# 1

# The Conditions for Audacity

Why did the Court shape the norm against torture and inhuman or degrading treatment in the way it did? What explains the peculiarity of the late 1990s – the period when the Court effectuated a sudden and foundational change in the way this prohibition is understood? This chapter presents a framework that will help us answer these questions. The theoretical framework provides an institutional explanation for understanding norm change by situating the transformation of the norm within the broader transformation of the Court. It is built upon insights gathered from secondary sources and elite interviews. It aims to serve as a heuristic tool to explain the conditions under which international courts, such as the European Court of Human Rights, can be expected to be audacious or forbearing.

While the framework was created with the example of the European Court in mind, it is meant to be applicable to other courts and tribunals. The framework is composed of one core component and three contributing factors. Having a large discretionary space, with no or limited negative feedback, is a necessary condition for courts to issue more audacious rulings across the board. However, there are several other sociopolitical factors that can facilitate the Court's audacity, such as emerging societal needs, the legal developments introduced by other courts or institutions, and civil society campaigns.

This framework and the accompanying analysis that will be presented in Chapters 6 and 7 contribute to the rich literature on the politics of international courts, and International Relations and International Law scholarship in general.[1] Most of the existing legal literature would

[1] 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; Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton and Oxford: Princeton University Press, 2014); Laurence R. Helfer and Karen J. Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts," *Theoretical Inquiries in Law* 14 (2013): 479–503; Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford and New York:

agree that lawmaking is an ordinary part of adjudication[2] and that legal change is one of its intentional or inadvertent outcomes.[3] Yet, this literature overlooks the question of when we can expect international courts to engage in progressive lawmaking or to resort to forbearance. The framework deals with this important question, promising to shed light on what motivates courts to serve as change agents and what hinders their progressive agendas.

## The Core Component: Discretionary Space

A large discretionary space – either given to or carved out by courts – is a necessary condition for international courts to be audacious enough to generate progressive change. The discretionary space, or the zone of discretion, is the strategic space within which courts carry out their functions in line with their preferences.[4] The bounds of this zone are delimited by the constraints set by formal rules. Within this space, courts have room for maneuver[5] and may "operate creatively."[6] This concept comes out of the rationalist institutionalist literature.[7] It is tailored

Oxford University Press, 2012); 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; Ingo Venzke, "Between Power and Persuasion: On International Institutions' Authority in Making Law," *Transnational Legal Theory* 4, no. 3 (2013): 354–73.

[2] See, for example, Fuad Zarbiyev, "Judicial Activism," in *Max Planck Encyclopedia of International Procedural Law* (*EiPro*) (Oxford: Oxford University Press, 2018).

[3] Studies have critically analyzed judicial lawmaking and its consequence, for example, Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification," *European Journal of International Law* 23, no. 1 (2012): 7–41; Tom Ginsburg, "Bounded Discretion in International Judicial Lawmaking," *Virginia Journal of International Law* 45, no. 3 (2005): 631–73; Helfer and Voeten, "International Courts as Agents of Legal Change," 77–110.

[4] Alec Stone Sweet, "The European Court of Justice and the Judicialization of EU Governance," *Living Reviews in European Governance* 5, no. 2 (2010): 15.

[5] Mark Thatcher and Alec Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions," *West European Politics* 25, no. 1 (2002): 5.

[6] Mark A. Pollack, "Delegation, Agency, and Agenda Setting in the European Community," *International Organization* 51, no. 1 (1997): 129.

[7] Mark A. Pollack, "Learning from the Americanists (Again): Theory and Method in the Study of Delegation," *West European Politics* 25, no. 1 (2002): 200–19; Pollack, "Delegation, Agency, and Agenda Setting in the European Community," 99–134; Mark A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003); Jonas Tallberg, "Delegation to Supranational Institutions: Why, How, and with What Consequences?," *West European Politics* 25, no. 1 (2002): 23–46; Jonas Tallberg, "The Anatomy of Autonomy: An Institutional Account of Variation in Supranational Influence," *JCMS: Journal of Common Market Studies* 38, no. 5 (2000): 843–64.

to study non-majoritarian institutions like courts.[8] What is distinctive about non-majoritarian institutions is that they exercise "specialised public authority" without being "elected by the people, nor [are they] directly managed by elected officials."[9] Courts are a special case of non-majoritarian institutions. They are delegated with authority to carry out functions such as supervising the implementation of a treaty, interpreting and applying its provisions, settling disputes, and (possibly) developing further rules.[10]

While the zone of discretion may appear to be an elusive concept, it can be pinned down in reference to other measures, in particular, court autonomy and authority. Autonomy concerns a court's independence from member states and parent organizations.[11] Authority, on the other hand, refers to a court's credibility and ability to influence its audience by serving as a reference point,[12] which goes beyond the question of whether court judgments are complied with.[13] High degrees of authority and autonomy should ideally yield a wide zone of discretion.

For international courts and tribunals, complete independence may not be possible because they derive their authority from a constitutive treaty signed and enforced by states. Moreover, it is these states that elect or appoint the judges sitting on these courts. Therefore, international courts

[8] See 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)." See also Sweet, "The European Court of Justice and the Judicialization of EU Governance," 1–50.

