International Courts and Selective Restraint in Times of Backlash

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Abstract

International courts operate under scrutiny and are often on the receiving end of criticism from states. Insights from the judicial behavior literature suggest that such criticism has an impact on how courts rule. Scholars have argued that courts can selectively increase their deference to states to manage and prevent backlash. This paper identifies a form of selective restraint that has so far received little attention. We argue that courts can show restraint selectively when treating issues with high political salience. We examine this expectation in the context of the European Court of Human Rights. Our analysis draws on a comprehensive dataset of rulings on the prohibition of torture and inhuman or degrading treatment, coded at the issue level, spanning from 1967 to 2023. We capture issue salience by investigating direct criticism expressed in meetings of state parties and third-party interventions in court proceedings. We exploit the fact some states have been more critical than others and that they have expressed criticisms in some issue areas and not others. On the whole, we show that states can successfully signal to courts their sensitivities about certain issues and obtain more favorable rulings for that issue. This is especially the case for issue areas subject to multiple expressions of criticism through diverse channels. Our findings highlight the importance of issue characteristics that underlie deferential tendencies of international courts in times of political pushback or backlash.

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1 Introduction

International courts are increasingly subjected to criticism from across the political spectrum. When the European Court of Human Rights found that Switzerland violated its obligation to protect its citizens from the adverse effects of climate change,[1] a former federal judge and a member of the Green Party reacted that this ruling was "legally untenable" and accused the court of making policy instead of interpreting the law (Swissinfo.ch 2024a). A Swiss senator from the Social Democrats echoed this criticism, emphasizing that "[f]or years, the court has independently developed the Human Rights Convention and thus taken on the role of the legislator. (...) We want to change that" (Swissinfo.ch 2024b). The European Court of Human Rights is not the only international court receiving such criticism. For example, the International Criminal Court found itself in the crosshairs amid anticipation that its Chief Persecutor, Karim Khan, would make a request for an arrest warrant against the Israeli Prime Minister Benjamin Netanyahu. Twelve Republican US senators sent the Chief Prosecutor a letter appealing him not to make such a request and threatening him and his family if he follows through (Driscoll 2024). When Karim Khan made the request anyway, the US President Biden called this move "outrageous" while the US Secretary of State Anthony Blinken questioned the "legitimacy and credibility of this investigation" (Ravid 2024).

The foregoing examples illustrate different types of reactions international courts may receive. These reactions often amount to criticism of past decisions, which can escalate to what has been called political pushback and backlash (Madsen et al. 2018). They can also include *preemptive threats* that seek to prevent the court from taking a particular course of action. In essence, both *criticism* and *threats* seek to influence courts and have implications on their independence (Hillebrecht 2021; Pollack 2023). This paper addresses the question of whether and how international courts take state feedback into account in calibrating their judgments (Stiansen and Voeten 2020; Helfer and Voeten 2020).

Most existing work agrees that international courts lead states to incur "sovereignty costs" by limiting the types of actions and decisions states can take (Moravcsik 2000; Hafner-Burton et al. 2015; Madsen et al. 2022). The extent of sovereignty costs is usually determined by international courts' scope of functions (Alter 2008). The weight of these costs can grow over time, especially when courts expand the scope of laws they interpret and apply (Abbott and Snidal 2000, 437). States sometimes seek ways to reduce these costs through various means, including extreme ones such as withdrawal from, or paralysis of, existing institutions, as well as more ordinary tools such as criticism to shape judicial outcomes (Steinberg 2004; Hillebrecht 2021; Pollack 2023).[2] The effects of the extreme sovereignty

[1] *Verein KlimaSeniorinnen v. Switzerland*, application no. 53600/20, ECHR[GC] (9 April 2024), paras 567-582.

[2] This literature disagrees on how much these attempts damage international courts' authority (Helfer and Voeten 2020, 2021; Stone Sweet et al. 2021, 2022).

cost-reduction methods are undoubtedly significant, yet criticism that does not reach such levels are both commonplace and impactful (Yildiz 2023, 209).

