Introduction: The Court Redefines Torture in Europe

Nahide, a mother of three, was born in Diyarbakır in southeast Turkey. Like many women in this region, she had a tragic life. Although violence against women is pervasive throughout Turkey, women in the east and southeast lead particularly difficult lives as many may lack access to education and employment opportunities, health services, and means of redress for injustices suffered.[1] Nahide's case was no different. She started living with Hüseyin Opuz in 1990, and they married five years later.[2] Hüseyin already had a pattern of abuse, but the violence grew worse after their marriage. In April 1995, he savagely beat both Nahide and her mother. They were covered with evidence of their abuse, which was confirmed by a medical report that described them as unfit to work for five days due to their injuries. Brushing aside the pain and the shame of being victims of domestic abuse, the women approached the public prosecutors and filed a complaint against Hüseyin. Afterward, they grew doubtful and withdrew their complaint. The local court discontinued their case due to a lack of evidence and the complaint's withdrawal. No protective measures were taken.

A year later, almost to the day, on April 11, 1996, Hüseyin and Nahide had another fight during which Nahide was again brutally beaten. According to the medical report, she was left with life-threatening injuries to her right eye, right ear, left shoulder, and back. Hüseyin was remanded, but, at a hearing on May 14, 1996, the public prosecutor requested that Hüseyin be released pending trial due to the nature of the offence and Nahide's quick recovery. When Hüseyin was released, Nahide withdrew her complaint, and the case was discontinued.

Almost two years later, on March 4, 1998, Hüseyin rammed into Nahide and her mother with his car, nearly killing Nahide's mother. The following

[1] Yakin Ertürk, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Mission to Turkey, *A/HRC/4/34/Add.2* (January 5, 2007), 2.

[2] The information provided in this story is taken from a court case: *Opuz* v. *Turkey*, application no. 33401/02, ECHR (June 9, 2009).

day, Hüseyin was taken into custody again. Two weeks later, on March 20, 1998, Nahide initiated divorce proceedings after suffering Hüseyin's abuse for years. Nahide and her mother also filed a petition specifically requesting protective measures from the local authorities. Hüseyin had been threatening to kill them both if Nahide would not return to live with him. Nahide, who had been living with her mother for about a month at the time, had no intention of doing so. The authorities ignored their petition, and the local court decided to drop their case due to lack of evidence. Fearing her husband's death threats, Nahide also dropped the divorce case. She could find neither remedy nor protection in the Turkish justice system. On November 14 of that same year, Nahide reported that Hüseyin threatened to kill her again; once more, her complaint was dismissed due to lack of evidence. Five days later, her mother filed another complaint, warning of death threats that grew more and more terrifying by the day. This complaint was not taken seriously, either, and their pleas for protection were ignored. This cycle of violent attacks, court proceedings, and discontinued cases repeated over the next few years.

In the face of the Turkish government's inaction, Nahide and her mother realised that escaping their fate meant leaving their hometown, their family, and their lifelong friends. What they needed was a fresh start. With this in mind, they planned in secret to move to Izmir on the west coast of Turkey. When Hüseyin found out, he was enraged and once again threatened to kill them. The two women, however, were determined. They picked a morning in early March 2002 to leave Diyarbakır, their home, and everything else behind. Nahide's mother made arrangements with a transport company. She loaded up their few belongings onto a truck with the driver's help and sat beside the truck driver. Had she known that Hüseyin was aware of their plans, would she have chosen to take the bus instead? Would it have made a difference? After all, Hüseyin had pledged that "wherever [they] go, [he] will find and kill [them]!"[3] As they set off on their journey, a taxi pulled in front of the truck and stopped. Hüseyin got out, opened the truck door, and shot Nahide's mother dead.

On March 13, 2002, the Diyarbakır Public Prosecutor filed an indictment accusing Hüseyin of murder. In 2008, Hüseyin was finally convicted of murder and illegal possession of a gun and sentenced to life imprisonment. However, due to Hüseyin's good conduct during the trial, the local criminal trial court reduced his sentence to fifteen years and ten months plus a fine. This decision was based on the conclusion that Hüseyin had

[3] *Opuz* v. *Turkey*, §54.

been provoked by the victim because the crime had been committed in the name of *family honor*. In many regions of the world, these two words are shockingly effective in reducing a sentence or letting the perpetrators of gender-based violence entirely off the hook. They would help Hüseyin, too. Hüseyin was released from prison because the criminal trial court counted the time he spent in pretrial detention and considered the fact that his case was pending appellate review before a higher court. Immediately following his April 2008 release, Hüseyin went right back to pursuing Nahide and issuing death threats. Nahide once again requested protection from the government, but to no avail.

In June 2008, Nahide brought her case before the European Court of Human Rights (the Court). In 2009, the Court found Turkey in violation of the European Convention of Human Rights (the Convention) for not protecting a domestic violence victim. In so doing, the Court broke new ground in European human rights law. It examined Nahide's complaint against the backdrop of "the vulnerable situation of women in south-east Turkey"[4] and the "common values emerging from the practices of European States."[5] The Court referenced relevant legal instruments such as the Convention on the Elimination of Discrimination against Women (CEDAW) and the Belém do Pará Convention (the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women).[6] The former prohibits gender-based discrimination, and the latter sets out specific state obligations to eradicate gender-based violence. Interights, a London-based nongovernmental organization (NGO), had intervened in the proceedings to argue that states are required to be vigilant about domestic violence complaints because women are often too afraid to report abuse to the relevant authorities.[7] The Court further relied on reports provided by leading civil society organizations such as the Diyarbakır Bar Association and Amnesty International, as well as the CEDAW Committee's Concluding Comments on Turkey. Providing a detailed description of the systemic nature of discrimination against women in Turkey and state authorities' passivity toward domestic violence victims, these reports reinforced Nahide's story.[8]

In light of the evidence brought by Nahide and the abovementioned reports, the Court decided that the Turkish government had failed to

[4] Ibid., §160.
[5] Ibid., §164.
[6] Ibid.
[7] Ibid., §157.
[8] Ibid., §192–93.

take protective measures that could have deterred Hüseyin from violating Nahide's personal integrity. It also ruled that the Turkish government bore responsibility for the abuse that Nahide had endured and that it had violated Article 3 (prohibition of torture) of the Convention. Even further, the Court found the Turkish authorities had discriminated against Nahide based on her gender, arguing that "judicial passivity in Turkey, albeit unintentional, mainly affected women."[9] Finally, it identified the episodes of violence against Nahide and her mother specifically as gender-based violence – a form of discrimination against women.[10]

The Court's judgment offered some compensation for the harm done to Nahide, but did not ask for Hüseyin's retrial or re-incarceration. Nonetheless, it became a landmark decision that opened the way for others to bring domestic violence complaints before the Court under Article 3 and inspired the 2014 Istanbul Convention on Violence against Women.[11] When the Court recognised the victimhood of Nahide and others like her, it fundamentally changed the meaning of the prohibition of torture and inhuman or degrading treatment. The decision also strengthened the principle that states may bear responsibility for acts perpetrated by private actors should they fail to protect the victims or punish the perpetrators.[12] The precedent set in this case would come to influence the lives of many domestic violence victims by allowing them to seek justice under this *expanded* meaning of the prohibition.

Indeed, treating domestic violence cases as torture or ill-treatment was not what the founders of the European human rights regime had in mind when they drafted Article 3 in 1950. The foundational premise of the prohibition against torture and inhuman or degrading treatment is to protect individuals against the acts of state authorities, not against family members or private individuals. Built on the conceptual divide between public and private spheres, the norm against torture was crafted as a protective shield against the excesses of state authorities acting in their official

[9] Ibid., §200.

[10] Article 14 (prohibition of discrimination) reads as follows: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." This means that Article 14 can only be invoked in conjunction with other articles in the European Convention.

[11] Selver B. Sahin, "Combatting Violence against Women in Turkey: Structural Obstacles," *Contemporary Politics* (2021): 1–21.

[12] The origins of this obligation in relation to Article 3 go back to earlier case law such as *A.* v. *the United Kingdom*, application no. 100/1997/884/1096 (September 23, 1998).

capacities. It did not initially mean to cover abuses committed by an individual (in their personal capacity) within the private sphere.

To understand the degree to which the meaning of the prohibition of torture has shifted over time, let us look closely at the original definition under Article 3, which reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Alastair Mowbray explains that, like most other rights under the Convention, Article 3 is formulated as a *negative obligation*; that is, an obligation to refrain from violating a right.[13] Negative obligations are derived from the classical liberal idea of curbing state interference in people's lives.[14] At its core, the prohibition holds that states must refrain from subjecting their citizens to torture and inhuman or degrading treatment. The Court's ruling in Nahide's case represents a new type of obligation – a *positive obligation* to protect and guarantee the fulfilment of individual rights.[15] States incur such obligations when they possess concrete knowledge of the risk of harm.[16] They are then required to take proactive measures to ensure that individuals facing such risks may enjoy their rights.[17] This may sometimes imply that states have to mobilise their resources to protect vulnerable groups, such as domestic violence victims, minors, or refugees,[18] or offer adequate medical treatment or minimally acceptable conditions to individuals under their control, such as detainees or prisoners.[19] Compared to negative obligations,

[13] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford and Portland: Hart Publishing, 2004), 5.

[14] Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London and New York: Routledge, 2012), 2.

