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A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights

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Abstract

It is well established in the literature that international courts make law and develop norms. Yet there is no systematic analysis of how adjudication refashions a given norm's trajectory. This article addresses this gap by combining legal analysis with social science methods. It takes a closer look at the European Court of Human Rights and provides a framework for understanding how court rulings develop norms – that is, how judicial decisions modify norms' content or scope. The framework is composed of a typology of court characters (arbitrator, entrepreneur and delineator) and the distinct modes of norm development that each character typically generates (incremental/inconspicuous, pronounced and peripheral development). The typology is informed by interviews carried out at the Court as well as the literature on judicial review and, in particular, the debate on judicial activism and restraint. Unlike the concepts of judicial activism and restraint, these characters are not antithetical, but complementary. I show how court characters complement one another by looking at the case of the norm against torture under Article 3 of the European Convention on Human Rights. I examine 157 judgments issued between 1967 and 2006. I find that the percentage of entrepreneur rulings considerably decreased in the post-1998 period, while arbitrator rulings increased by nearly the same amount. My analysis of nearly four decades of jurisprudence not only sheds light on how the Court operates but also furthers our understanding of how it refashions codified norms.

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1 Introduction

When it comes to identifying actors of legal change in international law, international courts are one of the usual suspects.[1] Courts not only adjudicate and solve legal disputes, but they also make law by determining what abstract norms mean. Through legal review, they clarify or modify a norm's content and scope of application.[2] Studies have convincingly showed how this process unfolds.[3] Some have looked at judicial philosophies that are dominant at different courts,[4] and some have analysed judges' styles of reasoning and motivations.[5] The majority of these studies agree that adjudication creates legal change, whether intentionally or inadvertently.[6] Yet they offer no systematic analysis of how different styles of reasoning influence norm development – that is, refinement either through the expansion or adjustment of norms' content or scope of application.[7] We know that adjudication makes law, but how does it influence the trajectory of an existing norm? This article responds to this question and links styles of reasoning – expressed via different judicial characters – with legal change generated through norms' interpretation or application to concrete situations.[8]

The manner in which courts generate social and legal change has been predominantly analysed through the prism of judicial activism and restraint debate.[9] This

1 For example, K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014); Helfer and Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts', 14 *Theoretical Inquiries in Law* (2013) 479; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012).

2 Bianchi, 'Game of Interpretation in International Law: The Players, the Cards, and Why the Game Is Worth the Candle', in *Interpretation in International Law* (2015) 34, at 40–41.

3 See, e.g., Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *Virginia Journal of International Law* (*VJIL*) (2005) 631; Venzke, *supra* note 1; F. Zarbiyev, 'Judicial Activism', in *Max Planck Encyclopedia of International Procedural Law* (2018).

4 Zarbiyev, 'Judicial Activism in International Law: A Conceptual Framework for Analysis', 3 *Journal of International Dispute Settlement* (2012) 247.

5 For a good overview, see de Freitas, 'Theories of Judicial Behavior and the Law: Taking Stock and Looking Ahead', in L.P. Coutinho, M.L. Torre and S.D. Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (2015) 105; see also C. Geyh (ed.), *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake* (2011); R.A. Posner, *How Judges Think* (rev. edn, 2010).

6 Studies have critically analysed judicial law-making and its consequence. See, e.g., von Bogdandy and Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *European Journal of International Law* (*EJIL*) (2012) 7; Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *VJIL* (2005) 631; Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* (*IO*) (2014) 77.

7 For a discussion on norm development, see N. Paulo, *The Confluence of Philosophy and Law in Applied Ethics* (2016).

8 On the distinction between norm interpretation and application, see Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication', 2 *Journal of International Dispute Settlement* (2011) 31.

9 R.M. Howard and A. Steigerwalt, *Judging Law and Policy: Courts and Policymaking in the American Political System* (2011).

debate revolves around the limits of a court's power.[10] Judicial activism is often associated with several behavioural patterns such as (i) interpreting law in a way that furthers social justice; (ii) engaging with non-judicial activities and the prescription of 'non-traditional remedies aimed at ameliorating social problems'; and (iii) issuing rulings that represent a radical break from established legal understandings, among others.[11] Judicial restraint, on the other hand, suggests that the judiciary assumes a more limited and deferential role. The proponents of judicial restraint believe that 'judges are neither society's trustees nor its policy-makers, but merely its servants and technicians'.[12] Hence, courts are expected to deliver narrow and legalistic rulings and leave generating systemic changes to the executive and legislative branches of the government.

The European Court of Human Rights (ECtHR) has also been studied through this paradigm.[13] Scholars have investigated whether the Court is really the activist that purposefully widens the ambit of the European Convention on Human Rights (ECHR)[14] or whether it is adhering to judicial self-restraint[15] by showing deference to the domestic authorities.[16] In addition, scholars have studied the ECtHR through the lenses of individual and constitutional justice paradigms.[17] The idea behind the individual justice model is that the Court's primary function is to provide redress to the individual applicants regardless of the systemic improvements that might be generated in the process. As for the constitutional model, the Court's role is to choose and adjudicate only the most serious allegations to create a larger and more significant impact.[18] Similar to the judicial activism and restraint debate, the individual and constitutional justice models concern judicial review and limits of judicial power.[19]

[10] E.g. Dworkin, 'Introduction', in B. Kiely (ed.), *Judicial Activism: Power without Responsibility?* (2006) 11; J.H. Ely, *On Constitutional Ground* (1996); T.M. Keck, *The Most Activist Supreme Court in History* (2004); Kirby, 'Judicial Activism: Power without Responsibility? NO, Appropriate Activism Conforming to Duty', in Kiely, *ibid.*, 27.; S.A. Lindquist and F.B. Cross, *Measuring Judicial Activism* (2009).

[11] Breyer, 'Judicial Activism: Power without Responsibility?', in Kiely, *supra* note 10, 71, at 72.

[12] Roberts, 'Judicial Activism', in B. Kiely (ed.), *Judicial Activism: Power without Responsibility?* (2006) 111, at 119.

[13] E.g. Dothan, 'Judicial Tactics in the European Court of Human Rights', 12 *Chicago Journal of International Law* (2011) 115; Johnson, 'Sociology and the European Court of Human Rights', 62 *Sociological Review* (2014) 547, at 549; de Londras and Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights', 15 *Human Rights Law Review* (*HRLR*) (2015) 523.

[14] Phillips, 'Judicial Activism: A Study in the Abuse of Power', in Kiely, *supra* note 10, 13.

[15] Thielbörger, 'Judicial Passivism at the European Court of Human Rights', 19 *Maastricht Journal of European and Comparative Law* (2012) 341, at 345.

[16] Member states here refer to the member states to the Council of Europe – the parent organization of the European Court of Human Rights (ECtHR).

[17] Greer and Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional" or "Institutional" Justice?', 15 *European Law Journal* (2009) 462, at 446; Harmsen, 'European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform', in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition, and Human Rights* (2007) 33; Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', 80 *Revue Trimestrielle Des Droits de l'homme* (2009), available at https://works.bepress.com/alec_stone_sweet/33/.

[18] Greer and Williams, *supra* note 17, at 446.

[19] Gronowska, 'The Strasbourg Court: Between Individual or General Justice', 15 *Comparative Law Review* (2013) 103.

This debate is often linked to a discussion about the boundaries of the Court's competence, delineated by the principle of subsidiarity and margin of appreciation.[20] Known as a 'tool of judicial self-restraint',[21] the subsidiarity principle was in fact introduced by the Court itself in the *Belgian Linguistics Case.*[22] It implies that the national authorities have a greater responsibility in safeguarding rights and offering remedies.[23] The ECtHR's role in this regard is supplementary and limited to providing external review.[24] This is a narrow supervisory competence, consisting of overseeing national measures 'against the yardstick of the Convention standards'.[25] The doctrine of the margin of appreciation, which stems from the principle of subsidiarity, works on the assumption that 'state authorities are in principle in a better position to give an opinion on the necessity of a restriction'.[26] Its rationale was articulated in *Handyside v. United Kingdom*:[27] '[T]he domestic margin of appreciation thus goes hand in hand with a European supervision.'[28] This doctrine, therefore, grants states supervised discretion[29] and underscores the idea that national authorities have a 'primary role in the protection of human rights'.[30] Both the principle of subsidiarity and the margin of appreciation envisage a circumvented role for the Court, in line with the individual justice model.

However, in reality, the Court has gone beyond this.[31] At times, it has effectively undertaken constitutional review to establish a 'Europe-wide human rights jurisprudence' and to maintain its coherence and quality.[32] The incongruity of these

[20] For more on these principles, see J. Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009); Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law', 18 *HRLR* (2018) 473; Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights', 15 *International Journal of Constitutional Law* (*IJCL*) (2017) 393.

[21] Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin', 11 *Human Rights Law Journal* (1990) 57, at 78; see also Christoffersen, *supra* note 20, at 242.

