8

Conclusion

International courts are important global actors of a complex nature. Unlike domestic courts, international courts do not represent government power, nor do they command unconditional or consistent state or public support. Nevertheless, continuous support from states is precisely what they need. The importance of states is the Achilles' heel for international courts. They need states to enforce their decisions and uphold their legitimacy. They also depend on states for funding, resources, and personnel. Therefore, courts need to maintain and, occasionally, cultivate state support. They do so by offering trade-offs or resorting to avoidance.[1] They allow states some leeway by either not finding them in violation or by passing on opportunities to recognise new individual rights and state obligations. To complicate matters, member states are not the only audiences that the international courts care about. Courts are also interested in obtaining and maintaining a good image in the eyes of the legal community, civil society, and academia. Such an objective requires completely different behaviour, such as issuing progressive landmark rulings or positively contributing to the development of International Law. We can, therefore, imagine international courts being pulled in opposite directions by these completely different motivations: keeping states content while upholding a good reputation in the eyes of the (legal) community.

This book presents theoretical insights into international courts' need for tactical balancing and how their relationship with states may shape their interpretive preferences by relying on the case of the European Court of Human Rights. I argue that courts like the European Court engage in resilience strategies necessary for their institutional survival – that is, maintaining their institution's image while also ensuring their continued access to resources and support. I identify two main resilience strategies: *forbearance*,

[1] 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): 3.

which refers to the underutilization of one's institutional power;[2] and *audacity*, which describes an institution's use of its authority to the maximum. "Maximum" here means that an institution behaves legally and does not imply that it has crossed into abuse of power (i.e., excess). Forbearance, in turn, does not imply that an institution would refuse to undertake the functions for which it was created (i.e., dereliction). Rather, it means that they will exert the minimum effort without taking on the challenge of being actors of (progressive) change.

I argue that when forbearing, courts are less willing to recognise new rights and obligations, and they have an overall lower propensity for finding states in violation. On the contrary, when audacious, courts have more willingness to acknowledge new rights and obligations, and they have a higher propensity for finding states in violation. Forbearance and audacity have different implications. While forbearance signals that courts can operate at a lower sovereignty cost to member states, audacity sets them as authoritative voices of international legal development. Forbearance helps win over state support, while audacity replenishes courts' reputational credit in the eyes of the international legal community. They also produce different outcomes, especially in the field of international human rights governance. While audacity expands the protections offered to the victims, forbearance leads to retractive rulings reversing this expansion or upholding the *status quo* in favour of member states.

Theoretical Framework and Methods

International courts serve crucial functions such as dispute resolution, treaty application, or provision of legal advice. But, every one of them comes with sovereignty costs.[3] This means international courts are costly to states for a variety of reasons: First, international courts undertake functions that are normally state functions, such as interpreting treaties or completing incomplete contracts.[4] Hence, by delegating to courts, states

[2] Alisha Holland, *Forbearance as Redistribution: The Politics of Informal Welfare in Latin America* (Cambridge: Cambridge University Press, 2017); Alisha C. Holland, "Forbearance," *American Political Science Review* 110, no. 2 (2016): 232–46.

[3] 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.

[4] Clifford J. Carrubba and Matthew Gabel, "International Courts: A Theoretical Assessment," *Annual Review of Political Science* 20, no. 1 (2017): 55–73; Gillian K. Hadfield, "Judicial Competence and the Interpretation of Incomplete Contracts," *Journal of Legal Studies* 23, no. 1 (1994): 159-84.

lose some degree of control. Second, international courts exert a degree of authority over states. Courts like the European Court are mandated to review complaints brought by private individuals against states and ask them to pay compensation when found in violation. These are all costly for states, not only in the financial sense but also in a political and symbolic sense. International courts are also known to issue rulings with wider policy implications. For example, the European Court asked Austria to allow same-sex couples to adopt each other's children.[5] It requested Switzerland not to ban begging on the streets[6] and that Bulgaria improve the conditions of psychiatric institutions and social care homes.[7]