[15] For a comprehensive assessment on the relation between positive and negative obligations, see Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Cambridge, England; Antwerp and Portland: Intersentia, 2016).

[16] Vladislava Stoyanova, "Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights," *Leiden Journal of International Law* 33, no. 3 (2020): 603.

[17] Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, 2.

[18] Moritz Baumgärtel, "Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 38, no. 1 (2020): 12–29; Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press, 2019).

[19] For a great overview on how criminal law can be mobilised to fulfill such positive duties see, Laurens Lavrysen and Natasa Mavronicola, *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Oxford and New York: Hart Publishing, 2020).

positive obligations are, therefore, more resource-intensive in nature and have a clear socioeconomic dimension.[20]

It is also interesting to note that such resource-intensive new obligations were not added to the European Convention through an official amendment procedure or by means of an additional protocol. Instead, it was the European Court itself that introduced these new obligations under the prohibition of torture and inhuman or degrading treatment in the 1990s and the early 2000s.[21] In so doing, the Court expanded the definition of what constitutes torture or ill-treatment in that period. This was a *prima facie* judicial innovation with which the Court significantly expanded the scope of individual protections under this prohibition and began prescribing more demanding obligations. It effectively took *thou shalt not torture* and made it *thou shalt prevent torture*.[22]

However, this is not to say that the Court is the protagonist in this story of change. While courts play an important role in processing and pronouncing legal change through their judgments, the origins of such change episodes are the *victims*. Victims are the real protagonists. Nahide's case is a good illustration of how real experiences of suffering and injustice come to be translated into legal language and then distilled as standards in the course of court proceedings. Their stories are where it all begins, and through their complaints, the law is refined to reflect and shape moral progress.[23] The Court's jurisprudence weaves individual experiences and the law together. They are the warp and the weft in the Court's brocade. From them, the Court derives abstract standards for appropriate behaviour.

[20] Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Oxford and New York: Hart Publishing, 2021), 128.

[21] This is not the only example where the Court took the lead by engaging in a judicial innovation. The Court played a similar role in the introduction of the pilot judgment procedure. For more, see Ezgi Yildiz, "Judicial Creativity in the Making: The Pilot Judgment Procedure a Decade after Its Inception," *Interdisciplinary Journal of Human Rights Law* 8 (2015): 81–102.

[22] Although there are also scholars who argue that there is no clear-cut ideational separation between positive and negative obligations, there are differences when it comes to the time of their introduction, the frequency of their use, as well as the Court's reasons for not finding a violation of them, as this book makes it clear. See also, for example, Sandra Fredman FBA, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

[23] Michael Goldhaber provides a brilliant account of how individual stories shape European human rights law. For more, see Michael Goldhaber, *A People's History of the European Court of Human Rights:* (New Brunswick: Rutgers University Press, 2008).

Even if the Court effectuates legal change through its judgments and decisions, the true driving force behind this change is the victims.

Case Selection: Positive Obligations under Article 3 and the European Human Rights System

The emergence of positive obligations under the prohibition of torture and inhuman or degrading treatment within the European human rights system is an ideal case to glean information about the conditions of *progressive legal change* – the main focus of this book. I define progressive change as expanding the range of protections afforded to victims and the correlative obligations states must comply with, and I investigate when we can expect to observe such foundational changes. The introduction of positive obligations is an unequivocal episode of progressive legal change undertaken by a court that is not unequivocally progressive.[24] Rather, it is known to have conservative origins and practices.[25] Unlike other courts and institutions, such as the Inter-American Court of Human Rights or the United Nations (UN) Treaty Bodies, which have more or less consistently followed a progressive line,[26] the European Court's record is mixed.[27] The European Court has not been as progressive compared to

[24] Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights," *European Journal of International Law* 14, no. 3 (2003): 529–68; Ezgi Yildiz, "Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights," *Temple International and Comparative Law Journal* 34, no. 2 (2020): 309–38.

[25] Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford and New York: Oxford University Press, 2017); Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights,"529–68; Ezgi Yildiz, "Extraterritoriality Reconsidered: Functional Boundaries as Repositories of Jurisdiction," in *The Extraterritoriality of Law: History, Theory, Politics*, ed. Daniel S. Margolies et al. (Routledge, 2019), 215–27.

[26] A good comparison is the Inter-American Court, which is known to predominantly engage in progressive interpretation. For more, see Lucas Lixinski, "The Consensus Method of Interpretation by the Inter-American Court of Human Rights," *Canadian Journal of Comparative and Contemporary Law* 3 (2017): 65.

[27] See, for example the state obligation to inform the families of disappeared persons. Eduardo Ferrer Mac-Gregor, "The Right to the Truth as an Autonomous Right under the Inter-American Human Rights System," *Mexican Law Review* 9, no. 1 (2016): 121–39. M. T. Kamminga, "The Thematic Procedures of the UN Commission on Human Rights," *Netherlands International Law Review* 34, no. 3 (1987): 299–323; David Weissbrodt, "The

other human rights courts and tribunals and stands out as a deviant case.[28] The European Court has been rights-expansive at certain times and for certain obligations.[29] Notably, it has oscillated between the audacity of its ruling in Nahide's case and its more forbearing attitude and deference to member states in other cases. The legal change explored here is shaped by these two opposing attitudes.

The book explains why the Court needs to oscillate between forbearance and audacity, and how this oscillation has shaped the norm against torture and inhuman or degrading treatment. This explanation sheds light on a broader question: what are the conditions under which we can expect international courts to be progressive?

Focusing on the European Court's recognition of new state obligations under Article 3, this book seeks to understand what it takes for the Court to be unambiguously progressive.[30] Analyzing change in environments that are not constantly progressive presents us with richer insights into the conditions under which progressive change is more or less likely to occur.[31] The Court is a compelling case to uncover the dynamics of change – especially in the context of the prohibition of torture and inhuman or degrading treatment – for at least three other reasons.

Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law," *University of Pennsylvania Journal of International Law*, no. 4 (2010 2009): 1185–1238.

[28] Deviant cases are atypical cases that stand out. They are ideal for explanatory studies that look into underspecified explanations, as is the case here. For more, see Jason Seawright and John Gerring, "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options," *Political Research Quarterly* 61, no. 2 (2008): 302.

[29] See for example, Giovanna Gismondi, "Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1," *Yale Human Rights and Development Law Journal* 18 (2016): 1. See also, Christine Byron, "A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies," *Virginia Journal of International Law*, no. 4 (2007 2006): 839–96.

[30] Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," *International Journal of Law in Context* 14, no. 2 (2018): 197–220; Ximena Soley and Silvia Steininger, "Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights," *International Journal of Law in Context* 14, no. 2 (2018): 237–57; Malcolm Langford and Daniel Behn, "Managing Backlash: The Evolving Investment Treaty Arbitrator?," *European Journal of International Law* 29, no. 2 (2018): 551–80. Erik Voeten, "Populism and Backlashes against International Courts," *Perspectives on Politics* (2019), 1–16.

[31] For a different assessment of conditions of change, see Nico Krisch and Ezgi Yildiz, "The Many Paths of Change in International Law: A Frame," in *The Many Paths of Change in International Law* (Oxford and New York: Oxford University Press, 2023).

First, beyond Europe, the Court is relevant on a global scale as a crucial source of authority in shaping the nature and the content of fundamental human rights.[32] With particular respect to the norm against torture and inhuman or degrading treatment, European jurisprudence has shaped the definitions currently in use.[33] For example, the UN Convention against Torture (CAT) adopted its definition of torture and inhuman or degrading treatment based on the one developed by the European Commission of Human Rights in the 1969 *Greek Case* decision.[34] Similarly, the well-known "minimum level of severity" criterion was first established in a European Court judgment.[35] In its 1978 *Ireland* v. *the United Kingdom* judgment, the Court pronounced that the alleged ill-treatment "must attain a minimum level of severity" to be considered under the prohibition of torture and inhuman or degrading treatment. The Court specified that the assessment of this minimum level should be relative, depending on the case's specific circumstances, including "the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."[36]

Second, in more recent history, the Court played an important role in debates around the redefinition of torture in the aftermath of the 9/11 attacks. The European Court's initial involvement was rather controversial and involuntary. The United States (US) government attempted to revise the legal definition of the norm against torture during its War on Terror that began in 2001. Former President George W. Bush's legal team meticulously distinguished torture from other forms of ill-treatment in an August 2002 Department of Justice memo (part of a series of memoranda known as Torture Memos).[37] This document limited the definition of torture to acts

[32] Helen Keller and Alec Stone Sweet, "Introduction: The Reception of the ECHR in National Legal Order," in *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford and New York: Oxford University Press, 2008), 15.

[33] John T. Parry, *Understanding Torture: Law, Violence, and Political Identity* (Ann Arbor: University of Michigan Press, 2010), 44.

[34] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights*, International Courts and Tribunals Series (Oxford and New York: Oxford University Press, 2010), 195.

[35] Association for the Prevention of Torture, "The Definition of Torture: Proceedings of an Expert Seminar" (Geneva, November 10, 2001); Aisling Reidy, "The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights," Human Rights Handbooks, No. 6 (Strasbourg: Council of Europe, 2003).

[36] *Ireland* v. *the United Kingdom*, application no. 5310/71, ECHR (January 18, 1978) §162.

