3

Mapping Out Norm Change

How did the Court refashion the norm against torture and inhuman or degrading treatment? Which elements of the norm were already present at the time of the Convention's inception, and which new dimensions were introduced at a later stage? The answers to these questions not only help one trace how the norm changed but also when and how much it did. To take on this task, this chapter closely examines the norm. Instead of treating the norm as a single unit, it breaks it down into components and assesses the norm's transformation over time by tracing when each component was introduced and what percentage of Article 3 jurisprudence they make up.

Norm disaggregation is particularly valuable for three reasons: First, it helps us understand what norms are made of. Norms are often thought to be vague or capacious.[1] Yet, by tracing the changing configuration of their contents, one gets closer to capturing norms in their entirety. Second, charting the range of obligations as they are introduced within a legal regime reveals the extent of judicial lawmaking. This is crucial because judicial lawmaking is often accompanied by the amnesia of creation. Such amnesia persists because courts resort to a narrative that they are not, in fact, introducing any new understandings; these new understandings were there all along.[2] Largely induced by courts' legitimacy concerns,

[1] For a good assessment of the definition and content of norms, see Michelle Jurkovich, "What Isn't a Norm? Redefining the Conceptual Boundaries of 'Norms' in the Human Rights Literature," *International Studies Review* 22, no. 3 (2020): 693–711.

[2] For a series of comprehensive analyses on judicial lawmaking, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford and New York: Oxford University Press, 2012); Karen Alter and Laurence 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; Tiago Fidalgo de Freitas, "Theories of Judicial Behavior and the Law: Taking Stock and Looking Ahead," in *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences*, ed. Luís Pereira Coutinho, Massimo La Torre, and Steven D. Smith (Cham and New York: Springer, 2015), 105–17.

this narrative is often employed to ensure that courts are not seen to be creating new obligations not previously agreed to by states.[3] Finally, as this book makes clear, international courts may not adopt the same interpretative lenses toward different obligations falling under the same norm. For example, they might not evenly apply expansive (or right-restraining) interpretations across the board, which makes it harder to assess how progressive a certain court is. Disaggregating norms and studying them at the level of obligations is useful to measure whether a court is right-expansive across the board or selectively.

This approach complements existing International Relations and International Law scholarship on norm change in substantial ways. Norm scholars have explored the impact that norms have on state behaviour. Yet, they have undertheorised what happens to norms once they are legalised and codified.[4] A new generation of norm scholars has amended this to a great extent, examining how the meaning, validity, and application of norms are disputed.[5] Nevertheless, they also have continued to take treaties as their point of reference, tending not to focus on international courts' impact on norm transformation.[6] This is despite the fact that international courts have a crucial role to play in updating norms' formal validity by interpreting treaties, as well as by establishing divergence

[3] Tom Ginsburg, "Bounded Discretion in International Judicial Lawmaking" *Virginia Journal of International Law* 45, no. 3 (2005): 631–73; Laurence R. Helfer and Karen J. Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts," *Theoretical Inquiries in Law* 14, no. 2 (2013): 479–504; Nienke Grossman et al., eds. *Legitimacy and International Courts* (Cambridge, New York: Cambridge University Press, 2018); Andreas Follesdal, "Survey Article: The Legitimacy of International Courts," *Journal of Political Philosophy* 28, no. 4 (2020): 476–99.

[4] Wayne Sandholtz, "Dynamics of International Norm Change: Rules against Wartime Plunder," *European Journal of International Relations* 14, no. 1 (2008): 101.

[5] Some examples include Mona Lena Krook and Jacqui True, "Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality," *European Journal of International Relations* 18, no. 1 (2012): 103–27; Susanne Zwingel, "How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective," *International Studies Quarterly* 56, no. 1 (2012): 115–29; Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," *International Organization* 58, no. 2 (2004): 239–75; Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge: Cambridge University Press, 2018); Nicole Deitelhoff and Lisbeth Zimmermann, "Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms," *International Studies Review* 22, no. 1 (2020): 51–76.

[6] See, for example, Wiener, *Contestation and Constitution of Norms in Global International Relations*.

and convergence around meanings.[7] Legal scholars, on the other hand, have long remarked upon the importance of international courts in norm development.[8] What has been missing in such doctrinal accounts, however, is a systematic explanation of when and why norms change.[9] Instead, this scholarship has presented the most up-to-date standards by taking snapshots of the law at a particular moment in time. So far, it has limited itself to providing a wealth of normative work on the "right" way to interpret[10] or on timeless jurisprudential analyses of available legal principles.[11]

Between Forbearance and Audacity bridges two distinct scholarships and offers a new approach to systematically studying norm change. This approach helps trace how adjudication influences the development of an existing norm through norms' interpretation or application to concrete situations.[12] At its core, it advocates studying every decision regardless of its importance – not just poring over a few landmark decisions as

[7] There are a few exceptions, such as Druscilla Scribner and Tracy Slagter, "Recursive Norm Development: The Role of Supranational Courts," *Global Policy* 8, no. 3 (2017): 322–32; Tobias Berger, *Global Norms and Local Courts: Translating the Rule of Law in Bangladesh* (Oxford and New York: Oxford University Press, 2017); 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.

[8] For example, Kanstantsin Dzehtsiarou and Conor O'Mahony, "Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court," *Columbia Human Rights Law Review* 44 (2013 2012): 309–66; Steven Greer, "The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation," *UCL Human Rights Review* 3 (2010): 1–14; Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford and New York: Oxford University Press, 2011).

[9] For a discussion on norm development, see Norbert Paulo, *The Confluence of Philosophy and Law in Applied Ethics* (London: Palgrave Macmillan, 2016).

[10] See, for example, Greer, "The Interpretation of the European Convention on Human Rights"; Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights," *German Law Journal* 12, no. 10 (2011): 1731–45; Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford and Portland: Hart Publishing, 2004); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007); George Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer," *European Journal of International Law* 21, no. 3 (2010): 509–41.

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

[12] On the distinction between norm interpretation and application, see Anastasios Gourgourinis, "The Distinction between Interpretation and Application of Norms in International Adjudication," *Journal of International Dispute Settlement* 2, no. 1 (2011): 31–57.

traditional legal analysis would require. This is what makes it possible to measure the magnitude, pace, and directionality of change.