What we explore here is, therefore, connected to the larger backlash politics literature, which treats backlash as a phenomenon that transcends beyond a simple "regressive form of contested politics" and has specific retrograde objectives and extraordinary tactics (Alter and Zürn 2020, 581). Recent literature focusing on the drivers of today's backlash politics argues backlash is linked to and fueled by a "political crisis of legitimacy" (della Porta 2020, 595) and can emerge in reaction to overlegalization of sensitive issues (Helfer 2002) and judicialization (Voeten 2022), especially when implementing judicial decisions becomes politically costly (Voeten 2020; Sandholtz et al. 2018). Such legitimacy crises are similarly central to states' efforts to mitigate the sovereignty costs imposed by international courts. Perceiving some of these courts' actions and decisions as exceeding their mandates or simply to be politically too costly, states employ political pushback and backlash tactics to reclaim authority and control over these institutions (Madsen et al. 2018).

Existing literature also explains how international courts may try to prevent and mitigate such reactions. These counter strategies include judicial avoidance, when courts dismiss a complaint made against a state wholly or partially, or when they have a selective treatment of the questions raised to prevent criticism (Odermatt 2018; Jackson 2022; Gerards 2014; Kurban 2024). Courts can also resort to avoidance by encouraging and facilitating friendly settlements (Fikfak 2022). Another technique that courts can resort to is to show selective deference to a particular group of states, such as consolidated democracies (Stiansen and Voeten 2020; Helfer and Voeten 2020; Madsen 2021a) and issue less demanding judgments (Dothan 2014) that can sometimes deviate from precedent to ensure compliance (Kucik and Puig 2022).

We agree with the literature that courts have interest in preventing and mitigating criticism. This is because chief among their organizational priorities is maintaining a good reputation in the eyes of member states, which oftentimes is a condition for securing resources and enhancing courts' political and social influence (Garoupa and Ginsburg 2015, 5). Courts' concern for reputation and authority can be a constraint on their choices and activities—a phenomenon coined the "authority trap."[3] In order to maintain their reputation and authority, international courts may respond to negative feedback by engaging in strategies for institutional survival that often involve demonstrating to states that they can operate with lower sovereignty costs.[4]

Where we add to the literature is the basis on which courts selectively exhibit greater restraint. Our contribution highlights *issue-based restraint*, where courts strategically com-

[3]This concept created for the international non-governmental organizations has relevance for international courts whose concern for authority or reputation shape may serve as a driver for forbearing and constrained strategies (Stroup and Wong 2017).

[4]Even if this relationship may appear to be transactional, it also contributes to the overall mission of maintaining courts' image as a legitimate authority "that can rightly influence or constrain [states'] political discretion" (Follesdal et al. 2013, 4).

promise on specific issue areas while maintaining their usual functions in others. We propose that courts employ such restraint in response to politically salient issues. By *political salience*, we mean the degree of importance that states attach to a policy domain.[5] Domains with high salience are those where states fiercely protect their sovereignty, seeking greater autonomy and resisting any constraints on their freedom of action. Hence, political salience is intrinsically related to sovereignty costs.

As we understand it, political salience for states is a subjective measure. Certain issues can have a greater propensity for salience. For instance, this may be the case for "politically unpopular groups," such as refugees and migrants, terror suspects, foreign criminals, or nontraditional families (Helfer and Voeten 2021, 911); issues such as in-vitro fertilization, same sex marriage, or deportations (Glas 2016); or fields like migration law that have traditionally been a state-led domains, carefully shielded from strong supranational oversight (Stappert and Gammeltoft-Hansen 2024, 104). But there are many reasons different states can consider different types of issues as salient. Reasons include, but are not limited to, a government's policy priorities, domestic mobilization and opposition, public opinion or influence of alliance politics.[6] We base our evaluations of salience on state expressions that reveal the importance of an issue to them rather than any objective measure.

We expect that courts will show deference when treating issues that they understand to be salient to states. In so doing, courts can signal their willingness to take member state concerns into account. In areas that are not as salient, courts can continue their work as usual. This strategic two-speed approach can help cut down criticism directed by member states while limiting criticism from other supporting constituencies. Thus, issue-based restraint is an efficient tool to mitigate and prevent backlash without seriously putting the courts' reputation at risk.[7]

We lay out two distinct channels of communication through which states send and courts receive information about political salience. These are *formal statements in international forums* and *state interventions through amicus curiae briefs*. Courts differ in the precision with which they can identify issues salient to states across these two channels. For this reason, we analyze the effect of formal statements and state interventions differently.