[22] ECtHR, *Belgian Linguistics Case*, Appl. nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 23 July 1968. All ECtHR decisions are available at http://hudoc.echr.coe.int/.

[23] Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *EJIL* (2008) 125, at 128.

[24] Besson, 'Subsidiarity in International Human Rights Law: What Is Subsidiary about Human Rights?', 61 *American Journal of Jurisprudence* (2016) 69.

[25] Petzold, 'The Convention and the Principle of Subsidiarity', in R.S.J. Macdonald and F. Matscher (eds), *The European System for the Protection of Human Rights* (1993) 41, at 49.

[26] P. Leach, *Taking a Case to the European Court of Human Rights* (3rd edn, 2011), at 161–162.

[27] The origins of the margin of appreciation doctrine can be traced back to ECtHR, *Greece v. United Kingdom*, Appl. no. 176/56, Judgment of 26 September 1958. For more, see Spielmann, 'Whither the Margin of Appreciation?', 67 *Current Legal Problems* (2014) 49.

[28] ECtHR, *Handyside v. United Kingdom*, Appl. no. 5493/72, Judgment of 7 December 1976, para. 49.

[29] Petzold, *supra* note 25, at 59.

[30] Spielmann, *supra* note 27, at 49.

[31] Greer and Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights', 12 *HRLR* (2012) 655; Gronowska, *supra* note 19.

[32] Wildhaber, 'A Constitutional Future for the European Court of Human Rights', 23 *Human Rights Law Journal* (2002) 161, at 163.

roles is well established in the literature. For example, Jonas Christoffersen finds that 'the Court has always faced the tension between the desire to safeguard the rights of individuals, to develop the standards, to elucidate the substantive content of the ECHR and to retain room for manoeuvre in future cases'.[33] Similarly, Steven Greer and Luzius Wildhaber explain that the Court assumes a plurality of functions. These range from handling routine adjudication of repetitive claims to responding to grave breaches of human rights.[34]

How does the ECtHR accommodate these seemingly incongruous roles then? I argue that, in practice, the Court manages the tension between the requirements of individual and constitutional justice by embracing different judicial characters. While roles are a set of actions that the Court performs, judicial characters combine roles with certain traits such as proactiveness, pragmatism or evasiveness. This article departs from the antithetical understanding of judicial roles (administration of individual versus constitutional justice) or styles of reasoning (judicial activism versus judicial restraint). Rather, it works on the assumption that the Court embodies different characters. It focuses on understanding their collective influence on norm development within the European human rights system.

What are the ways in which these characters mould and develop legal norms?[35] In order to provide a systematic account of different modes of norm development, the article proposes a framework. It then shows how this framework may be applied in an illustrative case study on the prohibition of torture and inhuman or degrading treatment under Article 3 of the ECHR.[36] This is an interesting case to analyse through this framework's lens because the Court has been actively redefining what this well-established peremptory norm entails.[37] That is to say, it is a highly legalized norm, which, at the same time, is quite dynamic. It therefore serves as an excellent example to trace the

[33] Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication Be Reversed?', in J. Christoffersen and M.R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (2011), at 184.

[34] Greer and Wildhaber, *supra* note 31, at 678–679.

[35] Legal norms are essentially part of the broader category of social norms but sufficiently different from other subcategories such as traditions, values or fashions. One distinguishing feature is that they may entail legally binding and enforceable rights and obligations. What distinguishes legal norms further is the idiosyncratic way they are created – be they part of a body of hard law or soft law – and the manner in which they are argued, interpreted and enforced. For more on this, see J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010); Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Is It International Law or Not, and Does It Even Matter?* (2012) 125.

[36] Illustrative cases show the applicability and relevance of theoretical frameworks. For more, see Levy, 'Case Studies: Types, Designs, and Logics of Inference', 25 *Conflict Management and Peace Science* (2008) 1.

[37] Cullen, 'Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights', 34 *California Western International Law Journal* (2003) 29; Shany, 'The Prohibition against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized under Existing International Law? Symposium on Reexamining the Law of War', 56 *Catholic University Law Review* (2006) 837; Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?', 15 *HRLR* (2015) 101.

distinct modes of norm development. I will refer to this norm not only to illustrate the applicability of the framework but also to flesh out its details throughout this article.

The framework is composed of a typology of court characters and a set of distinct modes of norm development that each character typically generates. The typology consists of arbitrator, entrepreneur and delineator characters. An arbitrator court gives narrow judgments that are tailored to the case at hand (tailored reasoning) or re-applies already established standards when reviewing the case (repeated reasoning). Such pragmatic decisions often lead to incremental and sometimes inconspicuous norm development. An entrepreneur court clearly defines the direction of the norm's development and sets standards applicable to future cases. Therefore, it generates pronounced norm development. A delineator court passes evasive judgments and refuses to tackle the complaint fully or to venture into new understandings. I argue that this avoidance is still a productive exercise. It delineates the contours of a norm and generates peripheral norm development.

The theoretical underpinnings of the typology come from the literature on judicial review and, in particular, the debates on judicial activism versus restraint. Similar to this literature, I identify character types by looking at how the ECtHR handles a given complaint – more specifically, the reasoning it employs and the conclusions at which it arrives. However, my understanding of judicial characters and their influence is more nuanced than how it is portrayed in this literature due to at least three reasons. First, it challenges the traditional way of analysing court behaviour through an over-simplified and dichotomous lens. The notions of judicial activism and judicial restraint fall short of fully accounting for how courts function and develop norms. The proposed typology includes the ordinary court decisions, which do not necessarily spur the controversy of activist (entrepreneur) or restraining (delineator) court decisions. Hence, it aspires to study judicial behaviour by adding an intermediate character – arbitrator – to capture what judicial activism and restraint literature leaves out. In so doing, it does not omit the mundane and incremental ways in which law develops.[38] This nuanced conceptualization has an additional benefit for understanding what is known as judicial restraint and its implication. The literature tends to combine arbitrator and delineator court characters under the category of judicial restraint. However, as we will see in the analysis section, they do not have the same influence on the development of the norm. In order to distinguish the impact of narrow rulings (arbitrator) and avoidance all together (delineator), it is crucial to look at them separately. Second, the framework is built upon the assumption that the ECtHR is able to switch between these characters or hold them at the same time.[39] It does not perceive judicial activism and restraint as features that represent an institution or an era. Rather, it allows for dynamism in shifting between characters or even manifesting different characters simultaneously.

[38] Baxter, 'International Law in "Her Infinite Variety"', 29 *International and Comparative Law Quarterly* (1980) 549, at 549.

[39] The assumption that all of these character types are available to the Court at all times came from my reading of Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Heidelberg Journal of International Law* (2004) 547.

Finally, and relatedly, these characters are not viewed as polar opposites. Instead, they serve a complementary function in adjusting the norms' content and scope of application. I illustrate how this complementarity works in a case study.

In addition to bringing a new perspective on the Court's behavioural patterns, the framework also advances the constructivist research on international norms. This literature has identified mechanisms to explain how norms emerge and get accepted and translated into treaty law.[40] However, not enough attention has been paid to what happens to norms once they are legalized.[41] This matter has been studied by legal scholars whose accounts often consist of taking snapshots to see what the law is at a particular moment in time.[42] This research attempts to bridge these two traditions. It combines approaches adopted by legal scholars and social science methods to bring a systematic explanation to legal change.[43] In what follows, I will elaborate on the framework and provide a concrete example of how it can be applied though an illustrative case study. I will do so in three steps. First, I will describe the empirical and theoretical foundations of the framework. Second, I will introduce its components. Third, I will apply the framework on the prohibition of torture and inhuman or degrading treatment (Article 3). In particular, I will examine whether the special features of this prohibition or the Court as an institution influence the selection of one character over another. I will then discuss how different characters engender different modes of norm development as well as their collective influence in adjusting this norm's content and scope.

2 Foundations of the Framework of Analysis

A Empirical Observations

In 2014, I carried out 36 semi-structured elite interviews with current and former judges, law clerks working for the Registry, representatives of non-governmental organizations and lawyers who brought cases before the ECtHR.[44] During the course

[40] See, e.g., Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *IO* (1998) 887; T. Risse *et al.*, *The Persistent Power of Human Rights: From Commitment to Compliance* (2013); T. Risse-Kappen, S.C. Ropp and K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (1999).

[41] Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder', 14 *European Journal of International Relations* (2008) 101.

[42] E.g. Dzehtsiarou and O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court', 44 *Columbia Human Rights Law Review* (2012) 309; Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation', 3 *University College London Human Rights Review* (2010) 1; I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011).

[43] For other examples of interdisciplinary works, see J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010); J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012).