Relying on the existing literature, I argue that states may attempt to influence courts and reduce the sovereignty costs in two main ways: First, they may do so formally by limiting courts' discretionary space. Discretionary space refers to the room for manoeuvre that courts enjoy when undertaking their mandates. When this discretionary space is wide, they can carry out their functions in line with their own preferences without fearing repercussions from member states.[8] When it is narrow, then courts have limited discretion and are more likely to be deferent. Second, states may also seek to affect courts informally by resorting to negative feedback, which can come in different intensities ranging from criticism, political pushback, or full-on backlash.[9] When such feedback is sparse, it may not affect courts much. However, when it is widespread and shared by states which normally constitute the courts' support base, such negative feedback may influence the courts and their interpretive choices to a great extent.[10]

[5] *X. and Others* v. *Austria*, application no. 19010/07, ECHR[GC] (February 19, 2013). Only five months after this ruling, Austria amended its civil code to allow unmarried same-sex couples to adopt children. For more, ILGA Europe, "Austria becomes the 14th European country to allow same-sex second-parent adoption" (August 1, 2013) available at www.ilga-europe.org/resources/news/latest-news/austria-becomes-14th-european-country-allow-same-sex-second-parent.

[6] *Lăcătuş* v. *Switzerland*, application no. 14065/15, ECHR (January 19, 2021).

[7] *Stanev* v. *Bulgaria*, application no. 36760/06, ECHR[GC] (January 17, 2012).

[8] Alec Stone Sweet and Thomas Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO," *Journal of Law and Courts* 1, no. 1 (2013).

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

[10] 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,"

Drawing from the rich literature on international courts and judicial behaviour, as well as the insights gathered from expert interviews with judges and other legal professionals, I have created a theoretical framework. As explained in the Introduction and Chapter 1, one would expect that when courts have *narrow discretionary space* and *receive widespread negative feedback*, there will be less space for audacity, and they will lean toward forbearance. When courts have *narrow discretionary space* but are spared from *widespread negative feedback*, they can be selectively audacious – especially when the stakes are low or when dealing with politically less contentious issues. When courts have *wide discretionary space* and *no widespread negative feedback*, they will be overall audacious. When courts have *wide discretionary space* and *receive widespread negative feedback*, they will be selectively forbearing. While being overall audacious, they will act forbearingly when it comes to contentious issues. That is to say, their forbearance will be tailored to actual or potential criticism. The breadth of discretionary space determines the overall tendency; the existence of widespread negative feedback indicates whether a given court will resort to selective forbearance or not.

This theory works on the assumption that left to their own devices, courts like the European Court – whose mandate dictates that they protect and safeguard human rights – would be overall audacious. Nevertheless, formal constraints and widespread negative feedback from member states might compel the courts to consider forbearance or selective forbearance. Even a mere threat, when widespread, may influence the courts.

The theoretical framework operates on the meso-level and views these strategies to be decided collectively by the Court as an institution. While not counting out the importance of the input from individual judges, the theory views their influence to be diffuse. Judges elected for limited terms are not really the agents that store the Court's institutional memory and guard its culture. This is a task carried out by the long-term staff, or the Court's bureaucracy, so to speak, such as the members of the Registry and law clerks. In addition, the Court's long-term, yet not elected, staff also undertake or contribute to some of the core functions, such as admissibility decisions or legal review, and they help set the Court's institutional priorities.[11] They, therefore, also join in the efforts to strategically adjust the

European Journal of International Law 32, no. 3 (2021): 897–906; Laurence R. Helfer and Erik Voeten, "Walking Back Human Rights in Europe?" *European Journal of International Law* 31, no. 3 (2020): 797–827.