We examine the influence of political salience on judicial restraint by focusing on the European Court of Human Rights (the Court)—a regional human rights court that was created to apply the European Convention on Human Rights (the Convention). Our primary

[5] This is similar to how issue salience is defined when studying interstate conflict (Diehl 1992, 334).

[6] It is important to note that by political salience, we do not attempt to get at the salience of court cases to judges. This has been done by scholars who have operationalized salience of cases using different measures, such as contemporaneous newspaper coverage of cases (Epstein and Segal 2000), the number of citations a case generates (Ulmer 1970) or the number of amicus curiae briefs a case attracts (Maltzman and Wahlbeck 1996). Of these measures, only the last one can potentially be an indication of the type of salience that we have in mind—amicus curiae briefs, but only those directly submitted by states.

[7] Courts might not have similar concerns when treating inadmissibility claims since inadmissibility decisions require minimum to little engagement with legal reasoning. They are often fairly short, and they do not have high visibility.

focus is on Article 3 of the Convention, which establishes an absolute prohibition against torture and inhuman or degrading treatment. Our analysis relies on an original dataset covering the Court's treatment of different obligations (representing different issue areas) falling under Article 3 between 1967 and 2023.[8] Our dataset includes issues ranging from torture and ill-treatment during custody to effective investigation, or the provision of legal remedy and protection to vulnerable groups. Our contribution lies in our ability to test the Court's differential attitudes towards different obligations based on the political salience of different issue areas to mitigate and prevent negative criticism or backlash.

We find that courts use selective restraint in ways consistent with most of our expectations. Courts show more restraint in issues that are signaled as politically salient. At the same time, not all states receive additional benefit for being the ones raising those issues. There is evidence that the Court is more willing to show restraint to states that signal that an issue matters to them through repeated involvement with the Court, notably through third-party interventions, especially if those states have a good rule of law record. Our contribution shows that selective restraint goes beyond states and regime characteristics and underscores the need to take account of differences between issue areas to understand judicial strategies in times of backlash. We go beyond studying state criticism expressed in international fora and use new data on state interventions to reveal a different source of information for courts to understand state sensibilities. Our study thus highlights the importance of theorizing about different channels of communication between states and courts.

2 Restraint and political salience

Judicial restraint reflects the conviction that the judiciary should adopt a more limited role and minimize its interference, rooted in normative beliefs about the proper scope of judicial power and the legitimacy of courts to review and scrutinize governmental or legislative actions (King 2008). One of the ways in which judicial restraint manifests is through judicial economy—whereby the courts decide not to rule on certain aspects of the case, limiting the case's scope (Alvarez-Jiménez 2009). Another way is through deference—whereby international courts refrain from finding states in violation, either wholly or partially, often out of respect for states' domestic procedures (Fahner 2020). Many courts resort to deferential standards of review or grant states a wide margin of appreciation (i.e., discretion granted to national authorities when interpreting and applying international treaties) (Gruszczynski and Werner 2014). Regardless of its type or underlying motivation, in cases that reach the stage of final ruling, judicial restraint ultimately results in the courts either refraining from finding the state in violation or issuing a limited ruling that narrows the scope of its decision and thereby reducing liability for states. This, in turn, can serve as a strategic tool

[8]This dataset is based on the dataset used in Yildiz (2023) but expands its temporal scope.

for international courts, helping them to preempt and mitigate backlash and state criticism (Hillebrecht 2021). Alternatively, it may function as a resilience strategy, allowing international courts to delegate difficult decisions to domestic authorities (Zurita and Brekke 2024) or future cases.