[44] These interviews were carried out in Strasbourg (France), London and Essex (the United Kingdom), Bern and Geneva (Switzerland), Copenhagen (Denmark) Istanbul (Turkey) and via Skype.

of a one-month visit at the Court in Strasbourg, I attended hearings and interviewed some members of its staff. The staff is comprised of judges (elected for a non-renewable term of nine years), the legal team of the Registry (a large number of whom are employed on a permanent basis) as well as support services. I asked each professional group a different set of questions, allowing them to explain the Court's core functions and roles.[45] These interviews revealed two important observations, which informed this typology: (i) the Court functions as a collective agent and (ii) the Court assumes diverse roles in accordance with different concerns.

First, the ECtHR is more than its elected judges. That is to say, judges are not the sole locus of agency. Rather, the agency within the Court is diffuse. The entire case-processing system is conducted mostly behind the scenes under the cloaks of anonymity by many hands. Judgments (that is, the majority opinion) are drafted through a rather complex procedure with the involvement of the Court's permanent staff. They are signed in the name of the whole chamber under the ownership of the Court. They are therefore the products of the entire Court – not only of the individual judges sitting on the bench.[46] They are 'the public documents' that embody the Court's collective vision for how the ECHR rights should be understood.[47]

Second, the ECtHR undertakes a diverse range of roles with different objectives in mind, as my interlocutors have divulged. For example, according to one judge, the Court's role is twofold: its technical role is to interpret and apply the ECHR and its philosophical role is 'to uphold the values of our civilization'.[48] Another judge with an academic background said that the Court's role is 'to build a Europe of Rights'.[49] This view was shared by another judge who described the Court's role as 'to be the consciousness of Europe … a European lighthouse'.[50] There were a few other judges who believed the Court is there to establish and maintain 'minimum common standards of protection throughout Europe'[51] or to develop 'the contents of Convention rights'.[52] There were others who believed that the Court's role should be more limited. For example, a judge from a Western European country defined the Court's role as ensuring that 'the High Contracting parties observe the Convention's provisions'.[53] He added the following: 'I have a very traditional sense of what it is to be a judge. I am not a policy maker. I am not a politician. I am here to decide on a case by case

[45] This exercise was repeated in 2017 for the Inter-American Court of Human Rights (IACtHR) system. I carried out 24 interviews in Washington, DC (USA), Mexico City (Mexico) and San Jose (Costa Rica) with the same group of professionals. The list of the interviewees can be found in Appendix 1, available at https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chaa014#supplementary-data.

[46] In this regard, they are different from separate opinions that are drafted and owned by individual judges or a group of them.

[47] Interview 4.

[48] Interview 8.

[49] Interview 9.

[50] Interview 13.

[51] Interview 7.

[52] Interview 4.

[53] Interview 15.

basis whether the member states have respected the human rights as provided by the Convention'.[54] Finally, a judge, who served as a constitutional court judge before joining the Court, argued that the primary role of the Court is to observe whether states comply with their obligations arising from the Convention.[55] He then added:

> The secondary or collateral role of the Court is that of standard setter. … A third, even perhaps more collateral but at the same time vitally important, role is that of ensuring that the Convention remains a credible document – this credibility could be undermined if the Court were to interpret and apply the Convention in such a way that some member States would consider it as re-writing the Convention. This could happen with unnecessary forays into areas such as ethics and morality.[56]

Indeed, the Court's roles are guided by various concerns, ranging from developing rights in light of European values to maintaining minimum human rights standards across the continent without antagonizing member states. These divergent concerns often require different modes of operation and character traits such as proactiveness, pragmatism or evasiveness. This is what different court characters fulfil. Acting as a 'standard-setter for European civilization' is quite different from, say, conservatively enforcing the ECHR's principles. Helen Keller and Alec Stone Sweet advance a similar argument. They claim that the Court assumes different roles depending on the Convention principles and the responding states. Accordingly, its functions include serving as: (i) 'a kind of High Cassation Court when it comes to procedure'; (ii) 'an international watchdog when it comes to grave human rights violations and massive breakdowns in rule of law'; and (iii) 'an oracle of constitutional rights interpretation when it comes to fine-tuning the qualified rights of Articles 8–11 and 14 ECHR'.[57] This is precisely what this typology aims at capturing: the Court's different modes of operation and what each means for the trajectory of a given norm.

B Theoretical Underpinnings

The typology is composed of ideal-type characters (arbitrator, entrepreneur and delineator); each assigned to a typical role that one could associate with international courts.[58] International tribunals are expected to settle disputes (arbitrator). Occasionally, they actively push the development of a norm in a certain direction and set standards (entrepreneur) or delimit its development and set boundaries (delineator). The debate on judicial activism and judicial restraint captures the essence of judicial roles and the limits of a court's power to a great extent. According to the advocates of judicial activism, 'the courts should go beyond [a certain] set of references [defined by the founding document] and enforce norms that cannot be discovered within the

[54] Interview 15.
[55] Interview 10.
[56] Interview 10.
[57] H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008), at 695.
[58] Shapiro proposes a similar logic with his mediating continuum, which ranges from go-between, mediator and arbitrator to judge. M. Shapiro, *Courts: A Comparative and Political Analysis* (rev. edn, 1986).

four corners of the document'.[59] As for the proponents of judicial self-restraint, the courts should (i) proceed slowly when imposing their social, economic or political view on society or setting aside laws and (ii) respect 'the accumulated body of wisdom expressed in the precedents and other sources of law' or the legitimacy of the 'popularly elected executive and legislative branches'.[60]

In the context of the European human rights system, judicial activism can be associated with the ECtHR's willingness to interpret the ECHR in light of present-day conditions.[61] This interpretive doctrine, also known as the living instrument principle, essentially means that the ECHR should be interpreted in line with the evolving values of European societies.[62] The Court's role is viewed as giving voice to the public values of the community it serves[63] – namely, European values.[64] The Court made a clear reference to this in *Soering v. United Kingdom*, where it recognized the *non-refoulement* principle under Article 3. Specifically, it argued that extraditing a fugitive to another state where he may be subject to torture 'would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom, and the rule of law" to which the Preamble refers'.[65] Other patterns of behaviour linked to the Court's activism are establishing far-reaching principles and engaging in 'judicial inventiveness'.[66] For example, in *Assenov and Others v. Bulgaria,* the Court formally acknowledged the states' obligation to carry out an effective investigation under Article 3.[67] It then coined the term 'the procedural limb of Article 3' around the mid-2000s, and, thereafter, it became commonplace to bring complaints under this article's 'procedural limb'.[68]

On the other end of the spectrum, the concept of judicial restraint offers a completely different vision. The ECtHR is expected to prescribe remedies only for the case

[59] J.H. Ely, *On Constitutional Ground* (1996), at 1.

[60] Cox, 'The Role of the Supreme Court: Judicial Activism or Self-Restraint?', 47 *Maryland Law Review* (1987) 118, at 122.

[61] Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', 21 *EJIL* (2010) 509, at 527.

[62] Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', 12 *German Law Journal* (2011) 1731.

[63] Zarbiyev, *supra* note 3, at 254.

[64] It is imperative to ask whether and to what extent the legitimacy of this exercise of public authority may be derived from community values. This question has been thoroughly discussed in von Bogdandy and Venzke, *supra* note 6.

[65] ECtHR, *Soering v. United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989, para. 88.

[66] Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights', 42 *Creighton Law Review* (2009), at 362; Young, 'Judicial Activism and Conservative Politics', 73 *University of Colorado Law Review* (2002) 1139, at 1141. Pilot judgment procedure is another example of the ECtHR's inventiveness. For more, see Yildiz, 'Judicial Creativity in the Making: The Pilot Judgment Procedure a Decade after Its Inception', 8 *Interdisciplinary Journal of Human Rights Law* (2014–2015) 81.

[67] ECtHR, *Assenov and Others v. Bulgaria*, Appl. no. 90/1997/874/1086, Judgment of 28 October 1998, para. 102.

[68] See ECtHR, *Ipek v. Turkey*, Appl. no. 25760/94, Judgment of 17 February 2004; ECtHR, *Balogh v. Hungry*, Appl. no. 47940/99, Judgment of 20 July 2004; ECtHR, *Khashiyev and Akayeva v. Russia*, Appl. nos 57942/00 and 57945/00, Judgment of 24 February 2005.

at hand and primarily focuses on administrating individual justice.[69] The Court channels this notion best when it acts in accordance with the abovementioned principle of subsidiarity[70] and the margin of appreciation doctrine.[71] The underlying tenet here is that the Court should refrain from generating a larger impact through its jurisprudence. The notion that 'judges apply law, they don't make it' is one of the core characteristics of judicial restraint.[72] In particular, the Court is expected to exercise restraint in the face of dubious evidence and facts (evidential qualification) or insufficiently clear standards (normative qualification).[73] This was the case, for example, in *Çakıcı v. Turkey*, where the Court refrained from connecting a disappearance complaint to discriminatory policies towards Kurdish people as a group.[74] Similarly, in *Ayder and Others v. Turkey*, the Court refused to examine the applicants' claim that they had been subjected to collective punishment. Instead, it limited its analysis to individualized complaints under Article 3.[75] In both instances, the Court refrained from passing judgments on systemic discriminatory policies.

