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

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It is well established in the literature that international courts make law. Yet, there is no systematic analysis of how adjudication refashions the trajectory that a norm could take. 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 (the Court) and provides a framework for understanding how court rulings develop norms – i.e. adjustment of 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*). It 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. However, unlike the concept of judicial activism and restraint, these characters are not antithetical. I show how they complement one another by looking at the case of the norm against torture under Article 3 of the European Convention. To that end, I examine 157 Article 3 judgments issued between 1967 and 2006. My analysis sheds light on how the Court operates, and shows that the percentage of entrepreneur rulings considerably decreased in the post-1998 period while arbitrator rulings increased by nearly the same amount.

Keywords: European Court of Human Rights, judicial characters, judicial activism and restraint, individual justice and constitutional justice models, norm development, norm against torture and inhuman or degrading treatment

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

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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 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 – i.e. refinement either through 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]

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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 for example, Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *Virginia Journal of International Law* (2005) 631; Venzke, *supra* note 1; F. Zarbiyev, Judicial Activism, Max Planck Encyclopedia of International Procedural Law (EiPro), 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* (Reprint edition, 2010).

6 Studies have critically analyzed judicial lawmaking and its consequence – 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* (2012) 7; Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *Virginia Journal of International Law* (2005) 631; Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* (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.

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 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 to further social justice; (ii) engaging with non-judicial activities and 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 (the Court; ECtHR) too has been studied through this prism.[13] Scholars have investigated whether the Court is really the activist that purposefully widens the ambit of the European Convention on Human Rights (the Convention),[14] or whether it is adhering to judicial self-restraint,[15] by showing deference to the domestic authorities.[16]

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

10 For example, Dworkin, 'Introduction', in *Judicial Activism: Power without Responsibility?* (2006); 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 *Judicial Activism: Power without Responsibility?* (2006); S. A. Lindquist and F. B. Cross, *Measuring Judicial Activism* (2009).

11 Breyer, 'Judicial Activism: Power without Responsibility?', in *Judicial Activism: Power without Responsibility?* (2006), at 71.

12 Roberts, 'Judicial Activism', in *Judicial Activism: Power without Responsibility?* (2006), at 119.

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

14 Phillips, 'Judicial Activism: A Study in the Abuse of Power', in *Judicial Activism: Power without Responsibility?* (2006).

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).

In addition, scholars have studied the ECtHR through the lenses of the 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 applicant regardless of the systemic improvements which 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 judicial activism and restraint debate, the individual and constitutional justice models concern judicial review and limits of judicial power.[19]

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 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

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); 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/ (last visited 21 January 2018].

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.

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 *Human Rights Law Review* (2018) 473; Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights', 15 *International Journal of Constitutional Law* (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 *Belgian Linguistics Case*, application nos. 1474/62;1677/62; 1691/62; 1769/63; 1994/63; 2126/64, ECHR (23 July 1968).

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

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

the Convention standards.'[25] The doctrine of 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. the United Kingdom*:[27] 'the domestic margin of appreciation thus goes hand in hand with a European supervision.'[28] This doctrine, therefore, grants states supervised discretion,[29] and underscores 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 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] Steven Greer and Luzius Wildhaber make a similar observation, and underline the impossibility of the 'systematic delivery of individual justice' due to the increasing caseload.[34]

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), at 49.

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

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

28 *Handyside v. the United Kingdom*, application no. 5493/72, ECHR (7 December 1976), §49.

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

30 Spielmann, *supra* note 32, at 49.

31 Greer and Wildhaber, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights', 12 *Human Rights Law Review* (2012) 655; Gronowska, *supra* note 23.

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

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 664.

How does the Court 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 vs. constitutional justice) or styles of reasoning (judicial activism vs. 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 Convention.[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] Hence, it is a highly legalized yet at the same time quite a dynamic norm. It therefore serves as an excellent example to trace 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 paper.

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 *Human Rights Law Review* (2015) 101.

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 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 vs restraint. Similar to this literature, I identify character types by looking at how the Court handles a given complaint; more specifically the *reasoning* it employs and the *conclusions* it arrives at. 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

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

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 Court 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. 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

39 The assumption that all 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).

40 See for example, Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (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 For example, 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 *UCL Human Rights Review* (2010) 1; I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011).

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 parts: Part I describes the empirical and theoretical foundations of the framework. Part II introduces its components. Part III applies the framework on the prohibition of torture and inhuman or degrading treatment (Article 3). In particular, it examines whether the special features of this prohibition or the Court as an institution influence the selection one character over another. It then discusses how different characters engender different modes of norm development, as well as their collective influence in adjusting this norm's content and scope.

Part I: Foundations of the Framework of Analysis

Empirical Observations

In 2014, I carried out 36 semi-structured interviews in Strasbourg, France; Bern and Geneva, Switzerland and via Skype. My interviewees included current and former judges, law clerks working for the Registry, representatives of NGOs, and lawyers who brought cases before the Court. During the course of a one-month visit, I attended hearings and interviewed some members of the Court's staff. The staff comprises 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.[44] These interviews revealed two important observations, which informed this typology: (i) the Court functions as a collective agent; (ii) the Court assumes diverse roles in accordance with different concerns.

First, the Court 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

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 This exercise was repeated in 2017 for the Inter-American human rights (IACHR) 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 the Annex I.

system is conducted mostly behind the scenes under the cloaks of anonymity by many hands. Judgments (i.e. 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.[45] They are 'the public documents' that embody the Court's collective vision for how the Convention rights should be understood.[46]

Second, the Court 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 Convention, and its philosophical role is 'to uphold the values of our civilization.'[47] Another judge with an academic background said the Court's role is 'to build a Europe of Rights.'[48] This view was shared by another judge who described the Court's role as 'to be the consciousness of Europe (…) a European lighthouse.'[49] There were a few other judges who believed the Court is there to establish and maintain 'minimum common standards of protection throughout Europe,'[50] or to develop 'the contents of Convention rights.'[51] 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.'[52] He further 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 basis whether the member states have respected the human rights as provided by the Convention.'[53] Finally, another judge, who served as a constitutional court judge before joining the Court, argued that

45 In this regard, they are different from separate opinions that are drafted and owned by individual judges or a group of them.
46 Interview 4.
47 Interview 8.
48 Interview 9.
49 Interview 13.
50 Interview 7.
51 Interview 4.
52 Interview 15.
53 Interview 15.

the primary role of the Court is to observe whether states comply with their obligations arising from the Convention. [54] 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.[55]

Indeed, the Court's roles are guided by various concerns 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 fulfill. Acting as a 'standard-setter for European civilization' is quite different from, say, conservatively enforcing the Convention 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.'[56] 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.

Theoretical Underpinnings

The typology is composed of ideal-typical characters (*arbitrator*, *entrepreneur*, and *delineator*); each assigned to a typical role one could associate with international courts.[57] International tribunals are expected to settle disputes (arbitrator). Occasionally, they actively

54 Interview 10.

55 Interview 10.

56 H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008), at 695.

57 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* (New edition, 1986).