[11] For a great analysis of the international courts' bureaucracies, see Tommaso Soave, *The Everyday Makers of International Law: From Great Halls to Back Rooms*, Cambridge

Court's interpretive preferences. Underlining the role of the elected judges and non-elected Court bureaucracy, the book advances an institutional explanation as to why and how the Court adjusts its interpretive preferences. In so doing, it complements the existing approaches that explain judicial strategies based on judges' profiles,[12] or the presence of a coalition of subnational supporters (or compliance constituencies) that cultivate judicial lawmaking by facilitating the implementation of court rulings.[13]

The framework also considers additional sociopolitical and legal factors. It expects that the courts' audacious tendencies increase when change attempts are in line with (1) widespread societal needs, (2) well-established legal principles and precedents developed by other courts and institutions, and (3) civil society campaigns. Hence, these factors are important in cultivating progressive tendencies in international courts. However, they might not be sufficient on their own. I argue that courts cannot prioritise these external factors above state interests unless they enjoy a wide discretionary space. My findings support this expectation and underline the importance of these additional factors. Yet, they also show that, in the case of the European Court, the Court's relationship with states is the most influential factor, as is the degree to which states constrain the Court with direct and indirect control mechanisms.

The case of the European Court of Human Rights has provided a fruitful testing ground to observe how states' control mechanisms may influence international courts' behaviour and interpretive preferences. I have analyzed when and how much the European Court has been progressive by looking at its treatment of the prohibition of torture and inhuman or degrading

Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2022); Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe*, New edition (Cambridge and New York: Cambridge University Press, 2022).

[12] 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; Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights," *International Organization* 61, no. 4 (2007): 669–701; 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.

[13] See, for example, Karen J. Alter and Laurence R. Helfer, "Nature or Nurture?" Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice," *International Organization* 64, no. 4 (2010): 563–92; Øyvind Stiansen, "Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments," *British Journal of Political Science* 51, no. 2 (2021): 899–907.

treatment between 1967 and 2016. Adopting a mixed-method approach, I have combined a range of social science methods with legal analysis. In particular, I have carried out content analysis of 2,294 rulings related to this prohibition to map out the Court's anti-torture jurisprudence. This large-scale analysis helped me identify when the Court acknowledged new obligations and when its propensity to find violations increased or decreased. I have supported these findings with legal analysis of landmark rulings and elite interviews conducted with experts both in and around the Court. More specifically, I interviewed 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. I have used these findings and insights to refine my key concepts and test my expectations.

The European Court is a fitting case to better understand how these expectations work in practice. Although the European Court might appear to be a single case, it is, in fact, three cases because the Court went through a significant institutional transformation in the course of its lifetime. Some of these transformations left a mark on its institutional structure, as well as its behaviour patterns. As explained in greater detail in Chapter 2, looking at the characteristics of the Court as an institution, one can confidently divide its history into three stages: the old Court, the new Court, and the reformed Court.

The Old Court (1959–1998)

The old Court is the earliest version of the Court. In this incarnation, the Court worked part-time and operated alongside the European Commission of Human Rights – a defunct institution that was in charge of filtering the applications brought by individuals and referring cases to the European Court. At this stage, the Court did not have full control of its docket. More importantly, the Court did not have compulsory jurisdiction. Initially, only a few states conditionally accepted the Court's jurisdiction, and their acceptance came with a time limit, two-to-five-year renewable terms. In other words, delegation to the Court was not automatic but optional. Similarly, not all the members accepted the right of individual petitions. They simply did not allow their citizens to bring a complaint before the European Court. This meant that the Court did not have a docket with a lifeline. Due to these structural constraints, it was not always clear that it would be able to carry out the functions for which it was created. The Court could enjoy only a narrow discretionary space, like a *tree in a box* with little space to grow.

The New Court (1998–2010)

The structure of the Court changed substantially in 1998 with Protocol 11. The Court became a permanent, full-time institution with compulsory jurisdiction. The European Commission which was formerly in charge of filtering applications was abolished. Therefore, individuals had direct access to the Court. Protocol 11 brought along two significant changes: First, all the member states of the Council of Europe had to recognise the Court's jurisdiction. This effectively meant that delegation to the Court became automatic. Second, all individuals residing in or complaining against any Council of Europe member state could bring their complaints before the Court without any exceptions. With these structural changes, the new Court could have a docket with a lifeline that the Court itself could control. This meant that the new Court began its life as an institution with a wide discretionary space. With its formal constraints removed, the Court finally had a space to grow and take root. It was finally taken out of its box and planted in the ground.