Scholars have also drawn attention to the downsides of increased restraint, especially when applied *selectively*. For example, Mikael Madsen finds that the European Court of Human Rights has shown increasingly more deference in the period after 2010, especially with respect to claims brought under Article 8 (the right respect private and family life) and Article 35 (admissibility criteria)—implying that more cases are discarded at the initial stages of the review due to deference to domestic procedures (Madsen 2021b, 120). Madsen also highlights that some countries benefit more from the Court's deferential attitude, highlighting that countries like Norway, Switzerland, and Czech Republic with high rule of law standards tend to receive fewer violations (Madsen 2021b, 120). Using doctrinal analysis, Başak Çali argues that the Court reserves stricter review for authoritarian and authoritarian-leaning states (Çali 2018, 2021). Analyzing the European Court's caselaw through mid-2016, Øyvind Stiansen and Erik Voeten present compelling evidence that the European Court has increasingly demonstrated greater deference to consolidated Western European democracies in its recent jurisprudence (Stiansen and Voeten 2020). Similarly, Larry Helfer and Erik Voeten show that the European Court of Human Rights has increasingly ventured into a regressive direction, narrowing its interpretation of the Convention rights when treating claims brought against consolidated democracies in the period after 2012 (Helfer and Voeten 2020, 823).

The role of political salience in shaping judicial decision-making has been extensively examined by scholars. In the context of domestic courts, research highlights how judicial actors prioritize safeguarding their institutional legitimacy and mitigating the risk of court-curbing legislation (Epstein and Knight 1997; Segal et al. 2011). For example, Tom Clark argues that the US Supreme Court tends to employ self-restraint and refrain from striking down laws when the Congress is hostile to the Supreme Court (Clark 2009). Similarly, Maron Sorenson finds that the Supreme Court adjusts its decision-making in high-stakes cases, responding to the broader political climate signaled by Congressional speeches, with positive sentiment encouraging assertiveness and negative sentiment prompting caution (Sorenson 2024). Her conclusion that courts actively seek to minimize political criticism aligns with the broader themes of this study.

Political salience has also been studied in the context of international courts. For example, in the case of the Court of Justice of the European Union, Clifford Carrubba and Matthew Gabel argue that third-party government involvement is indicative of political sensitivity of the case (Carrubba and Gabel 2017). They consider that third-party interventions signal government preference—an assumption this study shares—and they focus on the influence of third-party interventions against respondent states (Carrubba and Gabel

2017, 46). Their research found that the more third-party interventions opposing the defendant government (and the fewer in support), the more likely the court is to rule against the government (Carrubba and Gabel 2017, 193). This is because such a scenario implies that plurality of states is likely to comply with a ruling like this.

Others have noted that courts tend to treat "politically crucial cases" cautiously (Kapiszewski 2011) and act upon political signals to identify such crucial cases. For example, Olof Larsson and Daniel Naurin also look at the Court of Justice of the EU and argue that judges are concerned with but also uncertain of how their decisions will be received. Therefore, they operate under imperfect information and tend to be attuned to political signals (Larsson and Naurin 2016). The authors identify the threat of legislative override as a factor influencing court rulings, suggesting that cautious judges are attentive to signals about potential adversarial political reactions their decisions may provoke (Larsson and Naurin 2016, 378).

The literature also highlights that the noncompliance can be a signal. For example, James McCall Smith, looking at the Appellate Body (AB) of the World Trade Organization identified three types of signals that the AB is sensitive to—isolated noncompliance instances, noncompliance by the broader membership and broad-based opposition from a coalition of states (Smith 2023, 75). Jeffrey Kucik and Sergio Puig show that the AB acts on such signals and it is more likely to drift from previous rulings that have failed to secure compliance (Kucik and Puig 2022). Scholars have also explored the conditions under which the AB employs judicial economy, as a form of judicial restraint. For instances, Marc Busch and Krzysztof Pelc argue that judicial economy is not merely reserved for controversial cases; rather, it serves as a strategic tool to address the broader concerns of the membership (Busch and Pelc 2010). In a related vein, Ryan Brutger and Julia Morse find that the panelists tend to resort to judicial economy strategically, when powerful members such as the US and EU are on the losing side (Brutger and Morse 2015).

Building on this rich literature, our analysis focuses on the ways in which political salience about specific matters can be communicated to courts, and how courts can take this information into account as they make their decisions. We now turn to laying out argument and discussing our expectations.