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 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 four corners of the document.'[58] 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.'[59]

In the context of the European human rights system, judicial activism can be associated with the Court's willingness to interpret the Convention in the light of present day conditions.[60] This interpretive doctrine, also known as the living instrument principle, essentially means that the Convention should be interpreted in line with the evolving values of European societies.[61] The Court's role is viewed as giving voice to the public values of the community it serves,[62] namely the European values.[63] The Court made a clear reference to this in *Soering v. the 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'[64] Other patterns of behaviour linked to Court's activism are

58 J. H. Ely, *On Constitutional Ground* (1996), at 1.

59 Cox, 'The Role of the Supreme Court: Judicial Activism or Self-Restraint?', 47 *Maryland Law Review* (1987) 118, at 12.

60 Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', 21 *European Journal of International Law* (2010) 509, at 527.

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

62 Zarbiyev, *supra* note 3, at 254.

63 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.

64 *Soering v. the United Kingdom*, application no. 14038/88, ECHR (07 July 1989), §88.

establishing far-reaching principles and engaging in 'judicial inventiveness.'[65] For example, in *Assenov and Others v. Bulgaria,* the Court formally acknowledged the states' obligation to carry out effective investigation under Article 3.[66] It then coined the term 'the procedural limb of Article 3' around mid-2000s, and thereafter it became commonplace to bring complaints under this article's procedural limb.[67]

On the other end of the spectrum, the concept of judicial restraint offers a completely different vision. The Court is expected to prescribe remedies only for the case at hand and primarily focus on administrating individual justice.[68] The Court channels this notion best when it acts in accordance with the abovementioned principle of subsidiarity,[69] and the margin of appreciation doctrine.[70] 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.[71] 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).[72] This was, for example, the case in *Çakıcı v. Turkey*, where the Court refrained from connecting a disappearance complaint to discriminatory policies towards Kurdish people as a group.[73] Similarly, in *Ayder and Others v. Turkey*, the Court refused to examine the applicants' claim

65 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.

66 *Assenov and Others v. Bulgaria*, application no. 90/1997/874/1086, ECHR (28 October 1998), §102.

67 See, *Ipek v. Turkey*, application no. 25760/94, ECHR (17 February 2004); *Balogh v. Hungry*, application no. 47940/99, ECHR (20 July 2004); *Khashiyev and Akayeva v. Russia*, application nos. 57942/00 and 57945/00, ECHR (24 February 2005).

68 According to Article 35(1), 'the Court may only deal with the matter after all domestic remedies have been exhausted.'

69 For more, see Mowbray, 'Subsidiarity and the European Convention on Human Rights', 15 *Human Rights Law Review* (2015) 313; von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review', 10 *International Journal of Constitutional Law* (2012) 1023.

70 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.

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

72 Christoffersen, *supra* note 33, at 185.

73 *Çakıcı v. Turkey*, application no. 23657/94, ECHR[GC] (8 July 1999), §115.

that they had been subjected to collective punishment. Instead, it limited its analysis to individualized complaints under Article 3.[74] 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 identify judicial characters introduced here. Whether a judgment is driven by judicial 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.[75] According to Young, a minimalist judge may (i) resort to avoidance techniques and 'passive virtues' to avert reviewing the case altogether (delineator); (ii) give narrow rulings and leave undecided aspects for future consideration, as much as possible (arbitrator).'[76] 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).[77]

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* it arrives at. The description below explains the attributes of the Court's judicial characters, and the ways they effect norm development.

Part II: The Components of the Framework

Arbitrator

The Court's *arbitrator* character is its default character. It is most in tune with the dispute settlement role that the Court is traditionally associated with.[78] When acting as an arbitrator, the Court arrives at conclusions that are tailored for the case at hand, without evaluating principles in the abstract or setting standards to be applied in the cases to follow.[79] A defining feature of the arbitrator court is the tendency to give narrow rulings and to avoid pronouncing

74 *Ayder and Others v. Turkey*, application no. 23656/94, ECHR (8 January 2004), §112.
75 Young, *supra* note 65, at 1151.
76 *Ibid.*
77 *Ibid.*, at 1152.
78 Zarbiyev, *supra* note 62, at 254.
79*Ibid.*

widely applicable criteria with respect to how the norm should be understood.[80] 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 set of minor changes with no clear direction (*incremental* or *inconspicuous development*). In some instances, the collective effect of arbitrator decisions might also lead to a change of course or 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.'[81] Similarly, in *McCann and Others v. the 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.'[82] The Court's general approach in these cases – namely administering individual justice without discussing legal principles in the abstract – represents its arbitrator character.

Entrepreneur

The *entrepreneur* character manifests itself when the Court takes the initiative to develop a norm, pronounce generalizable rules, or establish criteria to review similar complaints. As an entrepreneur, the Court communicates its vision about how the norm should be understood

80 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.

81 *De Becker v. Belgium*, application no. 214/5, ECHR (27 March 1962), §14.

82 *McCann and Others v. the United Kingdom*, application no. 18984/91 (27 September 1995), §153.

and applied in the future.[83] An entrepreneur court judgment does not necessarily always involve progressive reasoning, although it often does.[84] 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.[85] 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*).[86]

The Court itself acknowledged its entrepreneur role in *Ireland v. the 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.'[87] *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.'[88] This

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

84 For example, *Tomasi v. France*, application no. 12850/87, ECHR (27 August 1992); *Ribitsch v. Austria*, application no. 18896/91, ECHR (04 December 1995); *Chahal v. the United Kingdom*, application no. 22414/93, ECHR (12 November 1996).

85 *Çakıcı v. Turkey*, *supra* note 70, §98.

86 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 (last visited 24 April 2019].

87 *Ireland v. the UK*, application no. 5310/71, ECHR (18 January 1978), §154.

88 *Selmouni v. France*, application no. 25803/94, ECHR (28 July 1999), §101.

dynamic spirit in general, and living instrument principle in particular, can be profusely found in entrepreneur court rulings.[89]

Delineator

When the Court 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.[90] 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*).[91] 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.[92]

In this case, the Court established the limits of its competence and presented itself with a legally valid reason why the Court 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, or abortion) or prevent complications that a judgment might spur.[93] The Court is then less

89 *Aksoy v. Turkey*, application no. 21987/93, ECHR (18 December 1996); *Kurt v. Turkey*, application no. 15/1997/799/998-999, ECHR (25 May 1998), *Dougoz v. Greece*, application no. 40907/98, ECHR (06 March 2001); *M.C. v. Bulgaria*, application no. 39272/98, ECHR (04 December 2003).

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

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

92 *Belgian Linguistics Case*, *supra* note 22 §10.

93 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 116, at 223.

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; it is rather, what the Court's silence or hesitation to issue a ruling imply. 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, the systemic discriminatory policies have been a politically-sensitive issue treated this way,[94] which was also confirmed in an interview with the author.[95] 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 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.'[96]

It is important to note that the Court has 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.'[97] In this regard, the Court has 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.'[98] Nevertheless, in *Anguelova*, the Court did not carry out this exercise. In his partly dissenting opinion, Judge Bonello criticized the Court for overlooking systemic racism. He argued that patching together evidence provided by human

94 *Çakıcı v. Turkey*, *supra* note 70; *Ayder and Others v. Turkey*, *supra* note 71.
95 Interview 35.
96 *Anguelova v. Bulgaria*, application no. 38361/97, ECHR (13 June 2002), §168.
97 *Ibid*,, §166.
98 *Ibid.*, §166.

rights organizations would suffice to see the great picture.[99] 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 section, 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.