The Reformed Court (2010–Present)

This story had another twist, however. The Court's progressive rulings, especially about the rights of immigrants and states' duties to provide legal protection to vulnerable groups, caught political attention and became targets of political campaigns of mostly right-wing groups.[14] As a result, the Court entered a new phase in the 2010s. Member states attempted to take back some control and reduce their sovereignty costs. They effectively wanted to prune the growing tree that the Court became and to direct it as to where *not* to expand.

They did this in two ways: First, member states resorted to voicing public criticism at a greater rate, and as a result, negative feedback became more commonplace. Criticism came not only from countries like Russia and Turkey but from the United Kingdom, Switzerland, and Denmark.[15] It was troublesome to hear criticism coming from Western

[14] Erik Voeten, "Populism and Backlashes against International Courts," *Perspectives on Politics* 18, no. 2 (2020): 407–22; 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.

[15] Isabela Garbin Ramanzini and Ezgi Yildiz, 'Revamping to Remain Relevant: How Do the European and the Inter-American Human Rights Systems Adapt to Challenges?', *Journal of Human Rights Practice* 12, no. 3 (2020): 768–80.

democracies that normally constitute the Court's support base. Losing the support of its traditional allies would be more costly to the Court. Second, member states initiated a reform process to discuss the future of the Court with a series of High-Level Conferences held in Switzerland, Turkey, the United Kingdom, Belgium, and Denmark between 2010 and 2018. Meetings were concluded with declarations that served as road maps to improve the European human rights regime. States also used this opportunity to express their visions for the Court, criticizing some of its progressive tendencies, especially concerning the rights of immigrants.

These structural and contextual differences imply that the European Court can be considered as three distinct case studies. I have applied the theoretical framework, developed on the basis of secondary sources and expert interviews, to assess the degree to which the old Court, the new Court, and the reformed Court have been forbearing or audacious. To this end, I have used a large-N study of the case law on the prohibition of torture and inhuman or degrading treatment under the European Convention on Human Rights.

Findings

My analysis shows that the changing structural constraints and varying intensities of negative feedback informed the Court's operation and interpretive preferences and shaped the dominant judicial strategies at the Court. Table 8.1 situates the different incarnations of the Court and identifies their dominant judicial strategies with an increasing audacity scale in ascending order from (1) general forbearance, (2) selective audacity, and (3) selective forbearance to (4) general audacity.

While at no point did the Court have general forbearance as the overarching strategy (1), the old Court favoured selective audacity (2), alongside a tendency toward forbearance. The new Court could afford to adopt audacity as its main judicial strategy to a great extent (3), whereas the reformed Court resorted instead to selective forbearance (4) in order to mitigate the relentless negative feedback and the political pushback it received.

In addition to pointing out the overall tendencies of the Court – different versions of it, to be exact – Table 8.1 helps contextualise the Court's varying attitudes toward the prohibition of torture and inhuman or degrading treatment. The expectations presented in the table guide the identification of the three most important turning points in the Court's anti-torture jurisprudence.

Table 8.1 *Judicial strategies of the Court in its different incarnations*

		Widespread negative feedback	
		Yes	No
Discretionary space	Narrow	*General forbearance* (1)	*Selective audacity* (2) *Old Court
	Wide	*Selective forbearance* (3) *Reformed Court	*General audacity* (4) *New Court

First, the old Court showed an overall forbearing tendency with select audacious rulings concerning politically low-stake issues. Primarily, the old Court was hesitant to override states' national security concerns, yet it could make great strides when the stakes were low, most visibly observed in the case of judicial corporal punishment – a judicial practice that was not employed much in Europe except in the United Kingdom, as described in Chapter 4.

