply with the ECHR. See note 13.

only monetary payments, but also political costs or the loss of security or income. However, the court and the observing states can assess the likely cost of compliance to the state; therefore the court and observing states can know if the cost is high or low relative to the costs of other judgments, and assess the probability it will be higher than the state's reputational payoff. When the court issues a costly judgment, states are considered less likely to comply with it, so if they do comply, they will earn more reputation, but if they do not comply, they will lose less reputation. Since losses are usually higher than gains, states also have a lower reputational incentive to comply with costly judgments.¹⁹

When the court issues a judgment that is well anchored in the Convention, the judgment will be considered more legitimate and noncompliance will signal a greater disrespect for the Convention system and cause greater damage to the state's reputation. Noncompliance with a judgment showing significant judicial discretion will be considered as a less severe violation by other states and will lead to a lower reputational sanction. When the reasoning of the court is in line with its previous precedents, this masks the discretion of the judges in this case. If the decision of the court is unanimous, this also reduces the appearance of judicial discretion and increases the legitimacy of the judgment.²⁰

When the court has a high reputation, the state is expected to comply with its ruling. Therefore, states face a higher reputational payoff when they are facing high-reputation courts. This will make the state more willing to comply with costly judgments.²¹

¹⁹ A more demanding judgment might in some cases signal that the initial violation of the state is more severe. In that case the state's reputation for compliance with international law will suffer a greater damage from the judgment itself and a still greater damage by the state's failing to comply with it. However, this Article is focused on reputation for compliance with the court, while bracketing other possible influences on the state's behavior, including broader considerations of its reputation for compliance with international law. If the judgment is more demanding, either because there is a severe violation or the court decided to use a stricter standard, noncompliance by the state will not signal that it does not value its reputation for compliance with the court's judgment as much as would noncompliance with a less demanding judgment.

²⁰ Not only unanimity but also greater consensus among the judges can increase the legitimacy of the decision. See Walter F. Murphy, *Elements of Judicial Strategy* 66 (Chicago 1964) ("In the judicial process a 5-4 decision emphasizes the strength of the losing side and may encourage resistance and evasion. The greater the majority, the greater the appearance of certainty and the more likely a decision will be accepted and followed in similar cases.").

²¹ States will earn less reputation for compliance with high-reputation courts than for compliance with low-reputation courts, but will lose more reputation for noncompliance. Since states are generally expected to comply, the losses from noncompliance will be higher than the gains from compliance, leaving the state with a higher reputational payoff when facing high-reputation courts. It is possible that a state that faces a very low-reputation court will earn a lot from compliance and lose little from noncompliance; this state's overall payoff may in some cases be similar to a state facing a high-reputation court that will earn

Turning to the behavior of the ECHR, it is useful to begin from the standard assumption that the ECHR, like other courts, has certain policy preferences that it seeks to promote with respect to the behavior of states under its jurisdiction.²² In order to improve its chances of obtaining compliance with its future judgments, the court tries to increase its reputation by increasing the reputational sanction on noncomplying states. A court with a high reputation has better chances of obtaining compliance to similar judgments than does a

little from compliance but lose a lot from noncompliance. This Article, however, assumes that the ECHR's reputation is consistently high enough that even the highest payoff from compliance is lower than the lowest payoff from noncompliance.

²² Theories regarding the motivation of courts or judges could be divided into four types of models according to the level of their sophistication. The first model is the legal model, which claims that judges simply uphold the law. The second model is the attitudinal model, which claims that judges follow their sincere policy preferences. The third group of models is comprised of the strategic account, which claims that judges can act strategically to ensure that their preferences will be followed, taking into account the reactions of other actors. For a similar ordering of the first three types of models, see Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 44–114 (Cambridge 2002). This Article is a part of a fourth group of models; it describes how courts act strategically to promote a long-term goal. The court is not concerned only with compliance in the case at hand; it is instead willing to risk noncompliance in the case at hand in order to increase its future chances of compliance by increasing its reputation. For a long-term strategic model, claiming that courts try to increase their future latitude of possible decisions that will not incur an override by the legislature, see Omri Yadlin, *Judicial Activism and Judicial Discretion as a Strategic Game*, 19 Bar Ilan Uni L Rev 665 (2003) (Hebrew). For a brief discussion of courts' deciding cases according to long-term interests, see Lee Epstein and Jack Knight, *The Choices Justices Make* 48–49 (CQ Press 1998).

Theories can be focused on the behavior of judges inside the courts (internal theories) or on the behavior of the court as a unit (external theories), like the theory discussed here. Epstein and Knight also distinguish between internal and external strategies. *Id.* at 138.

This theory does not claim that other theories have no explanatory power. If the law is clear, the court might follow the legal model instead of acting strategically. If individual judges have strong preferences in the case at hand, they may follow the attitudinal model or a short-term strategy model. The theory presented here will be particularly relevant when there is room for judicial discretion and the judges' preferences are not intense.

In order for the theory to apply, judges in the court need not be aware of those tactics. My claim is only that the court acts *as if* it intentionally follows this strategy. Tactics might have evolved for different reasons. One possibility is that tactics can evolve in a process of natural selection: types of behavior that aided the court's reputation will be repeated, and behaviors that damaged it will be abandoned. Axelrod presents three reasons for the disappearance of bad strategies in favor of better strategies: 1) Learning—strategies that proved successful in the past are repeated; 2) Imitation—strategies that proved successful for others are imitated; and 3) Selection—institutions or individuals that are unsuccessful are eliminated from the game. See Robert Axelrod, *The Evolution Of Cooperation* 50 (Basic 1984). Courts learn in similar ways; they repeat strategies that helped their reputation in the past and imitate strategies of other successful courts. Courts that do not learn to act strategically will lose relevance or cease to function, leaving in operation only good strategists.

low-reputation court. Alternatively, a high-reputation court can increase the demands of its judgments compared to those of a low-reputation court while maintaining a similar risk of noncompliance. This Article focuses on the ECHR's ability to increase its reputation by strategically manipulating its judgments, bracketing out other factors affecting the court's reputation. However, the court's reputation is influenced by many other factors that shape the beliefs of states about future compliance with the ECHR. Those factors may include the individual prestige of the court's judges, the reputation of the states under its jurisdiction, and its institutional setting and enforcement mechanisms. Those other factors shape the court's preliminary reputation even before it issues its first judgment, so changes that affect those factors may also alter the court's reputation.