We intuitively know that human rights improve over time in line with evolving societal needs. Yet, we cannot immediately guess when, why, and how much a norm can transform over time. This is precisely what can be revealed when norms are studied in a disaggregated manner by taking obligations as a reference. Tracing obligations demonstrates exactly when a norm fundamentally transforms and helps identify the type and magnitude of this transformation. Unlike previous studies that view legal change through the lenses of punctuated equilibrium theory (i.e., long phases of norm *stasis* disrupted by sudden and substantial adjustments),[13] this book makes it clear that there is no single way that norm change happens. Norm change sometimes occurs gradually, while other times, it appears in sudden bursts. Moreover, not every change episode would be of the same magnitude. In order to examine norm change using these different metrics, we need to disaggregate norms and study their transformation at the level of obligations.

This approach thus stands apart from those that investigate norms' strength or resilience by looking at norm clusters (i.e., a group of norms) in a more aggregated fashion.[14] While looking at norms as aggregated groups of standards makes sense to test their strength and resilience, such an approach does not allow the degree of precision necessary to trace how and how much norms transform within a given legal regime.

In addition to introducing this new approach to tracing norm change, this chapter also serves as an important stepping stone to the subsequent analysis. The results of the systematic content analysis presented below provide key information about when and how much the norm against torture and inhuman or degrading treatment changed over time. In so doing, they successfully illustrate the norm's trajectory in parallel with the European Court's institutional transformation.

[13] See, for example, Paul F. Diehl and Charlotte Ku, *The Dynamics of International Law* (Cambridge: Cambridge University Press, 2010).

[14] See, for example, Carla Winston, "Norm Structure, Diffusion, and Evolution: A Conceptual Approach," *European Journal of International Relations* 24, no. 3 (2018): 638–61; Eglantine Staunton and Jason Ralph, "The Responsibility to Protect Norm Cluster and the Challenge of Atrocity Prevention: An Analysis of the European Union's Strategy in Myanmar," *European Journal of International Relations* 26, no. 3 (2020): 660–86; Michal Ben-Josef Hirsch and Jennifer M. Dixon, "Conceptualizing and Assessing Norm Strength in International Relations," *European Journal of International Relations* 27, no. 2 (2021): 521-47.

Disaggregating Norms

Legal norms are composite constructs composed of obligations and correlative rights.[15] A common definition of a norm in International Relations is "a standard of appropriate behavior for actors with a given identity."[16] However, as Wayne Sandholtz rightly argues, this definition conflates norms with customs, traditions, values, or fashions.[17] Instead, he advocates Nicholas Onuf's definition of norms as standards of conduct that have a prescriptive quality in compelling agents to "behave in accordance with [them]."[18] This is a more compelling definition of legal norms and is the definition used in this book. Legal norms are part of the broader category of social norms, yet they still differ from other subcategories such as traditions, values, or fashions.[19] What distinguishes legal norms from social norms is the idiosyncratic way they are created – whether part of a body of hard law or soft law – and the manner in which they are argued, interpreted, and enforced.[20]

The fact that legal norms may entail multiple enforceable rights and obligations is the reason they should not be studied as highly abstract, singular units.[21] Focusing on a norm as a single unit would mean that only their most traditional elements are placed under the magnifying glass. For example, in the case of the prohibition of torture and inhuman

[15] Here, I only refer to primary norms.

[16] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 891.

[17] Sandholtz, "International Norm Change."

[18] Nicholas Onuf, *International Legal Theory: Essays and Engagements, 1966–2006*, 1st edition (New York: Routledge-Cavendish, 2008), 450.

[19] For nonlegal norms, see, for example, Erna Burai, "Parody as Norm Contestation: Russian Normative Justifications in Georgia and Ukraine and Their Implications for Global Norms," *Global Society* 30, no. 1 (2016): 67–77; Jessica L. Beyer and Stephanie C. Hofmann, "Varieties of Neutrality: Norm Revision and Decline," *Cooperation and Conflict* 46, no. 3 (2011): 285–311; Stephanie C. Hofmann and Andrew I. Yeo, "Business as Usual: The Role of Norms in Alliance Management," *European Journal of International Relations* 21, no. 2 (2015): 377–401; Alexander Cooley, "Authoritarianism Goes Global: Countering Democratic Norms," *Journal of Democracy* 26, no. 3 (2015): 49–63.

[20] For more on this, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010); Joost Pauwelyn, "Is It International Law or Not, and Does It Even Matter?," in *Informal International Lawmaking*, ed. Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters (Oxford: Oxford University Press, 2012), 125–61.

[21] R. R. Baxter, "International Law in 'Her Infinite Variety,'" *The International and Comparative Law Quarterly* 29, no. 4 (1980): 549. See also Michael Bothe, "Legal and Non-Legal Norms – a Meaningful Distinction in International Relations?," *Netherlands Yearbook of International Law* 11 (1980): 65–95.

or degrading treatment, this is interrogative torture or ill-treatment. However, this norm's transformation cannot be fully understood without looking at its nontraditional elements – epitomised by the case of Nahide, a domestic violence victim. In order to understand norms and how they change, we need to take a closer look at what they embody. Legal change happens at the level of obligations (or rights), not at the level of norms. Therefore, the unit of analysis to study legal change should be each and every obligation falling under the same norm. It is the concrete obligations that root the abstract norms in a particular context. Norms become clearer as obligations become more specific. Norms grow stronger as the obligations reach taken-for-granted status.

Disaggregating norms offers certain benefits that other broad-brush approaches do not.[22] For example, disaggregation can tell us about the magnitude of change and whether this pertains to the norm's main logic or application (norm's core and periphery, respectively).[23] It can also reveal its unevenness. Indeed, while certain obligations are transformed at a higher rate and in sudden bursts, certain others might remain the same or change gradually over time. Focusing on norms globally without paying attention to their actual content prevents us from fully comprehending norms' nature, scope, or robustness. Such approaches do a special disservice to any attempt to understand their transformation. One cannot fully grasp how norms change if they are viewed as solid, singular, and confined behavioural standards. When looked at under the magnifying glass, each obligation that a norm embodies has the ability and potential to grow and take a direction of its own. Indeed, norms develop and are refined through expansion or adjustment of their scope or content.[24] What actually facilitates this refinement is the transformation or clarification of obligations (or rights) that they embody – and transformation for each obligation may not look the same, as we see in this book.

[22] Alison Brysk and Michael Stohl, *Contesting Human Rights: Norms, Institutions and Practice* (Cheltenham: Edward Elgar Publishing, 2019); Averell Schmidt and Kathryn Sikkink, "Breaking the Ban? The Heterogeneous Impact of US Contestation of the Torture Norm," *Journal of Global Security Studies* 4, no. 1 (2019): 105–22; Jeffrey S. Lantis, "Theories of International Norm Contestation: Structure and Outcomes," *Oxford Research Encyclopedia of Politics*, June 28, 2017; Anette Stimmer, "Beyond Internalization: Alternate Endings of the Norm Life Cycle," *International Studies Quarterly* 63, no. 2 (2019): 270–80.