[37] A set of legal memoranda drafted by John Yoo, then Deputy Assistant Attorney General, and signed in by Jay S. Bybee, then the head of the Office of Legal Counsel of the Department of Justice.

causing extremely severe pain, equivalent to what one would feel when experiencing organ failure or death.[38] In so doing, the Torture Memos effectively permitted other coercive and cruel interrogation methods falling short of this specific definition as lawful instruments under the euphemism "enhanced interrogation methods."[39] When crafting this circumscribed definition, the Torture Memos relied on the European Court's reasoning in the 1978 *Ireland* v. *the United Kingdom* judgment, where the Court indeed invoked a restricted definition of torture. However, as we will see in Chapter 4, this 1978 judgment was issued in a specific political context in which the Court had limited discretionary space. In subsequent rulings, the European Court changed its position and expanded the definition of acts that could be characterised as torture.[40] Yet, the abovementioned memos disregarded these more recent developments and referred only to *Ireland* v. *the United Kingdom.*

The European Court's direct involvement in this debate was different. The Court had a chance to weigh in on the legality of this distinction and of American interrogation practices. It did so by reviewing cases concerning European countries that aided and abetted the US extraordinary rendition program and associated interrogation practices.[41] The European Court was the first international court to characterise the US government's use of enhanced interrogation techniques as torture in *El-Masri* v. *The Former Yugoslav Republic of Macedonia*.[42] The Court was also the first international court to cite and use parts of the Senate Intelligence Committee's

[38] For more, see Karen J. Greenberg, ed., *The Torture Debate in America* (Cambridge and New York: Cambridge University Press, 2006), 362; See also, Lisa Hajjar, *Torture: A Sociology of Violence and Human Rights* (New York; London: Routledge, 2013).

[39] Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib*, 1st edition (New York: Cambridge University Press, 2005).

[40] *Selmouni* v. *France*, application no. 25803/94, ECHR (July 28, 1999).

[41] Extraordinary rendition is a War on Terror method whereby suspected individuals would be apprehended, detained, transferred, and interrogated without due process, often in secret locations with the consent or support of foreign governments. For more on extraordinary renditions, see Jane Mayer, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program," in *The United States and Torture: Interrogation, Incarceration, and Abuse* (New York and London: New York University Press, 2011).

[42] These cases are *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, application no. 39630/09, ECHR[GC] (December 13, 2012); *Al-Nashiri* v. *Poland*, application no. 28761/11, ECHR (July 24, 2014); *Husayn (Abu Zubaydah)* v. *Poland*, application no. 7511/13, ECHR (February 16, 2015); *Nasr and Ghali* v. *Italy,* application no. 44883/09, ECHR (February 23, 2016); *Al-Nashiri* v. *Romania*, application no. 33234/12, ECHR (May 31, 2018); *Abu Zubaydah* v. *Lithuania*, application no. 46454/11, ECHR (May 31, 2018).

report investigating the CIA's treatment of detainees during the War on Terror between 2001 and 2006.[43]

Third, the European Court's rich jurisprudence allows one to observe the full extent of the prohibition of torture and inhuman or degrading treatment.[44] This diverse jurisprudence has been formed in light of political events ranging from counterterrorism operations in Northern Ireland, Turkey, and Chechnya, to Europe's recent migration crisis. More recently, the Court has also issued judgments establishing states' positive obligations to investigate racially motivated police violence or to protect victims of domestic abuse from their perpetrators. However, the expansion of the norm's meaning has not always been a smooth process. The European Court has been intermittently challenged by different waves of political pushback since its inception. As a result, the Court often felt the need to (re-)negotiate its role and the scope of its functions with member states. The following chapters present an empirically rich analysis of how these instances of negotiations and tactical balancing have left their mark on the way the norm against torture developed. They also evaluate the repercussions of formally or informally controlling courts and the normative consequences of pushback, backlash, and resistance against international courts.

Charting the Transformation of the Norm against Torture and Inhuman or Degrading Treatment

Between Forbearance and Audacity maps out how the scope of the norm against torture has transformed through the Court's jurisprudence over nearly five decades. My analysis of the case law shows that this expansion was a result of two developments. First, beginning in the late 1970s, the Court started lowering the thresholds of severity required to establish a violation under Article 3. The criteria used to assess complaints became

[43] Senate Select Committee on Intelligence and Dianne Feinstein, *The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (Brooklyn: Melville House, 2014).

[44] For doctrinal analyses on the extent of this prohibition, see for example, Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*; Elaine Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (London: Routledge, 2018); Eva Brems and Janneke Gerards, eds., *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2014).

even more inclusive in the late 1990s. Second, the Court imposed new state obligations in the late 1990s. These new obligations, also known as positive obligations, had not traditionally been associated with the prohibition of torture or inhuman or degrading treatment. The case of Nahide is an example of this foundational change.

This norm's transformation has generated practical effects for the victims (i.e., the rights holders) and states (i.e., the duty bearers). It has revolutionised how we understand what states are responsible for and who can claim to be protected under this prohibition. The introduction of positive obligations means that states are now legally obliged to take a variety of resource-intensive progressive measures. They are expected to take steps to *prevent* violations before they occur and to *rectify* the harm done to the victims afterward. This includes passing legislation to protect domestic violence victims and offering them appropriate remedies, improving the conditions of detention facilities, and training law enforcement officers.

New victim groups have benefited from this foundational change in the norm. Traditionally, the norm covered victims of interrogative torture or ill-treatment, such as prisoners or terrorist suspects. The norm's transformation opened avenues to justice for new victim groups, such as the relatives of disappeared persons or detained migrants who spend long stretches of time in government-run detention facilities. Moreover, this expansion helped turn the spotlight on other victims needing protection from private actors, such as domestic violence survivors like Nahide, or disabled persons in privately run institutions. Indeed, more and more victim groups began seeking protection under this strong prohibition, whose violation has long been considered a source of embarrassment for states.[45] *Between Forbearance and Audacity* explains how we got here and what was at stake in generating this foundational legal change in Europe.

The book examines torture *together* with other forms of inhuman or degrading treatment. It, therefore, differs from most contemporary accounts of torture that primarily focus on torture under interrogation, particularly as a part of War on Terror policies.[46] In most of these

[45] Interview 28.

[46] Alfred W. McCoy, *Torture and Impunity: The U.S. Doctrine of Coercive Interrogation* (Madison, Wisconsin: The University of Wisconsin Press, 2012); Douglas A. Johnson, Alberto Mora, and Averell Schmidt, "The Strategic Costs of Torture," *Foreign Affairs* (2017); Andrea Liese, "Exceptional Necessity – How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment When Countering Terrorism Special Issue – Contested Norms in International Relations," *Journal of International Law and International Relations*, no. 1 (2009): 17–48.

accounts, torture is seen as an extraordinary act incompatible with democratic governance and so is treated "as a separate, universally prohibited, egregious form of conduct."[47] There is a special stigma attached to torture as it reminds us of "the violent images from the premodern past," such as "the crucifixion by the Romans, the Inquisition [or] the Salem witch trials."[48] Nevertheless, there is a discontinuity between such torturous practices and the way torture is employed today. Torture is now more "clean" and much closer to other methods of ill-treatment.[49] Therefore, torture is not an isolated incident reserved only for extraordinary circumstances.[50] It is a classic tool in "the continuum of violent state practices" and has a natural link to other forms of inhuman or degrading treatment.[51]

In order to fully understand torture as a phenomenon with more varied implications, it is more appropriate to examine it together with other types of ill-treatment, some of which are newly acknowledged in cases like Nahide's. The debate on torture should therefore be broader.[52] It should include, for example, non-interrogative forms of torture and ill-treatment as well as states' obligations to prevent torture and to provide legal remedies. In a similar vein, the debate should also cover new victim groups recognised under this norm, such as minors, domestic violence victims, relatives of disappeared individuals, or irregular immigrants at detention centres.

This is how several of the UN Special Rapporteurs on Torture and the UN Committee against Torture have approached the topic. For example, former Special Rapporteur Sir Nigel Rodley maintained in his 2001 report that "the question of racism and related intolerance, which he believes

[47] Parry, *Understanding Torture*, 12.

[48] Robert M. Pallitto, *Torture and State Violence in the United States: A Short Documentary History*, 1st edition (Baltimore: Johns Hopkins University Press, 2011), 6.

[49] Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2009); Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (Ann Arbor: University of Michigan Press, 2009).

[50] Rebecca Gordon, *Mainstreaming Torture: Ethical Approaches in the Post-9/11 United States* (Oxford and New York: Oxford University Press, 2014); Parry, *Understanding Torture*; Tobias Kelly, *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty* (Philadelphia: University of Pennsylvania Press, 2012).

[51] Parry, *Understanding Torture*, 12.