Every time the ECHR obtains compliance with one of its judgments, this signals to other states that the complying state views the reputational sanction as higher than the material cost of the judgment. This also signals the state's high assessment of the court's reputation, which leads other states to update their beliefs about future compliance upward, increasing the court's reputation. If the court obtains compliance with a costly judgment, it will gain more reputation than it would gain for compliance with a less costly judgment because compliance indicates that the court's reputation is high enough to outweigh the higher material costs of compliance.²³ The higher the reputation of the court, the higher the costs it can impose on the state and still obtain compliance.²⁴ Similarly, when the court's reputation is high, it will obtain compliance even from low-reputation states or when it uses unconstrained reasoning; therefore, obtaining compliance in these cases will greatly increase the court's reputation.

The court increases its reputation by putting that reputation to the test. In some cases, particularly when judges have discretion and do not have intensely-

²³ Similarly, David Law claims that when the court issues an unpersuasive, unpopular, or unenforceable decision and still obtains compliance, its power will be particularly enhanced. The reason for Law's claim is that the court's ability to coordinate people's behavior using their judgments in the future is enhanced by their having coordinated their behavior using unpopular decisions in the past. See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *Georgetown L J* 723, 780–81 (2009). John Hart Ely hints at the possibility that issuing activist decisions makes it easier for the court to employ activism in the future. See John Hart Ely, *Democracy and Distrust: A Theory Of Judicial Review* 48 (Harvard 1980) (“[O]ne of the surest ways to acquire power is to assert it.”).

²⁴ The states that assess the reputation of the court can try to learn about the court's reputation from its behavior. When a court issues a costly judgment, it is signaling that it believes its reputation is high enough to obtain compliance. This signal, however, is only credible if the state that complies with the court has more information about the court's reputation than the other states. Otherwise, the court can cheat and give costlier judgments to signal its high reputation, affecting by its actions the perception of the state that faces it. Only if we assume that the state that faces the court makes an independent assessment of the court's reputation will the behavior of the court credibly signal its high reputation.

held preferences,²⁵ the court may attempt to assess a state's costs of compliance and issue the costliest judgment that will still obtain compliance. When the court tries to determine the costliest judgment with which a state will comply, it draws on its assessments of the expected cost to the state, its own reputation, the state's reputation, and the nature of the reasoning. Together these factors determine the reputational payoff to the state. The state is going to comply if its reputational payoff is higher than the cost of the judgment; therefore, the court will try to set the cost as close as possible to the reputational payoff. Because the court cannot exactly assess the magnitude of the cost to the state *ex ante*, it cannot know with certainty whether it will obtain compliance. The court will try to walk on the brink of noncompliance, issuing the most demanding judgments that it expects will lead to compliance, while still maintaining a small risk of noncompliance because of the inherent uncertainty of the state's costs. As the court's reputation grows, it can demand more in its judgments while still expecting compliance and maintaining only the small irreducible risk of noncompliance. In order to continue to walk on the brink of noncompliance, the court must increase the demands of its judgments as its reputation grows.

Another method for walking on the brink of noncompliance is a shift to less constrained forms of reasoning as the court's reputation rises. By receiving compliance even with this unconstrained reasoning, the court signals its high reputation, since a lower-reputation court would probably not be able to obtain compliance with a judgment using such reasoning. Unlike issuing costly judgments that could be explained by alternative explanations—such as trying to promote the immediate preferences of the judges—a trend towards less constrained reasoning only damages the chances of compliance and the court's ability to promote its immediate preferences. Increasingly unconstrained reasoning is therefore better explained by a theory showing the strategic long-term benefit of risk-taking. When a particular type of reasoning is used by the court, its future use becomes more legitimate, since the court can support its future judgment by citation to its former judgments. When the court refers to its previous judgments, it indicates that it is acting consistently and is following the rules set by the Convention instead of the *ad hoc* discretion of its judges. Because the court cannot always choose the form of reasoning due to legal

²⁵ Judicial discretion is bounded by the constraints imposed by the Convention. While the Convention does constrain the ability of the court to manipulate its judgments, it leaves room for maneuvering the reasoning, and prescribed remedies can be used strategically to increase the court's reputation. The court's behavior results from a collective decision of the judges sitting on the panel. Judges may share the interest of the court in increasing its reputation; however, they may harbor other individual interests in shaping the result to suit their immediate preferences or in improving their future bargaining power within the court. In some cases judges may suppress their individual preferences to suit the court's interest, while in others they may follow their own preferences even against the court's interest—for instance, by dissenting when the court wishes to project unity.

constraints, introducing and legitimizing more forms of reasoning increases the court's maneuverability. By legitimizing new forms of reasoning, especially those that allow greater judicial discretion, the court can obtain compliance with more costly future judgments and thus increase its ability to promote its preferences. As the court's reputation grows and previous use legitimizes the reasoning used in its judgments, the court will shift to new forms of reasoning to continue to walk on the brink of noncompliance.

If the court generally obtains compliance, its reputation will continue to grow, allowing it to issue increasingly costly judgments and to shift to new and less constrained forms of reasoning. If the court obtains sustained noncompliance, its reputation will be damaged, and this will cause it to issue less costly judgments. It is also possible that as the court gathers experience and studies states' compliance decisions, its assessment of the states' costs improves, minimizing the uncertainty about states' compliance decisions. As the uncertainty diminishes, the court can issue costlier judgments with the near certainty that its judgment will lead to compliance.

By most accounts the ECHR has persistently obtained high rates of compliance with its judgments.²⁶ The court has also, by most accounts, increased the human rights standards it demands from states, thereby issuing increasingly costly judgments.²⁷ Over the years the court has shifted to less constrained methods of reasoning and has continually introduced new doctrines. The theory presented above may provide a new framework to explain the link between these three phenomena. According to my theory, the high rates of compliance that the court has received over the years increased its reputation, making it possible as well as strategically beneficial for the court to increase its demands and shift to less constrained forms of reasoning.

The correlation between the high compliance rates that the ECHR receives and its increasingly costly and less constrained judgments cannot prove the existence of a causal connection between these observations. The court has undergone an exceptional number of changes over the years; those changes may have caused, in whole or in part, its behavior. Some of those changes—particularly the rapid increase in the number of cases reaching the court, the different states that have entered its jurisdiction, and the changing nature of its

²⁶ See note 13.

²⁷ See Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 Hum Rts L J 57, 67 (1990). Voeten describes the phenomenon of increasing the demands of the court as time progresses. He claims that it is a result of the replacement of restrained judges by activist judges because aspiring EU members use activist judicial appointments to signal human rights commitments, and governments supporting European integration picked more activist judges. See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 Intl Org 669, 670–71, 690–91 (2007).

judgments—have also made the observations listed above extremely hard to prove.²⁸ The examples that follow are therefore not an attempt to prove these

²⁸ Besides the many problems with measuring compliance, mentioned in note 13, a simple compliance rate is a very inaccurate proxy for the court's reputation. Within the framework used in this Article, the impact of every individual compliance decision on the court's reputation depends on the demands of the judgment, the initial reputation of the court, the initial reputation of the state, and the type of reasoning used. All of these factors changed markedly over the years in many of the court's decisions. Some of these factors might have changed due to strategic behavior by the court or the litigants as the next paragraphs illustrate, rendering the attempt to measure the court's reputation empirically almost impossible. For similar selection effects problems focused on the relative demands of judgments, see Posner and Yoo, 93 Cal L Rev at 28 (cited in note 13); Laurence R. Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal L Rev 899, 918–19 (2005).