[23] For an assessment of what norm's core are, see Deitelhoff and Zimmermann, "Things We Lost in the Fire"; see also Nicole Deitelhoff and Lisbeth Zimmermann, "Norms under Challenge: Unpacking the Dynamics of Norm Robustness," *Journal of Global Security Studies* 4, no. 1 (2019): 2–17.

[24] For a discussion on norm development, see Paulo, *The Confluence of Philosophy and Law in Applied Ethics*.

Types and Modes of Change

Norms change in a variety of ways.[25] Change can be in how they are applied (i.e., regarding the issue areas they cover), or it could be in their main logic.[26] The first form of change is peripheral change. Change can be peripheral when it concerns a norm's scope. That is to say, the existing obligations under the norm may begin covering new issues and victim groups, or the norm may come to include entirely new obligations. Alternatively, the scope may also retract when it is settled which obligations fall outside of the norm's coverage. In the context of the norm against torture, the norm's scope broadened when it was invoked to protect other vulnerable groups such as women, children, or disabled individuals.[27] For example, in *Romanov* v. *Russia,* the Court found that the treatment of a mentally ill detainee would fall under Article 3.[28] This meant a new victim group (mentally ill inmates or patients) could now seek protection under this norm. Likewise, the scope might be narrowed down when a judgment clearly indicates what a given obligation does not cover. To illustrate, the Court decided that states' obligation to prevent suffering does not go as far as facilitating euthanasia for terminally ill patients in *Pretty* v. *the United Kingdom*.[29] The rulings thereby set the limits of the norm. As these examples show, peripheral change concerns what a norm covers. It can be traced by taking the norm's scope as a reference and analyzing whether it has expanded or contracted.[30]

Sometimes, change can permeate the core of the norm, transforming its very logic.[31] For example, when the Court introduced positive obligations under the prohibition of torture in the late 1990s, it essentially rewired the norm's internal logic. This is because, traditionally, states

[25] These categories are heuristic devices to help understand and explain the ways in which norms may change. This book's objective is not to enumerate and exemplify each type or mode of change. Rather, it is to explain how and why court-effectuated legal change occurs in such manners.

[26] Or norm's core as it is identified in Deitelhoff and Zimmermann, "Things We Lost in the Fire," 59.

[27] Traditionally, this norm was considered to cover mostly detainees, prisoners, or terrorist suspects.

[28] *Romanov* v. *Russia,* application no. 63993/00, ECHR (October 20, 2005).

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

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

[31] For a good explanation of what norms' core are, see Deitelhoff and Zimmermann, "Things We Lost in the Fire," 51–76.

were only responsible for acts actively committed by state agents (commission) under Article 3. After the introduction of positive obligations, the international community began to accept that the norm does not only entail obligations to refrain from doing something (i.e., torturing or subjecting someone to inhuman or degrading treatment). States became obligated to protect victims from acts perpetrated by their agents or private actors and started to bear responsibility for any failure to introduce necessary measures to protect vulnerable groups and prevent violations (omission).

The adoption of positive obligations generated both practical and ideational effects, transforming the norm's operating logic. On the practical level, positive obligations have enhanced protection under Article 3.[32] These new obligations require states to protect rights in a practical and effective way.[33] As one judge explained in an interview, they imply "a proactive approach by states to ensure that core values are actively promoted, pursued, and protected."[34]

On the ideational level, positive obligations have generated important changes in the way state obligations and individual rights are understood.[35] First, social rights have become less distinct from civil and political rights. Civil and political rights had typically been associated with negative obligations, and economic and social rights with positive obligations. Giving expression exclusively to civil and political rights, the European Convention was initially designed to impose only negative obligations. The Court's adoption of positive obligations reversed this separation. States are now required to take measures to actively protect rights rather than simply refrain from violating them.[36] Second, and relatedly, the prohibition of torture came to include other resource-intensive duties – such as investigating and punishing perpetrators, providing acceptable living conditions to detainees, refugees, and asylum seekers, and providing timely and sufficient medical treatment in detention facilities. Third, positive obligations

[32] Interview 5; Interview 9; Interview 27; Interview 28.

[33] Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2.

[34] Interview 10.

[35] By no means was the introduction of positive obligations only limited to the prohibition of torture. Positive obligations were also introduced under a variety of provisions, such as Article 2 (right to life) or Article 8 (right to respect for private and family life). Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*.

[36] Interview 9.

made it possible to address human rights abuses that were committed by private agents.[37] States may bear responsibility when they fail to prevent abuse by non-state actors. This is a revolutionary interpretation of rights that were initially created to regulate states' behaviour toward their citizens. Now, states may be culpable for *not* stepping in to protect vulnerable groups against mistreatment perpetrated by private individuals.

Another important analytic dimension is the mode of change. Change can be incremental or sudden. Norms can be slowly sculpted by means of gradual change over a long period of time or quickly transformed in sudden bursts to address an emerging social need. For example, the minimum level of severity criteria (required for an act to be considered torture or inhuman or degrading treatment) has been gradually lowered over time, but the state obligation to prevent domestic violence was introduced much more swiftly – in the context of Nahide's case (*Opuz* v. *Turkey*).

Having distinguished these two modes of change, I should emphasise that gradual or sudden changes are not diametrically opposed categories. Rather, they may feed into each other. Years of gradual change might open the gateway for a sudden change. Alternatively, an episode of sudden change might be followed and further refined by gradual change. In order to categorise the ways a norm may change – be it gradual but peripheral or sudden and foundational – we need to disaggregate norms and study the transformation of each and every obligation falling under them. This is how I study the ways the prohibition against torture and inhuman or degrading treatment changed over time. I first break the norm into traceable components – obligations – in my analysis of the Court's jurisprudence. Then, I trace the type and mode of change by focusing on each and every obligation falling under Article 3.

Measuring Audacity and Forbearance

This analysis also helps understand the degree to which the European Court has been either forbearing or audacious over time. As explained in the Introduction, I measure audacity and forbearance with respect to two criteria. The first of these is a given court's willingness to recognise new state obligations or new rights (*novel claims*). The second is its propensity for finding states in violation (*propensity*). While audacious courts will have a higher score for both of these measures, forbearing courts will have a lower score.

[37] Sandra Krahenmann, "Positive Obligations in Human Rights Treaties" (Geneva, Graduate Institute of International and Development Studies, 2012), 3.