[9] Thatcher and Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions," 2.

[10] Kenneth W. Abbott et al., "The Concept of Legalization," *International Organization* 54, no. 3 (2000): 401–19.

[11] Complete independence from member states is not entirely possible. This is because international courts and tribunals have a subordinate nature since they derive their authority from a constitutive treaty signed and enforced by states or because their judges are elected or appointed by states. However, courts, as in the case of the European Court, may be able to carve out a space of autonomy for themselves over time. See John Merrills, "International Adjudication and Autonomy," in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (New York: Routledge, 2011).

[12] Authority exists in different forms, and it may have different marks; for more information, see Fuad Zarbiyev, "Saying Credibly What the Law Is: On Marks of Authority in International Law," *Journal of International Dispute Settlement* 9, no. 2 (2018): 291–314; Nico Krisch, "Liquid Authority in Global Governance," *International Theory* 9, no. 2 (2017): 237–60.

[13] This definition is inspired by the ones offered in Ingo Venzke, "Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction," *Theoretical Inquiries in Law* 14, no. 2 (2013): 398; Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, "How Context Shapes the Authority of International Courts," *Law and Contemporary Problems* 79, no. 1 (2016): 1–36.

are by nature subordinate and depend on states.[14] That said, courts may be granted, or they may carve out, a space of autonomy for themselves over time, as was the case with the European Court.[15] According to Mikael Rask Madsen, the Court lacked autonomy when it was first instituted, but it then acquired "a higher degree of legal autonomy." This was due to "a set of interdependent processes of institutionalization, legalization, and even scientification of European human rights."[16] Darren Hawkings and Wade Jacoby provide a similar narrative.[17] They find that while the Court had limited autonomy in the 1960s and 1970s, its autonomy increased from the early 1980s onward.[18]

Authority, on the other hand, concerns the courts' standing in the eyes of member states and the broader international legal community. In theory, authority is derived from a court's reputation and credibility as an independent body in settling disputes in light of the law. In practice, a court's authority is certified when its decisions are respected and not challenged by member states.[19] Madsen, in another study, finds that the European Court's authority, like its autonomy, has increased over time.[20] The Court maintained narrow legal authority from its inception until the mid-to-late 1970s, but then it began to enjoy extensive authority in the 1990s and became "the *de facto* Supreme Court of human rights in Europe" with "a steady and growing docket."[21]

Indeed, the European Court began enjoying a larger discretionary space after the late 1990s, as Alec Stone Sweet and Thomas Brunell show in their study.[22] This is due to various reasons. First, the Court has been endowed

[14] Courtney Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts* (Cambridge and New York: Cambridge University Press, 2021), 32.

[15] Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics," *Law and Social Inquiry* 32, no. 1 (2007): 143.

[16] Ibid., 138.

[17] Darren Hawkins and Wade Jacoby, "Agent Permeability, Principal Delegation and the European Court of Human Rights," *The Review of International Organizations* 3, no. 1 (2008): 1–28.

[18] Ibid., 16–24.

[19] This definition is inspired by the one offered in Alter, Helfer, and Madsen, "How Context Shapes the Authority of International Courts," 1–36. More specifically, they measure authority based on the extent to which international courts' decisions are respected and the domestic authorities take measures to implement them.

[20] Mikael Rask Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash," *Law and Contemporary Problems* 79, no. 1 (2016).

[21] Ibid., 143.

[22] Sweet and Brunell, "Trustee Courts and the Judicialization of International Regimes," 61.

with compulsory jurisdiction to authoritatively interpret the Convention since 1998. Second, the Court has been able to expand its own zone of discretion by interpreting the Convention and the scope of its powers.[23] An important illustration of such judicial constructs is the principle of evolutive interpretation (i.e., the living instrument doctrine).[24] This principle has provided justifications for progressive interpretation in light of present-day circumstances and for expanding the Court's interpretive authority. Finally, states have not attempted to override any of the Court's important decisions regarding the interpretation of the European Convention by means of treaty revision.[25]

What Stone Sweet and Brunell do not remark upon in their study is that the European Court has also been known to engage in more forbearing treaty interpretation and to generate interpretive concepts that have the effect of narrowing the scope of its powers. Prominent examples falling under this category are the principle of subsidiarity and the margin of appreciation doctrine – both require the Court to act deferent to domestic authorities and to their authority to guarantee rights protection at the national level.[26] The existence and use of such principles do not mean that the Court's zone of discretion is effectively contracted. Instead, they signal that the Court does not have the sole intention to use its authority to the maximum. It may also have the instinct to use less discretion and assume a more circumscribed role.

Such a trade-off might be necessary for obtaining essential resources to survive and be secure (e.g., funding, state support, or legitimacy).[27] As Michael Barnett and Liv Coleman argue, institutions have diverse preferences that range from surviving to furthering their mandate and

[23] Sweet, "The European Court of Justice and the Judicialization of EU Governance," 15.

[24] Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights," *German Law Journal* 12, no. 10 (2011): 1731–45; George Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy," in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, ed. Andreas Føllesdal, Birgit Peters, and Geir Ulfstein (New York: Cambridge University Press, 2013): 106–41.