Second, the new Court exhibited an overall audacious tendency, as explained in Chapters 5 and 6. My analysis of the Court's jurisprudence over five decades confirms this and shows that the most significant transformation took place under the new Court's watch: The emergence of positive obligations transpired in the late 1990s in rapid succession and with virtually no opposition. This was also due to the favourable sociopolitical context, which allowed the new Court to audaciously effectuate change without prioritizing state interests. Despite their late appearance and resource-intensive nature, positive obligations constitute an important segment of the Court's jurisprudence on Article 3 – making up 62% of the jurisprudence between 1967 and 2016.

Finally, the reformed Court acted selectively forbearing. While it continued to audaciously develop certain obligations, such as refraining from inflicting police brutality, it shied away from doing so when it came to certain other obligations. This was most remarkable in its treatment of claims touching upon sensitive state interests, such as the rights of immigrants, asylum seekers, and refugees, or the state obligation to provide sufficient medical care in detention centres. The reformed Court turned to selective forbearance when treating these claims in order to mitigate and preempt widespread negative feedback and political pushback, as discussed in Chapter 7. Overlapping grievances expressed by the Court's long-time allies such as the United Kingdom, Denmark, and Switzerland (as well as

by newcomers like Russia) compelled the Court to resort to forbearance in the 2010s, especially in cases related to the *non-refoulement* principle under Article 3. Yet, the reformed Court has kept up with a progressive record when it comes to other obligations, such as the provision of legal remedy or the obligation to curb excessive force during law enforcement operations.

The analysis of the reformed Court's bifurcated approach presents us with interesting results, some confirming and some deviating from the existing literature. First, the reformed Court's selective forbearance, especially concerning the *non-refoulement* principle, indicates that the driver behind the current trends at the Court might not be the changing profile of judges.[16] As explained in Chapter 7, a more state-friendly cohort of judges would have a lower propensity to find states in violation concerning most other less-established and resource-intensive obligations, such as the provision of legal protection and remedy. However, we observe exactly the opposite. The reformed Court increased its propensity to find a violation of the obligation to provide legal protection more than any other obligation. At the same time, it decreased its propensity to find a violation of the *non-refoulement* obligation more than any other obligation. The treatment of these two obligations could not be more different.

Second, looking at the reformed Court's treatment of the claims concerning the *non-refoulement* principle, I also observe a favourable treatment of Western European countries that are known to be "good faith interpreters" – similar to what is argued in the literature.[17] Third, an assessment of the reformed Court's approach to claims concerning medical care at detention facilities demonstrates the importance of issue characteristics, which has not been fully explored in the literature. In this case, we see that the reformed Court's selective forbearance is not limited to Western European countries. On the contrary, the reformed Court shows a good amount of deference to formerly communist countries, particularly when reviewing the quality of medical care offered and the applicants' request for release on health grounds. I argue that this is most likely because the reformed Court is hesitant to strongly enforce a resource-intensive

[16] The judges' changing profile has been presented as a potential explanation in 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; Helfer and Voeten, "Walking Back Human Rights in Europe?"

[17] 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.

obligation in resource-poor countries and to overrule the decisions of the national authorities.

Perhaps the most vivid illustration of the reformed Court's bifurcated approach is the comparison of the recent landmark rulings on the living conditions of refugees and irregular migrants and the obligation not to inflict excessive violence during law enforcement operations. This comparative assessment reveals that while the reformed Court took a step back concerning the former, it took a step forward with respect to the latter. This finding reminds us that progress might not always be wholesale, and that progressive achievements might be more fragile than we realise; hard-earned rights, which we greatly enjoy today, might be chipped away or even unavailable tomorrow.