As the preceding discussion indicates, not every change episode is equal. Change proposals that transform the main logic of a norm, going beyond the adjustment of the scope of its application, are more audacious acts of change. Therefore, I consider the introduction of positive obligations under this norm in the late 1990s as an epitome of an audacious change, tracing the conditions that made this change possible in Chapter 6.

Data Collection and Analysis

My main methods for tracing legal change in the Court's anti-torture jurisprudence are legal analysis of a sample of rulings and content analysis of all Article 3 judgments. I collected every Article 3 judgment pronounced between 1967 and 2016 from HUDOC, the Court's official case repository.[38] This amounts to 2,294 rulings in total.[39] Figure 3.1 shows the distribution of Article 3 cases in ratio to the number of all cases for the period under study.

As Figure 3.1 shows, during the old Court and the new Court periods, Article 3 cases made up only 5% and 7% of all jurisprudence. This changed dramatically during the reformed Court period, where Article 3 cases constituted 21% of the jurisprudence.

Selection and Categorisation Rules

I have focused only on judgments from cases that passed an initial screening and were declared admissible for review.[40] My unit of analysis was

[38] This list also includes the Commission's decisions which were not referred to the Court. When there are both a Commission decision and a Court judgment about the same case, I have only looked at the latter.

[39] I have only assessed the final rulings issued by the highest body. This meant that I have privileged Grand Chamber rulings over Chamber rulings and the European Court rulings over the decisions of the European Commission except when these decisions were never referred to the Court. This total number includes 2,270 rulings issued by the European Court as well as 24 decisions that were issued and not reviewed by the Court. The 2,270 Court rulings include violation and no violation decisions separately. For the period under study, there are 1,929 judgments involving at least one violation decision and 652 judgments involving one no violation decision. In this count, some of the cases are counted twice because they involve at least one violation and at least one no violation decision.

[40] Every complaint brought before the Court is subjected to an admissibility test before being sent for judicial review. Article 35 of the Convention lays out criteria for admissibility decisions, according to which the applicant must exhaust all available domestic remedies and apply to the Court no more than six months after the final domestic court decision (prior to Protocol 15, which effectively reduces this time limit to four months). The Court

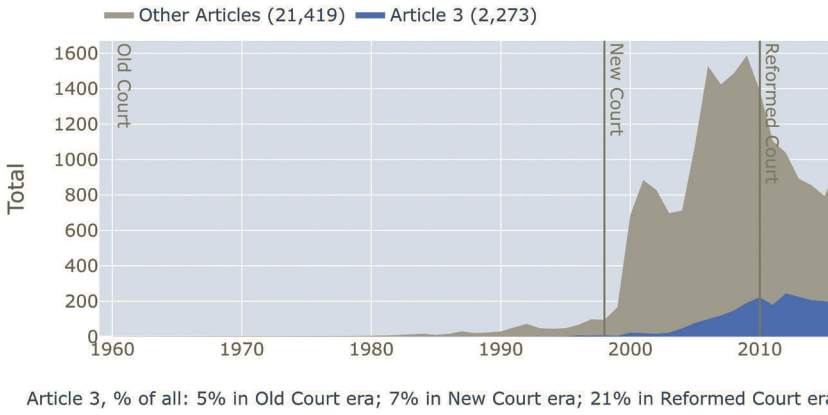

Figure 3.1 The evolution of the share of Article 3 cases in the entire jurisprudence

individual claims brought under Article 3. Because many cases involve claims concerning more than one obligation under Article 3, I separated out each complaint representing a distinct obligation.[41] For example, an applicant may have complained that she was subjected to inhuman treatment under custody (ill-treatment under custody) and that domestic authorities did not properly investigate her complaint (failure to fulfil procedural obligation). The Court may take a different position for each of these obligations.[42] It may find the responding state in violation concerning the first complaint but *not* in violation with respect to the second complaint. That is why looking at each complaint separately helps disentangle the Court's attitudes toward different obligations.

My first step was then to map out all the obligations that are associated with the norm against torture and inhuman or degrading treatment. To carry out this task systematically, I first ran a pilot study of decisions rendered between 1967 and 2006 with the goal of determining what types of

may declare any application inadmissible if the application is manifestly ill-founded (not based on facts or reliable evidence) or if the applicant has not suffered a significant disadvantage. Moreover, the Court may refuse to review a case if the applicant wishes the Court to revise and quash a decision taken by a domestic court – known as "fourth-instance" applications.

[41] This total number includes violation and no violation decisions separately. For the period under study, there are 1,929 judgments involving at least a violation decision and 652 judgments involving a no violation decision. In this count, some of the cases are counted twice because there were both violations and no violations.

[42] Yildiz, "A Court with Many Faces."

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obligations fall under the norm against torture and inhuman or degrading treatment. I started with 1967 because that was the year in which the first complaint concerning Article 3 was reviewed.[43] I stopped in 2006 because, shortly thereafter, there was an unprecedented increase in the number of Article 3 cases. Analysis of such a long stretch of time allowed me to detect the types of obligations that are associated with the prohibition of torture and ill-treatment.

For the pilot study, I read each judgment and coded each complaint corresponding to a distinct obligation.[44] In order to cast a wide net, I used open coding. That is to say, without employing any established categorization, I noted the acts the applicants complained about and the Court's decision about each complaint. Through this exercise, I identified the types of acts that were considered Article 3 violations, as well as those that fell outside of the norm's scope.[45] Of the 284 cases pronounced between 1967 and 2006, some had more than one complaint relating to Article 3. To be exact, there were a total of 357 claims declared as Article 3 violations. Since my unit of analysis is isolated to obligations rather than the cases themselves, I reviewed all 357 separate claims.

When it comes to categorization, the circumstances and the location of ill-treatment determine what sort of obligation is involved. For example, if ill-treatment takes place after the arrest, then it is *ill-treatment during custody*; if it takes place during a riot control operation, then it is categorised as *police brutality*. Finally, if a complaint arises from unjustifiably stringent measures imposed on inmates, then it is categorised as *intrusive detention measures*. When categorizing obligations, I have made a distinction between positive and negative obligations. If an obligation calls upon state authorities to refrain from perpetrating an act (i.e., refrain from doing something), I list it as a *negative* obligation. If an obligation requires state authorities to take steps to ensure that individuals enjoy their rights (i.e., take active measures), then this obligation is categorised as a *positive* obligation. Tables 3.1 and 3.2 list the specific obligations identified, as well as related definitions.[46]

[43] The European Commission of Human Rights, *Heinz Zeidler-Kornmann* v. *The Federal Republic of Germany,* application no. 2686/65 (October 3, 1967).