[25] Sweet and Brunell, "Trustee Courts and the Judicialization of International Regimes," 66–67.

[26] 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; Eva Brems, "Positive Subsidiarity and Its Implications for the Margin of Appreciation Doctrine," *Netherlands Quarterly of Human Rights* 37, no. 3(2019).

[27] Michael Barnett and Liv Coleman, "Designing Police: Interpol and the Study of Change in International Organizations," *International Studies Quarterly* 49, no. 4 (2005): 593–619.

protecting their autonomy. Institutions make trade-offs to pursue these goals.[28] In this book, I argue that this has been precisely the case for the European Court. The Court has used these diverse judicial tools to make trade-offs and adjust its behaviour to prevent or mitigate widespread negative feedback and political pushback.[29]

### *Determinants of the Width of Discretionary Space: State Control*

As the case of the European Court shows, the zone of discretion is not a static space. Once the initial zone of discretion is established by formal powers and controls, it can be subsequently readjusted. Court activities may spur reactions from states, especially when they create domestic distributional consequences by issuing controversial rulings that are financially or politically costly to implement.[30]

In order to better understand what determines the bounds of discretionary space, it is worth briefly revisiting the theories on institutional design and delegation.[31] Most existing work agrees that international courts come with a "sovereignty cost" that can grow over time.[32] What they disagree on is the extent to which states can recover some of this cost by exerting control over courts.

Rationalist design scholars view states as the principals that delegate authority to courts as their agents, based on a contractual agreement.[33] While the expectations might be clear at the outset, courts – just like other institutions with delegated authority – may grow to have their own

[28] Ibid., 615.

[29] Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization*, 1st edition (Oxford and New York: Oxford University Press, 2002), 130.

[30] Hillebrecht, *Saving the International Justice Regime*, 36–37.

[31] See, for example, Darren G. Hawkins et al., eds., *Delegation and Agency in International Organizations*. Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 2006); Thatcher and Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions"; Tallberg, "Delegation to Supranational Institutions"; Karen J. Alter, "'Delegating to International Courts: Self-Binding vs. Other-Binding Delegation," *Law and Contemporary Problems* 71, no. 1 (2008); Manfred Elsig and Mark A. Pollack, "Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization," *European Journal of International Relations* 20, no. 2 (2014): 391–415.

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

[33] Pollack, "Delegation, Agency, and Agenda Setting in the European Community"; Pollack, "Learning from the Americanists (Again)," 200–219; Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations," *Journal of Conflict Resolution* 42, no. 1 (1998): 3–32.

preferences,[34] or may evade control mechanisms (i.e., agent slack).[35] They might be inclined to exploit their discretion and act autonomously.[36] In order to prevent this, states often prefer to exert direct control over delegated institutions – including, for example, withholding delegation,[37] imposing bureaucratic and budgetary restrictions,[38] and overruling judgments.[39] While agreeing that international courts are special cases of delegated authority and are more prone to being autonomous, most scholars in this camp theorise about the ways in which states may exert direct or indirect influence on courts.[40]

There are others who disagree with characterizing courts as agents, opting instead to characterise international courts as trustees.[41] They find that, while it might be appealing to control courts to prevent them from solely pursuing their own preferences, in reality, states enforce only limited control on courts.[42] This is because the functions that the courts typically carry out require "substantive levels of discretion."[43] In other words, courts need independence in order to preserve their own legitimacy and the legitimacy of their judgments.[44] In addition, courts are not solely dependent on their delegated authority; they may also derive some

[34] Hawkins and Jacoby, "Agent Permeability, Principal Delegation and the European Court of Human Rights."

[35] Karen J. Alter, "Agents or Trustees? International Courts in Their Political Context," *European Journal of International Relations* 14, no. 1 (2008): 34; Richard H. Steinberg, "The Decline of Global Trade Negotiations – and the Rise of Judicial and Regional Alternatives," *Journal of Scholarly Perspectives* 5, no. 1 (2009).

[36] Tallberg, "Delegation to Supranational Institutions," 28.

[37] Curtis Bradley and Judith Kelley, "The Concept of International Delegation," *Law and Contemporary Problems* 71 (2008): 20.

[38] Hillebrecht, *Saving the International Justice Regime*, 25.

[39] Clifford J. Carrubba and Matthew Gabel, "International Courts: A Theoretical Assessment," *Annual Review of Political Science* 20, no. 1 (2017): 55–73; Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," *American Journal of International Law* 98, no. 2 (2004): 247–75.

[40] Hawkins and Jacoby, "Agent Permeability, Principal Delegation and the European Court of Human Rights," 10.

[41] Alter, "Agents or Trustees?," 33; Thatcher and Sweet, "Theory and Practice of Delegation to Non-majoritarian Institutions," 7.

[42] Alter, "Delegating to International Courts"; Alter, "Agents or Trustees?

[43] Tallberg, "Delegation to Supranational Institutions," 26.

[44] Independence can be understood as impartiality and political insularity – the notion that judges will decide on the basis of facts and law and will not be employed as tools for furthering political goals. Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *American Journal of Comparative Law* 44, no. 4 (1996): 609.

authority from their normative functions.[45] Finally, courts might even expand their authority by building alliances with sub-state actors and compliance constituencies (e.g., advocacy networks, domestic judges, and officials from administrative agencies).[46] Such transnational coalitions may provide courts with an alternative source of support and reduce their dependency on states.