3 Argument and expectations

Our argument runs on the assumption courts can receive information about which issues are salient to states. To some extent, this does not require any explicit communication from states to courts. Judges can learn about which issues are politically salient through their exposure to various media sources, which sometimes also feature member state criticisms. Even when salient issues in a particular country do not appear on international news, they can be relayed by national judges and lawyers of that country working within the

court.[9] In addition, court secretariats include law clerks from different (if not all) member states. Being more directly immersed in the local context, national judges or lawyers have access to detailed information about the political climate. The insights of national judges and lawyers can complement the broader perspective of other judges when dealing with a political context they are not familiar with, thereby enhancing the overall judicial grasp of politically relevant matters.

While acknowledging these informal communication channels, our account focuses on formal ways in which states can communicate with courts and express their views on different issues. There are at least two formal channels. The first is *interstate meetings* where member states discuss the amendment of the treaty that the court is tasked with interpreting or the reform of the court itself. The second channel is opened by the possibility of states to submit their views in cases they are not party to—through *third-party interventions*. These channels differ in the precision with which they allow courts to understand which issues are salient to states, a point which we turn to in the operationalization section.

Be it obtained through informal or formal channels, the circulation and retention of information rely on interpersonal communication within the courts. We argue that the knowledge about the political salience of an issue for states (or for a particular state) can be passed among the members of the court, both elected judges (including the national judges) and courts' permanent staff who maintain the institutional culture and memory (Yildiz 2023, 59; Creamer and Godzimirska 2019). Especially the latter can retain the information communicated to the court at one point in time and make it available to the other members of the court as data points about what issues matter to which states (Heymann 2011, 1342).

Building upon these observations we organize our main expectations around possible differential treatment based on *issue areas* on the whole. We propose that courts will show more restraint to states when the issue at stake is communicated to be a politically sensitive one:

H1 An international court is likely to show more restraint to states when dealing with issue areas that are singled out as politically salient.

This hypothesis suggests that once an issue is communicated to be salient to the court, all states will receive restraint in judicial proceedings involving that issue.[10] Although we believe criticism will not give direct state-specific benefits, we argue that some states

[9] In fact, many international courts allow states to appoint national *ad hoc* judges to participate in cases concerning them if there is not already a national judge present. This is the case, for example, for the International Court of Justice, International Tribunal of the Law of the Sea, the Inter-American Court of Human Rights (in the context of inter-state applications), and the European Court of Human Rights.

[10] While we expect this to be the case, we are also cognizant of the possibility that the ones criticizing the court receive additional benefits. In the most extreme case, only those states that communicate salience to the court receive restraint in that issue area. More generally, it may be that the communicating states receive additional restraint above and beyond what is granted to others in that issue area. We find no evidence of a criticism-dividend, beyond what all states receive as part of issue-based deference.

can still expect to gain more from additional restraint. These are states with strong rule of law traditions, which generally uphold higher procedural standards in their domestic legal processes.[11] While this can provide a way for courts to show restraint based on high procedural standards, it also makes it more likely for some states to benefit from lower standards or additional procedural deference than others. Thus, states that have high procedural standards—those that respect rule of law—are likely to reap more benefits of any additional deference that courts may show. This leads us to our second expectation:

H2 States with a higher rule of law record are likely to benefit more from increases in restraint compared to states with a lower rule of law.

4 Case selection

We study the effect of political salience in the context of the European Court of Human Rights, a human rights court created to interpret the European Convention on Human Rights.[12] This is a good case to study the relationship between political salience and deference for several reasons. First, the range of rights protected under the Convention are diverse and there is a plausible variation in their salience to states. Some of the rights in question have given way to rulings with policy implications in areas touching upon state interest and received strong criticism from them. For example, the Court has declared that a British blanket ban on prisoner's right to vote is against the Convention[13] and ordered Turkey to release high-level political prisoners.[14] Second, unlike other human rights courts such as the Inter-American Court of Human Rights (IACtHR) or court-like institutions such as the UN Treaty Bodies, which are known to consistently follow a progressive line (Soley 2017; Lixinski 2010; Reiners 2021; Lesch and Reiners 2023), the Court's record is mixed (Yildiz 2020a,b; Çali 2018; Madsen 2011). It is neither uniformly state-friendly like the International Court of Justice (ICJ), or victim-friendly like these other human rights courts or UN Treaty Bodies (Zarbiyev 2012). Third, the Court is highly productive, having issued 38,260 judgments since its creation in 1959 to 2023.[15] It thus has a rich repertoire of cases that permits the empirical examination of issue-based restraint and its possible evolution over time.

