7

Legal Change in Times of Backlash

Standards change over time, and the manner in which they change may take many forms. International courts play an important role in transforming norms, as I have argued in this book. They are ideally placed to refashion existing norms, adapting them to changing times and societal needs. I have shown how this change process takes place within the European human rights system. In particular, I have demonstrated how the European Court refined the norm against torture and inhuman or degrading treatment over a period of nearly five decades. My analysis of the norm's transformation in the late 1990s might leave the reader with the impression that change is only about progressive norm expansion. Yet, this book is not meant to be solely about progress or about the 1990s. Rather, my approach is meant to capture the conditions under which the Court is likely to be audacious while also telling us why progressive change is hindered – or even reversed – when these conditions change and forbearance prevails.

Forces of progressive and regressive legal change are two sides of the same coin. The dramatic progress of the 1990s was followed by stagnation and removal of certain protections, as we will see in this chapter. Member states' negative feedback was an important factor in this not-so-subtle shift. Unlike the new Court, the reformed Court's lifetime has been dominated by reform talks and widespread negative feedback. Drawing from the framework presented in the Introduction and further explained in Chapter 1, I argue that this atmosphere has contributed to the selective forbearance we observe at the reformed Court today.

Brief History of the Reform Process

In 2010, the Council of Europe kicked off a series of High-Level Conferences to discuss how to restructure the European human rights regime and address the Court's growing caseload problem. These meetings were organised at the initiative of the Swiss, Turkish, British, Belgian,

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and Danish Chairmanships of the Council of Europe. These governments not only spearheaded the conversations around reforming the Court, but also provided draft declarations and shaped the substantive contents to be discussed. Indeed, these reform proposals reflected these governments' visions for the Court.

The first of these, the 2010 Interlaken Declaration, identified the Court's backlog and unenforced judgments as threats to the European human rights regime's efficiency.[1] The İzmir Declaration, issued the following year, highlighted that national authorities should take on larger responsibilities to protect rights at the national level – also known as the subsidiarity principle.[2] The idea behind this suggestion was that ensuring rights protection at the national level would prevent the Court from being overwhelmed with applications. This message was repeated in the Brighton Declaration in 2012. The member states invited the Court "to give great prominence" to the principles of subsidiarity and margin of appreciation and to apply them consistently.[3] Similarly, the 2015 Brussels Declaration "invite[d] the Court to remain vigilant in upholding the States Parties' margin of appreciation,"[4] while the 2018 Copenhagen Declaration emphasised that national authorities have a larger role in protecting rights, introducing preventive measures, and providing effective remedies.[5]

In order to understand the collective message channeled through these declarations, let us briefly revisit what the principle of subsidiarity and the margin of appreciation doctrine mean. These two concepts, both developed by the Court itself, are directly related to the extent of the Court's power over domestic authorities.[6] The principle of subsidiarity means that national authorities have a greater responsibility in safeguarding rights

[1] High-Level Conference on the Future of the European Court of Human Rights, "Interlaken Declaration" (2010), www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf.

[2] High-Level Conference on the Future of the European Court of Human Rights, "Izmir Declaration" (2011), www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.

[3] High-Level Conference on the Future of the European Court of Human Rights, "Brighton Declaration" (April 19–20, 2012), www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

[4] High-Level Conference on the Future of the European Court of Human Rights, "Brussels Declaration" (2015), www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf.

[5] High-Level Conference on the Future of the European Court of Human Rights, "Copenhagen Declaration" (2018), www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

[6] For more, see Andreas Føllesdal, "Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights – Or Neither?," *Law and Contemporary Problems* 79, no. 2 (2016): 147–63.

and offering remedies,[7] with the European Court's role seen as supplementary and limited to providing supranational review.[8] Similarly, the margin of appreciation doctrine grants national authorities the discretion to identify appropriate measures necessary to address and remedy violations.[9] Like the subsidiarity principle, it views the European Court's role as auxiliary and allows states leeway when it comes to fulfilling their obligations under the Convention.

While all of the declarations requested "enhanced subsidiarity" – whereby the primacy of the domestic authorities' role is re-emphasised – the Brighton and Copenhagen Declarations, in particular, ventured into prescribing how the Court should operate.[10] In this regard, these two declarations reflected the discontent of the United Kingdom and Denmark, the organisers of the High-level Conferences in Brighton and Copenhagen.[11] The United Kingdom's reform vision carried a strong anti-immigration flavour. David Cameron, the then Prime Minister, announced the news of the reform at the Parliamentary Assembly of the Council of Europe by stating, "the time is right to ask some serious questions about how the Court is working." He then added that the Court should not "see itself as an immigration tribunal … [and] undermine its own reputation by going over national decisions where it does not need to."[12] The Danish

[7] The Court described the nature of this principle in the *Belgian Linguistic* case as follows: "[The Court] cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the Convention." *Belgian Linguistic Case*, application no. 1474/62;1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR (July 23, 1968), §10.

[8] Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," *European Journal of International Law* 19, no. 1 (2008): 128.

[9] Philip Leach, *Taking a Case to the European Court of Human Rights*, New Edition, 4th edition (Oxford and New York: Oxford University Press, 2017), 161–62 at 5.11.

[10] Helen Fenwick, "Enhanced Subsidiarity and a Dialogic Approach – Or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg against the UK?," in *The UK and European Human Rights: A Strained Relationship?*, ed. Katja S. Ziegler, Elizabeth Wicks, and Loveday Hodson (Oxford and Portland: Bloomsbury Publishing, 2015), 196.

[11] Lize R. Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?," *Human Rights Law Review* 20, no. 1 (2020): 121–51.

[12] David Cameron, Speech on the European Court of Human Rights. Parliamentary Assembly of the Council of Europe (January 25, 2012), available at www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights.

government shared similar concerns about immigration and deportation cases. Lars Løkke Rasmussen, then the Danish Prime Minister, stated that "In Denmark… we have a critical debate about the expansive interpretation by the European Court of Human Rights, in particular on the question of the deportation of foreign criminals. It does not resonate with the general public understanding of human rights when hardcore criminals cannot be deported."[13] As Mikael Madsen establishes in his study, Danish criticism was mostly for domestic consumption and driven by the right-wing Danish government in power at the time.[14]

Such sentiments were by no means only shared by the governments of the United Kingdom and Denmark. They also widely resonated in Switzerland, Italy, and Russia, for example. The Swiss People's Party (a right-wing populist party that received the most votes in the 2019 federal election) depicts the Court as a threat to the Swiss legal order.[15] This harsh reaction is fueled by the party's fear of a Court ruling against some of its popular initiatives, such as banning the construction of minarets and deporting criminals.[16] The party attempted to bypass the Court by putting forward a proposal that would put domestic law above International Law. Despite their efforts, this initiative was ultimately rejected by the Swiss people on November 25, 2018.[17] The Italian Constitutional Court, on the other hand, declared in a 2015 ruling that the Italian Constitution is "axiologically dominant" over the European Convention and that domestic judges should favour an interpretation that is compatible with the Italian Constitution.[18]

[13] Jacques Hartmann, "A Danish Crusade for the Reform of the European Court of Human Rights," *EJIL: Talk!* (blog), November 14, 2017, www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/.

[14] 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): 729.