Even starting from the assumption that states are less likely to put in place intrusive control mechanisms over international courts,[47] we can reasonably expect that states may still attempt to reduce the sovereignty cost by resorting to indirect or more informal measures.[48] Laurence Helfer and Anne-Marie Slaughter describe these as "a range of structural, political, and discursive mechanisms to ensure that independent judges are nevertheless operating within a set of legal and political constraints."[49] These reactions often may not amount to full dejudicialization or re-contracting – a complicated formal process to amend courts' constitutive treaties and the scope of their delegated authority.[50] Instead, indirect means may include the appointment of judges who favour deferring to state policies,[51] communicating dissatisfaction,[52] threatening withdrawals,[53] or a variety of other court curbing strategies.[54] As Mark Pollack highlights in his study of the paralysis of the Appellate Body of the World Trade Organization (WTO), such attacks or threats thereof are common.[55]

[45] Hillebrecht, *Saving the International Justice Regime*, 18.

[46] Alter and Helfer, "Nature or Nurture?," 563. Karen J. Alter, James T. Gathii, and Laurence R. Helfer, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences," *European Journal of International Law* 27, no. 2 (2016): 293–328.

[47] Tallberg, "The Anatomy of Autonomy," 861.

[48] For more details on the list of strategies designed to undermine courts' authority, see Heidi Nichols Haddad, "Judicial Institution Builders: NGOs and International Human Rights Courts," *Journal of Human Rights* 11, no. 1 (2012): 134.

[49] Laurence R. Helfer and Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo," *California Law Review* 93, no. 3 (2005): 902.

[50] Alter, "Agents or Trustees?"; Daniel Abebe and Tom Ginsburg, "The Dejudicialization of International Politics?," *International Studies Quarterly* 63, no. 3 (2019): 525.

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

[52] Abebe and Ginsburg, "The Dejudicialization of International Politics?," 525.

[53] Ginsburg, "Bounded Discretion in International Judicial Lawmaking," 557–58; Steinberg, "Judicial Lawmaking at the WTO," 263–64.

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

[55] Ibid., 21.

Such reactions, when concerted or systematic, might compel the courts to adjust their practices and interpretive preferences.[56] In this sense, courts, just like other institutions, may act strategically to ensure their survival and increase their reputation, relevance, and resources.[57] As this book argues, forbearance is the collective term to depict judicial strategies geared toward such aims. It essentially means that a given court chooses to underutilise its prerogatives and refrains from issuing sweeping judgments with significant adjustment or implementation costs. This dynamic implies that even courts that enjoy a wide discretionary space occasionally may be constrained by the preferences of other actors, especially states.[58] Only when such constraints are lifted can international courts afford to be audacious and pursue more progressive agendas unrestrained by state interests.

### *Negative Feedback and Signaling*

When could widespread negative feedback influence court behaviour? Serving as a tool of indirect control, negative feedback is not only about punishing courts for past behaviour; it is also for future signalling.[59] The influence of negative feedback may work in two ways. First, when accumulated, negative feedback can erode the state or public support for an institution. The mechanism behind this dynamic can be best explained by drawing inspiration from recent Historical Institutionalist accounts that focus on endogenous drivers of change – rather than exogenous ones such as geopolitical shifts, recessions, crises, or other shocks.[60] The

[56] This adjustment might involve a combination of rational and cognitive processes. For more details, see Ezgi Yildiz and Umut Yüksel, "Understanding the Limitations of Behavioralism: Lessons from the Field of Maritime Delimitation," *German Law Journal* 23, no. 3 (2022): 413–30.

[57] Barnett and Coleman, "Designing Police."

[58] Ginsburg, "Bounded Discretion in International Judicial Lawmaking," 632.

[59] Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2012), 445–74.

[60] See, for example, Wolfgang Streeck and Kathleen Thelen, eds., *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford and New York: Oxford University Press, 2005). For a general overview of this literature, see Orfeo Fioretos, "Historical Institutionalism in International Relations," *International Organization* 65, no. 2 (2011): 367–99; Giovanni Capoccia, "When Do Institutions 'Bite'? Historical Institutionalism and the Politics of Institutional Change," *Comparative Political Studies*

source of change can be the institutions themselves. As explained by James Mahoney and Kathleen Thelen, institutions generate distributional effects; those that are not advantaged by this effect are likely to challenge the institutions.[61] Such negative feedback might have a diffusion effect and culminate in social and political pressures undermining the institutions.[62] This observation is applicable to international courts whose outputs might generate negative feedback and erode their "political support bases over time."[63] The erosion of support might trigger formal or informal processes that threaten international courts' authority and autonomy.

Second, negative feedback and signalling can inform courts' organizational priorities. Chief among those priorities is maintaining a good reputation in the eyes of member states, which oftentimes is a condition for securing resources and enhancing courts' political and social influence.[64] Courts' concern for reputation and authority can be a constraint on their choices and activities, and can compel them to prioritise their "organizational imperatives" over pursuing unequivocally progressive agendas – a phenomenon coined as the "authority trap."[65] In order to maintain their reputation and authority, international courts may respond to negative feedback by engaging in strategies for institutional survival and resilience, which include judicial avoidance,[66] or showing deference.[67] In so doing, they

49, no. 8 (2016): 1095–1127; Giovanni Capoccia and R. Daniel Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism," *World Politics* 59, no. 3 (2007): 341–69.