Part III: Case Study on Article 3

Coding Rules

I gathered all 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 found[100] – and 2006.[101] This amounts to 157 cases.[102] Then, I identified the character type for each case, looking at *the reasoning* the Court developed to assess the merits of the complaint as well as the *conclusion(s)* it arrived at. Typically, each case is assigned to a character. Yet, in some instances, a case may feature two characters.[103] 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 below outlines coding rules, composing of two criteria, for each character type.

99 *Ibid.*, (Partly dissenting opinion of Judge Bonello)

100 The European Commission of Human Rights, Report of 5 November 1969, Greek Case, Yearbook XII (1969), p.186

101 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.

102 The list of cases analyzed for this study can be found in Annex II.

103 13 cases were coded as two characters.

Table 1: Coding rules for character types and modes of norm development[104]

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

I coded a judgment as an arbitrator court ruling when (i) the case at hand uses repeated or narrowly tailored reasoning without establishing principles that can be applied to other cases; (ii) when the case's conclusions are 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. the United Kingdom* in 1997, the Court 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. the United Kingdom.*[105] It then referred to *Soering*, where it was established that expelling a person to a place where that person 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]

104 The assignment of character types to each case based on the criteria outlined here can be found in Annex II.
105 *Chahal v. the United Kingdom,* application no. 22414/93, ECHR (15 November 1996).
106 *Soering v. the United Kingdom*, application no. 14038/88, ECHR (7 July 1989).
107 *D. v. the United Kingdom*, application no. 30240/96, ECHR (2 May 1997) §54 (emphasis added).

D. v. the United Kingdom is an important reference case, yet it does not set a clear precedent. This is because the Court 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. the United Kingdom)*, the Court acknowledged the seriousness of his condition but did not find 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. the 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) introduce 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. the 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 Convention in 1949. The British delegation appealed arguing that Article 3 should not cover corporal punishment, as it was being practiced in the United Kingdom at the time.[111] Some 30 years after this discussion, the Court found that corporal punishment constitutes a violation of Article 3. The Court based this

108 For example, *Karara v. Finland*, application no. 40900/98, ECHR (29 May 1998); *B.B. v. France*, application no. 47/1998/950/1165, ECHR (7 September 1998); *S.C.C. v. Sweden*, application no. 46553/99, ECHR (15 February 2000).

109 *Bensaid v. the United Kingdom*, application no. 44599/98, ECHR (6 February 2001) §40.

110 See for example, *N v. the United Kingdom*, application no. 26565/06, ECHR (27 May 2008) or *Paposhvili v. Belgium*, application no. 41738/10, ECHR (13 December 2016). In *N v. the 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 Article 3 is not the lack of medical infrastructure in the country where the applicant returns; but it is the lack of medical assessment concerning the risk the applicant would face upon his removal.

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

expansive conclusion on the living instrument doctrine – also introduced in this case.[112] It pronounced that the level of severity of the acts would be assessed in the light of present day conditions. In *Tyrer*, the Court did 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 which 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 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 reincarceration of a gravely ill prisoner, who had been on a 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 reincarceration.[115]

Finally, delineator court rulings are those where the Court (i) overtly or covertly refuses to engage a particular aspect of a complaint; (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.

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 *Cyprus v. Turkey*, application no. 25781/94, ECHR (10 May 2001); *Bursuc v. Romania*, application no. 42066/98, ECHR (12 October 2004); *Moldovan and Others v. Romania*, application no. 41138/98 and 64320/01, ECHR (12 July 2005); *Gürbüz v. Turkey*, application no. 26050/04, ECHR (10 November 2005).

114 *Gürbüz v. Turkey*, *supra* note 110 §71.

115 The Court arrived at the same conclusion in *Uyan v. Turkey*, application no. 7454/04, ECHR (10 November 2005; *Kuruçay v. Turkey*, application no. 24040/04, ECHR (10 November 2005).

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 Court may employ a widely applicable reasoning and then arrive at retractive conclusions.[117] For example, in *Ireland v. the United Kingdom*, the Court introduced the minimum level of severity criteria to assess whether a complaint would fall under Article 3 – i.e. looking at the duration of the treatment, its physical and mental effects, of all which would be relative to the sex, age and the 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 some others – as we observe 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 violation with discriminatory policies towards Kurdish people, assuming its delineator role. Similarly, in *Öcalan v. Turkey*, the Court found that punishing the applicant with death penalty after a mistrial would constitute a

116 The reason why there are so few of them could be because I have only analysed Article 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. the United Kingdom*, *supra* note 84. The other example of this kind is *Çakıcı supra* note 70.

118 *Ibid.*, §168.

119 *Selmouni*, *supra* note 85, §101.

120 They are often brought in conjunction with Article 14 (prohibition of discrimination) *Akkoç v. Turkey*, application no. 22947/93 and 22948/93, ECHR (10 October 2000); *Ayder and Others v. Turkey*, *supra* note 71; *Anguelova v. Bulgaria*, *supra* note 93; *Ahmet Özkan and Others v. Turkey*, application no. 21689/93, ECHR (06 April 2004); *Bekos and Koutropoulos v. Greece*, application no. 15250/02, ECHR (13 December 2005).

121 *Hasan Ilhan v. Turkey*, application no. 22494/93, ECHR (09 November 2004), §108. See also, *Selçuk and Asker v. Turkey*, application no. 12/1997/796/998-999, ECHR (24 April 1998).

violation of Article 3, and expanded the application of the norm as an entrepreneur. However, it refrained from expressing an opinion about whether the implementation of 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.

Working Hypotheses

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

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 European Convention, 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

122 *Öcalan v. Turkey*, application no. 46221/99, ECHR[GC] (12 May 2005), §165.

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

124 According to Article 53 of the Vienna Convention on the Law of Treaties, 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 Article 15 are as follows: Article 2 (right to life except in respect of deaths resulting from lawful acts of war), Article 4:1 (prohibition of slavery) and Article 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.

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 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 CPT's reports as evidence.[131] A former judge confirmed this and maintained that the CPT reports make up for the Court's inability to carry out fact-finding.[132] CPT reports, therefore, reduce the Court's likelihood to decline to review a complaint due to lack of evidence.

The table below lists the main instruments, expert bodies, and committees specialized on torture prohibition that were introduced and created between 1967 and 2006.[133]

129 It has, however, 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, *Akdeniz v. Turkey*, application no. 25165/94, ECHR (31 May 2005), §104: *Ahmet Özkan, supra* note 117, §312; *Anguelova v. Bulgaria*, supra note 93, §139.

130 Interview 1.

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.