[44] For more on content analysis and how to carry it out, see Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (SAGE Publications, 2018); Alan Bryman, *Social Research Methods*, 4th edition (Oxford and New York: Oxford University Press, 2012).

[45] This is mostly because my analysis is carried out on cases that passed the initial screening and were evaluated on their merits. That is, claims that evidently do not fall under this norm or those declared *inadmissible*, are not reviewed for this study.

[46] These categories and definitions served as a codebook during the coding exercise.

Table 3.1 *Claims concerning negative obligations*

Negative obligations
Ill-treatment during custody refers to a range of physical or mental abuse inflicted on victims after their arrest, namely during interrogation, detention, or imprisonment.
Refoulement constitutes a violation when a state places or transfers a person to somewhere they may face danger. The prohibition of *refoulement*, better known as the principle of *non-refoulement,* forbids states from extraditing, deporting, or expelling a person to a country where they might be tortured or ill-treated.
Torture is a (deliberate) infliction of severe pain to extract information or confession, to punish, or to intimidate.
Police brutality is excessive violence used during arrest attempts, police raids, security checks, road controls, or riot control operations.
Intrusive detention measures are unjustifiably stringent procedures imposed on inmates, such as strip searches, genital inspections, and solitary confinement without any compelling reason.
Destruction of property, homes, and livelihood constitutes a violation not due to the actual loss of property but due to the destruction's effect on victims' psychology and the extreme distress it generates.
Discrimination occurs when states implement unfavourable or unfair measures directed at certain groups or minorities based on their gender, sexual orientation, ethnicity, religion, or political beliefs.
Family separation refers to state authorities' unjustified decision to remove children from the custody of parents and place them with foster parents or childcare institutions, or to deport them without their parents, or to deport their parents.
Extrajudicial acts concern instances of unacknowledged detention, abduction, physical attack, and extrajudicial killing that are not officially documented and that allegedly take place with direct involvement or acquiescence of, state agents.

In the second part of my data analysis, I used the categories and coding rules in Tables 3.1 and 3.2 to analyze the remainder of the cases issued only by the European Court – leaving aside the decisions of the European Commission since it is an entirely separate body. For this study, I analyzed 2,270 Court judgments in total, which are made up of 3,553 separate complaints (including the 284 cases and 357 claims from the pilot study mentioned earlier). When coding judgments, I made use of the "case details" announced on the Court's website for each case. The case details include information on the Articles invoked, as well as on the conclusions reached.

Table 3.2 *Claims concerning positive obligations*

Positive obligations
Failure to provide legal protection/remedy arises when a state refuses to protect or its efforts fall short of protecting victims from abuse perpetrated by state agents or private individuals. This category also includes states' unwillingness or inability to offer a sufficient legal remedy or an effective recourse to legal remedy.
Failure to inform the relatives of disappeared persons occurs when states fail to conduct an effective investigation and inform the relatives (and sometimes the larger public) about the whereabouts of the disappeared persons in due course.
Failure to provide acceptable detention conditions occurs when a state is either unwilling or unable to provide detention facilities that comply with the minimum standards for the treatment of prisoners and detainees.
Failure to provide necessary medical care refers to deficiencies in supplying necessary medical assistance or appropriate conditions for sick and disabled inmates.
Failure to fulfil procedural obligations arises when states are unwilling or unable to carry out a timely and effective investigation into arguable claims of the victims or when they obstruct the proper administration of justice.
Failure to facilitate euthanasia refers to state authorities' refusal to help with euthanasia and assisted suicide by providing necessary substance and by not criminally charging the ones involved.
Failure to provide a healthy environment concerns state authorities' failure to take necessary and sufficient measures to ensure individuals can enjoy healthy living conditions without risks such as air pollution, water contamination, or chemical exposure.

Only in a few instances did the case details provide sufficient information for classification. A clear majority of the coding also required reading the judgment segments for Article 3, as well as the Court's conclusions. Two research assistants went over my codes, taking "case details" as a reference, to ensure that they were in line with the Court's records.

The resulting dataset includes information about the responding states and the number of claims that were ruled as violation or no violation of Article 3, amounting to 2,787 violation claims and 766 no violation claims, respectively. A higher percentage of claims concern violation decisions (around 78%), while only 12% of the claims concern a no violation decision. This could be because the analysis only focuses on the claims that passed the admissibility stage. The admissibility assessment might have selected cases that are more likely to be considered a violation of Article 3.

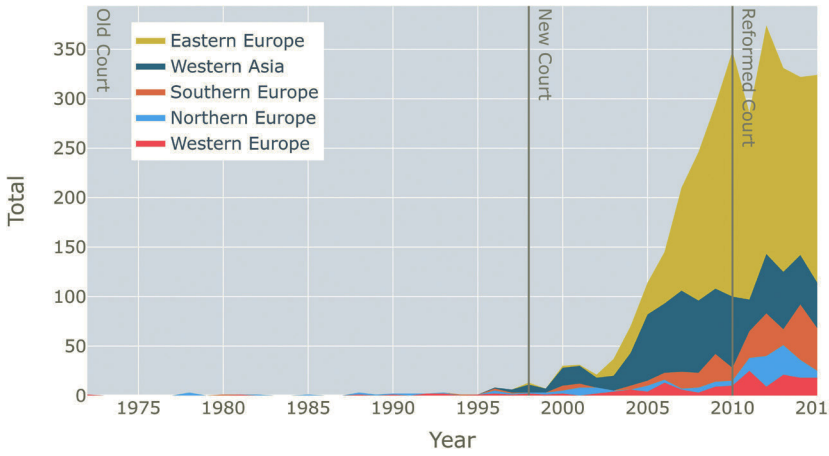

Figure 3.2 Distribution of Article 3 cases across different regions in Europe (UN Geoschemes)

This might explain the higher percentage of violation decisions captured in the dataset. While this appears to be a rather skewed finding, it does not pose a problem to my main objective, which is to chart out how the norm against torture and inhuman or degrading treatment transformed over time and how the Court's attitudes changed toward this norm.

Mapping Out the Anti-torture Jurisprudence

The first-cut analysis reveals the geopolitical distribution of the Court's anti-torture jurisprudence. As Figure 3.2 shows, the majority of Article 3 claims come from the Central and Eastern European countries (mostly formerly communist countries). Western Asia (e.g., Turkey, Armenia, and Azerbaijan) and Southern Europe (e.g., Italy, Greece, and Spain) come second and third, respectively. Northern Europe (e.g., Denmark, Norway, and Finland) and Western Europe (e.g., Germany, Belgium, and the Netherlands) are the least represented regions.