[15] Tilmann Altwicker, "Switzerland: The Substitute Constitution in Times of Popular Dissent," in *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level*, ed. Patricia Popelier, Koen Lemmens, and Sarah Lambrecht (Cambridge: Intersentia, 2016), 395, http://edoc.unibas.ch/43279/.

[16] Ibid., 400.

[17] John Revil, Swiss Reject Proposal to Put Domestic Law above International Rules. *Reuters* (November 25, 2018), available at www.reuters.com/article/us-swiss-treaties/swiss-reject-proposal-to-put-domestic-law-above-international-rules-idUSKCN1NU05T.

[18] Sabato Raffaele, "Judicial Dialogue: The Experience of Italy," in *Judicial Dialogue and Human Rights*, ed. Amrei Müller and Hege Elisabeth Kjos (New York: Cambridge University Press, 2017), 275.

In a similar fashion, the Russian Constitutional Court successfully established the Russian Constitution's supremacy over the European Convention before Russia's recent expulsion from the Council of Europe. With a 2015 judgment, the Russian Constitutional Court granted itself the right to review whether the European Court judgments are aligned with the Russian Constitution.[19] This move was to counter what Russian President Putin viewed as the "politicization" of European Court rulings and the perceived discrimination against Russia.[20] Courtney Hillebrecht, who documents a series of strategies that Russia used to undermine the Court's authority, argues that this decision endowed "the Russian Constitutional Court and the Russian government with the ability to opt out of particular ECtHR decisions."[21]

These overlapping grievances expressed by the Court's long-time allies, such as the United Kingdom, Denmark, Switzerland, and Italy, as well as newcomers like Russia, shaped the discussions at the High-Level Conferences. The reform proposals expressed in these meetings showed that improving the Court's functions and addressing the case backlog were not member states' only concerns. In particular, the Brighton and Copenhagen Declarations articulated a renewed vision for the Court by emphasizing the principle of subsidiarity and the margin of appreciation doctrine. The draft versions of both of these declarations, which contained even more direct language on weakening the Court's autonomy and review powers, were leaked before their final versions.[22] The harsh tone in the leaked documents sent a strong signal and amplified the message that the Court should show deference to national authorities that are better placed to protect rights and offer remedies. This effectively implied that the Court should refrain from issuing rulings with wider policy implications, especially when it comes to politically salient issues,

[19] Aaron Matta and Armen Mazmanyan, "Russia: In Quest for a European Identity," in *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level*, ed. Patricia Popelier, Sarah Lambrecht, and Koen Lemmens (Cambridge: Intersentia, 2016), 481.

[20] Ibid., 496. Political crises such as the war with Ukraine and Georgia and the annexation of Crimea led to a sour relationship between the Council of Europe members and the isolated Russia.

[21] Courtney Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts* (Cambridge and New York: Cambridge University Press, 2021), 138.

[22] Laurence Helfer, "The Burdens and Benefits of Brighton," *ESIL Reflections* 1, no. 1 (2012): 1–6; Alice Donald and Philip Leach, "A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must Be Rewritten," *EJIL: Talk!* (blog), February 21, 2018, www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/.

such as the right of refugees, asylum seekers, or any other politically undesired groups.

Some scholars have interpreted member states' reliance on these two principles as an appeal to the Court to adopt a more conservative and state-friendly position.[23] The language used in these declarations certainly attests to that. For example, the Copenhagen Declaration clearly identifies the role of the Court as "provid[ing] a safeguard for violations that have not been remedied at national level and authoritatively interpret[ing] the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties (VCLT), giving appropriate consideration to present-day conditions."[24] It is rather telling that member states favour an interpretive method that has only a minor part in the Court's history,[25] instead of *the living instrument principle* developed by the Court itself in *Tyrer* v. *the United Kingdom*.[26] The living instrument principle, namely that rights should be interpreted in light of present-day conditions, is more readily associated with expansive interpretation. Despite sounding like a technical suggestion, this plea to be more loyal to the intentions of the drafters and the treaty text itself has sent strong signals to the Court and informed its interpretive preferences to a great extent, as I argue here.

In addition to the calls for forbearance made throughout the High-Level Conferences, most visibly in the Brighton and Copenhagen Declarations, various countries have criticised the Court over specific judgments that they deemed to be politically motivated. For example, the United Kingdom questioned the legitimacy of the European Court's judgments on prisoners' voting rights.[27] *Hirst (No.2)* v. *the United Kingdom* and *Greens and MT* v. *the United Kingdom* infuriated the government, particularly the then Prime Minister David Cameron.[28] The House of

[23] See for example, Oddný Mjöll Arnardóttir, "The Brighton Aftermath and the Changing Role of the European Court of Human Rights," *Journal of International Dispute Settlement* 9, no. 2 (2017), 3.

[24] High-Level Conference on the Future of the European Court of Human Rights, Copenhagen Declaration.

[25] George Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer," *European Journal of International Law* 21, no. 3 (2010): 513.

[26] *Tyrer* v. *the United Kingdom,* application no. 5856/72, ECHR (April 25, 1978).

[27] Kanstantsin Dzehtsiarou and Alan Greene, "Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners," *German Law Journal.* 12, no. 10 (2011): 1710.

[28] Owen Bowcott, "Prisoners 'Damn Well Shouldn't' Be Able to Vote, Says David Cameron," *The Guardian*, December 13, 2013, available at: www.theguardian.com/politics/2013/dec/13/prisone Prisoners 'Damn Well Shouldn't' rs-right-to-vote-david-cameron.

Commons and the Supreme Court backed his position. While the House of Commons voted overwhelmingly in favour of keeping the blanket ban on February 10, 2011,[29] the Supreme Court passed a judgment on October 16, 2013, upholding the blanket ban on inmates' voting rights.[30] Similarly, the government of Russia vehemently objected to the *Yukos* judgment (*Oao Neftyanaya Kompaniya Yukos* v. *Russia*), in which the Court awarded Yukos (a Russian oil company) shareholders nearly 1.9 billion euros – the largest award in the Court's history.[31] The Constitutional Court of Russia defied this judgment, pronouncing: "Russia was not bound to enforce the ECtHR decision on the award of pecuniary compensation to the company's ex-shareholders, as it would violate the Constitution of the Russian Federation."[32] Last but not least, the government of Turkey challenged the Court's 2014 *Cyprus* v. *Turkey* ruling, where the Court ordered the Turkish government to pay 90 million euros to the government of Cyprus.[33] Ahmet Davutoğlu, then Foreign Minister of Turkey, firmly reported that "in terms of the grounds of this ruling, its method and the fact that it is considering a country that Turkey does not recognise as a counterparty, we see no necessity to make this payment."[34] Turkey has not paid the requested amount to this day, despite the reminders sent from the Committee of Ministers.[35]

[29] House of Commons, Hansard Debate, February 10, 2011, C. 502. The motion to keep the current ban was supported by 234 parliamentarians and opposed by 22.

[30] *R (on the application of Chester) (Appellant)* v. *Secretary of State for Justice (Respondent) and McGeoch (AP) (Appellant)* v. *The Lord President of the Council and another (Respondents) (Scotland),* UKSC 63 (October 16, 2013).

[31] The exact amount is EUR 1,866,104,634. *Oao Neftyanaya Kompaniya Yukos* v. *Russia,* application no. 14902/04, ECHR (July 31, 2014).