Any attempts to compare empirically the court's behavior today to its behavior before the acceptance of Protocol 11 on November 1, 1998, must account for the significant changes caused by the Protocol. The Protocol abolished the previous two-tiered system, under which cases first reached the European Commission of Human Rights and only later reached the ECHR, and replaced it with one full-time court. Protocol 11 also made compulsory jurisdiction and individual petition mandatory, thus preventing states from withholding their consent to individual cases and allowing individuals from all member states to petition the court.

Acceptance of the court's jurisdiction by many new states may have sent a signal that the court has a high reputation and is therefore effective; this signal may have further increased the court's reputation or affected it in ways not explained by this Article. Increasing the court's jurisdiction exposed the court to many new states that have lower human rights standards. Even if the court continues to demand the same human rights standards, its judgments would be more demanding on the new states because they need to suffer greater costs to comply with the same standard. Therefore, even if the costs of judgments could be observed, the change in the characteristics of the states makes it impossible to verify whether the increased demands of the court were caused by changing the standards demanded by the court or by the initially lower standards of the states that entered its jurisdiction.

The number of cases reaching the ECHR and the number of its judgments has increased meteorically, even after the institutional change of Protocol 11. From 1955 to 1998, forty-five thousand applications were allocated to a judicial formation, and 837 judgments were issued. In 1999 alone, however, the ECHR saw these numbers increase to 8,400 and 177, respectively, and then gradually increase further through 2009, during which 57,100 applications were allocated to a judicial formation, and 1,625 judgments were issued. See 2009 Report at 11–12 (cited in note 14). The rising number of cases may have increased the court's reputation by signaling its effectiveness in ways not predicted by the theory. The higher volume of cases may have allowed the court to choose from a greater pool those cases most suited to practice its strategy; at the same time it may have exhausted the court's time resources and made it a less competent strategist. Only empirical data can support either of these hypotheses. A significant change in the number of cases makes measures like the relative number of violations declared per case appearing before the court useless because of selection effects. Possible selection effects include selection used by the court, which may choose to focus on more cases with a higher chance of violation in order to improve human rights standards, but can also deliberately choose to focus on cases in which it expects compliance. Another selection effect results from the behavior of the

observations, much less the causal connection between them. Instead, they are meant only to provide a few illustrative examples for how the theory fits the court's judgments.²⁹

In support of his claim that the ECHR has increased its human rights standards, Mahoney cites the *Dudgeon* case.³⁰ In *Dudgeon*, the criminal laws of Northern Ireland proscribing homosexual practices between consenting adults were found to violate the right to respect for private life protected by the Convention.³¹ Similar complaints had been dismissed at a preliminary stage decades earlier.³²

The ECHR's judgments regarding transsexuals serve as another example of this trend. In *Rees v United Kingdom*,³³ the court ruled that a refusal to change the registration of sex in the birth certificate of transsexuals and preventing them from marrying a person of the sex opposite their current sex did not violate the Convention.³⁴ Fifteen years later in the case of *Christine Goodwin v United*

applicants, who can strategically choose to bring before the court cases that have the same probability of victory, so, as the court demands higher standards, those parties would adjust and introduce more cases. However, if the court, in response to the greater number of cases, resorts to deciding only the cases with the most severe violations and delays the others—thus increasing the litigation costs of the applicants—the applicants may respond by submitting cases with more severe violations instead. Furthermore, the states may act strategically as well by changing their litigation strategy, thus adding another possible bias.

An increasingly large number of the cases appearing before the court are repetitive cases, stemming from the same systemic problem that the state failed to amend. See Jackson, 39 Conn L Rev at 784-785 (cited in note 14). The existence of repetitive cases attests to noncompliance with the court and may have therefore damaged its reputation. On the other hand, repetitive cases inflate the court's caseload and indicate the continuing trust of applicants who turn to the court, which may benefit the court's reputation. Repetitive cases also make empirical attempts to assess the court's compliance rates very difficult because they highlight the problems of delayed and partial compliance and also the different demands of different cases. The difference between the demands of different cases is evident when considering the court's new pilot cases, which may be significantly more demanding since they mandate large structural changes and prevent every individual violation from separately appearing before the court.

²⁹ While focusing on a limited number of examples can serve only as anecdotal illustrations of the theory and does not qualify as proof, they may provide a fruitful new framework for thinking about the court while supplying the tools for future testing of the hypothesis raised in this Article. This Article is a part of a larger project, initiated by the author's PhD dissertation, which compares several national and international courts and their behavior over time and may further support the theory of judicial decision-making presented here. See Shai Dothan, *Strategy and Adaptation in the Israeli Supreme Court* (unpublished draft on file with author) (applying this theory to the Israeli Supreme Court).

³⁰ *Dudgeon v United Kingdom*, 4 Eur Ct HR 149 (1981).

³¹ *Id.* ¶ 63.

³² See Mahoney, 11 Hum Rts L J at 61–62 (cited in note 27).

³³ *Rees v United Kingdom*, (1987) 9 Eur Ct HR 56 (1986).

³⁴ *Id.* ¶¶ 46, 51.

Kingdom,³⁵ the court ruled that the system of birth certificates and the prevention of marriage do, in fact, violate the Convention.³⁶

These examples could be explained by the willingness of the court to follow an emerging consensus among the states of Europe.³⁷ However, trying to explain those changes as resulting from an emerging consensus is subject to the criticism that the judges refer to opinions and legal systems that conform to their decision and ignore opinions that clash with it. Since the consensus that the judges claim they are following does not purport to involve all states in Europe—or even all the judges in the court³⁸—it is an explanation that cannot be falsified; the claim is hard to disprove but also less convincing because it cannot be tested. Nevertheless, pointing to cases in which the court increased its demands when there was clearly no consensus can further reduce the validity of this explanation. In *Hirst v United Kingdom*,³⁹ the Grand Chamber decided that a blanket ban on prisoners' right to vote is a violation of Article 3 of Protocol Number 1 to the Convention, which protects the right to free elections.⁴⁰ In a joint dissenting opinion, five judges criticized this decision as digressing from the court's consistent case law to leave a large margin of discretion to the states in determining their electoral system.⁴¹ The dissenting judges specifically called

³⁵ *Christine Goodwin v United Kingdom*, 35 Eur Ct HR 18 (2002).