[61] James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, ed. James Mahoney and Kathleen Thelen (New York: Cambridge University Press, 2010), 8.

[62] Wolfgang Streeck and Kathleen Thelen, "Introduction: Institutional Change in Advanced Political Economies," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen (Oxford: Oxford University Press, 2005), 1–39.

[63] Alan M. Jacobs, "Social Policy Dynamics," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (Oxford: Oxford University Press, 2016), 351.

[64] Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015), 5.

[65] This concept created for international nongovernmental organizations has relevance for international courts whose concern for authority or reputation may serve as a driver for forbearing and constrained strategies. Sarah S. Stroup and Wendy H. Wong, *The Authority Trap: Strategic Choices of International NGOs* (Ithaca: Cornell University Press, 2017).

[66] Steinberg, "Judicial Lawmaking at the WTO," 269.

[67] 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.

underutilise their discretionary space and signal back to the states that they can operate on lower sovereignty costs.[68]

### *Strategies for Institutional Survival and Resilience: Between Tactical Balancing and Trade-Offs*

International courts are sensitive to the threat of negative feedback and such feedback itself. They engage in tactical balancing exercises to fend off negative criticism and to preserve the institution and its public image. This self-preservation exercise is a collective strategy undertaken not only by the judges who are elected for a limited term but also by the Secretariat staff employed on a more permanent basis, as we will discover in Chapter 2. Hence, all members of the judicial elite working at the Court can partake in fashioning strategies and trade-offs for institutional survival or resilience.

The literature on courts provides insights into how this trade-off might look. For example, Diana Kapiszewski argues that judicial review is not a strictly mechanical exercise and that it is accompanied by tactical balancing.[69] That is to say, judges read the content of each politically important case and the case's context. They simultaneously balance multiple considerations, including their own ideology and life view, how they perceive the interest of the institution they serve, the political and economic implications of their decision, the opinion of the public, and the state of International Law.[70] Kapiszewski's theory convincingly portrays how judicial decisions are shaped by "multiple political and institutional pressures."[71] It also explains how judges can be selectively assertive when the context calls for it.

This depiction is directly applicable to the case of the European Court. When the Court's zone of discretion is narrow, issue characteristics matter more; the Court can be assertive only in select instances. The likelihood

[68] 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.

[69] Diana Kapiszewski, "Tactical Balancing: High Court Decision Making on Politically Crucial Cases," *Law and Society Review* 45, no. 2 (2011): 471–506.

[70] According to Kapiszewski's framework, judges have six considerations: (1) their own ideology, (2) judicial institutional interests, (3) elected branch preferences, (4) the possible economic or political consequences of their decision, (5) popular opinion regarding the case, and (6) the law and legal considerations. Kapiszewski, "Tactical Balancing," 472–73.

[71] Ibid., 472.

of the Court being assertive and audacious increases as its zone of discretion enlarges. This is what Mikael Rask Madsen captures in his study of the history of the European human rights regime. Madsen introduces the concept of "legal diplomacy" to depict the old European Court and the Commission's attempts to provide legal and extra-legal solutions to the disputes they settled up until the 1970s. He also remarks that legal diplomacy gave way to more progressive trends in the subsequent period, especially in the late 1990s, when the new Court secured a larger zone of discretion.[72]

The interviews I gathered at the Court provide insights into how this tactical balancing might look today. Almost all of the judges I interviewed confirmed, either explicitly or implicitly, that judges do consider the broader implications that their decisions might generate. During an interview, an experienced judge clarified the distinction between political decisions and legal decisions that may have a political impact. According to them, the Court refrains from making political decisions. This does not, however, mean the Court is unaware of the political effects of its decisions. It takes them into consideration when delivering judgments.[73] Another judge underlined that the Court cannot function in isolation and that "the European Court is particularly well placed to observe the general trends in the society."[74] Similarly, a judge from a Western European country explained that, normatively, the Court should not be influenced by external factors when delivering decisions; however, empirically that is the case. They avowed the following:

> We are human beings. I am a human being like yourself, with blood and flesh. I read the newspapers. I understand what is happening in the environment. I am sure, at least subconsciously, we, as judges, are influenced by external factors, and whether we are more prone to take more human rights viewpoint or more government viewpoint is a matter of personality. It depends on where you are coming from. A lot of the judges come from the human rights community, so they instinctively perhaps are willing to listen to human rights views, and some come from the civil service sector, and they pay more attention to the state side. Empirically, judges are

[72] Mikael Rask Madsen, "Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 56–57"; Madsen, "The Challenging Authority of the European Court of Human Rights."

[73] Interview 18.

[74] Interview 11.