The literature on judicial activism and judicial restraint provides a roadmap to identifying judicial characters introduced here. Whether a judgment is driven by activism or restraint is often detected by looking at the way judicial decisions are reasoned and by analysing their conclusions. Ernest Young's account, which relies on Cass Sunstein's judicial 'minimalism' and 'maximalism' paradigm, serves as an excellent example in this regard.[76] According to Young, a minimalist judge may (i) resort to avoidance techniques and 'passive virtues' to avert reviewing the case altogether (delineator) and (ii) give narrow rulings and leave undecided aspects for future consideration as much as possible (arbitrator).[77] A maximalist judge, on the other hand, might seize every opportunity to pass judgments that include 'sweeping rules' or to address issues that it could safely ignore (entrepreneur).[78]

Drawing from this literature, I identify judicial characters by looking at the reasoning the Court develops to assess the merits of a complaint and the conclusions at which it arrives. The description below explains the attributes of the Court's judicial characters and the ways in which they effect norm development.

[69] According to Art. 35(1), 'the Court may only deal with the matter after all domestic remedies have been exhausted'.

[70] For more, see Mowbray, 'Subsidiarity and the European Convention on Human Rights', 15 *HRLR* (2015) 313; von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review', 10 *IJCL* (2012) 1023.

[71] For more, see Benvenisti, 'The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy', 9 *Journal of International Dispute Settlement* (2018) 240; Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', 14 *Cambridge Yearbook of European Legal Studies* (2012) 381.

[72] Posner, 'The Rise and Fall of Judicial Self-Restraint', 100 *California Law Review* (2012) 519.

[73] Christoffersen, *supra* note 33, at 185.

[74] ECtHR, *Çakıcı v. Turkey,* Appl. no. 23657/94, Judgment of 8 July 1999, para. 115.

[75] ECtHR, *Ayder and Others v. Turkey,* Appl. no. 23656/94, Judgment of 8 January 2004, para. 112.

[76] Young, *supra* note 66, at 1151.

[77] *Ibid.*

[78] *Ibid.*, at 1152.

3 The Components of the Framework

A Arbitrator

The ECtHR's arbitrator character is its default character. It is most in tune with the dispute settlement role with which the Court is traditionally associated.[79] When acting as an arbitrator, the Court arrives at conclusions that are tailored to the case at hand, without evaluating principles in the abstract or setting standards to be applied in the cases to follow.[80] A defining feature of the arbitrator court is the tendency to give narrow rulings and to avoid pronouncing widely applicable criteria with respect to how the norm should be understood.[81] The Court often assumes this character when reviewing cases that involve repetitive legal problems or issues for which there is already a well-established standard. In this state, the Court is often pragmatic. It resorts to repeated reasoning (application of reasoning or criteria developed for another case or context) or tailored reasoning (customized reasoning or conclusions with very limited implications beyond the specific case at hand). Therefore, arbitrator court judgments typically lead to gradual changes or a set of minor changes with no clear direction (incremental or inconspicuous development). In some instances, the collective effect of arbitrator decisions might also prompt a change of course or it might impede the norm's expansion.

In *De Becker v. Belgium*, the Court clarified what its arbitrator role entails. It decided to strike out this case because the applicant had already withdrawn his complaint following the introduction of a new legislation in Belgium. It supported this decision by arguing that 'the Court is not called upon … to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on the specific case of the application of such an Act to the Applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention'.[82] Similarly, in *McCann and Others v. United Kingdom*, the Court repeated this reasoning by underlining that 'it is not the role of the Convention institutions to examine *in abstracto* the compatibility of national legislative or constitutional provisions with the requirements of the Convention'.[83] The Court's general approach in these cases – namely, administering individual justice without discussing legal principles in the abstract – represents its arbitrator character.

B Entrepreneur

The entrepreneur character manifests itself when the ECtHR takes the initiative to develop a norm, pronounce generalizable rules or establish criteria to review similar

[79] Zarbiyev, *supra* note 3, at 254.

[80] *Ibid.*

[81] Narrow judgments 'do not venture far beyond the problem at hand'. They are tailor-made rulings that do not lend themselves to be applied to future cases. Sunstein, 'Beyond Judicial Minimalism', 43 *Tulsa Law Review* (2008) 825, at 826.

[82] ECtHR, *De Becker v. Belgium*, Appl. no. 214/5, Judgment of 27 March 1962, para. 14.

[83] ECtHR, *McCann and Others v. United Kingdom*, Appl. no. 18984/91, Judgment of 27 September 1995, para. 153.

complaints. As an entrepreneur, the Court communicates its vision about how the norm should be understood and applied in the future.[84] An entrepreneur court judgment does not necessarily involve progressive reasoning, although it often does.[85] Some entrepreneurial judgments might increase the specificity of a given norm. This clarifies the norm and, in some cases, limits its application to select situations or groups of people. In these cases, its delineator character is also engaged. For example, in *Çakıcı,* the Court developed a set of criteria to identify whether a family member of a disappeared person would be a victim of a violation himself/herself.[86] These criteria may have made it more difficult for some of the applicants to prove their victimhood claims – having a delineator court effect. Yet, at the same time, they clarified the scope of this prohibition and specified who could seek protection under Article 3 – having an entrepreneur court effect. What is distinctive about such entrepreneurial court judgments is that they contain generalizable standards or conclusions, which often enhance a norm's precision and specificity (pronounced norm development).[87]

The ECtHR itself acknowledged its entrepreneur role in *Ireland v. United Kingdom* by reasoning as follows: 'The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.'[88] *Selmouni v. France* was another testament to the Court's view that norm development is one of its core objectives. Having emphasized the need to develop higher standards – in line with the living instrument principle – the Court announced that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.[89] This dynamic spirit in general, and living instrument principle in particular, can be profusely found in entrepreneur court rulings.[90]

C Delineator

When the ECtHR takes on its delineator character, it assumes a deferential position or refrains from expressing legal opinion on the matter. This may appear to be the Court's unwillingness to evaluate a claim and pass a judgment that could set a precedent.[91]

[84] Kapiszewski, Silverstein and Kagan, 'Introduction', in D. Kapiszewski, G. Silverstein and R.A. Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (2013) 1.

[85] E.g. ECtHR, *Tomasi v. France*, Appl. no. 12850/87, Judgment of 27 August 1992; ECtHR, *Ribitsch v. Austria*, Appl. no. 18896/91, Judgment of 4 December 1995; ECtHR, *Chahal v. United Kingdom*, Appl. no. 22414/93, Judgment of 12 November 1996.

[86] *Çakıcı v. Turkey, supra* note 74, para. 98.

[87] For a discussion on norms' precision, see Stimmer, 'Beyond Internalization: Alternate Endings of the Norm Life Cycle', *International Studies Quarterly*, available at https://academic.oup.com/isq/advance-article/doi/10.1093/isq/sqz001/5369125.

[88] ECtHR, *Ireland v. United Kingdom*, Appl. no. 5310/71, Judgment of 18 January 1978, para. 154.

[89] ECtHR, *Selmouni v. France*, Appl. no. 25803/94, Judgment of 28 July 1999, para. 101.

[90] ECtHR, *Aksoy v. Turkey*, Appl. no. 21987/93, Judgment of 18 December 1996; ECtHR, *Kurt v. Turkey*, Appl. no. 15/1997/799/998–999, Judgment of 25 May 1998; ECtHR, *Dougoz v. Greece*, Appl. no. 40907/98, Judgment of 6 March 2001; ECtHR, *M.C. v. Bulgaria*, Appl. no. 39272/98, Judgment of 4 December 2003.

[91] For more, see Odermatt, 'Patterns of Avoidance: Political Questions before International Courts', 14 *International Journal of Law in Context* (2018) 221.

Yet this avoidance is not without an effect on the way a norm develops. Indeed, such judgments have a productive outcome of delineating the norm's scope and signalling the red lines for the norm's expansion (peripheral development).[92] While delineator court judgments identify the norm's contours in some instances, they might bring the norm development to a halt in some others. In the *Belgian Linguistics Case*, the Court gave the grounds for adopting a deferential position and acting as a delineator:

> [The Court] cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the Convention.[93]

In this case, the Court established the limits of its competence and presented itself with a legally valid reason why it may avoid addressing a complaint partially or fully.