[32] Iryna Marchuk and Marina Aksenova, "The Tale of Yukos and of the Russian Constitutional Court's Rebellion against the European Court of Human Right," *Osservatorio Costituzionale, Associazione Italiana Dei Costituzionalisti (AIC)*, 2017, 1–2. See also Marina Aksenova and Iryna Marchuk, "Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights," *International Journal of Constitutional Law* 16, no. 4 (2018): 1322–46.

[33] The ECtHR ordered Turkey to pay 30,000,000 euros to compensate for the non-pecuniary damage suffered by the relatives of the missing persons and 60,000,000 euros for the enclaved Greek-Cypriot residents of the Karpas peninsula. *Cyprus* v. *Turkey*, application no. 25781/94, ECHR[GC] (May 12, 2014).

[34] Tulay Karadeniz and Ece Toksabay, "Turkey to Ignore Court Order to Pay Compensation to Cyprus," *Reuters*, May 13, 2014, available at www.reuters.com/article/us-turkey-cyprus-davutoglu/turkey-to-ignore-court-order-to-pay-compensation-to-cyprus-idUSBREA4C0AX20140513.

[35] PACE Committee on Legal Affairs and Human Rights, The Implementation of the Judgments of the European Court of Human Rights, *Doc. 15123* (July 15, 2020), 18–19.

The Influence of the Reform Process on the Court

Various scholars explored the ways in which the Court has responded to this widespread negative feedback and political pushback, which only some identify as a full-blown backlash.[36] For example, Mikael Madsen observes a significant increase in the percentage of rulings that refer to subsidiarity or margin of appreciation in the period between 2005 and 2015.[37] Başak Çall focuses on the differential treatment in the case law and argues that the Court reserves stricter review for authoritarian and authoritarian-leaning states.[38] Similarly, Øyvind Stiansen and Erik Voeten find that the Court has increasingly shown greater deference to consolidated Western European democracies in its recent jurisprudence.[39]

Such a varied impact, or bifurcated approach, is to be expected.[40] As established in the literature, international courts are often financially and politically supported by Western states,[41] as is the case for the European Court.[42] Hence, the negative feedback from this support base is more likely to be taken into account by the Court.[43] However, as explained in

[36] For distinguishing backlash from political pushback see, 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. For an argument that the recent reform process did not hamper the Court's authority, see 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.

[37] Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?," *Journal of International Dispute Settlement* 9, no. 2 (2018): 199–222. Janneke Gerards does not find qualitative evidence that such references are accompanied by less strict standards of review. For more, see Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights," *Human Rights Law Review* 18, no. 3 (2018): 495–515.

[38] Başak Çalı, "Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights," *Wisconsin International Law Journal* 35, no. 2 (2018): 237–76; Başak Çalı, "Autocratic Strategies and the European Court of Human Rights," *European Convention on Human Rights Law Review* 2, no. 1 (March 10, 2021): 11–19.

[39] 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."

[40] Laurence R. Helfer and Clare Ryan, "LGBT Rights as Mega-Politics: Litigating before the ECtHR," Duke Law School Public Law & Legal Theory Series No. 2021–32, January 15, 2022, 30, https://doi.org/10.2139/ssrn.3867604.

[41] Hillebrecht, *Saving the International Justice Regime*, 40–41.

[42] Laurence R. Helfer and Erik Voeten, "Walking Back Human Rights in Europe?," *European Journal of International Law* 31, no. 3 (2020): 825.

[43] Stiansen and Voeten, "Backlash and Judicial Restraint," 770.

this book, issue characteristics matter, too. The reformed Court is likely to choose selective forbearance when dealing with politically salient issues, such as immigrants and refugees, and some resource-intensive positive obligations regardless of the regime type of the responding state.

The extent to which this reform process, as well as the widespread negative feedback, influenced the reformed Court and undermined its authority has also been a subject of academic debate. For example, Larry Helfer and Erik Voeten identify regressive trends, which became dominant at the Court, especially in the 2012 post-Brighton period.[44] Through an analysis of judicial dissents, they establish that some of the judges themselves believe that the Grand Chamber has overturned previously progressive rulings.[45] They argue that this trend may be due to two reasons. First, the Court may be responding to political signals and criticisms of its previously expansive rulings, similar to what I argue here. Second, the Court may be following the right-restrictive trends at the domestic level.[46] They point out the fact that there is now a growing number of European countries that favour more limited human rights protections accorded to "politically unpopular groups," such as refugees and asylum seekers, terrorist suspects, and nontraditional families.[47] Alec Stone Sweet, Wayne Sandholtz, and Mads Andenas disagree with this analysis, arguing that there are no clear regressive trends and that the efforts to "rein" the Court have failed.[48] They maintain that the Court's authority remains intact because it is protected by the rules governing treaty amendment, and because the political challenge against the Court was voiced by a minority of states, while states continue to finance the Court's activities.[49]

Even though the reformed Court continues to execute its core functions – for which the old Court did not have a guarantee – strong resistance and protests by member states are not inconsequential. Short of tarnishing the Court's authority, such widespread negative feedback

[44] Helfer and Voeten, "Walking Back Human Rights in Europe?," 797–827.
[45] Ibid., 823.
[46] Ibid.
[47] 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.
[48] 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.
[49] Sweet, Sandholtz, and Andenas, "The Failure to Destroy the Authority of the European Court of Human Rights," 41–42.

has the potential to influence the Court both directly and indirectly. First, pushback and criticism may eventually provoke formal changes. In fact, some of the core ideas expressed in High-Level Conferences have since been incorporated into the official protocols amending the Convention.[50] For example, Protocol 15, drafted after the Brighton Declaration, stipulates the inclusion of the principle of subsidiarity and margin of appreciation doctrine in the Preamble of the Convention.[51] Several civil society organizations have criticised this provision, as it would potentially curtail the Court's progressive spirit and represent a setback for human rights protection in Europe.[52] This reaction was warranted because preambles matter when it comes to the interpretation of a treaty text. Adding these two principles to the treaty text is likely to put extra pressure on the reformed Court to consider them.

Second, no matter how we identify it – backlash, political pushback, or widespread negative feedback – such strong signalling evokes some behavioural changes at the Court. Even if member state pushback does not openly and directly target the Court's authority, it indirectly influences the Court's behaviour, encouraging it to be selectively forbearing.[53] Member state calls for forbearance and negative feedback amounts to interference, which may not be direct or come in the form of an executive override. Nevertheless, the Court might nonetheless voluntarily relinquish some of its autonomy over its interpretive preferences in order to maintain its authority. As argued here, and as shown in the existing literature, international courts may seek to maintain their authority and support from member states by reacting to or pre-empting backlash.[54] Courtney Hillebrecht lists these strategies, which range from "dejudicialisation of

[50] The last two protocols are Protocol 15 and Protocol 16, which were opened for signature on June 24, 2013, and October 2, 2013, respectively.

[51] Protocol 16 came into force on August 1, 2018, for those states that have signed and ratified the protocol. Protocol 16 extends the jurisdiction of the Court to give advisory opinions to the highest courts and tribunals of the states upon their request – an idea that has been raised and reiterated in the Izmir and Brighton Declarations.

[52] Marisa Iglesias Vila, "Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights," *International Journal of Constitutional Law* 15, no. 2 (2017): 393–413.