Table 2: Legal Instruments Expert Bodies and Committees Specializing on Torture Prohibition

	Overlapping & Parallel (pre-1998)	*Overlapping & 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 the table above indicates.[134] They have strengthened the prohibition of 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:

H1: The Court is less likely to issue delineator court rulings – relative to entrepreneur or arbitrator rulings – concerning Article 3.[135]

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 find that the Court became more powerful,[137] and issued more courageous and progressive judgments once it

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

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.

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 caselaw. 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 Court's authority. Structurally, the European human rights system has become simpler over time.[139] It was originally set up as a two-tier system: On the first tier, the European Commission of Human Rights (the Commission), established in 1954, would receive individual complaints and decide their admissibility.[140] On 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 that functioned as a quasi-judicial filter,[141] and constricted the Court's authority.[142] Protocol 11, which entered into force in 1998, revamped this original design and abolished the Commission. 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.

This essentially symbolized the Court's rebirth. As scholars of regime complexity point out, when there are overlapping or parallel institutions it is harder to resolve where authority resides.[143] The moment the Court became a single institution in charge of reviewing the human rights practices of all Council of Europe member states, it began operating on firmer

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 & Social Inquiry* (2007) 137.

139 This is inspired from institutional complexity analysis of Carneiro and Wegmann, 'Institutional Complexity in the Inter-American Human Rights System: An Investigation of the Prohibition of Torture', 22 *The 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.

143 Alter and Meunier, *supra* note 134, at 13.

ground. Mikael Rask Madsen's analysis of the Court's institutional transformation confirms this observation.[144] The Court could only maintain narrow legal authority from its inception until the mid-to-late 1970s. 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.'[145]

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.[146] This burdensome task proved to be beneficial for strengthening the system and providing the Court with "renewed political support."[147]

These changes came with a pitfall: an increased caseload. The number of applications grew from 404 in 1981 to 4,750 in 1997, and 32,402 in 2005. This trend continued with 49,900 applications in 2008 and 61,300 in 2010.[148] This graph below shows the evolution of the share of Article 3 judgments over the years:

144 Madsen, *supra* note 138.

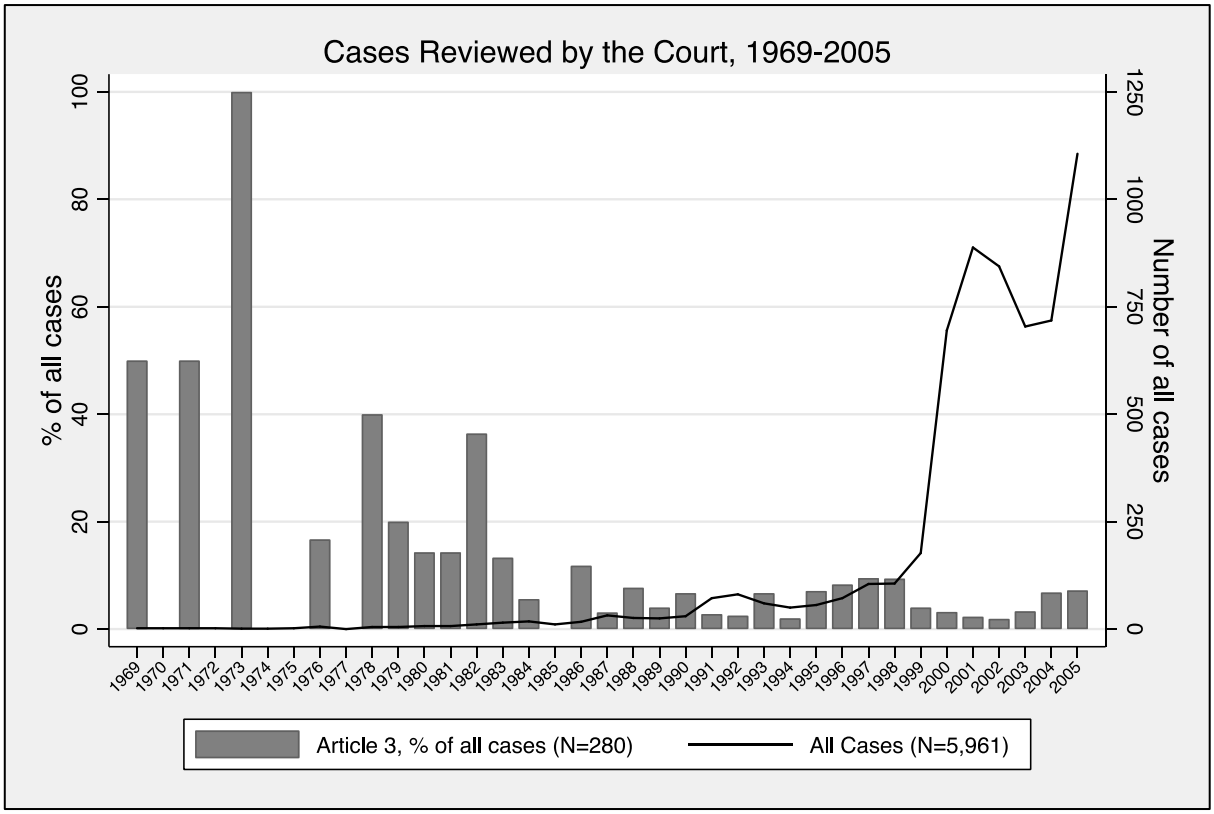
145 *Ibid.*, at 143.

146 Bates, *supra* note 142.

147 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.

148 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[149]



Only considering the Court's authority, we can identify 1998 as an important turning point. Thereafter, the Court became an institution with substantive authority and increasingly unmanageable caseload. Taking the creation of the new Court in 1998 as a watershed moment, we can expect the following:

H2: The Court is more likely to deliver 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 forward-looking reasoning we see in

149 The information about the number of cases was obtained from the HUDOC, the ECtHR's official database. The sample of 280 cases comprises all the Article 3 judgments reviewed between 1969 and 2005. 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.

entrepreneurial judgments. My interviewees divulged that the caseload influenced the way the Court approached all articles under the Convention, 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]

H3: The Court's likelihood to deliver entrepreneurial court rulings will diminish as the caseload increases in the post-1998 period.

Results

Turning to the results of analysis, I draw a distinction between the period before 1998 and the period that follows that year. The table below 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 working hypothesis (H1). Delineator court judgments constitute only 7.14% and 5.13% of the decisions for the pre-1998 and post-1998 period, respectively. 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% 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%.