³⁶ Id ¶¶ 93, 104. In another case decided between *Rees* and *Goodwin*, the court reiterated its consciousness of the seriousness of the problems facing transsexuals and the need to keep the issue under review. See *Cossey v United Kingdom*, (1991) 13 Eur Ct HR 622, ¶ 42 (1990). The court has indicated a growing displeasure with the practice of the UK. See *Sheffield (Kristina) v United Kingdom*, (1999) 27 Eur Ct HR 163, ¶ 60 (1998). For further discussion of this development in the case law of the ECHR, see Beate Rudolf, *Constitutional Developments—European Court of Human Rights: Legal Status of Postoperative Transsexuals*, 14 Intl J Con L 716 (2003).

³⁷ See Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell Intl L J 133, 134 (1993).

³⁸ In the *Dudgeon* case, the majority opinion refers to an increased tolerance towards homosexual practices and their decriminalization in the majority of the states of Europe. *Dudgeon v United Kingdom*, 4 Eur Ct HR ¶ 60. The Cypriot judge Zekia, however, wrote a strong dissent referring to the criminalization of similar homosexual practices in Cyprus. *Dudgeon v United Kingdom*, 4 Eur Ct HR ¶ 2 (1981) (Zekia dissenting). Judge Walsh in his opinion (dissenting in part) specifically attacks the court's argument that a European norm has or can evolve by referring to the extreme diversity of the countries making up the Council of Europe. Id ¶ 16.

³⁹ *Hirst v United Kingdom*, (2006) 42 Eur Ct HR 41 (Grand Chamber 2005).

⁴⁰ Id ¶ 85.

⁴¹ *Hirst v United Kingdom*, 42 Eur Ct HR 41, ¶¶ 2–5 (Grand Chamber 2005) (Wildhaber, Costa, Lorenzen, Kovler, and Jebens dissenting).

attention to the fact that there is a ban on prisoners voting in many other countries in Europe—thus no consensus exists as to that issue.⁴²

The doctrines of interpretation used consistently by the ECHR show its tendency to shift towards less constrained reasoning and judgments with which compliance is costlier. One vehicle for constantly increasing the demands of the court's judgments is the doctrine of evolutionary interpretation, which suggests that the Convention is a living instrument that should be read differently as times change.⁴³ This doctrine also supports the use of novel reasoning since it allows the court to issue judgments that are not grounded in previous precedent. This doctrine should be considered in light of another doctrine of interpretation used by the court: the principle of effectiveness, which renders the safeguards of the Convention practical and effective.⁴⁴ This principle was used to increase the human rights standards demanded by the court to insure the effectiveness of the Convention system. A third doctrine of interpretation used by the court is teleological interpretation.⁴⁵ The link between the three methods of interpretation allows the court to increase the demands of its judgments continuously. Teleological interpretation can be used to interpret the treaty in an evolutionary fashion because the object and purpose of the treaty are flexible and dynamic, as opposed to the text or the subjective views of the parties, which do not change with the progress of time. Teleological interpretation can also be used to make the Convention effective; it allows the court to read the duties of the state expansively and read the reservations from these duties restrictively.

Over the last two decades the ECHR has embraced increasingly less constrained methods of interpretation.⁴⁶ For example, as the next section shows, the court recently changed its doctrine and started demanding specific actions

⁴² Id ¶¶ 2–3. After five years had passed and the UK failed to amend the law in accordance with the *Hirst* judgment, the court issued a pilot judgment which gives the UK six months, from the time it becomes final, to introduce legislative proposals intended to conform to *Hirst*. See *Case of Greens and MT v United Kingdom*, Applications Nos 60041/08 and 60054/08, ¶ 115 (Nov 23, 2010) (by a Chamber of the court), online at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&source=tkp&highlight=application%20|%20nos.%20|%2060041/08%20|%2060054/08&sessionid=66537804&skin=hudoc-en> (visited Feb 14, 2011). While this judgment is not very demanding compared to *Hirst*, since it is clear only such legislative changes can amend the violation, it is another indication of the court's incremental move towards more demanding judgments.

⁴³ See, for example, *Tyrer v United Kingdom*, (1979-80) 2 Eur Ct HR 1, ¶ 31 (1978).

⁴⁴ See *Soering v United Kingdom*, 11 Eur Ct HR 439, ¶ 90 (1989).

⁴⁵ See François Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in Mireille Delmas-Marty, ed, *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* 283, 292 (Martinus Nijhoff 1992).

⁴⁶ For the claim that the court has moved over the last two decades to the use of more activist measures of interpretation that allow for greater discretion to the judges, see Popovic, 42 Creighton L Rev at 396 (cited in note 6).

from states instead of only finding a violation and allowing the state to choose the means of remediation. Adopting this new doctrine is another example of the court's tendency to increase its demands over time, as well as another method for increasing the court's discretion.

The ECHR does not always have full control over the reasoning or the remedy. Sometimes a certain remedy is obviously necessary or a certain form of reasoning is particularly fitting. The court may try to adjust the remedy and the reasoning so that it will not issue judgments that are too costly to be complied with, conditioned on their reasoning. In cases where the court imposes a very costly remedy, it may tend to adopt more constrained reasoning, or indicate that it had little or no discretion in its decision by minimizing dissent among the judges or by relying on precedent. When the remedy is less costly, the court may be more inclined to draw on more novel forms of reasoning. While such a tendency seems reasonable, it is extremely difficult to prove because other aspects of judicial decision-making point in the opposite direction. Less restrained forms of reasoning increase the judges' discretion and can therefore make more demanding judgments possible. Demanding judgments may incur more resistance by judges and lead them to write dissents even against the court's interest in projecting unity.

Another strategy the court can use is adjusting the different components of the remedy to reduce the risks of noncompliance. If the court issues a judgment that demands substantial efforts from the state, it can accompany the judgment with a demand for relatively low reparations; by paying those reparations the state can partly rebuild its reputation.⁴⁷ If very low, or zero, reparations are demanded, this may have an expressive function, suggesting the violation is less severe. Again, this strategy is hard to prove, since judgments that expose a severe violation may call for higher reparations to compensate the applicants for their personal harm.