> influenced by factors. International judges cannot be so naive as to do their jobs without taking account of external factors. It is all about legitimacy, trust, and the community believing that they are doing what they are supposed to be doing. So normatively, no; they should not take account of external factors, but yes, empirically, they do in different ways for different reasons.[75]

Another judge from an Eastern European country explained the dynamics of tactical balancing and argued that judges "cannot decide the cases without having a general political background." They then added that "This is completely normal. We are aware of the developments around us, and we have to look at [judicial review] from a certain perspective."[76]

Some judges supported their view on the necessity of tactical balancing with examples. One judge from Eastern Europe referred to *Hirst (No. 2)* v. *the United Kingdom*,[77] and *Greens and M.T.* v. *the United Kingdom*,[78] where the Court found that issuing a blanket ban on prisoners' voting rights violated the Convention.[79] They disclosed that the Court felt the need to find the United Kingdom in violation due to changing trends in Europe, as well as the strong signals sent from the Parliamentary Assembly against voting rights restrictions.[80] Similarly, another judge from Western Europe brought up *Lautsi* v. *Italy*,[81] a controversial decision about the display of crucifixes in state schools.[82] In the Chamber judgment of 2009, the Court unanimously found Italy in violation of Article 2 of Protocol 1 (right to education) in conjunction with Article 9 (freedom of thought, conscience, and religion). The case was then appealed to the Grand Chamber, which reversed this decision in 2011; this change, the judge later explained, was due to state pressure. They specifically underlined that, alongside ten member states of the Council of Europe, thirty-three members of the European Parliament collectively sent submissions in favour of the Italian

[75] Interview 15.
[76] Interview 13.
[77] *Hirst (No. 2)* v. *the United Kingdom,* app. no. 74025/01, ECHR [GC] (October 6, 2005).
[78] *Greens and M.T.* v. *United Kingdom,* app. nos. 60041/08 and 60054/08, ECHR (November 23, 2010).
[79] Interview 4.
[80] Parliamentary Assembly, Resolution on the Abolition of Restrictions on the Right to Vote 1459 (2005) (June 24, 2005); Parliamentary Assembly, Recommendation 1714 (2005) (June 24, 2005), which urged the Committee of Ministers to appeal that member states reconsider existing restrictions on electoral rights of prisoners and military personnel.
[81] *Lautsi and Others* v. *Italy*, app. no. 30814/06, ECHR (November 3, 2009).
[82] Interview 10.

government's position.[83] This was the largest group of third-party interveners ever in the Court's history, collectively appealing to the Court to be more forbearing.[84] As these examples show, legal review is often accompanied by tactical balancing, whereby judges gauge the importance of the case and the repercussions it might generate – albeit under the condition of imperfect information.[85]

Tactical balancing accompanies crucial cases with political and legal complexity in particular, as the examples above show. But tactical balancing in itself is a neutral exercise that might result in forbearing or audacious decisions. One argument proposed in this book is that the Court may tactically decide to act more forbearing when its zone of discretion is limited or when it receives overwhelming negative feedback. Alternatively, tactical balancing yields more audacious decisions when the Court's discretionary space is wide. Yet, as we will see in the following section, other factors can also facilitate the Court's assertiveness.

## Contributing Factors for Increased Audacity

In addition to the zone of discretion, which is the cornerstone, there are other sociopolitical and legal factors considered in the framework. The Court's likelihood of being audacious increases when its decisions are in line with (1) widespread societal needs, (2) the precedents or legal principles set by other courts and institutions or in other treaties, and (3) civil society campaigns. The expectation is that when the Court enjoys a large discretionary space, unrestrained by negative feedback, it will weigh these contributing factors more than its need to pay heed to state interests.

The existing literature has already identified the importance of these factors on the Court's behaviour and decisions. First, the Court may be more willing to effectuate change concerning matters around which European societies agree. As sociolegal scholars and legal historians such as Mikael Rask Madsen and Ed Bates explain, sociopolitical context constrains or enables the Court's tendencies to be more progressive.[86] There are also

[83] The intervening countries were Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania, and the Republic of San Marino.

[84] Interview 10.

[85] Abebe and Ginsburg, "The Dejudicialization of International Politics?," 524.

[86] See, for example, Mikael Rask Madsen, "International Human Rights and the Transformation of European Society: From 'Free Europe' to the Europe of Human Rights," in *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law*, ed. Mikael Rask Madsen and Chris Thornhill (Cambridge: Cambridge University

studies that explain how changing social trends may compel the Court to be more progressive and justify decisions with wider implications.[87] For example, Sarah Lucy Cooper finds that, while the Court rejected the notion of same-sex relationships as family units in the 1980s, it began to be receptive to the idea only in the 1990s when it had already become socially acceptable in Europe.[88]

This generally implies that successful attempts at change concern emerging societal needs or issues unlikely to provoke political resistance. The Court has traditionally checked this by looking at whether there are repeated complaints about an issue and whether a European consensus exists around a practice.[89] The existence of repeated complaints, especially brought against multiple countries, is a sign of the pervasiveness of the problem. For example, introducing procedural obligations under the prohibition of torture was a response to a problem demonstrated by the systemic rule of law deficiencies in several member states.[90] The Court can also discern general trends by carrying out European consensus analysis (i.e., assessing whether there is unified agreement around a certain practice in Europe).[91] To illustrate, the Court justified its decision that states would not have a positive obligation to facilitate euthanasia by looking at the general trends in Europe. Noting that "assisted suicide and consensual killing are unlawful in all Convention countries except the Netherlands,"

Press, 2014); Madsen, "From Cold War Instrument to Supreme European Court"; Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford and New York: Oxford University Press, 2010).