Further breaking down the results indicates that the Court's anti-torture jurisprudence is mostly driven by the claims brought against Russia, Turkey, Romania, Ukraine, and Bulgaria – two of which are also EU members (see Figure 3.3).[47]

[47] For the distribution of types of claims for each country, see the Annex.

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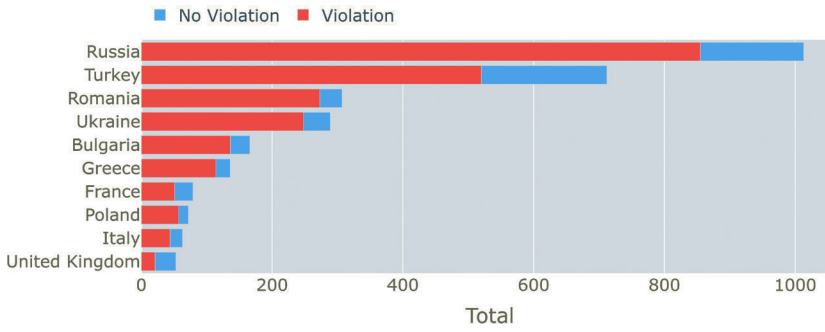

Figure 3.3 Number of claims per country[48]

The dataset also covers types of acts that are in violation of Article 3 and lists whether they concern negative or positive obligations. Figure 3.4 shows the distribution of claims invoking negative and positive obligations over time. It also gives information about whether the Court – or its different incarnations, to be exact – issued a violation or no violation ruling with respect to these claims.

Figure 3.4 portrays the total number of claims invoking negative obligations (on the left) and positive obligations (on the right). At first glance, we see that the claims concerning negative obligations and positive obligations are distributed differently over time. Negative obligations were recognised much earlier, during the old Court era. Positive obligations appeared on the Court's radar only in the late 1990s, during the reign of the new Court. The number of rulings invoking positive obligations rapidly increased after that, under the watch of the reformed Court, eclipsing the ones related to negative obligations. This figure offers us useful insights with respect to the pace of change (i.e., gradual and sudden change). While negative obligations have been refashioned in a more gradual manner spreading across time, positive obligations emerged suddenly in a relatively short time span in the period after the late 1990s.

As also seen, a clear majority of complaints, approximately 62%, invoke positive obligations. This is a counterintuitive finding. Considering that positive obligations as a category only emerged in the late 1990s, one would expect to see more claims to be invoking negative obligations. Indeed, negative obligations have long been established under Article 3.

[48] You can find the Court's propensity to find a violation against these countries in the Annex.

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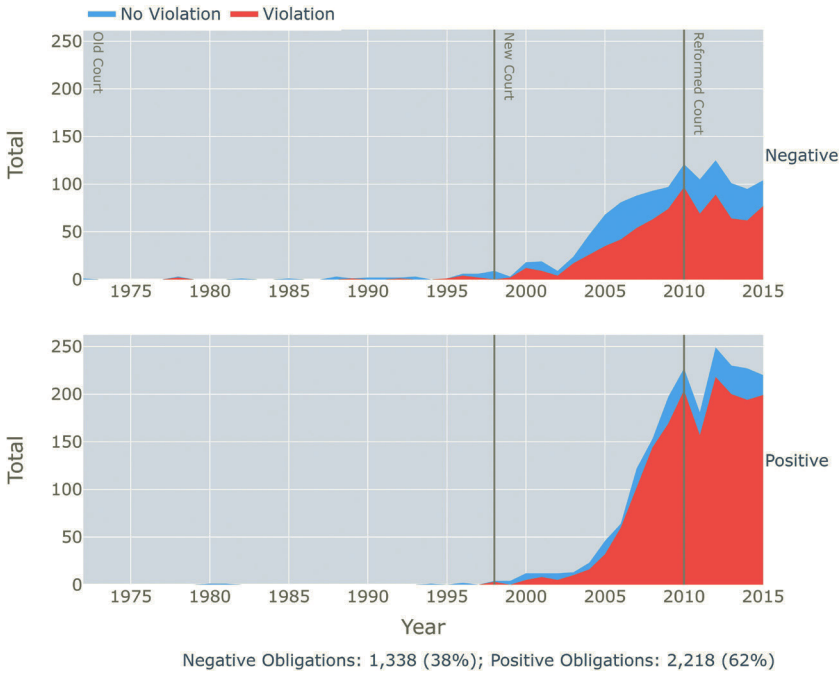

Figure 3.4 Distribution of claims by obligation type and outcome (violation or no violation)

Yet, the magnitude of positive obligations far surpasses that of negative obligations. In order to understand what is behind this pattern and which positive obligations have been frequently employed, Figure 3.5 and Table 3.3 further break down each category.

Figure 3.5 shows the breakdown of the total number of obligations falling under Article 3. What is interesting to observe here is that procedural obligations are the single most invoked obligation under this norm, with claims concerning detention conditions coming in as the not-so-distant second. Overall, we also see that there are significantly more violation decisions (shown in red or darker gray) than no violation decisions (shown in blue or lighter gray). That is to say, the Court is more likely to find a violation in cases that passed the admissibility stage. The admissibility review discards cases that are administratively flawed or are not likely to stand a chance in the legal review, otherwise known as manifestly ill-founded applications (i.e., cases that fail to provide evidence to support the legal arguments or those that include far-fetched complaints).

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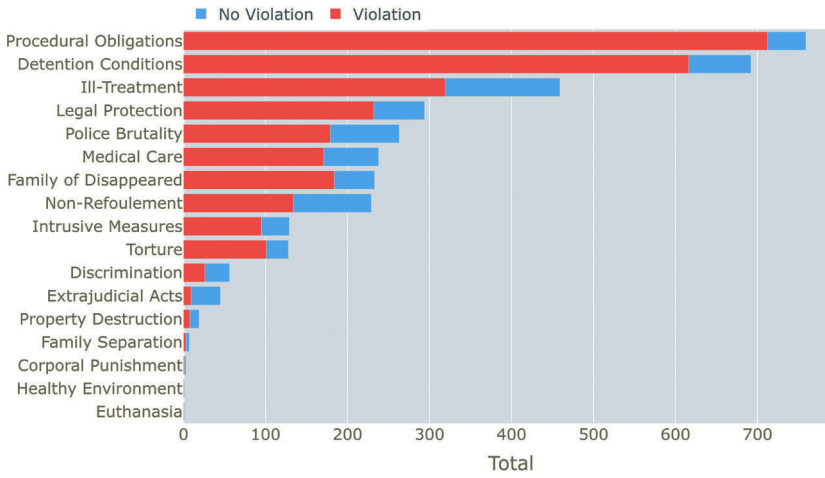

Figure 3.5 Types of obligations (disaggregated)

Table 3.3 further breaks down the information presented in Figure 3.5 and depicts the percentage of each obligation type, separating them as negative and positive obligations.