The *Von Hannover* case⁴⁸ illustrates the possible use of these tactics, although it certainly cannot prove their actual use by the court. The case

⁴⁷ For example, in the *Ilascu* case the court demanded that Russia take all necessary steps to release two prisoners held in the Moldavian Republic of Transnistria and pay a sum of approximately 600,000 EUR as just satisfaction. The prisoners were not released until they served their sentence, but Russia paid the just satisfaction and stated that by doing so they fully executed the judgment. *Ilascu and Others v Moldova and Russia*, 40 Eur Ct HR 46, Judgment ¶¶ 20–22 (2004); Committee of Ministers of the Council of Europe, Interim Resolution DH (2005), 84 (July 13, 2005). Sometimes when a fine is added to a sanction it is perceived as a price, which allows the violator to pay it and be exonerated from blame for the initial violation. See Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 J Legal Stud 1, 13–14 (2000). Russia may try to promote an understanding that the just satisfaction is a price it has to pay for the ability to violate, instead of a fine for violations that it has to remedy.

⁴⁸ *Von Hannover v Germany*, 40 Eur Ct HR 1 (2004) (“*Von Hannover P*”).

concerned paparazzi pictures of the Princess of Monaco taken outside her home without her knowledge and published by the tabloid press in Germany. After several German courts discussed the issue, the case reached the Federal Constitutional Court of Germany, which ruled that some of the photos were publishable under German law after balancing the protection of private life against freedom of press. The ECHR ruled that the German courts did not balance correctly between the competing interests and did not sufficiently protect the applicant's private life, resulting in a breach of Article 8 of the Convention.⁴⁹ To minimize the risks generated by overruling the German Constitutional Court, the ECHR decided the case unanimously, thus suggesting the lack of discretion in its decision.⁵⁰ To further minimize the risks of the judgment by lowering the stigma on Germany, the court did not decide the issue of just satisfaction and invited the parties to agree on this point.⁵¹

IV. FACING THE STATE'S STRATEGY

When a state complies with a costlier judgment, it will earn more reputation, but it will have to bear a higher material cost than it would when complying with a less costly judgment. Therefore, a state might rather comply with less costly judgments than comply with costlier judgments. Noncompliance with a costly judgment will cost the state reputation and usually leave it worse off than in cases of compliance.⁵² Noncompliance with a less costly judgment would be even worse, since the reputational sanction will be higher. The court earns the most reputation when it obtains compliance with a costly judgment; receiving compliance with a less costly judgment will earn the court less reputation. Noncompliance with a costly judgment will cause the court reputational damage, but noncompliance with a less costly judgment will result in even more reputational damage to the court.

⁴⁹ Id ¶¶ 78–80.

⁵⁰ The judgment of the court was joined by two concurring opinions.

⁵¹ *Von Hannover I*, 40 Eur Ct Hr ¶ 85. Despite requests from news organizations in Germany, Germany did not appeal the case to the Grand Chamber and reached a friendly settlement leading to the striking of the case from the list of the court's pending cases. This may be a testimony to the effectiveness of the court's strategy, as well as to Germany's high reputation, which prompted it to comply to avoid serious reputational damage. See Professional Publishers Association, *German government refuses to appeal against Princess Caroline decision* (Sept 2, 2004), online at <http://www.ppa.co.uk/press-and-media/news/2004/september/german-government-refuses-to-appeal-against-princess-caroline-decision> (visited Feb 14, 2011); *Von Hannover v Germany* (2006) 43 Eur Ct HR 7, ¶¶ 8–9 (2005) (“*Von Hannover II*”).

⁵² The court will try not to issue judgments in which the state's reputational payoff is lower than the material cost of avoiding noncompliance.

When the interaction between the court and the state is not iterated, the court will try to give the costliest judgment with which the state has an interest in complying—namely, a judgment that sets the material cost of compliance as only slightly lower than the state’s reputational payoff. Once this judgment is given, the state should comply—the best possible outcome for the court. If all states comply with the court to suit their immediate reputational interest, the court’s reputation will increase, and the court will shift towards costlier judgments, ultimately damaging the states’ interest.

If the interaction between the court and a certain state is iterated, the state may respond strategically to the court’s behavior. The state can signal to the court that it will not comply with costly judgments, even if it will suffer an immediate reputational sanction that is greater than the material cost of the judgment.⁵³ This signal will force the court to restrain itself and shift to less costly judgments to avoid the possibility of noncompliance.

For the state’s signal to be credible, it must be able to withstand the reputational cost it suffers for noncompliance more easily than the ECHR can sustain the damage to its own reputation caused by the state’s noncompliance. While high-reputation states suffer more damage than low-reputation states for each instance of noncompliance, noncompliance by a high-reputation state can cause the court much more damage than noncompliance by a low-reputation state. This Article assumes that the significant damage caused to the court by the noncompliance of a high-reputation state means that high-reputation states can sustain their noncompliance more readily than the court can withstand it. For that reason, high-reputation states can credibly threaten not to comply, even though their short-term reputational interests may suffer.

Low-reputation states pose no credible threat to the court, since their noncompliance will cause the court only minimal damage. Therefore, despite the fact that a low-reputation state stands to lose less than a high-reputation state for every individual act of noncompliance, this Article posits that in a direct confrontation between the court and a low-reputation state, the state will yield first. Theoretically, several low-reputation states may collude and decide collectively not to comply with costly judgments of the court, and their collective response may be damaging enough to the court’s reputation to make it restrain itself. For such collusion to work, however, the colluding states must be able to prevent free-riding by each individual state in the form of compliance with judgments that cost less than the reputational sanction of noncompliance. Furthermore, in order to be deterred, the court must be aware of the pact between the states, but making this agreement public can by itself cause

⁵³ The state needs to commit not to comply even against its short term interest. See Thomas C. Schelling, *The Strategy of Conflict* 41, 48 (Harvard 1960) (describing a similar situation of commitment to a conditional choice and showing that when an interaction is iterated a party can demonstrate its commitment during the first few rounds).

reputational damage to those states, making such a collusion very unlikely. While low-reputation states may continue not to comply with the court when the material cost of the judgment is higher than the reputational cost of noncompliance—a phenomenon that accounts for their high rates of noncompliance compared to those of high-reputation states—they cannot credibly signal to the court that they will not comply with future judgments even against their reputational interest.

Because the court is aware of the fact that it cannot withstand noncompliance by a high-reputation state, high-reputation states may not even need to refuse to comply with the court; they can use the mere threat of noncompliance to subdue the court. The court will restrain itself in advance when facing high-reputation states, preventing the need for noncompliance.