Table 3: Ratio of Character Types Relative to the Number of Cases Analysed[153]

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

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

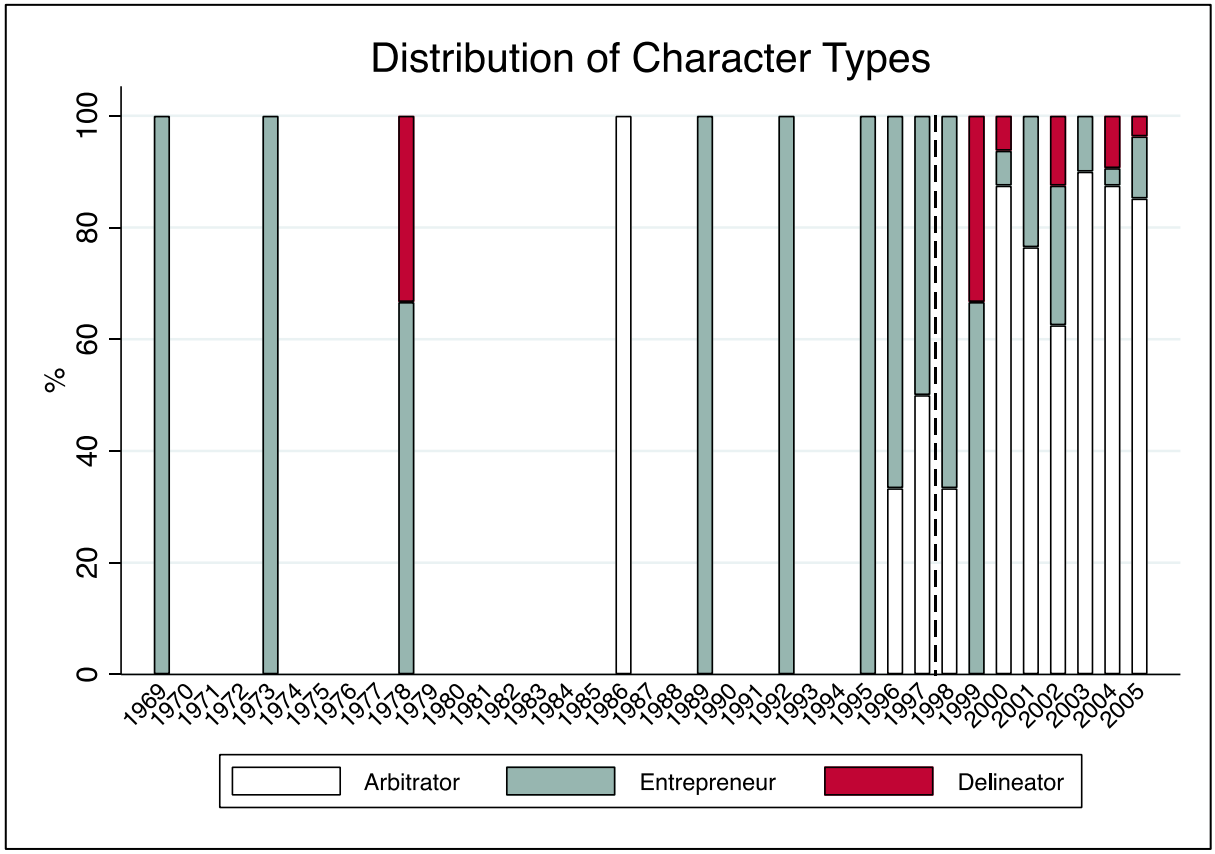
151 Interview 16.

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

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

Moreover, the figure below demonstrates the distribution of character types, relative to the total number of observations, for all 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 higher concentration of entrepreneur court judgments, the period after 1998 is clearly dominated by arbitrator court rulings. This finding is contrary to what H2 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 H3, there are only 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 each judgment is a chance for them to make a statement for the entire region.[154] A law explained their difference further with an analogy.[155] 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 a concern or capacity, he added.[156]

Second, one can expect that there is also less need to develop principles and criteria under Article 3. As the standards around a particular issue solidifies, which is clearly the case for this article, one 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. One can obviously not expect each case to be of the same value.

Finally, these observations lead to an important finding with respect to the overall influence of 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

154 Interview 50; Interview 51; Interview 52; Interview 53; Interview 55; Interview 56.

155 The IACtHR delivered 21 judgments in 2016; whereas the ECtHR delivered 1926 applications in the same year. Inter-American Court of Human Rights, *Annual Report 2016*, available at http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2016.pdf; European Court of Human Rights, Analysis of Statistics 2016, available at http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf .

156 Interview 55.

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. One could expect that transformation of other norms will manifest differently with different constellation of court characters. This will likely to be determined by their distinct features – i.e. whether they concern complex ethical issues around which there is not a clear agreement, or whether they are strongly protected by a web of international legal instruments.

Conclusion

This paper has attempted to bring a systematic explanation for the ways the Court develops the norms under the European Convention. 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 composes of 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 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 Court 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 to the Court 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 to meet 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 of 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 2010s, which is when the backlash against the Court started according to some scholars.[157] This could be the one of the culprits of the recent pushback against the Court. What irritates member states could be also the frequency of violation decisions or their accumulated effect, not only their content. Although the findings presented here are not sufficient to prove this claim, this exploratory study opens avenues for future research. Comparing the transformation of several norms would not only provide a more detailed assessment of different trajectories for norm development but also help systematically assess the Court's behavior patterns over time. Follow-up studies could successfully pinpoint whether there is a correlation between certain character types and backlash against the European Court or other tribunals.

157 See for example, Madsen, *supra* note 137; Voeten, 'Populism and Backlashes against International Courts', *Perspectives on Politics* (forthcoming) doi:10.1017/S1537592719000975.

Annex I: List of Interviews

I. Interviews for the European Court of Human Rights

Table 4: Judges Serving at the European Court of Human Rights

Judges Serving at the European Court of Human Rights[158]		
Interview 1	Current Judge	**15/09/14**
Interview 2	Current Judge	**15/09/14**
Interview 3	Current Judge	**17/09/14**
Interview 4	Current Judge	**17/09/14**
Interview 5	Current Judge	**18/09/14**
Interview 6	Current Judge	**18/09/14**
Interview 7	Current Judge	**19/09/14**
Interview 8	Current Judge	**23/09/14**
Interview 9	Current Judge	**24/09/14**
Interview 10	Current Judge	**24/09/14**
Interview 11	Current Judge	**26/09/14**
Interview 12	Current Judge	**26/09/14**
Interview 13	Current Judge	**29/09/14**
Interview 14	Current Judge	**29/09/14**
Interview 15	Current Judge	**29/09/14**

Table 5: Former Judges of the European Court of Human Rights

Former Judges of the European Court of Human rights		
Interview 16	Former Judge	**05/06/14**
Interview 17	Former Judge	**09/01/15**

Table 6: The Registry (ECtHR)

The Registry		
Interview 18	Permanent law clerk	**04/09/14**
Interview 19	Permanent law clerk	**16/09/14**
Interview 20	Senior level official at the Registry	**17/09/14**
Interview 21	Assistant lawyer	**17/09/14**
Interview 22	Assistant lawyer	**19/09/14**
Interview 23	Assistant lawyer	**20/09/14**
Interview 24	Permanent law clerk	**23/09/14**
Interview 25	Permanent law clerk	**25/09/14**

Table 7: Human Rights NGOs Involved in Strategic Litigation (ECtHR)

Strategic Litigation NGOs		
Interview 26	Amnesty International	**16/05/14**
Interview 27	Interights	**12/06/14**
Interview 28	The Open Society Justice Initiative	**24/06/14**
Interview 29	Truth Justice Memory Centre (Hakikat Adalet Hafiza Merkezi)	**15/08/14**
Interview 30	The International Rehabilitation Council for Torture Victims	**12/12/14**
Interview 31	The Association for the Prevention of Torture	**21/01/15**
Interview 32	REDRESS	**24/02/15**
Interview 33	The Centre for Reproductive Rights	**27/03/15**