[53] The Courts often face tradeoffs between judicial independence, accountability, and transparency. For more, see Jeffrey L. Dunoff and Mark A. Pollack, "The Judicial Trilemma," *American Journal of International Law* 111, no. 2 (2017): 227.

[54] Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," *American Journal of International Law* 98, no. 2 (2004): 247–75; Daniel Abebe and Tom Ginsburg, "The Dejudicialization of International Politics?," *International Studies Quarterly* 63, no. 3 (2019): 521–30.

hot-button topics that could spark backlash to watering down judgments to induce compliance."[55] I add forbearance and selective forbearance to this list of backlash mitigation strategies, which I explain further in "Selective Forbearance: Argument and Findings."

Selective Forbearance: Argument and Findings

The new Court audaciously initiated a foundational change in the way the prohibition of torture and inhuman or degrading treatment is understood. The reformed Court, on the other hand, has been more reluctant to choose audacity over forbearance. This is predominantly because the political environment in which the reformed Court has to operate is different. This environment is coloured by widespread negative feedback, accompanied by member states' outcries over previous rulings that favoured politically unpopular groups.

Member states' call for forbearance has been stronger with respect to certain issue areas. The rights of immigrants and refugees have been one of them, for example. The clearest indication of such a call is the draft Copenhagen Declaration, where the Court was invited not to act "as an immigration appeals tribunal, but respect the domestic courts' assessment of evidence and interpretation and application of domestic legislation, unless arbitrary or manifestly unreasonable."[56] A look at the Court's recent jurisprudence indicates that the Court catered to state sensitivities about irregular migrants, asylum seekers, and refugees while also following a more progressive line with respect to other issue areas.

In Chapter 3, I explained that the reformed Court has a higher propensity to find a violation than the old Court and the new Court, which can be seen in Table 7.1. While the reformed Court's rate of finding a violation is 82%, the new Court's rate is 73%, and the old Court's rate is a meagre 30%. As explained there, when it comes to the propensity to find states in violation, the new Court makes the biggest jump with a 43-percentage-point increase, while the reformed Court only increases nine percentage points. In Figure 7.1, I present the results showing how the propensity to find a violation changed from the new Court era to the reformed Court era, broken down by issue area.

[55] Hillebrecht, *Saving the International Justice Regime*, 24.

[56] Danish and Chairmanship of the Committee of Ministers of the Council of Europe, "Draft Copenhagen Declaration," February 5, 2018, https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf.

Table 7.1 *Propensity for finding a violation over time (duplicated)*

Era	Violation count	No violation count	Violation propensity	Difference in % points
Old Court	11	36	30%	–
New Court	893	325	73%	43%
Reformed Court	1,886	415	82%	9%

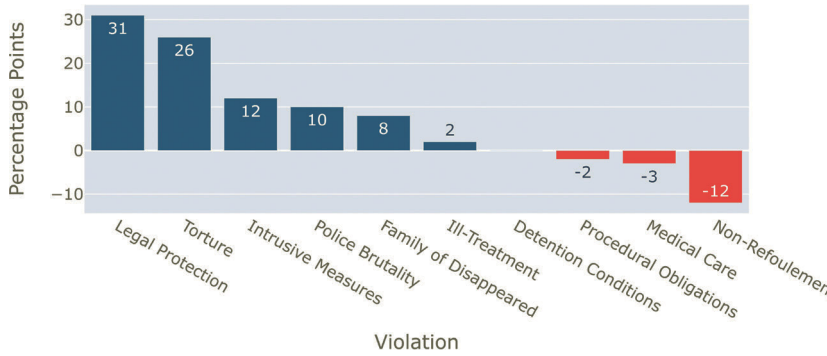

Figure 7.1 Change in propensity for finding a violation from the new Court to the reformed Court era (percentage points)

Looking at disaggregated scores across issue areas, we see that the reformed Court's propensity to find states in violation does not increase across the board. Rather, the reformed Court finds a violation less often than the new Court when it comes to cases about the *non-refoulement* principle (12-point decrease), the obligation to provide medical care (3-point decrease), and procedural obligations (2-point decrease). For the rest of the categories, the reformed Court either keeps up the practices of the new Court or shows an increase in propensity – with the highest increase of 31 percentage points concerning legal protection and 26 points concerning torture.

What explains this picture? The reformed Court's uneven support for progressive change *only* for certain obligations might not be fully explained only with reference to judges' changing profiles.[57] If the reason

[57] Stiansen and Voeten, "Backlash and Judicial Restraint"; 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.

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was that more state-friendly judges have been sitting on the bench during the reformed Court period, then one would expect a downward trend for most if not all obligations concerned. Such a downward trend would include the obligation to provide legal protection or remedy, for example. This is an excellent example of a resource-intensive obligation that directs states to behave a certain way. It is also relatively less established (compared to the obligation to refrain from torturing individuals or the principle of the *non-refoulement*). However, we see that the reformed Court's propensity for finding a violation of this obligation increases more than any other for the period under study, with a 31-point increase.

The targeted increase and decrease of propensity in finding states in violation signals that there might be other explanations at play. In this chapter, I further explore what could explain the reformed Court's bifurcated approach toward different obligations under the norm against torture and inhuman or degrading treatment. In particular, I consider the influence of two factors: widespread *negative feedback* (voiced by mostly Western European states) and *issue characteristics* (whether the obligation concerned is a resource-intensive one). This study provides an ideal testing ground to compare the practices of the old Court, the new Court, and the reformed Court, and to trace how these factors may have informed their interpretive preferences.

I start with distinguishing the reformed Court's propensity scores across geographical regions (namely Western European and formerly communist countries) for cases about *non-refoulement* and medical care as they show the clearest difference.[58] The *non-refoulement* principle – states' obligation to refrain from expelling individuals, such as criminals or asylum seekers, to countries where they are likely to be tortured or subjected to inhuman or degrading treatment – was introduced by the old Court as early as 1989.[59] This was one of the few obligations that the old Court acknowledged, signalling that this issue was not as politically salient or contentious back then as it is today, as explained in Chapters 3 and 4. Table 7.2 displays how the old Court, the new Court, and the reformed Court treated claims concerning the *non-refoulement* principle.

[58] We also observe a slight (only two percentage points) decrease with respect to procedural obligations. However, here, the reformed Court's treatment of claims coming from Western and Eastern European countries is not sufficiently different. The reform Court keeps the new Court's propensity score of 93% for Western Europe and decreases two percentage points with respect to formerly communist countries, from 96% to 94%.

[59] Başak Çalı, Cathryn Costello, and Stewart Cunningham, "Hard Protection through Soft Courts? *Non-Refoulement* before the United Nations Treaty Bodies," *German Law Journal* 21, no. 3 (2020): 355–84.

Table 7.2 *Rate and number of violations of the* non-refoulement *principle across regions and different eras*

	Western	Formerly communist
Old Court	57% (4 out of 7)	–
New Court	67% (26 out of 39)	73% (8 out of 11)
Reformed Court	46% (52 out of 113)	75% (44 out of 59)

We see that the new Court had an increased propensity to find states in violation when reviewing claims concerning the *non-refoulement* principle for both Western and formerly communist Eastern European countries, while having a higher propensity for the latter – 67% and 73%, respectively. The reformed Court, on the other hand, remarkably decreased the rate at which it found Western countries in violation – a 21-point decrease. Furthermore, it slightly increased its propensity rate for finding the formerly communist countries in violation by two percentage points. This finding implies that the reformed Court has resorted to selective forbearance and showed more lenience toward the Western countries – a group that was also the most vocally opposed to rights for asylum seekers, refugees, and foreign criminals in and around the high-level meetings. It also demonstrates that the reformed Court can resort to selective forbearance even in the context of the prohibition of torture and inhuman or degrading treatment – an absolute prohibition that contains nonderogable rights.