[52] This rich debate includes several important works on interrogative torture such as Shane O'Mara, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Cambridge, MA: Harvard University Press, 2015); Paul Lauritzen, *The Ethics of Interrogation: Professional Responsibility in an Age of Terror* (Washington, DC: Georgetown University Press, 2013); McCoy, *Torture and Impunity*; Johnson, Mora, and Schmidt, "The Strategic Costs of Torture"; Liese, "Exceptional Necessity"; John W. Schiemann, *Does Torture Work?* (Oxford and New York: Oxford University Press, 2018).

is all too relevant to issues falling within his mandate."[53] Former Special Rapporteur Manfred Nowak emphasised in his 2010 report that "among detainees, certain groups are subject to double discrimination and vulnerability, including aliens and members of minorities, women, children, the elderly, the sick, persons with disabilities, drug addicts, and gay, lesbian and transgender persons."[54] This point was also raised in the Committee against Torture's General Comment No.2. The Committee highlighted that "being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status, etc., to determine the ways that women and girls are subject to or at risk of torture or ill-treatment."[55]

Former Special Rapporteur Juan Méndez, an Argentinian lawyer who was a victim of torture during Argentina's military dictatorship,[56] called for recognizing "abuses in healthcare settings as torture and ill-treatment."[57] In his 2013 report, he stressed that abuses in healthcare facilities should be examined through the lens of the prohibition of torture and inhuman or degrading treatment since this would help better understand these violations and identify relevant state obligations.[58] Former Special Rapporteur Nils Melzer has adopted a similar approach to domestic violence.[59] He underlined that domestic violence is a form of inhuman or degrading treatment that amounts to torture when it involves "the intentional and purposeful or discriminatory infliction of severe pain or suffering on a powerless person."[60]

This call for a broader approach, endorsed by international authorities alongside the European Court, is not to trivialise or normalise torture. Rather, it is to point out that concentrating *only* on interrogative torture

[53] Sir Nigel Rodley, Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *A/56/156* (July 3, 2001).

[54] Manfred Nowak, Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, A/HRC/13/39 (February 9, 2010).

[55] UN Committee against Torture, General Comment No. 2, *CAT/C/GC/2* (January 24, 2008)

[56] For an account of Mendez's personal experience and work for progressing human rights, see Juan E. Méndez and Marjory Wentworth, *Taking a Stand: The Evolution of Human Rights* (New York: Palgrave Macmillan, 2011).

[57] Juan E. Méndez, Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *A/HRC/22/53* (February 1, 2013).

[58] Ibid.

[59] Nils Melzer, "Relevance of the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Context of Domestic Violence," *A/74/148* (July 12, 2019).

[60] Ibid., p. 19 §62.

implies that other forms of ill-treatment are somehow less problematic and, at times, even acceptable. Focusing on the exceptional makes us lose sight of the mundane. As this book will show, there are a host of other issues that deserve to be discussed in the context of the prohibition of torture and inhuman or degrading treatment.[61] In addition, as this book shows, the types of punishment considered inhuman or degrading treatment by today's standards could very well fall under the category of torture in the future. As Tobias Kelly explains, torture is not a neutral term; rather, it is a "historically contingent" category reproduced by legal and medical professionals and bureaucrats.[62] *Between Forbearance and Audacity* examines the transformation of torture and inhuman or degrading treatment as historically contingent legal categories within the European human rights regime.

Toward a Theory of Court-Effectuated Legal Change

Methodological Approach

In order to analyze what this norm is made of, and when and how much it changed over time, I have studied its transformation using a mixed-method approach that combines social science methods and legal analysis. To trace how the norm's coverage expanded, I have relied on content analysis of all Article 3 judgments issued between 1967 and 2016 – amounting to 2,294 judgments.[63] When carrying out this analysis, I read and analyzed every decision regardless of its importance. This approach differs from traditional legal analysis, whereby a few landmark decisions are duly analyzed. Instead of treating the prohibition of torture and inhuman or degrading treatment as a single unit of analysis, I recorded the different obligations that each judgment concerned. That is, I have disaggregated the norm into its constituent obligations and analyzed change by taking obligations as a reference. What is novel about this approach is that it shows not only what a specific norm is made of, but also how much it has changed.

[61] Having said this, important works exist that explore interrogative torture and why it does not work. Schiemann, *Does Torture Work?*; O'Mara, *Why Torture Doesn't Work*.

[62] Kelly, *This Side of Silence*, 14.

[63] I have only looked at the final rulings, in order to avoid overrepresenting certain claims in the dataset. For example, if there was an appeal to a ruling, then I only looked at the appeal. Similarly, I focused on the European Court rulings over the decisions of the European Commission except in instances where the cases were never referred to the Court. Of the cases analyzed, the European Court issued 2,270 rulings. In addition, I analyzed 24 decisions that were issued by the European Commission and not reviewed by the Court.

Employing content analysis, I carefully documented all the distinct obligations falling under the norm and determined when they appeared on the scene. I then used the information I gathered through content analysis to create an original dataset on the Court's Article 3 jurisprudence. Running analyses with this dataset, I could isolate each obligation and trace their developmental tracks separately. This has revealed when, how fast, and how much the norm changed. I have also used this analysis to assess the directionality of the change and whether the Court is uniformly or selectively progressive about obligations falling under the same norm.

I supported the insights I gathered from this large-N analysis with an in-depth reading of select judicial decisions and elite interviews. First, the legal analysis helped me refine this general account by zooming into specific and important judgments. Second, the insights gathered from expert interviews contributed to creating a framework of analysis that explains what motivated the Court to issue audacious rulings or adopt a forbearing attitude to accommodate member states' interests. In 2014 and 2015, I conducted thirty-six semi-structured interviews with experts in and around the Court. I adopted a purposive sampling approach to ensure that the insights from all the relevant experts were included in my analysis.[64] My interviewees consisted of current and former judges, law clerks working for the Court's Registry, representatives of civil society groups, and lawyers who brought cases before the Court. While the majority of interviews took place in Strasbourg, France, I also spoke with experts in Geneva and Bern, Switzerland; London and Essex, the United Kingdom; Copenhagen, Denmark; and İstanbul, Turkey.

The Framework of Analysis

Although international courts may appear neutral bodies, they often have multiple motivations and divergent concerns. These range from ensuring compliance with rulings to maintaining the stability of the regime and continuous access to material and ideational resources, such as funding or reputation.[65] These concerns, or a combination of them, influence how international courts behave and, ultimately, the outcome of their

[64] Oliver C. Robinson, "Sampling in Interview-Based Qualitative Research: A Theoretical and Practical Guide," *Qualitative Research in Psychology* 11, no. 1 (2014): 32.

[65] Leslie Johns, *Strengthening International Courts: The Hidden Costs of Legalization* (Ann Arbor: University of Michigan Press, 2015).

decisions.[66] For example, based on its mandate, the European Court can be described as a "community-serving" human rights court.[67] Its primary motivation should therefore be upholding and advancing rights protected under the Convention. However, at the same time, it is an institution with conservative origins.[68] It has certain organizational needs,[69] such as obtaining funding, securing respect for its decisions, and maintaining legitimacy in the eyes of its member states and the international community.[70]

How do these competing motivations or concerns influence the Court's behaviour? I argue that this complexity has compelled the Court to oscillate between audaciously expanding the definitions under the Convention and showing forbearance and considering states' sensitives. While the former behaviour is a manifestation of the Court's progressive mandate and intentions, the latter is prompted by the need for political expediency. Law develops in between these tactical moves. It is practically impossible to understand what motivates such moves without considering the Court's institutional characteristics and its relation to member states and the broader legal community. There is therefore a strong link between the transformation of the norm and the transformation of the institution that effectuates this process. This book sets out to explain this link. It traces the norm against torture and inhuman or degrading treatment and how it has been shaped by the institutional transformation of the European Court over five decades.

Theoretical Expectations

International courts are situated in a political context, where they interact with various stakeholders. In this configuration, they are particularly attuned to their relationship with member states. States have such a prominent role because they not only enforce court decisions and uphold

[66] For an account of different political and institutional pressures that shape judicial behavior see, Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1986); Diana Kapiszewski, "Tactical Balancing: High Court Decision Making on Politically Crucial Cases," *Law and Society Review* 45, no. 2 (2011): 471–506.

[67] Fuad Zarbiyev, "Judicial Activism in International Law – A Conceptual Framework for Analysis," *Journal of International Dispute Settlement* 3, no. 2 (2012): 247–78.

[68] Duranti, *The Conservative Human Rights Revolution*.

[69] Kapiszewski, "Tactical Balancing," 471–506.

[70] For more on the court legitimacy, see Harlan Grant Cohen et al., eds., *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018); Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification," *European Journal of International Law* 23, no. 1 (2012): 7–41.

courts' legitimacy, but they also provide courts with funding, resources, and personnel.[71] International tribunals are dependent on states; this dependency "endows courts with authority while also making them reliant on states for material, procedural and normative support."[72] As a result, international courts "wield *interdependent* lawmaking power" and are influenced by the preferences of states and other actors.[73] Therefore, they behave strategically to balance their objectives with the expectations of other actors, especially states.[74]

The importance of states is a source of fragility for international courts. This is because, unlike domestic courts, international courts do not channel government power or unconditional support. Instead, international courts come with a sovereignty cost that states might contest, especially if it grows over time.[75] This cost could be even higher for courts that receive complaints brought by individuals against member states, as is the case for the European Court. In order to balance the costs while cultivating and maintaining state support, courts may occasionally offer trade-offs or turn to judicial avoidance.[76] This might mean overriding their organizational imperative to suit state preferences or not using their institutional prerogatives to the maximum to signal that they can function at a lower-sovereignty cost.[77] In a way, international courts may need to negotiate their continued existence, relevance, and reputation.

[71] Andreas Follesdal, "Survey Article: The Legitimacy of International Courts," *Journal of Political Philosophy* 28, no. 4 (2020): 2.

[72] Courtney Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts* (Cambridge and New York: Cambridge University Press, 2021), 36.

[73] Tom Ginsburg, "Bounded Discretion in International Judicial Lawmaking," *Virginia Journal of International Law* 45, no. 3 (2005): 633.