If a high-reputation state is especially concerned about its reputation, but still wants to signal its disapproval of the court's judgments, it can use the milder response of criticizing the court and suffer only the smaller reputational sanction resulting from such criticism. Even criticism by a high-reputation state can damage the court; like noncompliance, criticism indicates the state does not fear the reputational loss associated with conflict with the court. Therefore, criticism will damage the court's reputation, although perhaps to a lower extent than noncompliance. Criticism can also marshal public opinion within the state against the court in a way that may make future noncompliance—or even exit from the treaty—inevitable due to the demands of the public. If the state cannot credibly threaten not to comply or to exit, it may use criticism to change the conditions in a way that may render future noncompliance or exit inevitable in some circumstances.⁵⁴

Criticism of the court's judgments by states can also indicate displeasure with the court's decision-making. If the court is believed to issue unjust or incorrect judgments, states will be less pressured to comply, indirectly decreasing the court's reputation. The perception of the court's judgments affects the reputational sanction for noncompliance and therefore the court's reputation. High-reputation states will usually be better able to affect the perception other states have of the court's judgments, allowing them even greater leverage against the court.

⁵⁴ The countermeasures that states can use against the court could be arranged from the strongest measure of leaving the treaty regime, to the intermediate measure of noncompliance, to the weakest measure of criticism. States may want to use the threat of exiting the treaty or noncompliance to coerce the court, but this threat may not be credible because of the high costs of exit or noncompliance for the state. Therefore, the state may attempt a practice Schelling terms brinkmanship, deliberately increasing the chances that retreating from the use of the most extreme measures will be impossible. *Id.* at 199–201. Criticizing the court may change internal public opinion in a way that may make it hard or impossible to remain in the treaty regime or to continue complying with the court, and it can therefore be tried as a strategy of brinkmanship.

The contrast between the court's behavior towards Russia and England illustrates this interaction. The ECHR has been mounting a sustained campaign against Russia regarding its military operation in Chechnya in 1999–2000. In May 2009 the court delivered its hundredth judgment regarding this military campaign, and over a hundred judgments are still pending.⁵⁵ In those judgments, Russia is accused of severe violations of the Convention, including extra-judicial killings and torture.⁵⁶ The court can continue issuing those judgments even if Russia criticizes it or delays compliance because the losses to its reputation are sustainable.⁵⁷ On the other hand, when the judgment of *Osman v the United Kingdom*⁵⁸ provoked severe academic criticism in England, the court retreated from this judgment in *Z and Others v United Kingdom*.⁵⁹ In *Osman*, the victims of an obsessive killer claimed they were not protected by the police, although they gave the police ample warnings of their concerns. The domestic courts rejected

⁵⁵ Russian Justice Initiative, *Russia and the European Court of Human Rights*, online at <http://www.srji.org/en/echr/russia/> (visited Feb 14, 2011).

⁵⁶ See, for example, *Magomed Musayev and Others v Russia*, Application No 8979/02, slip op, ¶¶ 92, 122 (ECHR 2008).

⁵⁷ The court also forms another type of reputation, a reputation for not being deterred by noncompliance and maintaining its course despite resistance. Such a reputation may deter states from noncompliance in future instances. If full Russian compliance with the court's judgments in this area seems impossible or even very improbable, the incentive of the court to restrain itself in order to increase the chances of compliance is eroded. Instead, the court may opt to issue even costlier judgments, since noncompliance with such judgments will serve as only a weaker negative reputational signal.

Russian compliance is closely monitored by the Committee of Ministers, but still remains partial. Department for the Execution of Judgments of the European Court of Human Rights, *Actions of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights*, Memorandum CM/Inf/DH 33, Part I (Sept 11, 2008). Russian criticism against the court has been severe; the former president of the court, Luzius Wildhaber, has even claimed the Russians poisoned him. Luke Harding, *I Was Poisoned by Russians, Human Rights Judge Says* (Guardian International Feb 1, 2007), online at <http://www.guardian.co.uk/world/2007/feb/01/russia.topstories3> (visited Feb 14, 2011).

Until January 15, 2010, Russia persistently withheld the ratification of Protocol 14, which allows changes that are urgently needed to assist the court in battling its mounting caseload. Russia is the last nation in Europe to withhold ratification. The recent decision of the Russian state Duma to approve the protocol may be a new sign of Russia's willingness to assist the court. Council of Europe Directorate of Communication, Press Release: *Russian Approval of Protocol 14—A Commitment to Europe: Statement by Secretary General of the Council of Europe, Thorbjørn Jagland* (Jan 15, 2010), online at <https://wcd.coe.int/ViewDoc.jsp?id=1571749&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE> (visited Feb 14, 2011). Following Russia's decision to ratify Protocol 14, the Protocol came into force on June 1, 2010.

⁵⁸ *Osman v United Kingdom*, 29 Eur Ct HR 245 (1998).

⁵⁹ *Z and Others v United Kingdom*, 34 Eur Ct HR 3 (2001).

their suit against the police without deciding the merits. The ECHR decided that although Article 2 protecting the right to life was not violated, Article 6 protecting the right to access to a court was violated.⁶⁰ The decision regarding the violation of Article 6 was criticized in an article published in the *Modern Law Review*.⁶¹ In *Z*, children who were ill-treated by their parents were not removed from parental control until after several years of abuse, resulting in severe psychological injuries. The court decided there was a violation of Article 3 preventing inhuman and degrading treatment, but although the suit against the authorities was dismissed in a way very similar to *Osman*, the court decided there was no violation of Article 6.⁶² Five judges in two separate dissents criticize the decision not to find a violation of Article 6 as contrary to the Court's decision in *Osman*.⁶³

The court will therefore avoid giving extremely costly judgments against high-reputation states, so as not to provoke them into strategic noncompliance. Because high-reputation states can also lose more through noncompliance than through compliance, however, they are less likely to be provoked to noncompliance by less costly judgments. In some cases, this would allow the court to continue issuing judgments against them. As an analogy, consider the relationship between good friends or business partners—while they will not attempt major transgressions against each other since they know that they can cause each other substantial damage merely by terminating their relationship, they may attempt minor transgressions since each side knows the other will not hurry to cut a relationship that is also beneficial for her.⁶⁴

Proving that the ECHR issues costlier judgments against low-reputation states seems impossible. The first problem is that the states' exact costs are not observable to an outsider and are also incommensurable. Even judgments that demand similar actions, such as paying the same amount of money, can be more

⁶⁰ *Osman*, 29 Eur Ct HR ¶¶ 122, 154.

⁶¹ Conor Gearty, *Unravelling Osman*, 64 Mod L Rev 159 (2001).

⁶² *Z and Others*, 34 Eur Ct HR ¶¶ 75, 104.

⁶³ *Z and Others v United Kingdom*, 34 Eur Ct HR 3, ¶ 3 (2001) (Rozakis and Palm dissenting in part); *Z and Others v United Kingdom*, 3 Eur Ct HR 3, ¶ 1 (2001) (Thomassen, Casadevall, and Kovler dissenting in part). This retreat is explained as a response to the arguments in Gearty's article (cited in note 61). See Jane Wright, *The Retreat from Osman: Z v United Kingdom in the European Court of Human Rights and Beyond*, in Duncan Fairgrieve, Mads Andenas, and John Bell, eds, *Tort Liability of Public Authorities in Comparative Perspective* 55, 63 (British Institute of International and Comparative Law 2002). However, the court in the case of *Z and Others* did find a violation of Article 13, protecting the right to an effective remedy for violations of the Convention. *Z and Others*, 34 Eur Ct HR ¶ 111.