I also analyzed the reasons why the reform Court did not find a violation and made a tally of the reasons provided, which is depicted in Table 7.3. We have learned (as shown in Table 7.2 above) that a clear majority of no-violation rulings are issued with respect to the Western European countries, as is the case for the violation rulings. The obligation to refrain from violating the *non-refoulement* principle is the only issue area where we observe more complaints brought before Western European states in the Article 3 jurisprudence. As we see in Table 7.3, while 70% of no-violation rulings issued against Western European countries are due to substantive reasons, 67% of no-violation rulings with respect to the formerly communist states are due to evidentiary reasons. This implies two things: First, it indicates that the evidentiary quality of cases brought against Western European and former communist countries might differ. Second, this difference affects the course of legal review. Due to the prior (evidentiary) issues, the reformed

Table 7.3 *Reasons for not finding a violation with respect to the* non-refoulement *principle across different regions (percentages and total numbers)*

	Western	Formerly communist
Substantive reasons	70% (43)	33% (5)
Evidentiary reasons	30% (18)	67% (10)
Total	100% (61)	100% (15)

Court cannot arrive at posterior (substantive) issues when reviewing cases brought against the formerly communist countries.

The finding concerning the reformed Court's treatment of claims related to the *non-refoulement* principle is consistent with what the existing literature observes as a more favourable treatment of cases concerning Western European countries.[60] This observation can also be traced qualitatively. For example, in *L. M. and Others* v. *Russia*, the Court found that the applicants' allegations were not "duly examined by the domestic authorities."[61] It then made its own assessment of whether the applicants would be subjected to torture and ill-treatment if they were to be returned to Syria, establishing that there is such a risk.[62] In *F. G.* v. *Sweden*, however, the Grand Chamber underlined that "in cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled."[63] In this case, the reformed Court agreed with the conclusions of the domestic authorities that the applicant's past political activities would not expose them to risk. Yet, the Court found Sweden in violation for not considering the impact of the applicant's conversion to Christianity as a factor – without establishing whether the applicant's conversion would increase the risk of ill-treatment that they may face upon their return to Iran. Even though the reformed Court found a violation in both of these cases, it treated them differently and assumed a larger role when reviewing a case against Russia

[60] Stiansen and Voeten, "Backlash and Judicial Restraint"; Çalı, "Coping with Crisis."
[61] *L. M. and Others* v. *Russia,* application no. 40081/14, 40088/14 and 40127/14, ECHR (October 15, 2015) §112.
[62] Ibid., §120–26.
[63] *F.G.* v. *Sweden*, application no. 43611/11, ECHR[GC] (March 23, 2016) §117.

Table 7.4 *Rate and number of violations regarding medical care across regions and different eras*

	Western	Formerly communist
Old Court	–	–
New Court	60% (15 out of 25)	80% (47 out of 59)
Reformed Court	74% (20 out of 27)	70% (89 out of 127)

and shied away from doing so when assessing the one against Sweden. This bifurcated approach explains, to a great extent, why we see a higher propensity to find a violation with respect to formerly communist countries in the most recent period.

We see a different trend for the cases concerning states' obligation to provide medical care in detention facilities, however. Table 7.4 shows that the rate of violation rulings increases for Western countries and decreases for formerly communist countries. This obligation was not recognised during the old Court, and the new Court had a higher propensity to find a violation for the formerly communist countries (80%) than for the Western European countries (60%). The reformed Court, however, had a slightly higher propensity to find a violation with respect to Western countries, amounting to only a four-percentage-point increase. Here, we observe a reverse pattern, with the reformed Court being more likely to find the Western European countries in violation.

Similar to the analysis of the cases related to the *non-refoulement* principle, I have looked at the reasons why the reformed Court issued no violation rulings, as shown in Table 7.5. I should note here that there are fewer cases under this category, which makes the analysis sensitive to smaller changes. Regardless, here we see that the reformed Court's treatment of Western and formerly communist countries differs from what we observed earlier. The reformed Court finds no violation due to substantive reasons in the majority of the cases – 86% and 92% of the cases brought against Western European and formerly communist countries, respectively. The no-violation rulings based on evidentiary reasons are in the minority, with 14% and 8% for Western and formerly communist countries, respectively.

Overall, in this example, we do not observe favourable treatment of Western European countries. I argue that the reformed Court turns to selective forbearance for different reasons here – reasons not fully investigated in the existing literature. What we see is not directly connected

Table 7.5 *Reasons for not finding a violation with respect to medical care across different regions (percentages and total numbers)*

	Western	Formerly communist
Substantive reasons	86% (6)	92% (35)
Evidentiary reasons	14% (1)	8% (3)
Total	100% (7)	100% (38)

to the reformed Court's specific response to (mostly) Western countries' criticism of the Court's previously progressive rulings with respect to asylum seekers, refugees, and foreign criminals. Hence, it is not a differential treatment motivated by the regime type of the responding states (i.e., established democracies vs. autocracies). Rather, the main concern is the issue characteristics and, more specifically, the reformed Court's unwillingness to put excessive burdens on states, which would result from strongly enforcing some resource-intensive positive obligations in resource-poor countries. The reformed Court resorts to selective forbearance, particularly when reviewing the applicants' request for release on health grounds. In such instances, the Court refrains from subjecting the decisions of the national authorities to a review and instead agrees with the solutions proposed at the national level. I argue that by avoiding burdensome rulings or an intrusive legal review, the reformed Court carefully pre-empts widespread negative feedback or backlash.

A qualitative reading of the no-violation rulings helps substantiate this claim. States' obligation to provide sufficient medical care to detainees and prisoners, as the name suggests, primarily corresponds to medical care offered to detainees and prisoners. A careful reading shows that the reformed Court was willing to apply the margin of appreciation doctrine to Western European and formerly communist countries alike, albeit without invoking this doctrine explicitly. For example, in *Goginashvili* v. *Georgia,* the reformed Court underlined that "[*s*]*tate's obligation to cure a seriously ill detainee is one of means, not of result*. Notably, the mere fact of a deterioration of the applicant's state of health, albeit capable of raising, at an initial stage, certain doubts concerning the adequacy of the treatment in prison, could not suffice, as such, for a finding of a violation of the State's positive obligations under Article 3 of the Convention."[64]

[64] *Goginashvili* v. *Georgia*, application no. 47729/08, ECHR (October 4, 2011), §71 (emphasis added).