Contributions

Between Forbearance and Audacity demonstrates how norms are entangled with power. Sometimes norms constrain power, and sometimes they are constrained by power. The transformation of the norm against torture and inhuman or degrading treatment within the European human rights regime reflects this delicate balance. State control over the definition of norms may go beyond their role in drafting treaties. This is especially the case when they attempt to be back-seat drivers instead of yielding control to specialised authorities like international courts.[18] As for international courts, they are reliable checks on the excess of state power. Nevertheless, they may have their own drive for power, especially when they fall into an "authority trap," trading their progressive instincts for ideational and material resources.[19] Laws and norms that improve the lives of victims like Nahide develop in between these tactical moves against and for power. Yet, such victims are also the ones that bear the brunt of the Court's choice of forbearance over audacity. The degree of protection that these norms offer is not a given, nor is it always on the rise. This is most clearly seen in the case of the reformed Court's forbearing treatment of the claims concerning the *non-refoulement* principle and the rights of detained migrants.[20]

The theory and analysis presented here explain how such episodes of forbearance and audacity have left their mark on the norm against torture

[18] Ezgi Yildiz and Nico Krisch, "Authority Matters: Structures of Norm Change in International Politics," *Unpublished Manuscript*, 2022

[19] Sarah S. Stroup and Wendy H. Wong, *The Authority Trap: Strategic Choices of International NGOs* (Ithaca: Cornell University Press, 2017).

[20] Helfer and Voeten, "Walking Back Human Rights in Europe?"

and inhuman or degrading treatment. In so doing, they offer several contributions to the broader literature on international norms, international courts, and institutions. While some of these contributions are specific to the case of the European Court and its anti-torture jurisprudence, some prove themselves to be generalizable to understand the trends at other courts and institutions that work with delegated authority.

First, the empirical analysis helps trace the European Court's jurisprudential trends and explain why and when the Court has been progressive, as well as how norms change over time. The findings also document the contents of the norm against torture and inhuman or degrading treatment, showing that 62% of the claims under this norm pertain to positive obligations that only appeared on the radar in the late 1990s. This counterintuitive finding and contextualised analysis shed light on the European Court and the transformation of the norm against torture and inhuman or degrading treatment under the European Convention. Although the findings are specific to the case of Article 3, this approach identifies the conditions for transformative legal change and offers insights into how similar analyses can be conducted on other international courts or concerning other norms.

Second, the book also presents empirical evidence of how direct and indirect state control over courts may look. States can abolish courts or make them dysfunctional.[21] However, this is only in extreme cases. The more mundane and common effect that states often seek is influencing courts' interpretive choices, as we see here. This finding has implications for the recent debates on the backlash against international courts and liberal institutions. Beyond its normative impact, this recent wave of backlash has practical negative repercussions for the protection of vulnerable groups such as migrants and refugees in Europe and beyond. Because when states influence the courts' interpretive choices through negative feedback, it often comes at the expense of such vulnerable groups. My analysis shows that granting courts and institutions a wide zone of discretion will reduce the need for forbearance to cater to state interests (i.e., prioritizing state interests over their core objectives). It also points out the fact that states' expressed preferences for forbearance might have a long-term influence on judicial practices and human rights enforcement. Forbearing tendencies may have an enduring legacy, as we see in the case of

[21] See, for example, 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 *Ireland* v. *the United Kingdom* ruling discussed in the Introduction.[22] Countering such tendencies with judicial courage and audacity requires a structurally favourable institutional setup and supportive discursive environment. Such concerns should be reflected in the institutional design decisions when creating and reforming international courts and court-like bodies.

Third, *Between Forbearance and Audacity* provides insights into the inner working of international courts. Courts and court-like institutions may not be only inclined to push the boundaries of their mandates.[23] On the contrary, they may occasionally choose to underutilise their privileges and power so they can cultivate state support – one can expect to see this pattern at other courts and institutions working with delegated authority. The framework and the key concepts, *audacity* and *forbearance,* promise to explain this dynamic elsewhere, such as in the International Court of Justice and the Court of Justice of the European Union. They can also explain some of the tendencies we observe in other institutions with delegated authority, such as the World Health Organization or the World Trade Organization. My findings here call for reflecting on state influence on other institutions with public policy impact, and for carrying out comparative studies on how they navigate their political environment and widespread negative feedback.