87 The European consensus doctrine works on this idea. European consensus refers to the common position of the majority of member states within the Council of Europe and indicates that, if in doubt, the Court will interpret in favor of this common position. Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights."

88 Sarah Lucy Cooper, "Marriage, Family, Discrimination and Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights," *German Law Journal* 12, no. 10 (2011): 1746–63.

89 Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights."

90 Eva Brems and Laurens Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights," *Human Rights Quarterly* 35, no. 1 (2013): 176–200.

91 See more, Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015); Panos Kapotas and Vassilis P. Tzevelekos, *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge: Cambridge University Press, 2019).

the Court ruled that states do not have an obligation to sanction euthanasia under Article 3 in *Pretty* v. *the United Kingdom* in 2002.[92]

Second, the Court may channel judicial innovations created or promoted by other courts and institutions or in other treaties, as Magdalena Forowicz shows in her work.[93] Innovations and changes initiated elsewhere may inform the Court about general trends in International Law. More practically, other institutions or treaties may set precedents and open the gateways for change. It is plausible to assume that emulating legal change launched by another institution would be less costly.[94] Therefore, these precedents provide the Court not only with guidance, but also with legally valid justifications to effectuate change within the European human rights system. Particularly in the context of the prohibition of torture, the global anti-torture regime – composed of specialised treaties, expert bodies, and committees that carry out on-site visits – and other Council of Europe instruments against torture and inhuman or degrading treatment have provided the Court with evidence or legal grounds to proactively develop the norm. For example, when recognizing Nahide's victimhood under Article 3 in *Opuz* v. *Turkey*, the European Court relied on the Convention on the Elimination of Discrimination against Women (CEDAW) and the Belém do Pará Convention.[95]

Finally, as previous studies established, civil society organizations can shape and inform court decisions by strategically litigating key cases and actively promoting the principles set out in these cases.[96] In particular, the influence of third-party interventions has been subjected to systematic studies.[97] For example, Yaël Ronen and Yale Naggan argue that although

[92] *Pretty* v. *the United Kingdom*, application no. 2346/02, ECHR (April 29, 2002), §28.

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

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

[95] *Opuz* v. *Turkey,* application no. 33401/02, ECHR (June 9, 2009).

[96] Rachel A. Cichowski, "Civil Society and the European Court of Human Rights," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011); Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (Oxford and Portland: Hart Publishing, 2011); Heidi Nichols Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts* (New York: Cambridge University Press, 2018).

[97] For an extensive analysis of the third-party interventions before the European Court, see Laura Van den Eynde, "An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 31, no. 3 (2013): 271–313."

there are relatively few cases in which *amicus curiae* briefs are submitted to the European Court, these submissions are often mentioned in the text of the judgment.[98] They find a correlation between third-party interventions and the Court finding a violation on the grounds that they intervene.[99] Other scholars portrayed the role of civil society organizations in creating positive change for a range of groups from minorities[100] to victims of gross violations in Chechnya and Turkey's Kurdish regions.[101]

Civil society can be influential because they provide the Court with vital information about the systematic nature of certain problems. They do so by acting as repeat players, bringing similar cases before the Court to draw attention to pervasive or protracted human rights violations. For example, their active promotion has helped the Court understand the scale of discrimination toward the Roma in Central and Eastern Europe.[102] The European Roma Rights Centre (ERRC), Interights, and the Open Society Justice Initiative intervened as third parties on the side of the applicants in *Nachova and Others* v. *Bulgaria* – a case about racially motivated police violence.[103] The ERRC also represented the applicants in *Moldovan and Others* v. *Romania [No.2]*.[104] This case concerned state authorities' failure to provide a legal remedy following the destruction of their home due to racially motivated mob violence. Finally, the ERRC and the Roma Center for Social Intervention and Studies ("the Romani CRISS") represent the

[98] Yael Ronen and Yale Naggan, "Third Parties," in *The Oxford Handbook of International Adjudication*, ed. Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (Oxford and New York: Oxford University Press, 2013), 824.

[99] Ibid., 824.

[100] James A. Goldston, "The Struggle for Roma Rights: Arguments That Have Worked," *Human Rights Quarterly* 32, no. 2 (2010): 311–25.

[101] Freek van der Vet, "Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights," *Human Rights Review* 13, no. 3 (2012): 303–25; Dilek Kurban, "Protecting Marginalised Individuals and Minorities in the ECtHR: Litigation and Jurisprudence in Turkey," in *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context*, ed. Dia Anagnostou and Evangelia Psychogiopoulou (Boston and Leiden: Martinus Nijhoff, 2010), 159–82; Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge and New York: Cambridge University Press, 2020).

[102] James A. Goldston, "Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges," *Human Rights Quarterly*, no. 2 (2006): 492–527; Goldston, "The Struggle for Roma Rights."

[103] *Nachova and Others* v. *Bulgaria,* application no. 43577/98 and 43579/98, ECHR [GC] (July 6, 2005).