In *Vasyukov* v. *Russia*, the reformed Court went even further, pronouncing that "while finding it particularly *disturbing* that *the applicant's infection with tuberculosis occurred in a penitentiary institution within the State's control*, the Court reiterates its constant approach that even if an applicant had contracted tuberculosis while in detention, this in itself would not imply a violation of Article 3, provided that he received treatment for it."[65] In this case, the reformed Court passed on the opportunity to find a state in violation for allowing the applicant to contract tuberculosis due to detainment conditions. It also forwent the occasion to pronounce that the responding states should take measures to prevent the spread of contractable diseases in detention facilities. Later in *Bagdonavičius* v. *Lithuania*, the reformed Court signalled that it is willing to consider the detention conditions' role on prisoners' health:

> The Court observes that in the cases concerning medical care in prison, it was most often faced with situations arising in connection with prisoners affected with severe to very severe ailments, such as to make their normal daily functioning very difficult. The present case differs from those cases in that the applicant's heart condition does not affect his everyday functioning in the same way as many serious illnesses do. That notwithstanding, the Court is ready to accept that as soon as he had his first myocardial infarction [heart attack], the applicant could have experienced considerable anxiety as to whether the medical care provided to him was adequate and whether it could be properly provided within the prison setting. At the same time, the Court is careful to note that although the applicant's heart illness was detected two years into his detention, nothing in the case file suggests that it came about his being imprisoned rather than by natural causes.[66]

The Court then agreed with the domestic courts' conclusions and refused to consider the applicant's release on the grounds of health conditions.[67] Indeed, such release requests often accompany the complaints related to insufficient medical care in detention facilities and prisons. When reviewing such claims, the European Court does not depart from the conclusions of the domestic authorities, arguing that "it cannot substitute its point of view for that of the domestic courts,"[68] and

[65] *Vasyukov* v. *Russia,* application no. 2974/05, ECHR (April 5, 2011), §66 (emphasis added).
[66] *Bagdonavičius* v. *Lithuania,* application no. 41252/12, ECHR (April 19, 2016) §77.
[67] Ibid., §85.
[68] *Hajoł* v. *Poland*, application no. 1127/06, ECHR (March 2, 2010) § 63. See also *Pakhomov* v. *Russia*, application no. 44917/08 ECHR (September 30, 2010), and *Bagdonavičius* v. *Lithuania.*

emphasizing that "Article 3 does not entitle a detainee to be released 'on compassionate grounds.'"[69]

The assessment of the no-violation rulings – the majority of which were issued against the formerly communist countries for the period under study – reveals that the reformed Court is willing to show deference to domestic authorities, not only in the Western European countries but also in countries such as Russia, Georgia, and Poland. Beyond a distinction between the West and the East, or consolidated or unconsolidated democracies, the Court's selective forbearance, in this instance, works with a different logic and serves two main purposes. First, it avoids financially burdening countries by requesting them to redirect more resources to their correctional facilities. Second, it carefully sidesteps the thorny issue of invalidating national legal review and asking domestic authorities to release prisoners on health grounds. This is despite the fact that stronger enforcement of Article 3 in this area would offer an extra layer of protection to prisoners and strengthen the right to health, which is not covered under the Convention.[70] However, issuing judgments with wider policy implications, such as requesting states to release prisoners on health grounds or asking especially resource-poor states to dedicate more resources to their prisons and detention centres, might provoke a political pushback, especially in the current environment. One can surmise that the reformed Court's cautious approach in this regard helps pre-empt further political pushback.

A Bifurcated Approach and Selective Forbearance through Landmark Rulings

Selective forbearance as a bifurcated approach has been the dominant mode of operation during the reformed Court era. It can be observed even in the reformed Court's treatment of the prohibition of torture and inhuman or degrading treatment, which is one of the – if not the – strongest prohibitions in the field of human rights. To illustrate how selective forbearance looks qualitatively, let us turn to two recent landmark Article 3 decisions: *Khlaifia and Others* v. *Italy [GC]* (2016),[71] and

[69] *Mozer* v. *the Republic of Moldova and Russia*, application no. 11138/10, ECHR[GC] (February 23, 2016) §178.

[70] Angus E. M. Wallace, "The European Court of Human Rights: A Tool for Improving Prison Health," *The Lancet Public Health* 5, no. 2 (2020): e78–79, https://doi.org/10.1016/S2468-2667(19)30258-0.

[71] *Khlaifia and Others* v. *Italy,* application no. 16483/12, ECHR[GC] (December 15, 2016).

Bouyid v. *Belgium[GC]* (2015).[72] These two rulings share some commonalities. They are both Grand Chamber judgments given in respect of the Western European countries around the same time – only one year apart. Yet, they have several differences. For example, they concern different types of complaints and obligations: The former concerns migrants' living conditions (a positive obligation), and the latter concerns police brutality (a negative obligation). In addition to these substantive differences, these two decisions also differ in terms of how the Grand Chamber dealt with them.

In *Khlaifia,* the Chamber had previously found that the conditions in which irregular migrants were held on the island of Lampedusa violated Article 3. It ruled that, although the exceptional wave of immigration was burdensome on the state, it did not exempt Italy from "its obligation to guarantee conditions that are compatible with respect for human dignity to all individuals."[73] This decision was in line with the Court's earlier jurisprudence with respect to the detention of irregular migrants, asylum seekers, and refugees. The new Court had already established state obligations to provide acceptable living conditions for irregular migrants in *Dougoz* v. *Greece* back in 2001.[74] In this audacious decision, the new Court characterised the suffering that migrants had to endure due to overcrowding and appalling living conditions as an Article 3 violation as discussed in Chapter 5.

Disagreeing with the Chamber ruling, the Italian government decided to request a referral to the Grand Chamber, and the Grand Chamber arrived at a different conclusion. More specifically, the Grand Chamber backed away from the Chamber's audacious approach and paid greater attention to the excessive burden that the Italian government bore.[75] It agreed that living conditions were "far from the ideal" and acknowledged the complaints about overcrowding and lack of hygiene, but did not consider them to be Article 3 violations.[76] None of the sitting judges issued a dissenting opinion on this ruling.

In *Bouyid*, the Grand Chamber issued an audacious ruling. The Chamber had earlier found that being slapped by a police officer, "though unacceptable," would not constitute "a sufficient degree of humiliation

[72] *Bouyid* v. *Belgium,* application no. 23380/09, ECHR[GC] (September 28, 2015).
[73] *Khlaifia and Others* v. *Italy,* application no. 16483/12, ECHR (September 1, 2015), §128.
[74] *Dougoz* v. *Greece*, application no. 40907/98, ECHR (March 6, 2001).
[75] *Khlaifia and Others* v. *Italy [GC],* §197.
[76] Ibid., §188.

or debasement" to be considered a violation of Article 3.[77] However, the Grand Chamber reversed this decision, arguing that a slap inflicted by police officers in a position of authority "may be perceived as humiliating" by the person receiving it.[78] Judges de Gaetano, Lemmens, and Mahoney (from Malta, Belgium, and the United Kingdom, respectively) dissented, arguing not only that the treatment does not constitute a violation but also that "it is not for the Court to impose general rules of conduct on law-enforcement officers."[79] Despite these dissenting opinions, *Bouyid* soon became the landmark decision lowering the threshold required for an act to qualify as police brutality.

These two cases accurately capture the conundrum that the reformed Court faces today. Should the Court draw stricter lines and forgo its audacity while its authority is challenged, or should it continue along the progressive trajectory that the new Court charted in the late 1990s? In the post-2010 period, the *de facto* Supreme Court of Europe faces a new reality: Widespread negative feedback is constraining not only in the abstract sense but also practically, as it can lead to formal changes that eventually may shrink the Court's discretionary space. The reformed Court has resorted to selective forbearance to counter the widespread negative feedback and the actual and potential loss of discretionary space. In other words, when under pressure, the reformed Court has eased its insistence on some of the more resource-intensive positive obligations, such as providing acceptable living conditions for irregular immigrants or refugees, while holding the line for other obligations, such as the obligation to refrain from using excessive force in law enforcement.