The defining feature of delineator court judgments is their evasive nature. This could be to stay clear of 'politically sensitive' issues in Europe (such as religious symbols, euthanasia and abortion) or prevent complications that a judgment might spur.[94] The ECtHR is then less likely to address the complaint fully on jurisdictional or evidentiary grounds. Alternatively, it may view the issue to fall outside of a given provision's scope or its competence. The reason behind the Court's evasiveness could range from its unwillingness to venture into new understandings to its inability to do so. What is important here is not why the Court chooses evasion but, rather, what the Court's silence or hesitation to issue a ruling implies. Regardless of its motivation, the Court's evasiveness communicates a larger message about how the norm would (or should) not be interpreted at that particular moment.

In the context of Article 3, systemic discriminatory policies have been treated in this way,[95] which was also confirmed in an interview with the author.[96] For example, in *Anguelova v. Bulgaria*, the applicant, a Bulgarian national of Roma origins, argued that her son had been ill treated and killed in custody. She then added that the authorities had not carried out effective investigations into her allegations. She alleged that both the ill treatment and the deficiencies in the investigations were racially motivated. She further argued that the Roma in Bulgaria face systemic racial discrimination. The Court evaded systemic racism allegations on the basis of a lack of evidence. It advanced that, 'in the present case the applicant's complaints are likewise based on serious arguments. It is unable, however, to reach the conclusion that proof beyond reasonable doubt has been established'.[97]

[92] Civil society organizations take these signals into account when pleading their next cases. Interview 27; Interview 35; Interview 36.

[93] *Belgian Linguistics Case, supra* note 22, para. 10.

[94] Odermatt also suggests courts resort to avoidance for a number of reasons such as to 'enhance or preserve its legitimacy' or 'prevent a negative public reception'. Odermatt, *supra* note 91, at 223.

[95] *Çakıcı v. Turkey*, *supra* note 74; *Ayder and Others v. Turkey*, *supra* note 75.

[96] Interview 35.

[97] ECtHR, *Anguelova v. Bulgaria*, Appl. no. 38361/97, Judgment of 13 June 2002, para. 168.

It is important to note that the ECtHR set out its own standard of reasonable doubt in this case, which 'may follow from the coexistence of sufficiently strong, clear, and concordant inferences or of similar unrebutted presumptions of fact'.[98] In this regard, the Court expressed its willingness to 'assess all the relevant facts, including any inferences that may be drawn from the general information adduced by the applicant about the alleged existence of discriminatory attitudes'.[99] Nevertheless, in *Anguelova*, the Court did not carry out this exercise. In his partly dissenting opinion, Judge Giovanni Bonello criticized the Court for overlooking systemic racism. He argued that patching together the evidence provided by human rights organizations would suffice to see the great picture.[100] Although this judgment was evasive, as Judge Bonello called out, it also delineated the norm's scope at the time, indicating an unwillingness to extend the application of Article 3 to systemic racial discrimination claims.

In the next part, I demonstrate this framework on a case study by examining how these judicial characters have collectively shaped the content and scope of the norm against torture and inhuman or degrading treatment under Article 3. The findings presented will be applicable to this case study only.

4 Case Study on Article 3

A Coding Rules

I gathered all of the Article 3 decisions in which at least one violation was found for the period between 1969, the first year in which a violation of Article 3 was established,[101] and 2006.[102] This amounts to 157 cases.[103] Then, I identified the character type for each case, looking at the reasoning the ECtHR developed to assess the merits of the complaint as well as the conclusion(s) at which it arrived. Typically, each case is assigned to a character. Yet, in some instances, a case may feature two characters.[104] This is when the Court employs a mixed approach: (i) adopting expansive reasoning but arriving at narrow conclusions; (ii) adopting repeated reasoning and arriving at expansive conclusions; or (iii) addressing some aspects of the complaint (arbitrator or entrepreneur) and evading some others (delineator). Table 1 outlines the coding rules, composed of two criteria, for each character type.

[98] *Ibid*, para. 166.

[99] *Ibid.*, para. 166.

[100] *Ibid.*, Partly Dissenting Opinion of Judge Bonello.

[101] *Yearbook of the European Commission of Human Rights: The Greek Case, 1969* (1969), vol. 12, at 186.

[102] 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 only look at the latter.

[103] The list of cases analysed for this study can be found in Appendix 2, available at https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chaa014#supplementary-data.

[104] Thirteen cases were coded as two characters.

Table 1: Coding rules for character types and modes of norm development

Arbitrator	Entrepreneur	Delineator
Repeated or tailored reasoning *Narrow conclusions*	*Widely applicable reasoning* *Expansive conclusions*	*Evasive or restraining reasoning* *Retractive conclusions*
Incremental or inconspicuous norm development	Pronounced norm development	Peripheral norm development

Note: The assignment of character types to each case based on the criteria outlined here can be found in Appendix 2.

I coded a judgment as an arbitrator court ruling when: (i) the case at hand used repeated or narrowly tailored reasoning without establishing principles that could be applied to other cases and (ii) when the case's conclusions were narrow. What is typical about arbitrator rulings is that they often generate an overall sense of incremental change, which may or may not have a clear direction. For example, in *D. v. United Kingdom* in 1997, the ECtHR found that the United Kingdom violated Article 3 when it removed an HIV-positive inmate to St. Kitts, where the victim would not be guaranteed access to necessary treatment. To do so, the Court relied on reasoning developed in previous case law (repeated reasoning). It invoked the principle that Article 3 prohibits torture and inhuman or degrading treatment in absolute terms – first introduced in *Chahal v. United Kingdom*.[105] It then referred to *Soering*, where it was established that expelling a person to a place where they may face such a treatment is contrary to Article 3.[106] Building on these principles, the Court found that the removal of the applicant would constitute a violation. Yet it did so on narrow grounds:

> The Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison. However, in the *very exceptional circumstances* of *this case and given the compelling humanitarian considerations at stake,* it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3.[107]

D. v. United Kingdom is an important reference case, yet it does not set a clear precedent. This is because the ECtHR built a narrow conclusion tailored to what it viewed as exceptional circumstances. When a few other applicants brought cases complaining about how their expulsion could adversely impact their health, the Court responded erratically.[108] For example, when another applicant suffering from schizophrenia complained about his removal to Afghanistan in 2001 (*Bensaid v. United Kingdom*), the Court acknowledged the seriousness of his condition but did not find

[105] ECtHR, *Chahal v. United Kingdom*, Appl. no. 22414/93, Judgment of 15 November 1996.
[106] ECtHR, *Soering v. United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989.
[107] ECtHR, *D. v. United Kingdom*, Appl. no. 30240/96, Judgment of 2 May 1997, para. 54 (emphasis added).
[108] E.g. ECtHR, *Karara v. Finland*, Appl. no. 40900/98, Judgment of 29 May 1998; ECtHR, *B.B. v. France*, Appl. no. 47/1998/950/1165, Judgment of 7 September 1998; ECtHR, *S.C.C. v. Sweden*, Appl. no. 46553/99, Judgment of 15 February 2000.

a violation. The Court justified this decision by arguing that the case did 'not disclose the exceptional circumstances of *D. v. the United Kingdom*'.[109] The change spurred by *D. v. United Kingdom* remained haphazard, with the Court deciding that expulsion of the seriously ill does not constitute a violation in some cases but amounts to a violation in others.[110]

Judgments were categorized as entrepreneur court rulings when they (i) introduced principles or criteria to clarify how the norm should be henceforth interpreted or (ii) set a precedent by expanding the application of the norm to new issues. Such judgments therefore tend to generate pronounced norm development. *Tyrer v. United Kingdom* is a good illustration of how these dynamics work. In *Tyrer*, the applicant complained that he had been subjected to judicial corporal punishment, which amounted to inhuman or degrading treatment under Article 3. Corporal punishment was indeed discussed during the drafting of the ECHR in 1949. The British delegation appealed, arguing that Article 3 should not cover corporal punishment, as it was being practised in the United Kingdom at the time.[111] Some 30 years after this discussion, the Court found that judicial corporal punishment constitutes a violation of Article 3. The Court based this expansive conclusion on the living instrument doctrine, which was also introduced in this case.[112] It pronounced that the level of severity of the acts would be assessed in light of present-day conditions. In *Tyrer*, the Court not only set a new applicable criterion, it also expanded the coverage of the norm by recognizing corporal punishment as a form of degrading treatment. Therefore, *Tyrer* is the quintessential example of entrepreneur rulings where the Court arrives at conclusions that clearly expand the norm's scope or when it launches principles that guide its interpretation in the cases to follow.

For pronounced norm development, it often suffices if either the reasoning or the conclusions are expansive, as all of the judgments that are coded for entrepreneur and arbitrator characters show.[113] For example, in *Gürbüz v. Turkey*, the Court did not introduce any new interpretive principle. Yet it proactively developed the norm by concluding that the re-incarceration of a gravely ill prisoner, who had been on a

[109] ECtHR, *Bensaid v. United Kingdom*, Appl. no. 44599/98, Judgment of 6 February 2001, para. 40.