[74] Ibid., 657–58.

[75] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 437.

[76] Miles Jackson, "Judicial Avoidance at the European Court of Human Rights: Institutional Authority, the Procedural Turn, and Docket Control," *International Journal of Constitutional Law* 20, no. 1 (2022): 112–140.

[77] Emilie M. Hafner-Burton, Edward D. Mansfield, and Jon C. W. Pevehouse, "Human Rights Institutions, Sovereignty Costs and Democratization," *British Journal of Political Science* 45, no. 1 (2015): 1–27. Mikael Rask Madsen explains how the European Court has re-negotiated its sovereignty cost to ensure that it would not pose a significant threat to the contracting states' sovereignty. For more see, Mikael Rask Madsen, "Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 56–57.

Jeffrey Dunoff and Mark Pollack successfully demonstrate some of the trade-offs that international courts face.[78] They explain that courts cannot be highly accountable, transparent, and independent at the same time. High judicial accountability (i.e., subjecting judges to periodic assessment and reappointment) and high judicial transparency (i.e., compelling judges to write separate opinions) mean there is less emphasis on judicial independence.[79] Shai Dothan is another scholar that evaluates such judicial strategies. Inspired by game theory, Dothan proposes a framework to investigate court tactics intended to ensure member state compliance with their judgments. Dothan essentially argues that courts must first make strategic moves to improve their reputation. Only after a positive reputation has been established can an international court afford to risk issuing onerous judgments and still expect to secure compliance.[80]

In a similar vein, an international court might strategise to balance its core functions with its need to gain member state support and preserve its reputation.[81] As Nuno Garoupa and Tom Ginsburg argue, maintaining a good judicial reputation in the eyes of multiple audiences (i.e., states, the legal community, academia, etc.) is a condition for courts to be effective.[82] This requires careful balancing. Court incentives to push forward long-term progressive change in International Law might be interrupted by the short-term necessity of holding back to accommodate member state interests. While pushing forward may increase a court's reputational capital in the eyes of the international legal community, its reputational credit may simultaneously be depleted in the eyes of member states. In order to ensure member states' continued support, a court may choose to issue "unadventurous" decisions that accommodate state interests – bolstering the Court's reputation and replenishing its future credit.[83] Even if

[78] Jeffrey L. Dunoff and Mark A. Pollack, "The Judicial Trilemma," *American Journal of International Law* 111, no. 2 (2017): 227.

[79] Ibid. 238.

[80] Shai Dothan, "Judicial Tactics in the European Court of Human Rights," *Chicago Journal of International Law* 12, no. 1 (2011); Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts*, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2014).

[81] Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago: University of Chicago Press, 2015), 2.

[82] Ibid., 2–4.

[83] For example, Miles Jackson calls for judicial avoidance to shield the Court from a potential political pushback. For more, see Jackson, "Judicial Avoidance at the European Court of Human Rights," 28.

this relationship may appear to be transactional, it also contributes to the overall mission of maintaining the Court's image as a legitimate authority "that can rightly influence or constrain [states'] political discretion."[84]

In order to account for the prominence and consequences of trade-offs influencing the Court's changing attitudes, I rely on the concepts of audacity and forbearance. I define audacity as using "one's institutional prerogatives in an unrestrained way" and forbearance as abstaining from doing so.[85] This definition is built upon the concept of forbearance introduced by Alisha Holland,[86] as well as Steven Levitsky and Daniel Ziblatt, who use Holland's definition.[87] In her groundbreaking book, Holland defines forbearance as "intentional and revocable government leniency toward violations of the law" and distinguishes forbearance from weak enforcement that oftentimes results from lack of capacity.[88] Instead, she characterises forbearance, the under-utilisation of one's institutional power, as a "political choice" and argues that governments resort to forbearance to appeal to poor voters.[89] Developed, thus, to understand domestic processes, the concept of forbearance helps one capture how governments further their electoral interests while also meeting some of their poor constituencies' distributive demands.[90]

I argue that the main logic behind this concept is applicable to international courts that are also sometimes willing to underutilise their powers to appeal to states as their main constituencies and meet their redistributive claims. Moreover, building upon this concept, I argue that forbearance has an antithesis: audacity. While under-utilising one's authority is a political choice, so is over-utilizing it. That is to say, audacity is also a strategy and not just a natural tendency. I chose to use *forbearance* together with *audacity* to capture tactical balancing that takes place in the course of supranational legal review.

[84] Andreas Follesdal, Johan Karlsson Schaffer, and Geir Ulfstein, "International Human Rights and the Challenge of Legitimacy," in *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives*, ed. Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013), 4.

[85] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishing, 2018), 63. Their definition of forbearance is borrowed from Alisha Holland, *Forbearance as Redistribution: The Politics of Informal Welfare in Latin America* (Cambridge: Cambridge University Press, 2017).

[86] Holland, *Forbearance as Redistribution*.

[87] Levitsky and Ziblatt, *How Democracies Die*.

[88] Holland, *Forbearance as Redistribution*, 13.

[89] Alisha C. Holland, "Forbearance," *American Political Science Review* 110, no. 2 (2016): 233.

[90] Holland, *Forbearance as Redistribution,* 15–17.

International courts may choose to use their institutional prerogatives in an audacious way by pronouncing progressive decisions, regardless of how such decisions impact state interests. Alternatively, they may resort to forbearance and not fully use their institutional prerogatives in order to win over state support. I identify these two behaviour types as strategies for institutional survival and resilience – employed at measured doses and appropriate intervals suitable to maintaining an institution's image and ensuring its continued access to resources.

I measure the degree of audacity and forbearance in reference to two observations. The first is the willingness to recognise new obligations or new rights (*novel claims*); the second is the propensity for finding a violation overall (*propensity*). I argue that a higher rate of accepting novel claims and a higher rate of propensity to find states in violation are signs of audacity. International courts' recognition of novel claims requires a high degree of audacity since they not only recognise these claims as legally valid claims but also lower the thresholds to find a violation in the future.[91] In other words, the first violation rulings that accept novel claims are costlier than subsequent rulings that simply build on them as precedents. Although there is no clear rule recognizing the authority of judicial precedents in International Law, invoking existing precedents helps increase the legitimacy of legal reasoning and conclusions.[92] In a similar fashion, finding states in violation at a higher rate calls for judicial courage and demonstrates a given court's audacity.[93] While audacious courts will have a higher score for both of these measures, forbearing courts will have a lower score. By implication, while audacity expands the protections offered to the victims, forbearance leads to retractive rulings reversing this expansion or upholding the status quo.

To be sure, forbearance and audacity are not the only strategies expected from institutions. Theoretically, courts may also refuse to perform their mandate (dereliction) or go beyond it (excess or *ultra-vires*). However, these two types of behaviour take place outside of the courts' delegated zone of discretion. Dereliction occurs when an institution intentionally does

[91] Ezgi Yildiz et al., "New Norms in Old Regimes: Judicial Strategies for Importing Environmental Norms," *Unpublished Manuscript*, 2022.

[92] Harlan Cohen, "Theorizing Precedent in International Law," in *Interpretation in International Law*, ed. Andrea Bianchi, Daniel Behn, and Matthew Windsor (Oxford: Oxford University Press, 2015), 268–89.

[93] Scholars take no violation rulings as a sign of restraint. See for example Øyvind Stiansen and Erik Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights," *International Studies Quarterly* 64, no. 4 (2020): 770–84.

not deliver its mandate, whereas excess refers to an institution's overuse of its powers. In other words, dereliction describes an actor's choice not to do what they must, and excess concerns an actor's choice to do what they must not. In this book, I will only be focusing on audacity and forbearance as types of behaviour that fall within the competence of courts and other institutions without creating serious legitimacy concerns.

Audacity and forbearance bear a resemblance to what legal scholarship identifies as judicial activism and judicial restraint. Judicial activism is often associated with courts going beyond applicable law "in a way that furthers social justice" or the prescription of "non-traditional remedies aimed at ameliorating social problems."[94] Judicial restraint, on the other hand, suggests that the judiciary assumes a more limited and deferential role. The proponents of judicial restraint argue that judges should respect the executive and legislative branches and minimise their interference.[95] While judicial activism portrays judges as norm entrepreneurs, judicial restraint views them as neutral arbiters.

There is conceptual compatibility between judicial activism/restraint and audacity/forbearance, yet I have chosen to use the latter pair for three reasons. First, the concepts of judicial activism and restraint explain judicial behaviour based on judges' worldviews, attitudes, and convictions about their role and the scope of their powers.[96] They are more about fixed attributes and less about strategies.[97] As we will see in this book, international courts, like the European Court, may not have a uniform or static vision about how to treat a certain claim. Their attitudes may change based on the characteristics and the salience of the subject matter, as well as the requirements of political expediency at the time.

Second, and relatedly, judicial activism and restraint concepts do not fully capture the institutional and relational dynamics unique to international courts. While they are suitable for studying judicial philosophies on a granular level (micro level), often with reference to judges'

[94] Stephen Breyer, "Judicial Activism: Power without Responsibility?," in *Judicial Activism: Power without Responsibility?*, ed. Benjamin Kiely (Melbourne: The University of Melbourne, 2006), 72.

[95] J. Clifford Wallace, "Jurisprudence of Judicial Restraint: A Return to the Moorings," *George Washington Law Review* 50, no. 1 (1981): 8.