Due to persistent negative feedback, the reformed Court has not been able to take the overall audacious approach that the new Court could assume when launching the foundational change under the norm against torture and inhuman or degrading treatment in the late 1990s. The new Court revealed a different mindset when acknowledging Nahide's victimhood under Article 3, or irregular migrants' right to have acceptable living conditions in *Dougoz* v. *Greece*. In the post-2010 period, the reformed Court began to oscillate between audacity and forbearance at a higher rate and turned to selective forbearance at opportune times.

[77] *Bouyid* v. *Belgium [GC]*, §56.
[78] Ibid., §105–106.
[79] *Bouyid* v. *Belgium [GC]*, Joint Partly Dissenting Opinion of Judges de Gaetano, Lemmens, and Mahoney.

On the one hand, the reformed Court has taken a step back from developing certain obligations, as we see in *Khlaifia*. It effectively took back some of the protections granted to irregular immigrants with the *Dougoz* decision. On the other hand, the reformed Court has continued to progressively sculpt other obligations, such as the obligation to refrain from engaging in police brutality, as we see in *Bouyid*. The difference between these two obligations is that while the former is a controversial resource-intensive positive obligation toward irregular immigrants and asylum seekers – one by which European states currently have no interest in being bound – the latter is a core negative obligation around which there is a general agreement.

This book's treatment of Article 3 cases substantiates what the resurgent literature theorises about current trends at the reformed Court. For example, Başak Çalı argues that the Court has been attentive to the changing attitudes of European states toward the European human rights system since the mid-to-late 2000s.[80] The Court has not spoken in a uniform voice, claims Çalı. Rather, the Court has developed a tendency to invoke the margin of appreciation for established democracies that it deems to be "good faith interpreters and thus guardians of the Convention" – particularly in response to the appeals led by the United Kingdom.[81] In parallel, the Court has developed bad faith jurisprudence concerning those that "show disrespect for the Convention values."[82] The second category is composed of the countries in Eastern Europe and the Caucasus, where democratic transitions are halted or reversed.

I find evidence for this argument, especially when it comes to the Court's treatment of the claims related to the *non-refoulement* principle under Article 3. However, my findings also show that issue characteristics matter a great deal. As discussed earlier, the reformed Court has been willing to afford a margin of appreciation even to countries such as Russia when reviewing claims about insufficient medical care in detention facilities.[83] Hence, the regime type of the responding state explains only some of the bifurcated behaviour. The issue characteristics, especially whether an obligation is resource-intensive or whether reviewing its implementation would require greater scrutiny of national decisions, are also important factors to consider.

[80] Çali, "Coping with Crisis," 269.
[81] Ibid., 243.
[82] Ibid.
[83] Ibid.

My analysis overall shows that the reformed Court has been operating in two different gears. This is most visibly shown in the comparative example of two recent Grand Chamber rulings concerning the living conditions of refugees and police brutality. While the Court has taken a step back concerning the obligation to provide acceptable living conditions for refugees, asylum seekers, and irregular migrants, it took a step forward with the obligation not to inflict excessive violence while enforcing the law. Both large-N analysis of the case law and select reading of the recent landmark rulings indicate that this bifurcated tendency is an outcome of institutional survival and resilience strategies that the reformed Court has been adapting in the face of potential and actual widespread negative feedback.

What Judges Think about Political Pushback and Future Directions of the Norm's Trajectory

Beyond a systematic and selective reading of the case law, the impact of the current political climate and widespread negative criticism can also be gleaned from the insights gathered in the context of my interviews in and around the Court in 2014 and 2015. Several of my interviewees at the Court directly talked about the impact of political pushback and backlash. One judge, in particular, laid out the scene as follows:

> We are living in a time when human rights are not so self-evident. We should not undermine the whole system of the European Convention by going too far. This is a risk for an international court. [We] think we can do more, but the backlash can be enormous. [We] have to be cautious. Sometimes the consequence would be taking a step back. You can still have dynamic interpretation, but the Court has to be cautious.[84]

Upon being asked when they thought this change occurred, they referred to 2010 and added: "the Court is conscious and avoids the impression that it is taking the role of the legislatures."[85] A former judge echoed this point, arguing that the risk of backlash has been high since 2010. He added: "the Court is losing its traditional friends like the United Kingdom, Switzerland, the Netherlands, and Denmark, and it is also losing Turkey."[86] A high-level Registry official told me that criticisms of the Court are also due to the nature of issues that the Court deals with: "The life of this institution

[84] Interview 2.
[85] Ibid.
[86] Interview 17.

has always been a controversial one. Whenever the Court is perceived as touching on national interest, [the states] will scream. Objectively, there are cases the states do not like… cases that concern trade union rights or torture. This is not a feature that is going to go away."[87] The first judge cited above echoed this point when they told me that ethical issues, deportation, and asylum cases are politically sensitive cases and need to be treated with caution.[88]

Although it is impossible to make predictions about future trends, much can be inferred from the sentiments and opinions directly expressed by judges. When I asked fifteen Court judges about the future direction of the norm against torture and inhuman or degrading treatment, seven of them told me that the norm's expansion had reached its limits,[89] four claimed that there was still room for expansion,[90] and four abstained from directly answering.[91]

The seven who believed that the norm had reached its limit thought that the Court should be more cautious. Almost all judges in this camp – except one – are from Western European countries. One of them said that "there should be a line drawn… The Court should be aware of the implications the judgments are generating. Not everything can be inhuman or degrading. If everything is degrading, then nothing is. There is a difference between a fundamental right and a desired right. Fundamental rights should not be diluted."[92] Another judge with a similar background said: "The frontiers are well settled. We are perfectly aware of the language we use. We are not using the word 'torture' for everything. We should be absolutely precise and consistent with the case law. *Selmouni* was a deliberate step and such steps are not taken every day. We would lose our credibility if we change our approach every second year. We need to consistently follow our case law."[93] One other Western European judge said: "we probably reached a point where we have to maintain the standards."[94] Another echoed this sentiment and said that "[the standards] cannot get any lower than that," referring to the *Bouyid*.[95] Another judge who had previously

[87] Interview 20.
[88] Interview 2.
[89] Ibid.; Interview 3; Interview 4; Interview 6; Interview 8; Interview 9; Interview 15.
[90] Interview 1; Interview 7; Interview 10; Interview 14.
[91] Interview 5; Interview 11; Interview 12; Interview 13.
[92] Interview 3.
[93] Interview 8.
[94] Interview 9.
[95] Interview 15.

served at a constitutional court in a Western European country wanted the Court to maintain the standards and thought that this "requires constant balancing."[96] They added that when changing standards, "we need to consider what it costs to the state, what the civil society thinks, and what our role is."[97]