This analysis demonstrates the scope of the norm by revealing interesting information about the Court's treatment of complaints involving negative and positive obligations. The Court, for example, issued violation decisions for 86% of the claims invoking positive obligations but only for 65% of the claims invoking negative obligations. More than half of the claims invoking negative obligations concern ill-treatment during custody (34%) and police brutality (19%). As for positive obligations, two-thirds of claims pertain to procedural obligations (34%) and failure to provide acceptable detention conditions (31%).

Beyond showing what this norm entails, these findings also showcase why it is more fitting to focus on each obligation separately rather than studying the norm as a single unit. They also reveal that there are clusters of decisions about certain obligations, whereas, about some others, there are only a few decisions. Because of this unevenness, we cannot expect all of these obligations to change at the same time, in the same manner, and with the same magnitude. Finally, tracing separate obligations gives leverage to effectively capture the magnitude of change (i.e., foundational or peripheral change). Despite their recent appearance, positive obligations now take up a sizeable portion of all the complaints concerning the

Table 3.3 *Percentage of claims invoking negative and positive obligations*

Claims invoking negative obligations	Number and percentages of violation decisions	Number and percentages of no violation decision
Ill-treatment during custody	**318 (24%)**	**140 (10%)**
Police brutality	**179 (13%)**	**84 (6%)**
(Non-)Refoulement	134 (10%)	95 (7%)
Intrusive detention measures	95 (7%)	34 (3%)
Torture	100 (7%)	27 (2%)
Discrimination	26 (2%)	30 (2%)
Unacknowledged detention and extrajudicial killings	9 (1%)	36 (3%)
Destruction of property	8 (1%)	11 (1%)
Family separation	3 (0%)	4 (0%)
Corporal punishment	1 (0%)	2 (0%)
Total	**873 (~65%)**	**463 (~35%)**
Claims Invoking Positive Obligations		
Failure to fulfil procedural obligations	**712 (32%)**	**47 (2%)**
Failure to provide acceptable detention conditions	**616 (28%)**	**76 (3%)**
Failure to provide legal protection/remedy	231 (10%)	62 (3%)
Failure to provide necessary medical care	171 (8%)	67 (3%)
Failure to inform relatives of disappeared persons	184 (8%)	49 (2%)
Failure to facilitate euthanasia	0 (0%)	1 (0%)
Failure to provide a healthy environment	0 (0%)	1 (0%)
Total	**1,914 (~86%)**	**303 (~14%)**

norm against torture and inhuman or degrading treatment. As can be seen in Table 3.3 and Figure 3.6, violation decisions concerning positive obligations far surpass the ones for negative obligations (1,914 and 873,

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respectively). In other words, the Court found states in violation of Article 3 far more often for *inaction* than for action.

The results of this large-scale analysis lead one to the question, why were positive obligations created and used to this extent from the late 1990s onward? The uncharacteristic nature of this period is also confirmed by legal analysis conducted on leading Article 3 jurisprudence. As we will see in Chapters 4 and 5, the Court gradually lowered the minimum thresholds for finding violations since the late 1970s (*peripheral* and *gradual change*), but this trend took an unprecedented leap in the late 1990s. In addition, during the same period, the Court launched positive obligations under Article 3 and transformed the core principles of the norm in a rather swift manner (*core* and *sudden change*). What explains this shift in the late 1990s? I tackle this question in Chapter 6, where I sketch out the conditions that facilitated the new Court's overall audacious tendencies, relying on the theoretical framework presented in the Introduction and Chapter 1.

Measures of Audacity and Forbearance

The results of this analysis also reveal information about the degree to which the Court has been audacious or forbearing over time. The first measure is the willingness to accept *novel claims,* and the second is the overall *propensity* to find a violation. First, I looked at whether the different incarnations of the Court accepted novel claims and how many tries it took for a certain claim to be recognised under Article 3. For this assessment, I focused on the first violation rulings, where the Court recognises a novel claim. This is because such pronouncements require a high degree of judicial audacity. Such rulings also reduce the cost of finding a violation about the same or similar claims in the future, as explained in the Introduction.[49] Figure 3.6 depicts the attitudes of the old Court, the new Court, and the reformed Court toward novel claims.

On the left side, we see the list of claims brought under the prohibition of torture and inhuman or degrading treatment. The blue lines indicate how long it took for a specific claim to be considered to fall under this prohibition. The start of the blue line shows the first year when a particular claim was brought, and the end of the blue line indicates the first year when the Court found a violation with respect to that claim. At first

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

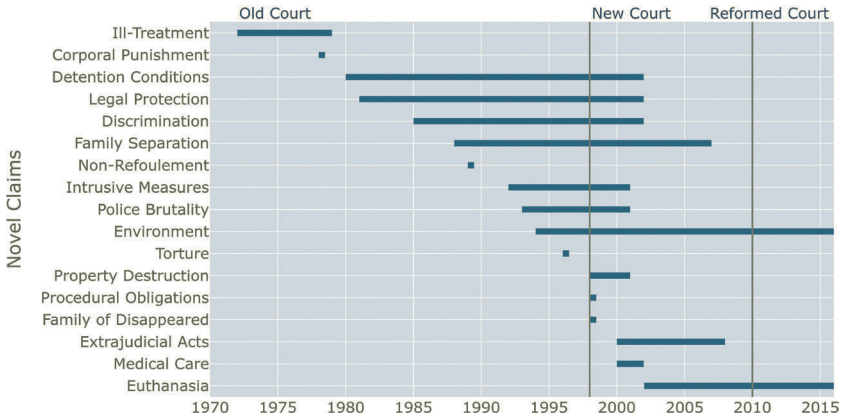

Figure 3.6 Attitudes toward novel claims: period from first claim to first violation ruling

glance, we see a few things. First, the old Court's reception of novel claims was limited. Several blue lines starting during the old Court ended only at the time of the new Court. The new Court, on the other hand, showed a remarkable willingness to accept novel claims. As for the reformed Court, it was confronted with only two novel claims – both carried forward from the new Court period (namely, the obligation to provide a healthy environment and facilitate euthanasia). This is to be expected because, as time progresses, there are not many novel claims left. However, the reformed Court may still appraise and pronounce whether or not these two claims, or others that might be lodged in the future, fall under Article 3.[50]

We also observe that some claims took longer to be accepted. For example, the complaints about detention conditions started in 1980, but the old Court did not find a violation concerning detention conditions until 2001. It was the new Court that recognised unacceptable detention conditions as constituting a violation of Article 3.[51] The claims concerning

[50] There is a pending case before the reformed Court, *Duarte Agostinho and Others* v. *Portugal* and 32 Other States, application no39371/20 (communicated September 7, 2020); for more, see Corina Heri, "The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got to Do with It?," *EJIL: Talk!* (blog), December 22, 2020, www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/.