[96] Stefanie A. Lindquist and Frank B. Cross, *Measuring Judicial Activism* (Oxford University Press, 2009); Frank B. Cross and Stefanie A. Lindquist, "The Scientific Study of Judicial Activism," *Minnesota Law Review* 91, no. 6 (2007): 1752–84.

[97] I have argued this point elsewhere. For more, see Ezgi Yildiz, "A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights," *European Journal of International Law* 31, no. 1 (2020).

self-identification,[98] their explanatory power diminishes at the organizational level (meso-level). International courts' compositions are different from domestic courts. The influence of international judges elected for limited terms is more diffuse, as we will see in Chapter 2.[99] Permanent legal staff, partaking not only in legal review but also in prioritizing institutional objectives and storing institutional memory, play an important role. The members of the secretariat and other permanent staff are also concerned with "the long-term health" and the "integrity and reputation" of the institution.[100] Hence, their input and the influence of the courts' common institutional culture should also be considered when analyzing judicial strategies.

Third, the concepts of forbearance and audacity are more generalizable. While judicial activism and restraint were developed to examine only the judiciary, forbearance and audacity may explain the strategies of actors or organizations beyond the judiciary. Engaging in politics of institutional resilience is something international courts and other international organizations with delegated authority have in common. The concepts of forbearance and audacity help answer the questions about how organizations balance their institutional imperatives while also attempting to avoid political pushback or backlash. They thus enable studying international courts in comparison to, or in conjunction with, other organizations.

Determinants of Forbearance and Audacity

As this book makes clear, international courts need an important quality to be audacious: a large discretionary space. Discretionary space (or zone of discretion) represents the freedom of choice that an institution enjoys *above what it must do* (dereliction) and *below what it must not do* (excess).[101] Figure I.1 displaces the scope of the discretionary space as well as the location of my key concepts within this space:

[98] Geoffrey R. Stone, "Selective Judicial Activism," *Texas Law Review* 89, no. 6 (2011): 1423.

[99] It is difficult, if not impossible, to trace the impact of individual judges on norms' interpretative evolution, which is embedded in the broader sociopolitical context. For more, see Ezgi Yildiz, "Interpretative Evolution of the Norm Prohibiting Torture and Inhuman or Degrading Treatment under the European Convention," in *Language and Legal Interpretation in International Law,* ed. Anne Lise Kjaer and Joanna Lam (New York: Oxford University Press, 2022), 295–314.

[100] David D. Caron, "Towards a Political Theory of International Courts and Tribunals," *Berkeley Journal of International Law* 24, no. 2 (2006): 24.

[101] Alec Stone Sweet and Thomas L. Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization," *Journal of Law and Courts* 1, no. 1 (2013): 65.

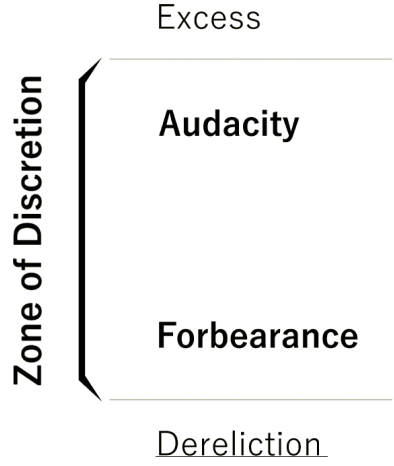

Figure I.1 Representation of zone of discretion

Theoretically, the bounds of this space are defined by formal rules, and within this space, courts have the liberty to decide as they wish – without venturing into excess and dereliction. But, in practice, are international courts truly free to choose their own interpretive preferences within their zone of discretion?

According to the existing scholarly works, institutions with an expansive discretionary space, such as constitutional courts, tend to generate "sweeping outcomes that are frequently unanticipated."[102] That is to say, when an international court's zone of discretion is wide, it can be audacious across the board. Yet, when this zone is narrow, or there is a credible threat that this zone may shrink, it ought to be careful not to undermine state interests.[103] My theoretical framework follows a similar logic. When international courts' zone of discretion is narrow, they lean toward forbearance to signal that their operations have low sovereignty costs. They tend to issue forbearing rulings overall while being selectively audacious. In such instances, the issue characteristics matter more. While courts will not be motivated to venture into progressive understandings that conflict

[102] Mark Thatcher and Alec Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions," *West European Politics* 25, no. 1 (2002): 16.

[103] Such credible threats may only materialise when member states unite under the objective of court-curbing. Karen J. Alter, "Agents or Trustees? International Courts in Their Political Context," *European Journal of International Relations* 14, no. 1 (2008): 37.

Table I.1 *Expectations regarding court responses to changes in discretionary space and negative feedback*

		Widespread negative feedback	
		Yes	No
Discretionary space	Narrow	General forbearance (1)	Selective audacity (2)
	Wide	Selective forbearance (3)	General audacity (4)

with state interests, they may still pronounce certain right-expansive rulings concerning matters of low salience to states. By doing so, they build confidence, and perhaps in the future, they will be given a larger discretionary space. On the contrary, courts with wide discretionary space may act audaciously across the board unless there is a risk that their operations will spur negative feedback or backlash, which in extreme situations, may also shrink their discretionary space.

Hence, in addition to the breadth of discretionary space, negative political feedback matters. As the literature explains, courts may be influenced by political signals, public opinions, or "policy moods."[104] Instead of direct control, states may indirectly control courts through "feedback politics."[105] Negative feedback is often geared toward "communicating dissatisfaction,"[106] and, in extreme cases, signalling state intent to undermine a given court's authority,[107] or which scholars of domestic judicial politics identify as "court curbing."[108] Negative feedback is a sustained criticism that goes beyond isolated outcries. When negative feedback is widespread, voiced by multiple member states or states that normally constitute a court's support base, the need for forbearance increases.

Table I.1 outlines how international courts are expected to behave based on their discretionary space and the negative feedback they receive.

[104] Laurence R. Helfer and Erik Voeten, "Walking Back Human Rights in Europe?," *European Journal of International Law* 31, no. 3 (2020): 802; Richard Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," American Journal of International Law 98, no. 2 (2004): 247–75; Garoupa and Ginsburg, *Judicial Reputation*.

[105] Daniel Abebe and Tom Ginsburg, "The Dejudicialization of International Politics?," *International Studies Quarterly* 63, no. 3 (2019): 525.

[106] Ibid., 525.

[107] Hillebrecht, *Saving the International Justice Regime*, 27–30; Steinberg, "Judicial Lawmaking at the WTO," 263–64.

[108] Mark A. Pollack, "International Court Curbing in Geneva: Lessons from the Paralysis of the WTO Appellate Body," *Governance*, accessed June 5, 2022, https://doi.org/10.1111/gove.12686.

The strategies that courts can adopt vary in the degree to which they are associated with progressive attitudes – in ascending order from (1) general forbearance to (2) selective audacity, (3) selective forbearance, and finally, (4) general audacity. When international courts enjoy only a narrow discretionary space, and when they receive widespread negative feedback, they will tend toward *general forbearance*. On the contrary, when courts with limited discretionary space do not receive widespread negative feedback, they can afford to be *selectively audacious*, especially regarding noncontentious issues with lower stakes. When courts enjoy a wide discretionary space but face widespread negative feedback, they still tend to be overall audacious, but *selectively forbearing*. Their selective forbearance will be tailored to issue areas where they receive the most criticism to mitigate actual or potential political pushback and backlash. Finally, courts that enjoy wide discretionary space and that are free from widespread negative feedback can be *generally audacious*.

While these expectations are listed independently here, they might occasionally influence each other. For example, the reason why a given court has only narrow discretionary space may be the widespread negative feedback that has resulted from previous audacious behaviour. More concretely, applying these expectations to the European Court, we can surmise that when the Court has a narrow discretionary space, it will be overall forbearing; because it is forbearing, it will not face widespread negative feedback or backlash. When the Court has wide discretionary space, it will tend toward audacity. If this audacity spurs negative feedback (or backlash in extreme cases), the Court will only be selectively forbearing.

The institutional history of the European Court includes three phases and presents us with an interesting in-case variation. These phases are *the old Court* (1959–1998), *the new Court* (1998–2010), and *the reformed Court* (2010–present). Each of these distinct phases is marked by different zones of discretion and different degrees of negative feedback. The old Court is the first incarnation and covers the period until 1998 – when the European human rights system underwent an institutional transformation. The pre-1998 old Court was a part-time body working alongside the European Commission of Human Rights (the Commission) – a separate institution in charge of filtering applications from individual complainants. Member states could choose whether to accept the Court's jurisdiction or allow individuals' right to bring complaints. Hence delegation was not automatic, and the Court was not entirely in control of its docket. As a result, it could enjoy only a *narrow discretionary space*.

This model changed with Protocol 11 in 1998. A new full-time Court was created, and the Commission was abolished. Moreover, individuals gained direct access to the Court, which became a permanent body with compulsory jurisdiction. Due to these changes, the new Court began its life as a court with a *wide discretionary space*. While this institutional structure mostly stayed the same, the new Court entered into a reform phase in 2010. Member states organised a series of High-Level Conferences to discuss the future of the Court, which heralded a new era where voicing criticism and directing negative feedback became more commonplace.[109] Different from its previous versions, the post-2010 reformed Court has been confronted with *widespread negative feedback*.