The four who believed that there is still room for norm expansion have mixed backgrounds – two from Eastern European countries and two from Western European countries. They also have a less uniform set of reasons for thinking the norm could be further expanded. For example, one judge from Eastern Europe stated firmly: "the new horizon is the metamorphosis of the inhuman treatment to torture."[98] They predicted that the issues categorised as inhuman treatment would slowly but surely be considered torture in the future. Another, with a similar background, argued that the Court should regulate the conduct of private parties.[99] Another added: "We need to be careful about new threats and be ready to expand this right to counter new challenges," such as the developments in cyberspace.[100] Finally, one judge from Western Europe disclosed that "the new frontier would be – but this perhaps is just wishful thinking on my part – to extend Article 3 to protect the unborn child, by dumping the Roman law concept of *persona*."[101]

Notably, interviewed judges from Western European countries call for caution or forbearance almost uniformly. Their vision dovetails with that of member states, as expressed in the final declarations of the High-Level Conferences. What member states and these judges have in common is their desire for a less interventionist supranational supervisory body that guards the existing principles without venturing into new understandings. In sum, the judges' views come down to two main arguments. First, they think that the Court has already acknowledged the lowest minimum thresholds to find a violation under this norm. If they raise the bar any higher, they might put the Court's credibility at risk. Second, they believe that the Court should instead spend its energy on safeguarding existing standards and winning state support for the achievements of the 1990s. One Western European judge identified this effort as "ensuring that the Convention remains a credible document."[102]

[96] Interview 6.
[97] Ibid.
[98] Interview 1.
[99] Interview 7.
[100] Interview 14.
[101] Interview 10.
[102] Ibid.

These two reasons might be more connected than they first appear. The political climate in Europe calls for prudence. It requires the Court to put the brakes on issuing rights-expansive rulings and to concentrate its efforts on gaining state support and maintaining its legitimacy. This caution might appear even more warranted to the judges because the norm had already been substantially transformed in the late 1990s. However, it appears that these judges fear the repercussions, and that fear informs their opinions about whether to expand the norm further. Three of the seven judges who argued for halting the norm's expansion alluded to this connection.[103] Two of them, in particular, called for forbearance on the grounds that pushing for even more progressive standards would jeopardise the Court's credibility and the credibility of the standards it set.[104]

As for the group of judges who believe in the need for further expansion, they still appreciate a more proactive and instructive European Court. They explain how the norm can develop further in a way, for example, to cover the conduct of private actors or the challenges that new technologies bring. However, those who envision a more audacious role for the Court are in the minority, and they do not put forth a strong and unified vision about what remains to be done.

The judges' perspectives indicate that the current political climate is certainly not ripe for launching a new wave of progressive change. The prime reason is the aura of negative feedback alongside acts and threats of narrowing the Court's discretionary space. As I have argued, the permissive zone of discretion is the necessary condition for progressive change. On its own, it may not be enough, but it nevertheless remains a crucial factor. Without it, audacity becomes too costly, and the Court becomes too preoccupied with acquiring state support and respect for its decisions. Therefore, the Court leans toward selective forbearance, as we observe during the reformed Court period.

Moreover, direct and indirect state control over international courts has consequences. When international courts are under pressure, they are likely to prioritise securing resources for themselves, whether ideational (credibility, legitimacy) or material (funding). This is true even for human rights courts, which should be liberal-leaning under normal circumstances. Therefore, in times of backlash, the international courts' core function – the maintenance and refinement of norms – suffers. This is not simply a loss in the abstract but a loss in real terms; a loss that is most

[103] Interview 3; Interview 6; Interview 8.
[104] Interview 3; Interview 8.

felt by the victims who seek protection and who are left with no or limited recourse for remedy.[105]

The Backlash Debate

The overall approach adopted in this book can help show when progressive change is likely and when it is unlikely. It highlights the moments where we can expect stagnation or retraction of existing standards. When international courts' discretionary space is narrow – or there is a credible threat that this space will shrink – they face an increasing need to heed member state appeals or to pre-empt their reaction. International courts might not always favour progressive change that they had previously adhered to, as in the case of the treatment of irregular migrants, asylum seekers, and refugees in the post-2010 period. Their need for tactical balancing and desire to secure their authority and legitimacy may preclude the chances of progressive legal change on some matters, yet this does not mean that the shift is wholesale. As the *Boyuid* example shows, isolated instances of rights-expansive rulings may still appear. Rather, the essential finding is that the courts' need for institutional survival and resilience comes before any other agenda. Therefore, while there are sporadic progressive change episodes in the current period, the expansive interpretation is not evenly applied – this is the case even when one restricts the analysis to a single norm, as I do here.

My findings reveal that the reformed Court has reserved its audacious rulings only for select obligations under Article 3. This uneven application of audacity (and forbearance) indicates that judges' changing profiles – with more state-friendly judges being elected – may not fully explain the current trends at the Court. Rather, they point us to the institutional strategies fashioned to mitigate and prevent political pushback and uphold the authority of the Court. They also show the importance of issue characteristics and the targeted criticism voiced by certain member states in shaping these strategies. These findings, thus, contribute to the burgeoning debate on the sources and the consequences of the backlash against the European Court in particular and liberal institutions in general. They also help one contextualise and historicise the costs and consequences of member state attempts to influence the Court's interpretive preferences through formal and informal means. My analysis of how member states

[105] Hillebrecht, *Saving the International Justice Regime*, 31.

employed these means to influence the way the Court carried out the judicial review over five decades complements this debate, which predominantly assesses the situation with today's optics. An important lesson to draw from this analysis is that the backlash is neither new nor unique to today's political climate. The Court has seen different episodes of backlash, and in return, it has relied on its inbuilt resilience strategy – general or selective forbearance – to fend off political pushback.[106] As a matter of fact, the Court's unvarying progressive track in the late 1990s is the exception rather than the rule, an exception that was conditioned upon several factors described in Chapter 5.

Conclusion

This chapter has discussed the current trends at the reformed Court against the backdrop of the recent reform initiatives and the general atmosphere of widespread negative feedback and backlash since the 2010s. To do so, it has relied on the results of the content analysis carried out on the case law between 1967 and 2016, a close reading of some of the recent landmark judgments, as well as the insights gathered from elite interviews conducted with current and former judges. I have assessed the extent to which the reformed Court resorts to selective forbearance, which spurs stagnation or even regression of the rights-expansive trends *only* with respect to certain obligations. I have found that the reformed Court, challenged by widespread negative feedback, selectively pays heed to member states' concerns, and I have explained how this bifurcated approach manifests itself.

The reformed Court continues a progressive line of reasoning when it comes to certain core obligations, such as the obligation to refrain from using excessive force during law enforcement operations (i.e., police brutality) or the provision of legal remedy. Yet, it adopts a more forbearing attitude toward certain other obligations, such as the obligation to uphold the *non-refoulement* principle or the provision of sufficient medical care in detention centres. Looking at the Court's recent decisions concerning the rights of irregular immigrants, refugees, and asylum seekers under Article 3, I have shown that the Court began to backtrack on its progressive

[106] For an analysis of the Court's resilience strategies, see Mikael Rask Madsen, "The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court," *European Convention on Human Rights Law Review* 2, no. 2 (2021): 180–208.

tendencies in the late 1990s and early 2000s. This evokes the memories of the old Court that had to prioritise member states' interests and could only enact change when it was absolutely safe to do so. I have concluded by exploring the future trajectory of the norm against torture and inhuman or degrading treatment, as the ECHR judges see it, and by discussing how these findings contribute to the debate on the backlash against international courts and liberal institutions.