158 This section includes interviewees that were serving as judges at the time of the interview with the author.

Table 8: Academic Lawyers (ECtHR)

Academic lawyers		
Interview 34	Academic lawyer affiliated with Kurdish Human Rights Project (KHRP) and European Human Rights Advocacy Center (EHRAC)	**09/07/14**
Interview 35	Academic lawyer affiliated with KHRP	**10/07/14**
Interview 36	Academic lawyer affiliated with KHRP and EHRAC	**11/07/14**

II. Interviews for the Inter-American Court of Human Rights

Table 9: Judges Serving at the Inter-American Court of Human Rights

Judges Serving at the Inter-American Court of Human Rights[159]		
Interview 49	Current Judge	**22/08/17**
Interview 50	Current Judge	**24/08/17**
Interview 51	Current Judge	**25/08/17**
Interview 52	Current Judge	**25/08/17**

Table 10: Former Commissioners and Judges of the Inter-American Commission and Court of Human Rights

Former Commissioners and Judges of the Inter-American Commission Court of Human Rights		
Interview 37	Former Commissioner	**05/06/17**
Interview 38	Former Commissioner	**07/06/17**
Interview 39	Former Judge	**07/06/17**
Interview 40	Former Commissioner	**12/06/17**

Table 11: Current Staff of the Inter-American Commission and Court of Human Rights

Current Staff of the Inter-American Commission and Court of Human Rights		
Interview 41	Current Staff at the Commission	**06/07/17**
Interview 42	Current Staff at the Commission	**13/07/17**
Interview 53	Current Staff at the Court	**17/08/17**
Interview 54	Current Staff at the Court	**21/08/17**
Interview 55	Current Staff at the Court	**24/08/17**
Interview 56	Current Staff at the Court	**25/08/17**
Interview 57	Current Staff at the Court	**25/08/17**

Table 12: Former Staff of the Inter-American Commission and Court Now Employed by NGOS (IACtHR)

Former Staff of the Inter-American Commission and Court Now Employed by NGOS		
Interview 58	Former Court Staff Working for an NGO	**21/08/17**
Interview 59	Former Court Staff Working for an NGO	**23/08/17**
Interview 60	Former Court Staff Working for an NGO	**23/08/17**

Table 13: Strategic Litigation NGOS, IOs and Academics (IACtHR)

Strategic Litigation NGOs, IOs and Academics		
Interview 43	CEJIL	**08/06/17**
Interview 44	CEJIL	**08/06/17**
Interview 45	Amnesty International	**26/06/17**
Interview 46	Researcher at UNAM – Mexico City	**27/06/17**
Interview 47	Women's Global Network for Reproductive Rights	**28/06/17**
Interview 48	OHCHR	**28/06/17**

159 This section includes interviewees that were serving as judges at the time of the interview with the author.

Annex II: List of Cases Analyzed

Table XIV: The List of Cases in Which the Court (and the Commission) Found a Violation Under Article 3 ECHR[160]

Date	Case Name	Application No.	Character Type	Reasoning
05/11/69	GREEK CASE	3321/67, 3322/67, 3323/67, 3344/67	Entrepreneur	Widely applicable reasoning; expansive conclusion
14/12/73	EAST AFRICAN ASIANS v. THE UNITED KINGDOM	4403/70-4419/70, 4422/70, 442J/70, 444/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70	Entrepreneur	Widely applicable reasoning; expansive conclusion
18/01/78	IRELAND v. THE UNITED KINGDOM	5310/71	Entrepreneur/Delineator	Widely applicable reasoning; retractive conclusion
25/04/78	TYRER v. THE UNITED KINGDOM	5856/72	Entrepreneur	Widely applicable reasoning; expansive conclusion
18/07/86	WARWICK v. THE UNITED KINGDOM	9471/81	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
07/07/89	SOERING v. THE UNITED KINGDOM	14038/88	Entrepreneur	Widely applicable reasoning; expansive conclusion
27/08/92	TOMASI v. FRANCE	12850/87	Entrepreneur	Widely applicable reasoning
04/12/95	RIBITSCH v. AUSTRIA	18896/91	Entrepreneur	Widely applicable reasoning
12/11/96	CHAHAL v. THE UNITED KINGDOM	22414/93	Entrepreneur	Widely applicable reasoning
17/12/96	AHMED v. AUSTRIA	25964/94	Arbitrator	Repeated/Tailored reasoning
18/12/96	AKSOY v. TURKEY	21987/93	Entrepreneur	Widely applicable reasoning; expansive conclusion
02/05/97	D. v. THE UNITED KINGDOM	30240/96	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
25/09/97	AYDIN v. TURKEY	28293/95, 29494/95 and 30219/96	Entrepreneur	Expansive conclusion
24/04/98	SELÇUK AND ASKER v.	12/1997/796/998-	Entrepreneur	Widely applicable

160 When analyzing cases, I considered those Commission's decisions that were not reviewed by the Court such as the *Greek Case* and *East Asian African v. the United Kingdom.* However, I did not assess other Commission decisions for which the Court issued a separate ruling. In such cases, I analysed the only the Court ruling in order to avoid analysing the same case twice.

	TURKEY	999		reasoning; expansive conclusion
28/05/98	KURT v. TURKEY	15/1997/799/1002	Entrepreneur	Widely applicable reasoning; expansive conclusion
09/06/98	TEKIN v. TURKEY	52/1997/836/1042	Arbitrator	Repeated/Tailored reasoning
09/09/98	PM v. HUNGARY	23636/94	Arbitrator	Repeated/Tailored reasoning
23/09/98	A. v. THE UNITED KINGDOM	100/1997/884/1096	Entrepreneur	Widely applicable reasoning; expansive conclusion
28/10/98	ASSENOV AND OTHERS v. BULGARIA	90/1997/874/1086	Entrepreneur	Widely applicable reasoning; expansive conclusion
08/07/99	ÇAKICI v. TURKEY	23657/94	Entrepreneur/Delineator	Widely applicable reasoning; retractive conclusion
28/07/99	SELMOUNI v. FRANCE	25803/94	Entrepreneur	Widely applicable reasoning; expansive conclusion
28/03/00	MAHMUT KAYA v. TURKEY	22535/93	Arbitrator	Repeated/Tailored reasoning
06/04/00	LABITA v. ITALY	26772/95	Arbitrator	Repeated/Tailored reasoning
11/04/00	SEVTAP VEZNEDAROGLU v. TURKEY	32357/96	Arbitrator	Repeated/Tailored reasoning
13/06/00	TIMURTAŞ v. TURKEY	23531/94	Arbitrator	Repeated/Tailored reasoning
27/06/00	ILHAN v. TURKEY	22277/93	Arbitrator	Repeated reasoning; narrow conclusion
27/06/00	SALMAN v. TURKEY	21986/93	Arbitrator	Repeated reasoning; narrow conclusion
11/07/00	DIKME v. TURKEY	20869/92	Arbitrator	Repeated reasoning; narrow conclusion
11/07/00	JABARI v. TURKEY	40035/98	Arbitrator	Repeated reasoning; narrow conclusion
10/10/00	SATIK AND OTHERS v. TURKEY	31866/96	Arbitrator	Repeated/Tailored reasoning
10/10/00	AKKOÇ v. TURKEY	22947/93 and 22948/93	Entrepreneur/Delineator	Expansive reasoning; evasive reasoning
14/11/00	TAŞ v. TURKEY	24396/94	Arbitrator	Repeated/Tailored reasoning
16/11/00	BILGIN v. TURKEY	23819/94	Arbitrator	Repeated/Tailored reasoning
28/11/00	REHBOCK v. SLOVENIA	29462/95	Arbitrator	Repeated/Tailored reasoning
20/12/00	BÜYÜKDAG v. TURKEY	28340/95	Arbitrator	Repeated/Tailored