[110] See, e.g., ECtHR, *N. v. United Kingdom*, Appl. no. 26565/06, Judgment of 27 May 2008; ECtHR, *Paposhvili v. Belgium*, Appl. no. 41738/10, Judgment of 13 December 2016. In *N. v. United Kingdom*, the Court found that the responding state does not have an obligation to provide for the applicant's medication even though her removal back to Uganda would diminish the quality of her life and life expectancy. Then, in *Paposhvili*, the Court found a violation. More specifically, it argued that what constitutes a violation of Art. 3 is not the lack of medical infrastructure in the country where the applicant returns but, rather, the lack of medical assessment concerning the risk the applicant would face upon their removal.

[111] Council of Europe, Preparatory Work on Article 3 of the European Convention of Human Rights, Doc. DH(56)5 (1956), at 11–13.

[112] For example, Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013) 106.

[113] ECtHR, *Cyprus v. Turkey*, Appl. no. 25781/94, Judgment of 10 May 2001; ECtHR, *Bursuc v. Romania*, Appl. no. 42066/98, Judgment of 12 October 2004; ECtHR, *Moldovan and Others v. Romania*, Appl. no. 41138/98 and 64320/01, Judgment of 12 July 2005; ECtHR, *Gürbüz v. Turkey*, Appl. no. 26050/04, Judgment of 10 November 2005.

long-term hunger strike, would constitute a violation – an application of the abovementioned *Soering* principle.[114] The Court invoked Article 3 to prevent a potential violation for the first time in this context of re-incarceration.[115]

Finally, delineator court rulings are those where the Court (i) overtly or covertly refuses to engage a particular aspect of a complaint or (ii) arrives at conclusions that repudiate the expansive interpretations introduced earlier. This way, the Court draws the contours of the norm and sometimes brings its development to a halt. Delineator court judgments indicate the red lines for the norm's expansion. This might mean that the *status quo* is kept or the potential for extending the norm's application to new issues is undercut.

I have identified nine delineator court rulings for this study.[116] Although the number of observations is small, it still informs us about the nature of this character. All delineator court rulings are also coded for another character – five of them are entrepreneur and delineator, and four of them are arbitrator and delineator. These combinations occur for two reasons. First, the ECtHR may employ a widely applicable reasoning and then arrive at retractive conclusions.[117] For example, in *Ireland v. United Kingdom*, the Court introduced the minimum level of severity criteria to assess whether a complaint would fall under Article 3 – that is, looking at the duration of the treatment and its physical and mental effects, all of which would be relative to the sex, age and state of health state of the victim. In so doing, it clarified how the norm should be applied (pronounced development). Then, it found the five techniques to be inhuman or degrading treatment despite the European Commission's earlier finding that they amount to torture – modern versions of the techniques used to extract information in previous times (retractive conclusion).[118] This decision could have halted the norm development had the Court not backtracked from it in *Selmouni*, where it established that lower thresholds would be applied to identify torture.[119]

Second, the Court may treat different complaints brought under Article 3 differently. It may employ expansive or repeated reasoning to assess some claims while refusing to address others, as we observed in the remaining seven cases.[120] For example, in *Hasan Ilhan v. Turkey*, the Court acted as an arbitrator and found the destruction of the victim's home a violation of Article 3 – repeating a reasoning first introduced in *Selçuk and Asker v. Turkey*.[121] Nevertheless, it did not go as far as linking the said

[114] *Gürbüz v. Turkey*, *supra* note 114, para. 71.

[115] The Court arrived at the same conclusion in ECtHR, *Uyan v. Turkey*, Appl. no. 7454/04, Judgment of 10 November 2005; ECtHR, *Kuruçay v. Turkey*, Appl. no. 24040/04, Judgment of 10 November 2005.

[116] The reason why there are so few of them could be because I have only analysed Art. 3 cases reviewed based on their merits. One may expect to see the Court act as a delineator when declaring cases inadmissible.

[117] *Ireland v. United Kingdom*, *supra* note 88. The other example of this kind is *Çakıcı*, *supra* note 74.

[118] *Ibid.*, para. 168.

[119] *Selmouni, supra* note 89, para. 101.

[120] They are often brought in conjunction with Art. 14 (prohibition of discrimination). ECtHR, *Akkoç v. Turkey*, Appl. no. 22947/93 and 22948/93, Judgment of 10 October 2000; *Ayder and Others v. Turkey*, *supra* note 75; *Anguelova v. Bulgaria, supra* note 97; ECtHR, *Ahmet Özkan and Others v. Turkey*, Appl. no. 21689/93, Judgment of 6 April 2004; ECtHR, *Bekos and Koutropoulos v. Greece*, Appl. no. 15250/02, Judgment of 13 December 2005.

[121] ECtHR, *Hasan Ilhan v. Turkey*, Appl. no. 22494/93, Judgment of 9 November 2004, para. 108; see also ECtHR, *Selçuk and Asker v. Turkey*, Appl. no. 12/1997/796/998–999, Judgment of 24 April 1998.

violation with discriminatory policies towards Kurdish people, assuming its delineator role. Similarly, in *Öcalan v. Turkey*, the Court found that punishing the applicant with the death penalty after a mistrial would constitute a violation of Article 3, and it expanded the application of the norm as an entrepreneur. However, it refrained from expressing an opinion about whether the implementation of the death penalty in itself would violate Article 3.[122] In both examples, the Court's evasion clearly delineated how far the interpretation of Article 3 would go.

B Working Hypotheses

In this part, I formulate working hypotheses based on the features of the case under study and of the ECtHR as an institution.

1 Features of the Case Study

The prohibition of torture has a special nature.[123] It is a peremptory norm.[124] At least in a legal sense, it is a 'settled norm'.[125] It is an absolute prohibition and any attempt to violate it necessitates special justifications.[126] Under Article 15 of the ECHR, the contracting states may not request derogation from their obligations under Article 3, even 'in time of war or other public emergency threatening the life of the nation'.[127] This article leaves no leeway to states to suspend their Article 3 obligations. Therefore, Article 3 attracts a high level of scrutiny and does not allow national definitions 'to prevail against that of the Court'.[128] The Court has never shown deference or invoked a margin of appreciation with respect to the substantive obligations under Article 3.[129] We should thus be surprised to find deferent or evasive judgments about this absolute prohibition.

Moreover, the introduction of new legal instruments prohibiting and preventing torture has made delineator judgments less likely. My interlocutors confirm that the

[122] ECtHR, *Öcalan v. Turkey*, Appl. no. 46221/99, Judgment of 12 May 2005, para. 165.

[123] Nowak, 'What Practices Constitute Torture? US and UN Standards', 28 *Human Rights Quarterly* (2006) 809, at 820.

[124] According to Art. 53 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, a peremptory norm is 'a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted'.

[125] In a social sense, the ubiquitous acceptance of the norm against torture is disputed, however. This is partially because of the pervasive use of torture despite the existence of sophisticated legal safeguards put in place. Barnes, 'The "War on Terror" and the Battle for the Definition of Torture', 30 *International Relations* (2016) 102; D'Ambruoso, 'Norms, Perverse Effects, and Torture', 7 *International Theory* (2015) 33.

[126] M. Frost, *Ethics in International Relations: A Constitutive Theory* (1996), at 105.

[127] Other articles that fall under the non-derogable norm category under Art. 15 are as follows: Art. 2 (right to life except in respect of deaths resulting from lawful acts of war), Art. 4(1) (prohibition of slavery) and Art. 7 (no punishment without law).

[128] S.C. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000), at 27.

[129] However, it has allowed a margin for the procedural obligations emanating from this norm. The Court expects the investigations to be carried out in an effective manner, yet, at the same time, it underlines that it is 'not an obligation of result, but of means'. Interview 15. For example, ECtHR, *Akdeniz v. Turkey*, Appl. no. 25165/94, Judgment of 31 May 2005, para. 104: *Ahmet Özkan, supra* note 121, para. 312; *Anguelova v. Bulgaria*, supra note 97, para. 139.

anti-torture regime – specialized treaties, expert bodies and committees that carry out onsite visits – has provided the Court with evidence or legal grounds to proactively develop the norm. For example, a judge underlined the importance of the Convention against Torture in propelling the progressive interpretation in the *Selmouni* judgment.[130] Another judge divulged that 'I have no doubt that the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Committee for the Prevention of Torture (CPT) established under Article 1 of that Convention, were important catalysts in this delicate process of norm evolution'. He added that the Court often relies on the CPT reports as evidence.[131] A former judge confirmed this and maintained that these reports make up for the Court's inability to carry out fact-finding.[132] They, therefore, reduce the Court's likelihood of declining to review a complaint due to a lack of evidence. Table 2 lists the main instruments, expert bodies and committees specialized in torture prohibition that were introduced and created between 1967 and 2006.[133]

Table 2: Legal instruments, expert bodies and committees specializing in torture prohibition

	Overlapping and parallel (pre-1998)	**Overlapping and parallel (post-1998)**
International	1950 – Universal Declaration of Human Rights 1966 – Covenant on Civil and Political Rights (ICCPR) 1984 – Convention against Torture (CAT); Committee against Torture 1985 – Special Rapporteurship on Torture	1999 – Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture) 2006 – Optional Protocol to CAT (OPCAT); Subcommittee on Prevention of Torture
Regional	1989 – European Convention for the Prevention of Torture; European Committee for the Prevention of Torture	2001 – Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment (revised in 2008, 2017)

The international anti-torture regime has grown more complex with the proliferation of parallel and overlapping specialized legal instruments and human rights bodies, as Table 2 indicates.[134] This development has strengthened the prohibition of

[130] Interview 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

[131] Interview 10.