[51] *The Greek Case* is a noteworthy exception. The European Commission of Human Rights has considered and found a violation about unacceptable detention conditions. However, since this decision was taken by the Commission, and not the Court itself, it is not included in this particular assessment. The European Commission of Human Rights, Report of 5 November 1969, *Greek Case*, Yearbook XII (1969).

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the *non-refoulement* principle and torture were instant successes, on the other hand. They were acknowledged by the old Court in a rapid fashion, which signals that these claims were politically less contentious and the old Court could treat them with selective audacity.

Out of eleven novel claims brought before the old Court, the old Court accepted four of them. The new Court accepted eleven novel claims, seven of which were originally brought before the old Court. The reformed Court has not accepted any novel claims for the period under study. This is because most of these claims were already accepted by the new Court, with the exception of two pending claims. Moreover, the reformed Court period is underway, and there is still time and opportunity for the reformed Court to accept novel claims under Article 3. Purely based on willingness to accept novel claims, the new Court appears to be the most audacious one, while the old Court is selectively audacious. As for the reform Court, it is hard to assess its practices on this front since most of the novel claims were acknowledged by its predecessor, with the exception of two novel claims – namely, the obligation to provide a healthy environment and facilitate euthanasia.

I have also looked at how many repeated claims it took to get a novel claim recognised. Five novel claims were successful on the first try: corporal punishment, *refoulement*, torture, procedural obligations, and state obligations toward the family of the disappeared. Two novel claims (state obligations to provide a healthy environment and to facilitate euthanasia) had only one unsuccessful try each during the period under study. Finally, ten novel claims took more than one attempt to be acknowledged, as outlined in Table 3.4.

As Table 3.4 shows, while most of the claims were acknowledged after a few tries, claims concerning extrajudicial acts (i.e., unacknowledged detention and extrajudicial killings) and discrimination took the most tries. There were seventeen trials before claims about extrajudicial acts were considered to fall under the prohibition of torture and inhuman or degrading treatment, and most of these claims were dismissed due to evidentiary reasons. Similarly, the Court did not find complaints about discrimination to constitute a violation for evidentiary reasons nine out of twelve times. The obligation to provide medical care in detention settings was a distant third when it comes to the number of tries taken before finding the first violation – with four takes, most of which were unsuccessful due to substantive reasons.

When assessing how long it took for a certain claim to be accepted, the quality of applications should also be taken into consideration. Indeed,

Table 3.4 *Prior takes before the acceptance of novel claims*

Novel claims	Number of prior takes	Reasons for finding no violation in prior takes
Extrajudicial acts	**17**	**Substantive, Evidentiary (x16)**
Discrimination	**12**	**Substantive (x3), Evidentiary (x9)**
Medical care	4	Substantive (x3), Evidentiary
Legal protection/remedy	3	Substantive (x3)
Family separation	3	Substantive (x3)
Intrusive detention measures	3	Substantive, Evidentiary (x2)
Detention conditions	2	Substantive, Evidentiary
Police brutality	2	Substantive, Evidentiary
Property destruction	1	Evidentiary
Ill-treatment during custody	1	Substantive

not every application will be of the same quality or be equally convincing. However, since this study strictly focuses on complaints that passed the initial admissibility stage, which weeds out the weakest claims, there should not be striking differences in the quality of claims examined for this study.

When it comes to propensity scores, we see a slightly different picture. Table 3.5 shows that the old Court has a low propensity to find a violation. A higher percentage of rulings were no-violation rulings. It should be noted that the number of cases for the old Court is also relatively low. However, starting with the new Court, we see an upward trend in the propensity to find states in violation, which increases further during the reform Court. Such a trend is expected because it is easier to build on the precedent and continue the progressive trends set in the previous period.

This first-cut analysis of these measures shows some clear differences between the three different incarnations of the Court. The old Court is not audacious across the board when it comes to treating novel claims, as it acknowledges only a select number of them. When it comes to propensity scores, it is mostly forbearing. Therefore, it is apt to characterise the old Court as overall forbearance leaning but selectively audacious, as will be further explained in Chapter 4. The new Court, on the other hand, is uniformly audacious when it comes to novel claims since it accepts nearly all of them. Propensity scores also attest to this as the new Court shows a forty-three-percentage-point increase on the old Court's propensity scores. The sociopolitical conditions that cultivated the new Court's

Table 3.5 *Propensity for finding a violation over time*

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

audacity and how the new Court's audacious attitudes transformed the norm against torture and inhuman and degrading treatment will be discussed in Chapters 5 and 6.

As for the reformed Court, it is harder to read its tendencies at the aggregate level. This is because there is relatively little information about its attitudes toward novel claims since most of these claims were already recognised by the new Court. However, we see that the reformed Court has the highest propensity to find a violation. Although the reformed Court's propensity score is impressive in itself, one can also argue that it comfortably continues the practices of the new Court with only a nine-percentage-point increase. For this reason, I will try to glean more information about the reformed Court's propensity scores by further disaggregating them in Chapter 7.

Conclusion

This chapter has introduced the methodological choices adopted in this book and presented the results of the content analysis carried out on all Article 3 decisions issued between 1967 and 2016. For this analysis, instead of studying norms as unitary phenomena, I have disaggregated them. I have focused on each and every obligation that the norm against torture and inhuman or degrading treatment contains and traced the norm's transformation by taking these separate obligations as a reference. The chapter has mapped out the distinct obligations that this norm entailed and explained why looking at these obligations separately helps us better understand the pace and the magnitude of change. The chapter also introduced some preliminary findings to probe into the dominant tendencies demonstrated during different incarnations of the Court, which range from audacity, selective audacity, selective forbearance, and forbearance. Thus, this chapter has presented an overview before turning to more in-depth analyses of different change episodes in the following chapters.