				reasoning
21/12/00	EGMEZ v. CYPRUS	30873/96	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
30/01/01	DULAŞ v. TURKEY	25801/94	Arbitrator	Repeated/Tailored reasoning
27/02/01	ÇIÇEK v. TURKEY	25704/94	Arbitrator	Repeated/Tailored reasoning
06/03/01	HILAL v. THE UNITED KINGDOM	45276/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
06/03/01	DOUGOZ v. GREECE	40907/98	Entrepreneur	Widely applicable reasoning; expansive conclusion
03/04/01	KEENAN v. THE UNITED KINGDOM	27229/95	Entrepreneur	Expansive conclusion
19/04/01	PEERS v. GREECE	28524/95	Entrepreneur	Widely applicable reasoning
01/05/01	BERKTAY v. TURKEY	22493/93	Arbitrator	Repeated/Tailored reasoning
10/05/01	CYPRUS v. TURKEY	25781/94	Entrepreneur/Arbitrator	Expansive reasoning; narrow conclusion
10/05/01	Z AND OTHERS v. THE UNITED KINGDOM	29392/95	Arbitrator	Repeated/Tailored reasoning
22/05/01	ALTAY v. TURKEY	22279/93	Arbitrator	Repeated/Tailored reasoning
23/05/01	DENIZCI AND OTHERS v. CYPRUS	5316-25321/94 and 27207/95	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
31/05/01	AKDENIZ AND OTHERS v. TURKEY	23954/94	Arbitrator	Repeated/Tailored reasoning
10/07/01	PRICE v. THE UNITED KINGDOM	33394/96	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
24/07/01	VALASINAS v. LITHUANIA	44558/98	Arbitrator	Tailored reasoning; narrow conclusion
18/10/01	INDELICATO v. ITALY	31143/96	Arbitrator	Repeated/Tailored reasoning
15/11/01	IWANCZUK v. POLAND	25196/94	Arbitrator	Repeated/Tailored reasoning
14/02/02	ABDURRAHMAN ORAK v. TURKEY	31889/96	Arbitrator	Repeated/Tailored reasoning
13/06/02	ANGUELOVA v. BULGARIA	38361/97	Entrepreneur/Delineator	Widely applicable reasoning; evasive reasoning
18/06/02	ORHAN v. TURKEY	25656/94	Arbitrator	Repeated/Tailored reasoning
15/07/02	KALASHNIKOV v. RUSSIA	47095/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
22/10/02	ALGUR v. TURKEY	32574/96	Arbitrator	Repeated/Tailored reasoning
14/11/02	MOUISEL v. FRANCE	67263/01	Entrepreneur	Widely applicable

				reasoning; expansive conclusion
26/11/02	E. AND OTHERS v. THE UNITED KINGDOM	33218/96	Arbitrator	Repeated/Tailored reasoning
04/02/03	LORSE AND OTHER v. THE NETHERLANDS	52750/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
04/02/03	VAN DER VEN v. THE NETHERLANDS	50901/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
29/04/03	NAZARENKO v. UKRAINE	39483/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
29/04/03	POLTORATSKIY v. UKRAINE	38812/97	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
29/04/03	KUZNETSOV v. UKRAINE	39042/97	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
29/04/03	DANKEVICH v. UKRAINE	40679/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
29/04/03	KHOKHLICH v. UKRAINE	41707/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
29/04/03	ALIEV v. UKRAINE	41220/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
29/04/03	MCGLINCHEY AND OTHERS v. THE UNITED KINGDOM	50390/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
03/06/03	PANTEA v. ROMANIA	33343/96	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
19/06/03	HULKI GUNEŞ v. TURKEY	28490/95	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
22/07/03	AYSE TEPE v. TURKEY	29422/95	Arbitrator	Repeated/Tailored reasoning
22/07/03	ESEN v. TURKEY	29484/95	Arbitrator	Repeated/Tailored reasoning
22/07/03	YAZ v. TURKEY	29485/95	Arbitrator	Repeated/Tailored reasoning
24/07/03	YÖYLER v. TURKEY	26973/95	Arbitrator	Repeated/Tailored reasoning
13/11/03	ELÇI AND OTHERS v. TURKEY	23145/93 and 25091/94	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
27/11/03	HENAF v. FRANCE	65436/01	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
04/12/03	M.C. v. BULGARIA	39272/98	Entrepreneur	Widely applicable reasoning; Expansive

				conclusion
11/12/03	YANKOV v. BULGARIA	39084/97	Entrepreneur	Expansive conclusion
16/12/03	KMETTY v. HUNGARY	57967/00	Arbitrator	Repeated/Tailored reasoning
08/01/04	SADIK ÖNDER v. TURKEY	28520/95	Arbitrator	Repeated/Tailored reasoning
08/01/04	ÇOLAK AND FILIZLER v. TURKEY	32578/96 and 32579/96	Arbitrator	Repeated/Tailored reasoning
08/01/04	AYDER AND OTHERS v. TURKEY	23656/94	Arbitrator/Delineator	Repeated/Tailored reasoning; evasive reasoning
17/02/04	IPEK v. TURKEY	25760/94	Arbitrator	Repeated/Tailored reasoning
11/03/04	G.B. v. BULGARIA	42346/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
11/03/04	IORGOV v. BULGARIA	40653/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
01/04/04	RIVAS v. FRANCE	59584/00	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
06/04/04	AHMET ÖZKAN AND OTHERS v. TURKEY	21689/93	Arbitrator/Delineator	Evasive reasoning; Repeated/Tailored reasoning
24/04/04	AKTAŞ v. TURKEY	24351/94	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
19/05/04	R.L. AND M.J.D v. FRANCE	44568/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
19/05/04	TOTEVA v. BULGARIA	42027/98	Arbitrator	Repeated/Tailored reasoning
01/06/04	ALTUN v. TURKEY	24561/94	Arbitrator	Repeated/Tailored reasoning
03/06/04	BATI AND OTHERS v. TURKEY	33097/96 and 57834/00	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
22/06/04	AYDIN AND YUNUS v. TURKEY	32572/96 and 33366/96	Arbitrator	Repeated/Tailored reasoning
01/07/04	BAKBAK v. TURKEY	39812/9	Arbitrator	Repeated/Tailored reasoning
08/07/04	ILASCU AND OTHERS v. MOLDOVA AND RUSSIA	48787/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
20/07/04	BALOGH v. HUNGARY	47940/99	Arbitrator	Repeated/Tailored reasoning
20/07/04	MEHMET EMIN YUKSEL v. TURKEY	40154/98	Arbitrator	Repeated/Tailored reasoning
27/07/04	A.A. AND OTHERS v. TURKEY	30015/96	Arbitrator	Repeated/Tailored reasoning
30/09/04	KRASTANOV v. BULGARIA	50222/99	Arbitrator	Repeated/Tailored reasoning
05/10/04	BARBU ANGHELESCU	46430/99	Arbitrator	Repeated/Tailored