Taking Stock and Going Forward: Legal Change Elsewhere

International courts have always played an important role by updating treaties and completing incomplete contracts. Today, there is even an increased need for these functions. With the decline of multilateral treaty-making,[24] international courts are often called upon to offer governance solutions in areas where there is no clear international agreement, such as the environment or climate change.[25] Therefore, courts are likely to play

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

[23] Michael N. Barnett and Martha Finnemore, "The Politics, Power, and Pathologies of International Organizations," *International Organization* 53, no. 4 (1999): 699–732.

[24] Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking," *European Journal of International Law* 25, no. 3 (2014): 733–63; Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods," *American Journal of International Law* 108, no. 1 (2014): 1–40.

[25] Helen Keller and Corina Heri, "The Future Is Now: Climate Cases before the ECtHR," *Nordic Journal of Human Rights* 40, no. 1 (2022): 153–174, https://doi.org/10.1080/18918131.2022.2064074.

even more important roles in the future. It is crucial to understand what motivates courts to adopt progressive agendas or back away from doing so.

Beyond the example of the transformation of the norm against torture and inhuman or degrading treatment, the analytical approach and the findings presented here offer a way to study legal change to better understand when international courts are likely to serve as change agents. This is a phenomenon that has so far received limited attention in the International Relations literature on international norms and legal change.[26] The role of international courts does not take up an important place in analyses of how norms are created or how they change over time.[27] Treaty negotiations, where the parties come up with definitions and standards that are most favourable to them, are considered the decisive political interactions. However, as we have seen, lawmaking continues beyond this moment of origin. The extralegal concerns, especially the role of power, that are at the forefront during treaty negotiations do not suddenly disappear when the treaties are concluded. Instead, they retreat to the background, informing the way in which international courts and tribunals apply those treaties. This book has brought these concerns to light, in particular, the role of structural constraints and powerful criticism on the international courts' likelihood to initiate progressive legal change.

Another important novelty that the book has advocated for is disaggregating abstract norms into tangible obligations. Doing so means taking obligations as a reference point to study norm change. Focusing on obligations helps trace not only how norms change over time, but also how norms are contested and why certain norms are not fully internalised. First, it is possible to contest a portion of a norm rather than contesting it in its entirety. Contestation might be directed at some of the obligations contained within the norm. For example, state contestation about their obligation to provide ideal living conditions to irregular migrants and refugees does not necessarily imply the contestation of the norm against torture and inhuman or degrading treatment in its entirety. European states

[26] There are, of course, notable exceptions. 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): 77–110; Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford and New York: Oxford University Press, 2012).

[27] For exceptions, see Druscilla Scribner and Tracy Slagter, "Recursive Norm Development: The Role of Supranational Courts," *Global Policy* 8, no. 3 (2017): 322–32; Zoltán I Búzás and Erin R Graham, "Emergent Flexibility in Institutional Development: How International Rules Really Change," *International Studies Quarterly* 64, no. 4 (2020): 821–33.

may continue to comply with the rest of the obligations that the norm entails, only objecting to that specific portion.

Second, the norm's transformation might make it difficult for states to comply.[28] As legal standards of accountability increase over time, states have to continuously adapt their practices to remain in compliance with the norm. This requires states to be more actively engaged if they intend to keep up with changing standards. For example, after Nahide's case, where the Court formally acknowledged states' obligation to protect domestic violence victims under Article 3, Turkey and other European countries had to readjust their own national policies and legal practices in order to remain compliant. Norm compliance, therefore, is not a one-time effort that can only be measured by taking state ratification of relevant international treaties as a reference.[29] Rather, it is an ongoing iterative exercise that requires states to follow decisions of international courts and institutions concerning what a given norm entails.

Moreover, the theoretical framework, key concepts, and methodological approach adopted here open up new avenues for research on international courts and norm development. Similar studies can be conducted with respect to other legal norms in the European Convention. The proposed framework and methodology also display strong potential for uncovering the behavior of a range of judicial and quasi-judicial interpretative bodies – such as the Inter-American Court of Human Rights, the Court of Justice of the European Union, the International Court of Justice, the International Criminal Court, the International Criminal Tribunals for Rwanda and Yugoslavia, or relevant UN treaty bodies. The framework and associated concepts could also be used in a comparative fashion to probe the extent to which international courts tend to serve as actors of change. An analysis of how tribunals with roughly similar zones of discretion effect (or fail to effect) change would serve as a good basis to better understand international courts' behavior.[30]

[28] What I refer to here is norm compliance rather than compliance with court judgments.