⁶⁴ A similar phenomenon will occur in close-knit communities. Ellickson shows that farmers in Shasta County will suffer minor transgressions from each other, but they will usually not attempt to sue each other, which constitutes a major transgression. See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 56, 60–61 (Harvard 1991).

demanding on certain states because of their lower financial assets or the political implications of the judgment. The preliminary condition of the states before the judgment is also very different, with high-reputation states usually having higher human rights standards. Therefore, even if the court demands exactly the same standard of human rights protection from high-reputation and low-reputation states, the judgment will be much more demanding on the low-reputation states, providing a credible alternative explanation for the court's apparent preference for high-reputation states. The court is also trying to maintain an image of impartiality and will therefore try to hide any sign of bias. To do that, the court may even deliberately change its actions strategically, for instance by issuing costly judgments against high-reputation states or restraining itself when facing low-reputation states to refute the double standards claim. The following examples therefore do not attempt to prove that the ECHR is noticeably more demanding on low-reputation states or that the reason for such bias is the strategic calculation described above rather than other possible explanations. They are only meant to illustrate how the court's behavior fits this strategic calculation.

The contrast between *The Greek Case*⁶⁵ and *Lawless v Ireland*⁶⁶ illustrates the court's tendency to issue costlier judgments against low-reputation states and be more lenient towards high-reputation or democratic states.⁶⁷ The *Lawless* case concerned the detention without trial of G.R. Lawless, a former member of the Irish Republican Army (IRA). The detention of Lawless was part of an effort by the Irish government to suppress the military activities of the IRA in Northern Ireland. In this case, the court ruled that detention without trial contradicted Articles 5 and 6 of the Convention.⁶⁸ However, the court also found that the detention was founded on the right of derogation duly exercised by the Irish government in accordance with Article 15 of the Convention.⁶⁹ Because the Irish government derogated from the Convention according to the prescriptions of Article 15, no breach of the Convention was found in this case.⁷⁰ In contrast, the

⁶⁵ *The Greek Case*, 1969 YB Eur Conv on HR.

⁶⁶ *Lawless v Ireland (No 3)*, 1 Eur Ct HR (ser A) (1961). The *Lawless* case was the first case decided by the court; therefore, the court's restraint can also be explained by practicing greater caution when its reputation is low.

⁶⁷ This claim is raised with regard to these cases in Brendan Mangan, *Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform*, 10 Hum Rts Q 372, 383 (1988); Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 Fordham Intl L J 101, 114 (1995); Frede Castberg, *The European Convention On Human Rights* 169 (A.W. Sijthoff 1974); Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 Harv Intl L J 1, 3-4 (1981).

⁶⁸ *Lawless*, 1 Eur Ct HR ¶ 7.

⁶⁹ *Id.* ¶ 30.

⁷⁰ *Id.* ¶ 48.

European Commission of Human Rights' report on *The Greek Case* found that no public emergency existed in Greece, a precondition for derogating from the Convention.⁷¹ Greece, where a military government ruled at the time, was therefore found in breach of the Convention.⁷²

Another example illustrating the ECHR's restraint when facing high-reputation states is the case of *Bankovic and Others v Belgium and Others*.⁷³ Bankovic and other citizens of the Federal Republic of Yugoslavia lodged a complaint against seventeen members of the North Atlantic Treaty Organization (NATO)⁷⁴ alleging their responsibility for violations of the Convention because of the killing of several people in a NATO air strike. This application concerned all the high-reputation, powerful states of Western Europe. The court concluded that the case was not admissible since the persons injured were not under the jurisdiction of the respondent states.⁷⁵

The narrow reading of jurisdiction in the *Bankovic* case can be compared to a more expansive reading in other cases decided against low-reputation states. In the case of *Loizidou v Turkey*,⁷⁶ where a Cypriot national claimed she was denied the enjoyment of her property (plots of land located in Northern Cyprus) by Turkey, the ECHR ruled Turkey had jurisdiction although the violation was committed outside its territory.⁷⁷ The court stated that jurisdiction resulted from the exercise of effective control by Turkey over the territory in question.⁷⁸ In a

⁷¹ *The Greek Case*, 1969 YB Eur Conv on HR ¶ 169.

⁷² Following the decision in *The Greek Case*, the Greek government denounced the Convention on December 12, 1969. The case was not referred to the court within three months and was therefore referred to the Committee of Ministers, which decided that Greece had violated numerous articles of the Convention. Note that before the court became very active, important cases like *The Greek Case* were not referred to the court and were therefore decided by the Committee, which could find a violation with a two-thirds majority. See Mark W. Janis, Richard S. Kay, and Anthony W. Bradley, *European Human Rights Law: Text And Materials* 27 (Oxford 3d ed 2008). Greece refused to take part in the discussions at the Committee of Ministers, due to its denunciation of the Convention and the Commission's Report. See Committee of Ministers of the Council of Europe, Resolution DH(70)1 (Apr 15, 1970).

⁷³ *Bankovic and Others v Belgium and Others (Admissibility)*, (2007) 44 Eur Ct HR SE5 (2001).

⁷⁴ The NATO members named in the complaint were Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom.

⁷⁵ *Bankovic*, 44 Eur Ct HR ¶ 82.

⁷⁶ *Loizidou v Turkey*, (1997) 23 Eur Ct HR 513 (1996).

⁷⁷ *Id* ¶ 47.

⁷⁸ *Loizidou v Turkey (Preliminary Objections)*, 20 Eur Ct HR (Ser A), ¶ 62 (1995); *Loizidou*, 23 Eur Ct HR ¶ 52. See Alexandra Ruth and Mirja Trilsch, *Bankovic v Belgium (Admissibility)*, in Bernard H. Oxman, ed, *International Decisions*, 97 Am J Intl L 168, 172 (2003) (criticizing the attempt to distinguish the cases by claiming that the precedent set in *Loizidou* and another case, *Cyprus v Turkey*, (2002) 35 Eur Ct HR 30, ¶ 74 (ECHR 2001), is preserving a

later case, *Ilaşcu v Moldova and Russia*, the court found Moldova responsible for actions in a territory it did not in fact control.⁷⁹ In his partly dissenting opinion, Judge Loucaides criticized the gulf between this decision and the court's decision in *Banković*.⁸⁰

Another way the ECHR can take greater risks regarding low-reputation states is by trying novel forms of reasoning in the judgments issued against them. After the court uses that form of reasoning in one case, it becomes more entrenched and legitimate if applied in future cases. This allows the court to issue costlier judgments against high-reputation states using the same type of reasoning in the future. The court can therefore use low-reputation states to set a precedent for a certain form of reasoning that can later be used to issue costly judgments against high-reputation states.