This institutional transformation influenced the way the Court operated in its different incarnations. During the time of the old Court, norm development under Article 3 was overshadowed by two overarching concerns regarding member states: avoiding interference in states' national security policies and not generating resource-intensive positive obligations (some of which also required finding states liable for the conduct of private actors). Nevertheless, the old Court would pass more audacious rulings when reviewing cases concerning issues with low political stakes. Notably, the Court saved its right-expansive rulings when addressing issues around which there was already a general agreement in Europe, such as the inhumane nature of corporal punishment or the death row phenomenon.[110]

The new Court, however, became more audacious across the board after 1998. Within a span of a few years, it launched a series of resource-intensive positive obligations. It certified the absolute nature of the prohibition against torture, which cannot be justified even in self-defence. The reformed Court has not fully taken up this progressive trend. While remaining audacious overall, the reformed Court has been selectively forbearing, especially when reviewing claims related to the *non-refoulement*

[109] There is an interesting debate on the impact of this period on the Court's authority and practices. For more, see Mikael Rask Madsen, "Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights," *The British Journal of Politics and International Relations* 22, no. 4 (2020): 728–38; Helfer and Voeten, "Walking Back Human Rights in Europe?"; Alec Stone Sweet, Wayne Sandholtz, and Mads Andenas, "Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten," *European Journal of International Law* 32, no. 3 (2021): 897–906; Alec Stone Sweet, Wayne Sandholtz, and Mads Andenas, "The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018," *The Law and Practice of International Courts and Tribunals* 21, no. 2 (2022): 244–77.

[110] The term refers to the emotional stress felt by prisoners waiting to be executed.

principle (i.e., cases about forcing refugees and asylum seekers to return to a country where they may face torture and inhuman or degrading treatment).

This differential treatment indicates that the main driver behind the Court's selective forbearance might not be the election of more state-friendly judges. Such a cohort would issue forbearing rulings across the board. Rather, the differential treatment of the *non-refoulement* principle directly corresponds to several European governments' requests for greater forbearance in judicial review, especially in cases concerning refugees and asylum seekers.[111] This finding calls for greater scrutiny of the reformed Court's bifurcated approach toward the norm against torture and inhuman or degrading treatment.

As Mikael Rask Madsen explains, the current elected judges sitting in the new Court and the reformed Court are different from those that served in the old Court.[112] Madsen observes that they are significantly younger, more experienced in human rights law, and less connected to politics and diplomacy in and around the Court.[113] On the surface, this might increase the audacity of a given court. However, this is not necessarily always the case with the European Court, as we will see in Chapter 7. Especially the reformed Court, the most recent incarnation of the Court, shows selective forbearance concerning politically sensitive issues (e.g., the *non-refoulement* principle) while being highly audacious when it comes to less controversial topics (e.g., curbing police brutality). This bifurcated approach indicates that the Court's audacious or forbearing tendencies may not be entirely (or only) determined by the preferences of the judges elected for limited terms, as I will discuss further in Chapter 2.

Conditions for Audacity

In addition to the importance of the width of the discretionary space and feedback politics, my findings show that the European Court's

[111] Helfer and Voeten, "Walking Back Human Rights in Europe?," 798; Laurence R. Helfer and Erik Voeten, "Walking Back Dissents on the European Court of Human Rights: A Rejoinder to Alec Stone Sweet, Wayne Sandholtz and Mads Andenas," *European Journal of International Law* 32, no. 3 (2021): 911.

[112] Mikael Rask Madsen, "The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights," in *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek (Oxford: Oxford University Press, 2015), 259–76.

[113] Ibid., 262.

audacity is likely to increase when its decisions are: (1) in line with widespread societal needs, (2) supported by legal principles and jurisprudence developed by other courts or institutions, and (3) actively promoted by civil society groups.

First, unsurprisingly, it is easier to generate change when that change reflects societal needs.[114] International courts do take societal trends into account when reviewing and adjusting existing norms, whether considering changing moral values (e.g., increased acceptance of LGBTQ communities),[115] technological advancements (e.g., the use of in vitro fertilization),[116] or new awareness around emerging crises (e.g., environmental degradation or climate change).[117] Proving a demonstrable link between a particular complaint and an emerging societal need not only creates a sense of urgency but also grants courts the social legitimacy necessary to engage in progressive change.

Second, legal developments initiated by other international treaties, courts, or expert bodies can be influential by setting precedents and establishing clear directions for change. International courts may rely on the principles exported from other treaties, decisions, or expert body reports to establish a stronger legal basis for the norm's expansion.[118] For example, when further developing the norm against torture, the European Court has often relied on the case law of the UN Committee against Torture and the reports of the Committee for the Prevention of Torture created under the European Convention for the Prevention of Torture.[119] Similarly, Nahide's case benefited from the principles set by the CEDAW and Belém do Pará Convention.

[114] See for example George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy," in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, ed. Andreas Føllesdal, Birgit Peters, and Geir Ulfstein (New York: Cambridge University Press, 2013), 106–41.

[115] See for example Laurence R. Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe," *International Organization* 68, no. 1 (2014).

[116] Lyria Bennett Moses, "Understanding Legal Responses to Technological Change of In Vitro Fertilization," *Minnesota Journal of Law, Science and Technology* 6, no. 2 (2005): 505–618.

[117] For an illustration see, Jaap Spier, "There Is No Future without Addressing Climate Change," *Journal of Energy and Natural Resources Law* 37, no. 2 (2019): 181–204.

[118] See for example Nina Reiners, *Transnational Lawmaking Coalitions for Human Rights* (Cambridge and New York: Cambridge University Press, 2021).

[119] Forowicz, *The Reception of International Law in the European Court of Human Rights*, 201–13.

Finally, civil society organizations may play an active role in generating change with what is commonly known as strategic litigation.[120] This term refers to coordinated campaigns for effecting social change by bringing exemplary cases before judicial bodies.[121] Strategic litigation includes various legal tools such as representing the applicants before courts, providing them with legal advice, or submitting observations (*amicus curiae*) on an ongoing case.[122] Civil society groups can be influential because they can bring similar cases before the same institution or before different institutions to maximise impact. This increases the chances of successfully obtaining a violation decision supporting their cause. As this book reveals, civil society organizations also benefit from three working methods: specialization, transfer of expertise, and cross-fertilization of legal standards – that is, utilization of standards developed in other legal regimes.

Contributions

The framework and the accompanying analysis provide theoretical, conceptual, and empirical contributions to the rich scholarship on international norms and judicial politics. They offer empirical evidence for, and theoretical explanation of, why and when courts generate progressive change and when they refrain from doing so. The framework developed here can be adjusted to explain delegated institutions' motivations to resort to forbearance to signal that they can operate at a lower-sovereignty cost to the states. While organizations may set their own agendas and chart their courses by occasionally even pushing the limits of their mandates, they might also consciously do the reverse to maintain their institutional reputation and secure access to resources. Unlike previous

[120] Loveday Hodson, "Activating the Law: Exploring the Legal Responses of NGOs to Gross Rights Violations," in *Making Human Rights Intelligible: Towards a Sociology of Human Rights*, ed. Mikael Rask Madsen and Gert Verschraegen (Oxford and Portland: Hart Publishing, 2013), 278; Laura Van den Eynde, "An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 31, no. 3 (2013): 271–313.

[121] James Goldston, "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges," *Human Rights Quarterly* 28 (2006): 496.

[122] See for example Catherine Corey Barber, "Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organisations," *The International Journal of Human Rights* 16, no. 3 (2012): 411–35; Rachel A. Cichowski, "Civil Society and the European Court of Human Rights," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011); Heidi Nichols Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (New York: Cambridge University Press, 2018).

studies on judicial behavior, the framework works on the meso-level. It assesses judicial behaviour not only as an expression of the preference of the judges elected for a limited term, but instead as an institutional strategy adopted by all members of the judicial elite at the Court.[123]

In addition, the book presents an analysis of the development of the prohibition of torture and inhuman or degrading treatment and the judicial motivations shaping this process. By demonstrating what this norm entails and how much its contents have changed over time, the book helps identify the pace and magnitude of legal change. This empirically rich assessment complements existing doctrinal analysis on the European Court[124] and its jurisprudence on the prohibition of torture and inhuman or degrading treatment,[125] and in particular positive obligations.[126] However, the relevance of this close-up analysis goes beyond the specialised debate on the European Court or its jurisprudence by offering insights for audiences interested in understanding the development of international norms and law and the role of international courts in this regard in three key ways.

First, the findings presented here have broader implications for the literature on international norms. They showcase the importance of courts and court-like bodies in norm development and transformation.[127]

[123] See for example Erik Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights," *American Political Science Review* 102, no. 4 (2008): 417–33.

[124] See for example Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (Cambridge: Cambridge University Press, 2021); Jens T. Theilen, *European Consensus between Strategy and Principle* (Baden-Baden: Nomos Publishers, 2021); Alastair Mowbray, "Subsidiarity and the European Convention on Human Rights," *Human Rights Law Review* 15, no. 2 (2015): 313–41; Steven Greer and Luzius Wildhaber, "Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights," *Human Rights Law Review* 12, no. 4 (2012): 655–87.

[125] See for example Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*; Corina Heri, *Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR* (Gordonsville: Hart Publishing, 2021); Lutz Oette, "The Prohibition of Torture and Persons Living in Poverty: From the Margins to the Centre," *International and Comparative Law Quarterly* 70, no. 2 (2021): 307–41; Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law*.