[29] Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology* 110, no. 5 (2005): 1373–1411; Steven C. Poe, "The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression," in *Understanding Human Rights Violations*, ed. Sabine C. Carey and Steven C. Poe (Burlington: Ashgate, 2004), 16–38.

[30] For some recent examples of such comparative analyses, see Jillienne Haglund, *Regional Courts, Domestic Politics, and the Struggle for Human Rights* (Cambridge: Cambridge University Press, 2020); Courtney Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts* (Cambridge and New York: Cambridge University Press, 2021).

The re-application of the framework introduced here requires calibrating the concepts and the scope conditions, however. The importance of the zone of discretion would still apply in general, but its determinants should be established in a particular context and for a given court. As explained in the Introduction and Chapter 1, an international court's discretionary space enlarges and shrinks as a function of its autonomy or authority. A court's autonomy is measured in reference to its independence from the member states that fall under a given court's jurisdiction. A court's authority emanates from its reputation not only in the eyes of states but also among the broader international community. For some courts and quasi-judicial bodies, authority can be boosted by the support of national judiciaries or civil society groups in the absence of strong political support.[31]

For example, the Inter-American Court of Human Rights is a very different institution, structurally and culturally.[32] Unlike the European Court, it has diversified its source of support and funding.[33] It has successfully built an alternative support group that includes diverse actors, such as civil society organizations, international organizations, and European governments.[34] This has reduced the Inter-American Court's dependency on member states and created the space for the Inter-American Court to refine its trademark as a progressive human rights court, which is the key to retaining and enlarging its alternative support group. The existence of such alternative supporters would ideally weaken the influence of some negative feedback effect, for example. Thus, the framework should be adjusted in light of such particular features when applied to other courts and contexts.

Such comparative assessments and sophisticated studies that look into the political dynamics of court practices are more necessary than

[31] Alexandra Huneeus, Javier Couso, and Rachel Sieder, "Introduction," in *Cultures of Legality: Judicialization and Political Activism in Latin America*, ed. Javier Couso, Alexandra Huneeus, and Rachel Sieder (Cambridge University Press, 2010), 3; Alexandra Huneeus, "Constitutional Lawyers and the Inter-American Court's Varied Authority," *Law and Contemporary Problems* 79, no. 1 (2016): 183.

[32] 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.

[33] Silvia Steininger, "Creating Loyalty: Communication Practices in the European and Inter-American Human Rights Regimes," *Global Constitutionalism* 11, no. 2 (2022): 161-196.

[34] Heidi Nichols Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (New York: Cambridge University Press, 2018); Heidi Nichols Haddad, "Judicial Institution Builders: NGOs and International Human Rights Courts," *Journal of Human Rights* 11, no. 1 (2012): 126–49.

ever.[35] Growth in the emergence and use of international courts is a distinctive feature of the post-Cold War period. This is not likely to go away. What is new in this picture is the varying degree of political push-back and backlash against these courts. The strategies of such attacks may vary, yet their overall purpose is to subdue these institutions. This is why it is imperative to study how courts and court-like bodies work under ideal circumstances, as well as how they operate under pressure. Such analyses are vital to reveal the causes of jurisprudential trends that expand or restrict rights. They also demonstrate how power operates behind the scenes to choose which victims deserve protection and how much protection they deserve. Through such analyses, we also get to learn more about how norms shape power and how legal refinement touches the lives of victims we encountered in this book, such as Nahide. While they remain the real protagonists of legal change, their impact is filtered through various institutional concerns and the changing winds of power.

[35] Roger P. Alford, "The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance," *Proceedings of the ASIL Annual Meeting* 94 (2000): 160–65; Thomas Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?," *Leiden Journal of International Law* 14, no. 2 (2001): 267–75.