	v. ROMANIA			reasoning
12/10/04	BURSUC v. ROMANIA	42066/98	Arbitrator/Entrepreneur	Repeated reasoning; expansive conclusion
26/10/04	ÇELIK AND IMRET v. TURKEY	44093/98	Arbitrator	Repeated/Tailored reasoning
02/11/04	ABDULSAMET YAMAN v. TURKEY	32446/96	Arbitrator	Repeated/Tailored reasoning
02/11/04	TUNCER AND DURMUS v. TURKEY	30494/96	Arbitrator	Repeated/Tailored reasoning
02/11/04	MARTINEZ SALA AND OTHERS v. SPAIN	58438/00	Arbitrator	Repeated/Tailored reasoning
09/11/04	HASAN ILHAN v. TURKEY	22494/93	Arbitrator/Delineator	Repeated/Tailored reasoning; evasive reasoning
02/12/04	FARBTUHS v. LATVIA	4672/02	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
18/01/05	KEHAYOV v. BULGARIA	41035/98	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
20/01/05	MAYZIT v. RUSSIA	63378/00	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
25/01/05	SUNAL v. TURKEY	43918/98	Arbitrator	Repeated/Tailored reasoning
03/02/05	BIYAN v. TURKEY	56363/00	Arbitrator	Repeated/Tailored reasoning
03/02/05	ZÜLCIHAN ŞAHIN AND OTHERS v. TURKEY	53147/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
24/02/05	KHASHIYEV AND AKAYEVA v. RUSSIA	57942/00 and 57945/00	Arbitrator	Repeated/Tailored reasoning
05/03/05	AFANASYEV v. UKRAINE	38722/02	Arbitrator	Repeated/Tailored reasoning
24/03/05	AKKUM AND OTHERS v. TURKEY	21894/93	Entrepreneur	Expansive conclusion
05/04/05	NEVMERZHITSKY v. UKRAINE	54825/00	Entrepreneur	Widely applicable reasoning; expansive conclusion
07/04/05	KARALEVICIUS v. LITHUANIA	53254/99	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
10/04/05	CANGÖZ v. TURKEY	28039/95	Arbitrator	Repeated/Tailored reasoning
12/04/05	SHAMAYEV AND OTHERS v. GEORGIA AND RUSSIA	36378/02	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
12/05/05	ÖCALAN v. TURKEY	46221/99	Entrepreneur/Delineator	Expansive conclusion; Evasive reasoning
24/05/05	SÜHEYLA AYDIN v. TURKEY	25660/94	Arbitrator	Repeated/Tailored reasoning; narrow conclusion

31/05/05	GÜLTEKIN AND OTHERS v. TURKEY	52941/99	Arbitrator	Repeated/Tailored reasoning
31/05/05	KISMIR v. TURKEY	27306/95	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
31/05/05	AKDENIZ v. TURKEY	25165/94	Arbitrator	Repeated/Tailored reasoning
02/06/05	NOVOSELOV v. RUSSIA	66460/01	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
07/06/05	DALAN v. TURKEY	38585/97	Arbitrator	Repeated/Tailored reasoning
09/06/05	I.I v. BULGARIA	44082/98	Arbitrator	Tailored reasoning; narrow conclusion
16/06/05	LABZOV v. RUSSIA	62208/00	Arbitrator	Repeated/Tailored reasoning
28/06/05	HASAN KILIÇ v. TURKEY	35044/97	Arbitrator	Repeated/Tailored reasoning
28/06/05	KARAKAS AND YESILIRMAK v. TURKEY	43925/98	Arbitrator	Repeated/Tailored reasoning
05/07/05	S.B AND H.T v. TURKEY	54430/00	Arbitrator	Repeated/Tailored reasoning
05/07/05	SAID v. THE NETHERLANDS	2345/02	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
12/07/05	ÖNDER v. TURKEY	39813/98	Arbitrator	Repeated/Tailored reasoning
12/07/05	MOLDOVAN AND OTHERS v. ROMANIA	41138/98 64320/01	Entrepreneur/ Arbitrator	Widely applicable reasoning; Narrow conclusion
26/07/05	N. v. FINLAND	38885/02	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
02/08/05	TANIS AND OTHERS v. TURKEY	65899/01	Arbitrator	Repeated reasoning
13/09/05	OSTROVAR v. MOLDOVA	35207/03	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
20/09/05	KARAYIGIT v. TURKEY	63181/00	Arbitrator	Repeated/Tailored reasoning
20/09/05	DIZMAN v. TURKEY	27309/95	Arbitrator	Repeated/Tailored reasoning
29/09/05	MATHEW v. THE NETHERLANDS	24919/03	Entrepreneur	Widely applicable reasoning
04/10/05	BECCIEV v. MOLDOVA	9190/03	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
04/10/05	SARBAN v. MOLDOVA	3456/05	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
13/10/05	GÜNAYDIN v. TURKEY	27526/95	Arbitrator	Repeated/Tailored reasoning
18/10/05	AKDOGDU v. TURKEY	46747/99	Arbitrator	Repeated/Tailored reasoning

20/10/05	ORHAN ASLAN v. TURKEY	48063/99	Arbitrator	Repeated/Tailored reasoning
20/10/05	ROMANOV v. RUSSIA	63993/00	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
25/10/05	FEDOTOV v. RUSSIA	5140/02	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
08/11/05	BADER AND KANBOR v. SWEDEN	13284/04	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
08/11/05	KHUDOYOROV v. RUSSIA	6847/02	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
08/11/05	ALVER v. ESTONIA	64812/01	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
08/11/05	GONGADZE v. UKRAINE	34056/02	Arbitrator	Repeated/Tailored reasoning
10/11/05	GÜRBÜZ v. TURKEY	26050/04	Arbitrator/Entrepreneur	Repeated/Tailored reasoning; expansive conclusion
10/11/05	KURUÇAY v. TURKEY	24040/04	Arbitrator	Repeated/Tailored reasoning
10/11/05	TEKIN YILDIZ v. TURKEY	22913/04	Arbitrator	Repeated/Tailored reasoning
10/11/05	UYAN v. TURKEY	7454/04	Arbitrator	Repeated/Tailored reasoning
08/12/05	KANLIBAŞ v. TURKEY	32444/96	Arbitrator	Repeated/Tailored reasoning; narrow conclusion
13/12/05	BEKOS AND KOUTROPOULOS v. GREECE	15250/02	Arbitrator/Delineator	Repeated/Tailored reasoning; evasive reasoning