[104] *Moldovan and Others* v. *Romania [No.2],* application no. 41138/98 and 64320/01, ECHR (July 12, 2005).

applicant in *Stoica* v. *Romania* – another case concerning racially motivated ill-treatment.[105] In all of these cases, various civil society organizations called attention to racial motivations behind police violence and authorities' failure to provide a legal remedy. They relentlessly challenged the Court by using litigation to portray the systemic discrimination against the Roma in Central and Eastern Europe. The Court finally acknowledged racial motivations behind ill-treatment and police violence in *Stoica* in 2008.[106]

In addition to the existing literature, my interviewees at the Court referred to these three contributing factors when explaining the change in Article 3 jurisprudence. In 2014, I asked fifteen current and two former judges a series of questions about what influences them when carrying out judicial review and sources of legal change.[107] Concerning the basic drivers of interpretive change, all seventeen of them underlined the relevance of changing times and societal needs. One judge with an academic background elucidated that legal change is due to the changing societal dynamics in Europe. They then added that "We have to interpret the Convention guarantees in the line of these new developments and new threats."[108] Another judge, who previously served as a supreme court justice, identified the source of change as "the life itself…the Convention as a living instrument. We cannot always be ahead of our time, but we cannot afford to be left behind."[109] Finally, a judge from a Western European country described that

> To some extent, this whole notion of a changing norm within the changing societal dynamics is inevitable. (…) Nobody expected a homosexual relationship would constitute a family in the 1950s, but now we accept it. (…) If this issue was to be brought up in the 50s or 60s, the Court would unanimously decide that same-sex relationships are not protected under Article 8 [right to private and family life]. It would be a lot more difficult to come back to this issue in the 80s and 90s for this claim. So, the strategy should not be naive but timely.[110]

Ten of them also mentioned that other treaties, courts, and institutions might also provide the Court with encouragement and inspiration to effectuate change within the European system. One judge explained

[105] *Stoica* v. *Romania,* application no. 42722/02, ECHR (March 4, 2008).
[106] Ibid, §111–114.
[107] Current judges are those who were serving – and some of whom are still serving – at the Court in 2014 and 2015 when I carried out the interviews.
[108] Interview 9.
[109] Interview 13.
[110] Interview 15.

that other courts and treaties provide them with a "fresh perspective" and update them about what is at stake at the international level.[111] Another judge disclosed that other courts' case law gives a direction to the Court.[112] Finally, a Western European judge clarified that they may sometimes turn to "other tribunals or expert bodies to determine what the situation is at the international level."[113] They added that although the judgment will be decided on the basis of the Convention, "of course, we will think twice before we go against an established international practice."[114]

Unprompted, judges did not immediately talk about the role of civil society. When asked specifically, eleven of them confirmed that civil society groups may play an important role. They divulged that what makes civil society groups particularly influential is the fact that they bring new information about the legal developments taking place elsewhere, present the opinion of the public, and provide legal counsel to victims who otherwise may not be able to represent themselves.[115]

There was no clear agreement about the extent of civil society's influence in shaping the case law, however. Some judges argued that what matters is the legal arguments and not necessarily who brings them.[116] Others viewed civil society groups' role to be essential.[117] One judge expressed that "without them, we would have a partial picture."[118] Another judge explained their relevance as follows: "On issues such as segregation of Roma children, we do not get a lot of information from the governments, but the NGOs provide us with data and information. They bring us good cases too."[119] Similarly, a former judge observed that civil society groups are often "very useful with mapping out general problems."[120] Finally, one Western European judge described third-party submissions as "often interesting and occasionally challenging for the Court." They then added, "I would not say that entire judgments have been shaped on the basis of the intervention of an NGO. But certainly, they have contributed to shaping the case law."[121]

[111] Interview 3.
[112] Interview 5.
[113] Interview 6.
[114] Ibid.
[115] Interview 4; Interview 5; Interview 12; Interview 14; Interview 17.
[116] Interview 1; Interview 10; Interview 13.
[117] Interview 2; Interview 6; Interview 9.
[118] Interview 2.
[119] Interview 3.
[120] Interview 17.
[121] Interview 16.

## Conclusion

In this chapter, I have laid out the building blocks of my theoretical framework, which catalogues the conditions under which international courts, like the European Court, may be expected to issue audacious rulings. This framework relies on previous literature and insights gathered from interviews in and around the Court. The necessary condition for an audacious court is a wide discretionary space within which that court may act without fearing repercussions from states. Yet, such a wide discretionary space is not always given; when it is given, states might still attempt to influence courts through direct or indirect means. Such means include threatening to close down a court's discretionary space and threatening widespread negative feedback, as well as actually taking either action. International courts, in turn, are often compelled to (re)align their priorities in order to react to or pre-empt the use of such means. This (re)alignment is a form of tactical balancing whereby courts adjust their behaviour to ensure their continued access to resources and preserve their reputation and image. Finally, I have introduced additional factors that increase the likelihood of audacious rulings (i.e., congruence with changing societal needs, legal developments external to the regime, and civil society campaigns). In Chapter 2, I will take a look inside the Court and further explore how it operates, what its trade-offs are, and how its discretionary space changes over time.