[132] Interview 16.

[133] This list is not exhaustive. It is limited to the main legal instruments introduced during the period under study.

[134] This definition of complexity is based on Alter and Meunier, 'The Politics of International Regime Complexity', 7 *Perspectives on Politics* (2009) 13.

torture under Article 3 by serving a supportive and complementary function. Due to this prohibition's special nature and the complementary role of the international anti-torture regime, we can expect fewer delineator court judgments concerning Article 3. In other words, according to the first hypothesis, the Court is less likely to issue delineator court rulings – relative to entrepreneur or arbitrator rulings – concerning Article 3.[135]

2 The ECtHR's Institutional Features

It is important to understand the ECtHR's institutional features to gauge the likelihood of the Court adopting one character over another. In this regard, the Court's authority – its credibility and ability to influence – is an important measure.[136] Scholars have found that the Court became more powerful,[137] and issued more courageous and progressive judgments, once it secured more authority.[138] Therefore, there seems to be at least a correlation between authority and the Court's judicial courage to progressively develop its case law. We may reasonably expect more authority to bring about a higher share of entrepreneur judgments relative to the other two types.

The internal reorganization of the European human rights regime has favoured an upward trend for the ECtHR's authority. Structurally, the European human rights system has become simpler over time.[139] It was originally set up as a two-tier system. In the first tier, the European Commission of Human Rights, established in 1954, would receive individual complaints and decide their admissibility.[140] In the second tier, the ECtHR, founded in 1959, would review the cases referred by either the Commission or another member state (interstate cases). Moreover, it was left to member states to accept the Court's jurisdiction and allow the individual right to petition. This model gave a larger role to the Commission, which functioned as a quasi-judicial filter,[141] and constricted the Court's authority.[142] Protocol no. 11, which entered into force in

[135] The expectation is that, for provisions that do not carry the special characteristics of Article 3, this assumption may not hold.

[136] This definition is inspired by Alter, Helfer and Madsen, 'How Context Shapes the Authority of International Courts', 79 *Law and Contemporary Problems* (2016) 1.

[137] *Ibid.*, at 32.

[138] Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash', 79 *Law and Contemporary Problems* (2016), at 152; see also 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', 32 *Law and Social Inquiry* (2007) 137.

[139] This is inspired by the institutional complexity analysis of Carneiro and Wegmann, 'Institutional Complexity in the Inter-American Human Rights System: An Investigation of the Prohibition of Torture', 22 *International Journal of Human Rights* (2018) 1229.

[140] I. Bantekas and L. Oette, *International Human Rights Law and Practice* (2013), at 230.

[141] *Ibid.*, at 224.

[142] E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (2010); Madsen, 'Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in J. Christoffersen and M.R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (2011) 43.

1998, revamped this original design and abolished the Commission.[143] It replaced the old Court and the Commission – both of which worked on a part-time basis – with the new Court. The new Court became a permanent body with compulsory jurisdiction and started to receive applications directly from individuals.

As scholars of regime complexity point out, when there are overlapping or parallel institutions, it is harder to resolve where authority resides.[144] This ceased to be a problem for the European Court after Protocol 11. The Court consolidated its authority the moment it was remodelled to be the only institution in charge of reviewing the human rights practices of all Council of Europe member states. Mikael Rask Madsen confirms this and argues that the Court could only maintain narrow legal authority from its inception until the mid-to-late 1970s.[145] It began to enjoy extensive authority in the 1990s when it became 'the *de facto* Supreme Court of human rights in Europe' with 'a steady and growing docket'.[146]

The Court's growing authority was also boosted by the Eastward expansion in the 1990s. The European human rights system geographically expanded when formerly communist countries acceded to the Council of Europe. The number of member states rose from 22 to 47. This expansion meant that the Court's core function would include a new dimension. The Court was expected to continue with fine-tuning well-established democracies and to start cultivating a robust rule-of-law culture in new member states.[147] This burdensome task proved to be beneficial for strengthening the system and provided the Court with 'renewed political support'.[148] However, these changes came with a pitfall: an increased caseload. The number of applications grew from 404 in 1981 to 4,750 in 1997 and to 32,402 in 2005. This trend continued with 49,900 applications in 2008 and 61,300 in 2010.[149] Figure 1 shows the evolution of the share of Article 3 judgments over the years.

Only considering the ECtHR's authority, we can identify 1998 as an important turning point. Thereafter, the Court became an institution with substantive authority and an increasingly unmanageable caseload. Taking the creation of the new Court in 1998 as a watershed moment, the second hypothesis leads us to expect more entrepreneurial court rulings after 1998 compared to the preceding period. However, this expectation should be qualified further. The influence of authority will likely be moderated by the increasing caseload. Although a steady docket is crucial for the Court's operation, an exponentially growing workload with no sign of dissipation becomes crippling. It leaves the Court with little time to engage in the forward-looking

[143] Protocol no. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1994, ETS 155.

[144] Alter and Meunier, *supra* note 135, at 13.

[145] Madsen, *supra* note 139.

[146] *Ibid.*, at 143.

[147] Bates, *supra* note 143.

[148] O'Boyle, 'The Imperiled Success of the European Court of Human Rights', in *Trente Ans de Droit Européen des Droits de l'Homme: Études à La Mémoire de Wolfgang Strasser* (2007) 251.

[149] These numbers are obtained from European Court of Human Rights, Annual Report 2010 (2011), at 13–14.

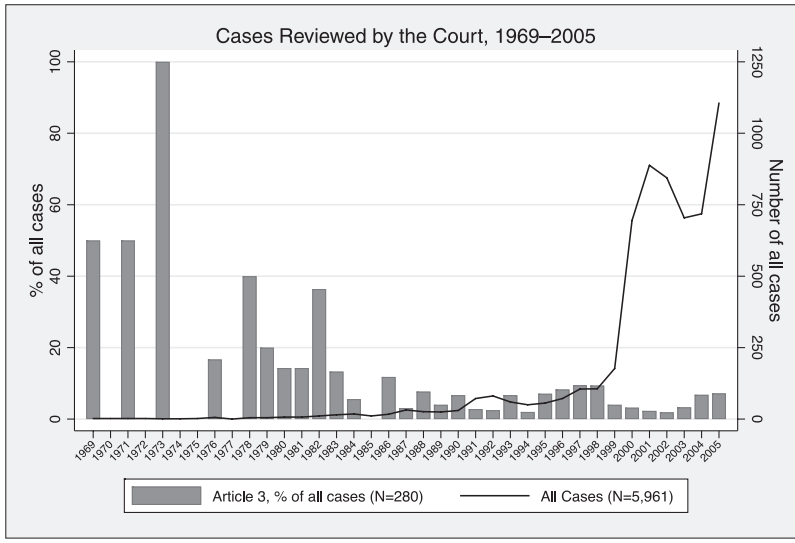

Figure 1: *Article 3 cases calculated as percentage of total number of cases. The information about the number of cases was obtained from HUDOC, the ECtHR's official database. The sample of 280 cases comprises all of the Article 3 judgments reviewed between 1969 and 2006. It should be noted that this number includes no-violation decisions as well as 157 violation decisions reviewed for this study. The sample of 5,961 represents the total number of cases reviewed during the same period.*

reasoning that we see in entrepreneurial judgments. My interviewees divulged that the caseload influenced the way the Court approached all articles under the ECHR, including Article 3.[150] One former judge explained that the current line of Article 3 jurisprudence is shaped by a recent tendency to issue 'contextualized' and 'minimalist' judgments that do not pay heed to establishing 'big principles'.[151] Thus, according to the third hypothesis, the Court's likelihood to deliver entrepreneurial court rulings will diminish as the caseload increases in the post-1998 period.

4 Results

Turning to the results of analysis, I draw a distinction between the period before 1998 and the period that follows that year. Table 3 displays the relative distribution of each character type for both periods.[152] There are some expected and some unexpected results. There are indeed very few delineator court judgments for both periods, in line with the first hypothesis. Delineator court judgments constitute only 7.14 per cent and 5.13 per cent of the decisions for the pre-1998 and post-1998 period, respectively.