In *Broniowski v Poland*,⁸¹ the applicant was one of a group of tens of thousands of Polish citizens who were repatriated from territories lost to Poland following World War II. The judgment found that the legal arrangements made by the Polish government to compensate the applicant for the loss of his property were inadequate, and as a result the applicant suffered a disproportionate part of the burden on the community. For that reason, the court found a violation of Article 1 of Protocol 1 protecting the right to property.⁸² The revolutionary part of the judgment was that the judgment did not only state that Poland was in breach of the Convention, it specified exactly the actions that Poland had to take to remedy this violation regarding all other claimants. Poland had to secure the implementation of the property rights of the remaining claimants or provide them with equivalent redress in lieu of property.⁸³ The court was using this judgment to identify for the first time a systemic problem with compliance to the Convention, making this a so-called “pilot judgment.”⁸⁴ It is not mere coincidence that this new type of reasoning

protection of the Convention only where it was previously enjoyed, and claiming that this argument was first used by the ECHR to expand the state's extraterritorial jurisdiction and was transformed in *Banković* into an argument to limit the state's jurisdiction); Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 Eur J Intl L 529, 545 (2003) (criticizing the Court's decision regarding jurisdiction in *Banković* as a digression from the Convention organs' previous jurisprudence).

⁷⁹ *Ilaşcu*, 40 Eur Ct HR ¶ 330–31.

⁸⁰ *Ilaşcu and Others v Moldova and Russia*, 40 Eur Ct HR 46, ¶ 1 (2004) (Loucaides dissenting in part).

⁸¹ *Broniowski v Poland*, (2005) 40 Eur Ct HR 21 (Grand Chamber 2004).

⁸² *Id.* ¶ 187.

⁸³ *Id.* ¶¶ 193–94.

⁸⁴ See Jackson, 39 Conn L Rev at 791 (cited in note 14). The court is following the Committee of Ministers's invitation to identify systemic problems. See Committee of Ministers of the Council of Europe, Res(2004)3 (May 12, 2004).

was used for the first time against a low-reputation state like Poland.⁸⁵ Similar systemic problems in high-reputation states did not give rise to similar decisions until after the precedent was formed in the *Broniowski* case—and even then only with restraint and caution.⁸⁶

⁸⁵ In fact, the court had tried to introduce this new type of non-declaratory judgment incrementally in previous cases. Jackson, 39 Conn L Rev at 783–84 (cited in note 14). Jackson compares *Assanidze v Georgia*, 39 Eur Ct HR 32, ¶ 203 (2004) (demanding the applicant's release “at the earliest possible date”; the applicant was released on April 9, 2004, one day after the judgment was given) with *Ilascu*, 40 Eur Ct HR ¶ 490 (progressing further by demanding that the respondent countries secure the “immediate release” of the applicants). Jackson explains that prior to *Broniowski*, the court demanded direct actions only when there was only one possible course to remedy the violation. Also note that all those cases were decided against Eastern European states, which are usually considered to have a low reputation; this supports the hypothesis that the court progresses its precedents by using novel forms of reasoning against low-reputation states.

⁸⁶ 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, 430 (2009). Sadurski claims that a similar systemic problem used to exist in England regarding widow benefits for men, but the court failed to identify a systemic problem, perhaps for fear of retaliation. On November 23, 2010, the court issued a rather mild pilot judgment against the UK regarding the issue of voting rights for prisoners. See *Case of Greens and M.T.*, Applications Nos 60041/08 and 60054/08, ¶¶ 110–22. By now the pilot judgment tool has become less novel. After *Broniowski*, the court identified a systemic problem in the *Case of Sejdic v Italy*, (2006) 42 Eur Ct HR 17 (2004), because the Italian legal system did not afford an effective mechanism to secure the rights of persons convicted in absentia. Id ¶ 44. Still, Sadurski claims that the court shows special restraint against Italy, since in the following Grand Chamber judgment and in all other Italian cases decided by the Grand Chamber, the court did not include a finding of a systemic violation in the operative part of the judgment. Sadurski, 9 Hum Rts L Rev at 427. See *Sejdic v Italy*, Judgment, No 56581/00, 2006 WL 5003056, ¶¶ 121–27 (Grand Chamber 2006). It should be noted regarding the *Sejdic* case, however, that in the meantime Italy instituted a reform, which changed the legal situation regarding some potential applicants, and the court decided it would be premature to check if a systemic problem existed after the reform. The court did not show restraint, however, in another case decided against Poland, *Hutten-Czapka v Poland*, (2007) 45 Eur Ct HR 4 (Grand Chamber 2006). In this case as well, the court found in the operative part of the judgment that a systemic problem existed because the legal situation in Poland imposes restrictions on landlords' rights and does not allow them to recover losses incurred in connection with property maintenance. Id at Judgment ¶ 3. In order to remedy this problem, the court ruled that Poland must secure a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community. Id at Judgment ¶ 4. Though it appears the court is using pilot judgments against low-reputation states like Poland, it is also trying to use this measure where there is some chance of compliance, which may explain why it did not begin to use this measure against Russia, for instance. Sadurski, 9 Hum Rts L Rev at 429.

V. CONCLUSION

This Article shows that the ECHR can increase its reputation by taking calculated risks. When it issues costly judgments, it risks noncompliance but gains reputation if the state complies. In some cases the court may try to issue the costliest judgment that will still gain compliance, but when choosing this judgment it takes a certain small risk of noncompliance. When the court's reputation increases, it can issue costlier judgments and maintain the same minimal risk of noncompliance. Therefore, as the ECHR obtains compliance with more cases, its reputation rises, and it will issue more and more demanding judgments. This explains the incremental increase in the demands of the ECHR from the states. High-reputation states may be able to respond to this trend of issuing more and more demanding judgments by strategically failing to comply with the court or by criticizing it. Therefore, the court will not direct its costliest judgments against high-reputation states and will issue costlier judgments against low-reputation states. This hypothesis supports the allegations that the court shows a double standard and demands more from low-reputation states. When the court demands only little from a state, it can use novel forms of reasoning without exceeding the minimum acceptable risk of noncompliance. Over time, the use of this novel reasoning renders the reasoning more legitimate and increases the ability of the court to use such reasoning even when issuing costlier judgments. The court can use novel forms of reasoning against low-reputation states that cannot deter the court effectively and render this reasoning more legitimate for future use.

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