[126] See for example Felix E Torres, "Reparations: To What End? Developing the State's Positive Duties to Address Socio-Economic Harms in Post-Conflict Settings through the European Court of Human Rights," *European Journal of International Law* 32, no. 3 (2021): 807–34; Stoyanova, "Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights"; Lavrysen, *Human Rights in a Positive State*.

[127] For other studies on norm change see, Wayne Sandholtz, "International Norm Change," *Oxford Research Encyclopedia of Politics*, June 28, 2017, https://doi.org/10.1093/acrefore/9780190228637.013.588; Wayne Sandholtz and Kendall W. Stiles, *International*

In norms literature, courts are often not portrayed as norm entrepreneurs. This could be because they are viewed as neutral bodies only able to react when activated or as lacking the proactiveness that norm entrepreneurs like states, non-state actors, or individuals may possess.[128] However, as we see in this book, international courts are actors of a complex nature, driven by multiple (and not always compatible) motivations, and they can show proactiveness when the conditions are right.

Moreover, courts are uniquely positioned to effectuate rule modification, and they play a significant role in consolidating meaning and resolving norm collisions.[129] International courts not only solve legal disputes but also serve as venues where abstract norms are discussed, negotiated, and grounded as legal standards. Therefore, it is essential to understand what prompts courts to adopt progressive agendas and what encourages them to display reticence instead.

Second, the framework introduced here contributes to the legal scholarship and the literature on international courts.[130] It offers conceptual tools to analyze what motivates courts to either effectuate progressive legal change or refrain from doing so. It also allows a glimpse of how courts operate under normal circumstances versus how they balance their priorities when under pressure. This inquiry carries particular importance today amidst a wave of backlash against liberal-leaning international institutions. As the guardians of international norms, international courts have had their fair share of resistance and pushback.[131] This book elucidates the precursors and implications of the recent backlash against the

Norms and Cycles of Change (Oxford and New York: Oxford University Press, 2008); Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887–917.

[128] Harald Müller and Carmen Wunderlich, eds., *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (Athens and London: University of Georgia Press, 2013).

[129] Druscilla Scribner and Tracy Slagter, "Recursive Norm Development: The Role of Supranational Courts," *Global Policy* 8, no. 3 (2017): 322–32; Tobias Berger, *Global Norms and Local Courts: Translating the Rule of Law in Bangladesh* (Oxford and New York: Oxford University Press, 2017). See also, Sassan Gholiagha, Anna Holzscheiter, and Andrea Liese, "Activating Norm Collisions: Interface Conflicts in International Drug Control," *Global Constitutionalism* (2020) 9, no. 2, 1–28.

[130] See for example Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford and New York: Oxford University Press, 2012); Helfer and Voeten, "International Courts as Agents of Legal Change," 77–110; Laurence R. Helfer and Karen J. Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts," *Theoretical Inquiries in Law* 14, no. 2 (2013): 479–503.

[131] See for example Voeten, "Populism and Backlashes against International Courts," 1–16; Madsen, Cebulak, and Wiebusch, "Backlash against International Courts," 197–220.

European Court and provides insights into how backlash permeates institutions, shapes their preferences, and hinders progressive agendas.

Third, the empirical analysis of the transformation of the norm against torture and inhuman or degrading treatment reveals what human rights entail and what legal change implies. On the surface, a norm such as the prohibition of torture and inhuman or degrading treatment remains the same over time, banning torture and other forms of ill-treatment. However, its interpretive transformation and changing standards of accountability have real-life implications for the victims (right-holders) and the states (duty-bearers).[132] The analysis presented here suggests that the debate on torture should be broader. It should include new victim groups recognised under this prohibition, such as domestic violence victims or irregular immigrants, and new state obligations, such as the provision of legal protection and remedy. However, my analysis also cautions that this normative development may not always be linear and on the increase. Progression can stall and even give way to regression.

The Structure of the Book

The Introduction lays out the building blocks of the theoretical framework, which lists the conditions under which the European Court may be expected to issue audacious rulings. This framework relies on previous literature and insights gathered from expert interviews. According to this framework, for courts like the European Court to be audacious, they need wide discretionary space. Chapter 1 introduces this concept and discusses how the boundaries of this space are determined. It also examines how states might attempt to influence the Court through negative feedback and how the Court might realign its priorities based on this feedback to preserve its institutional image and reputation and secure access to resources. Finally, the chapter introduces a range of supplementary factors that increase the likelihood of audacious rulings (i.e., changing societal needs, legal developments external to the regime, and civil society campaigns). The framework helps explain why the norm changed in the way it did and

[132] Christopher J. Fariss, "Respect for Human Rights Has Improved over Time: Modeling the Changing Standard of Accountability," *American Political Science Review* 108, no. 2 (2014): 297–318; Christopher J. Fariss, "The Changing Standard of Accountability and the Positive Relationship between Human Rights Treaty Ratification and Compliance," *British Journal of Political Science* 48, no. 1 (2018): 239–71; Christopher J. Fariss and Geoff Dancy, "Measuring the Impact of Human Rights: Conceptual and Methodological Debates," *Annual Review of Law and Social Science* 13, no. 1 (2017): 273–94.

lays out the conditions under which the Court may be audacious enough to generate progressive change in the future.

In the first part of Chapter 2, I look at the Court's inner workings and how it functions by relying on expert interviews and previous research. Expanding this assessment beyond the elected judges, I argue that the Court defines its organizational priorities as a collective body. This essentially implies that all members of the judicial elite working at the Court contribute to defining their collective purpose and determining if there is a need for tactical balancing. In the second part of the chapter, I analyze the Court's institutional structure and dynamics influencing the breadth of the Court's discretionary space over time. In particular, I give an account of the Court's institutional transformation from a part-time Court to a full-time Court in 1998 and the subsequent reform processes.

Chapter 3 explains my methodological choices and introduces my original dataset and main results. This dataset is built based on content analysis of all Article 3 judgments issued between 1967 and 2016. It specifically includes information on the responding government, the type of obligation engaged, the outcome of the ruling, and the Court's reasoning for not finding a violation. By disaggregating the norm against torture and inhuman or degrading treatment into its components, I map out different types of obligations under the prohibition of torture. I also capture the moment when positive obligations were acknowledged and record their share of the general Article 3 jurisprudence. In addition to jurisprudential mapping, I use the data gathered from this analysis to measure the degree of audacity and forbearance demonstrated by the Court in its three different incarnations.

Chapter 4 provides an overview of how the modern understanding of the norm against torture and inhuman or degrading treatment first came to be before assessing its subsequent gradual transformation under the old Court's watch. Taking the Convention drafters' stated intentions as a baseline, it traces the norm's development through several landmark judgments. Relying on legal analysis, I show that the boundaries of the norm against torture were initially limited to appease member states. The old Court could expand the norm only when it was safe to do so – that is, when stakes were low and there was an emerging consensus around an issue. This constraint influenced the way the norm against torture and inhuman or degrading treatment developed in the early days of the European human rights regime.

Chapter 5 explores how, immediately after its inception in 1998, the new Court took to progressive interpretation and generated a foundational

change in the way this prohibition is understood and applied. In particular, it takes a closer look at how the new Court introduced positive obligations and expanded the definition of this prohibition by enforcing ever-lower thresholds of severity for qualifying violations. I argue that, with these changes, the new Court reversed the compromises that the old Court made, especially regarding member states' national security concerns. Differing from the old Court, the new Court also showed a new willingness to recognise resource-intensive positive obligations and violations committed by private actors. I also discuss the areas where this progress was slower by looking at the Court's treatment of claims arising from systemic racism.

In Chapter 6, I apply my framework of analysis to explain how and why the norm against torture and inhuman and degrading treatment dramatically expanded after 1998. I look particularly at the conditions that made the new Court audacious enough to acknowledge these resource-intensive obligations. First, the Court secured a wide discretionary space after becoming a full-time court with compulsory jurisdiction. Second, it had reasons to believe that positive obligations were much needed in European societies, particularly in the aftermath of the accession of the formerly communist countries (known as the Eastward expansion). Third, introducing positive obligations was less likely to raise eyebrows as they were already established in the jurisprudence of other international courts and actively promoted by civil society groups.

In Chapter 7, I examine the current trends and the future of the norm against torture against the backdrop of recent reform initiatives and the general atmosphere of backlash since 2010. Relying on the results from my large-N analysis, insights from elite interviews, and legal analysis of some landmark rulings, I examine the reformed Court's selective forbearance and differential attitude toward different obligations under Article 3. I compare the reformed Court's recent decisions concerning the rights of irregular migrants, refugees, and asylum seekers with rulings concerning police brutality. I show that the reformed Court began to backtrack on the progressive policies developed in the late 1990s and early 2000s concerning the rights of migrants in general while increasing the standards of protection for countering police brutality, for example. This regressive trend directly corresponds to the degree of negative feedback that the Court has received from the Western European countries and indicates that the reformed Court is willing to heed member states' concerns while maintaining and improving human rights protection in other areas.

In the **Conclusion,** I revisit the key turning points in the Court's jurisprudence and unpack the reasons behind them. I also discuss the implications of the Court's varied attitudes on the norm's development and the degrees of protection it offers to victims. Finally, I discuss the applicability of the framework and associated key concepts to other studies on international courts and institutions.