[150] Interview 4; Interview 17; Interview 18; Interview 24.

[151] Interview 16.

[152] Since the Court passed few Art. 3 judgments in the period before 1998, the majority of the observations are placed in the post-1998 period.

Table 3: Ratio of character types relative to the number of cases analysed

Judicial characters	Pre-1998 (%)	Post-1998 (%)
Arbitrator	3 (21.43)	126 (80.77)
Entrepreneur	10 (71.43)	22 (14.10)
Delineator	1 (7.14)	8 (5.13)
N (Total) =	14	156

Note: The total number of observations is 170 since 13 cases were coded as two characters.

In stark contrast, there is a noticeable difference with respect to the distribution of entrepreneur and arbitrator judgments. Entrepreneur court judgments are more dominant in the pre-1998 period, constituting 71.43 per cent of all rulings. This picture changes in the post-1998 period, where arbitrator court judgments make up the clear majority of the rulings, which amounts to 80.77 per cent.

Moreover, Figure 2 demonstrates the distribution of character types, relative to the total number of observations, for all of the years between 1969 and 2006.

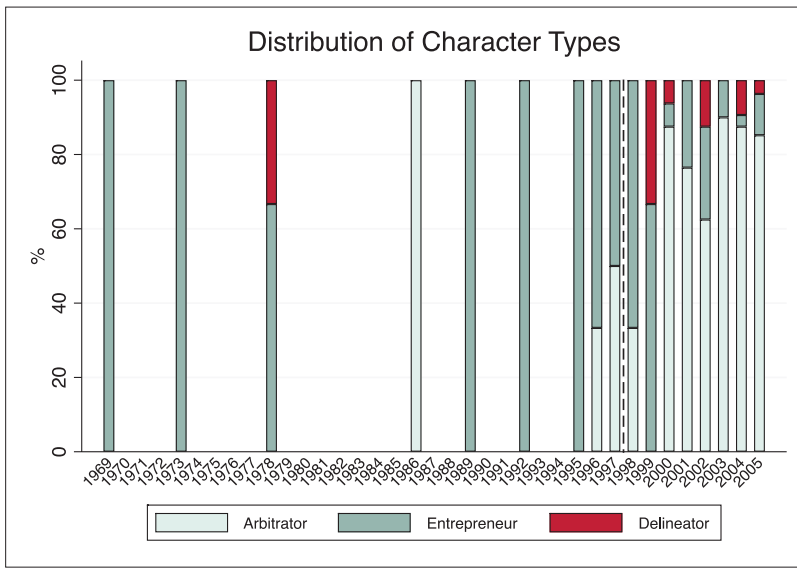

Figure 2: *Distribution of court character types per judgment under Article 3.*

While the period before 1998 can be characterized by a higher concentration of entrepreneur court judgments, the period after 1998 is clearly dominated by arbitrator court rulings. This finding is contrary to what the second hypothesis predicts. As expected, the increased workload seems to have greatly reduced the rate at which the Court issued entrepreneur rulings. In particular, entrepreneur judgments decreased in 2000 just as the Court's caseload exponentially grew (see Figure 1). In line with the

third hypothesis, there are only a few entrepreneur judgments and significantly more arbitrator judgments, especially in the period after 2000.

Indeed, more entrepreneur court judgments with broader implications appeared around the time when there were fewer applications. This may not be unique to the ECtHR. For example, there is a similar tendency at the Inter-American Court of Human Rights (IACtHR). According to the interviews I conducted at the IACtHR, the low number of applications is one of the reasons they pronounce judgments with extensive remedies and implications. The IACtHR judges and staff agreed that they receive far fewer applications to review and that each judgment is a chance for them to make a statement for the entire region.[153] A law clerk at the IACtHR explained their difference further with an analogy.[154] He described the IACtHR as a boutique court that works on a case much longer to ensure that the judgment stands out and generates systemic change. The ECtHR, on the other hand, delivers judgments on an industrial scale without such concern or capacity.[155]

Second, we can expect that there is also increasingly less need to develop principles and criteria under Article 3. As the standards around a particular issue solidify, which is clearly the case for this article, we can expect fewer entrepreneur court judgments. Earlier decisions such as *Tyrer* and *Selmouni* filled important gaps in understanding what the norm against torture and inhuman or degrading treatment entails and how it can be applied. They set precedents and served as the skeleton of the Court's jurisprudence in this regard. We obviously cannot expect each case to be of the same value. Finally, these observations have led to an important finding with respect to the overall influence of the rulings issued by different character types in the context of this study. When we look at the collective influence of each character type on the transformation of the norm, we can see how they complement each other. The entrepreneur court rulings that came in the earlier periods established generalizable understandings. The arbitrator court judgments applied or tailored these principles developed in entrepreneur court judgments. They were the bread and butter of Article 3 jurisprudence and developed the norm incrementally. Lastly, the delineator court judgments signalled the Court's red lines and marked the contours of the norm against torture and inhuman or degrading treatment under Article 3.

The transformation of Article 3, with relatively more entrepreneur court judgments in the beginning and few delineator court judgments throughout, follows an idiosyncratic trajectory. Although this case study represents the interrelated role of court character types in moulding a given norm, it by no means sets a single standard for norm development in general. We could expect that transformation of other norms will manifest differently with different constellation of court characters. This will likely be determined by their distinct features – that is, whether they concern complex

[153] Interview 50; Interview 51; Interview 52; Interview 53; Interview 55; Interview 56.

[154] The IACtHR delivered 21 judgments in 2016, whereas the ECtHR delivered 1926 applications in the same year. IACtHR, Annual Report 2016, available at www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2016.pdf; ECtHR, Analysis of Statistics 2016, available at www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf.

[155] Interview 55.

ethical issues around which there is no clear agreement or whether they are strongly protected by a web of international legal instruments.

5 Conclusion

This article has attempted to bring a systematic explanation for the ways in which the ECtHR develops the norms under the ECHR. To this end, it has presented a framework to trace how judgments manifesting different judicial characters refine norms by either expanding or adjusting their content or scope. The framework comprises a typology of court characters (arbitrator, entrepreneur and delineator) and distinct modes of norm development that each typically generates (incremental/inconspicuous, pronounced or peripheral development, respectively). The framework and the findings presented here contribute to the study of international courts and norms in three ways.

First, the typology builds on the literature on judicial review and, in particular, the debate on judicial activism and restraint. Yet the approach adopted here goes beyond this literature's dichotomous view of judicial roles and styles of reasoning. A closer look at the Court reveals that it might easily shift between these characters or hold them at the same time. Different court characters complement each other in developing norms. Entrepreneur rulings launch widely applicable reasoning or conclusions. Arbitrator rulings, on the other hand, invoke previously established principles or involve narrowly tailored reasoning and findings. As for delineator court rulings, they set the outer limits of the norm. The case study on Article 3 supports this claim and shows how each court character type has played a part in the norm's transformation.

Second, the findings confirm some expectations and call some others into question. In the context of Article 3, the ECtHR has rarely assumed its delineator character. However, contrary to intuition, the Court has not necessarily passed more entrepreneur rulings once it enjoyed substantive authority in the post-1998 period. Instead, we observe more arbitrator decisions in this period. One reason to factor in is that the Court's workload significantly increased in the post-1998 period, leaving little time for it to work out new principles or standards. Another plausible explanation could be that the entrepreneur decisions passed during earlier periods have already clarified the norm in a way that meets the societal needs of the time. The Court had already built fairly stable and applicable principles to interpret this norm – sometimes relying on standards set by other torture prohibition instruments, human rights bodies or expert committees. When the need for setting new standards declined, the Court turned to applying existing ones by means of arbitrator court decisions. While these explanations are provisional, they call for further studies into the link between the Court's authority and characters.

Finally, leaving aside the reasons behind increased arbitrator court decisions, this finding provides useful insights for the current debate on the backlash against international human rights mechanisms. Unlike what the proponents of political resistance against the ECtHR claim, this picture shows that the Court has not become more entrepreneurial in recent years. On the contrary, some of its most well-known

standards concerning the norm against torture were established much earlier. What dramatically changed in the most recent period is the number of court decisions. There has been an unprecedented increase in the Court's output in the run up to the 2010s, which is when the backlash against the Court started, according to some scholars.[156] This could be one of the culprits of the recent pushback against the Court. What irritates member states could also be the frequency of violation decisions or their accumulated effect, not only their content. Although the findings presented here are insufficient to prove this claim, this exploratory study opens avenues for future research. Follow-up studies could successfully pinpoint whether there is a correlation between certain character types and backlash against the ECtHR or other tribunals. Alternatively, this framework could help plotting judicial behaviour patterns across different courts or in relation to different norms.

[156] See, e.g., Madsen, *supra* note 139; Voeten, 'Populism and Backlashes against International Courts', *Perspectives on Politics* (forthcoming), available at doi:10.1017/S1537592719000975.