We focus our examination on the Court's treatment of claims related to the prohibition of torture and inhuman or degrading treatment under Article 3 of the Convention. We do this

[11] This group roughly corresponds to what Voeten (2022) call "consolidated democracies", which we use in some of our tests.

[12] The European Court of Human Rights is a Council of Europe organ; it predates, and it is different than the Court of Justice of the EU. Today, it mainly treats claims brought by private individuals against responding states.

[13] *Hirst (No.2) v. the United Kingdom*, application no. 4025/01, ECHR [GC] (6 October 2005).

[14] *Selahattin Demirtas v. Turkey*, application no. 14305/17, ECHR [GC] (22 December 2022).

[15] European Court of Human Rights, available at https://public.tableau.com/app/profile/echr/viz/Analysis_statistics/Overview.

because it is a hard case to assess selective restraint (Seawright and Gerring 2008; Gerring and Cojocaru 2016). Article 3 is an absolute prohibition and it contains nonderogable rights (Lesch 2023). This is to say, states cannot suspend their obligations arising from this prohibition even during crises, emergencies, or when addressing national security concerns (Cakal 2022, 2023). This is one of the few prohibitions where the Court does not usually give member states a large discretion (Gerards 2018; Brems 2019).[16] Hence, normally, we would not expect to see much restraint, selective or otherwise, when assessing the Court's treatment of claims under Article 3. This also implies that if we do find evidence for issue-based restraint under Article 3, we can safely assume that issue-based restraint also happens elsewhere in the Court's caselaw.

5 Operationalization

In this section, we discuss how we operationalize our key variables. We begin with our operationalization of *political salience*, which is done in two different ways depending on the precision with which it is communicated. We then discuss how we measure *restraint*. Finally, we discuss other variables we use as controls (whether we are dealing with a *key case*, for instance) or to explore heterogeneous treatment effects (*rule of law*).

5.1 Political salience

In the context of the Court, there are two formal channels through which the Court can get a sense of which issues are politically salient. First, they can rely on state views expressed during a series of meetings of states parties to the Convention, called the High-Level Conferences on the Future of the European Court. Second, they can rely on information they obtain about which states tend to intervene over which types of issues.[17] We describe these in turn and discuss how we operationalize them for our analyses.

5.1.1 High-Level Conferences

Member states engaged in a series of High-Level Conferences between 2010 and 2018.[18] These meetings often had states represented at the ministerial level and would also include the President of the Court as well as other Council of Europe representatives. This series of meetings allowed member states to collectively address some of the challenges that the Court has been facing, such as the caseload problem. However, member states went beyond

[16] This practice is formulated under the margin of appreciation doctrine and subsidiarity principle. Both require the European Court to act in a deferential way to domestic authorities that have the primary responsibility to ensure right protection at the national level. For more, see Brems (2019).

[17] While the magnitude and importance of these meetings cannot be denied, such meetings are not at all rare. For example, there was an analogous reform process at the Inter-American Court of Human Rights as well around the same time (Ramanzini and Yildiz 2020).

[18] These took place in Interlaken, Switzerland (February 2010); İzmir, Turkey (April 2011); Brighton, the United Kingdom (April 2012); Brussels, Belgium (March 2015); and Copenhagen, Denmark (April 2018).

that and used this opportunity to express their vision for the Court—one that involved more *subsidiarity* and a broader *margin of appreciation*. The principle of subsidiarity entails a larger role for national authorities in protecting rights, with the European Court's role being subsidiary to theirs (Christoffersen 2009). Similarly, the margin of appreciation doctrine means that national authorities should have a large degree of discretion when it comes to applying the Convention (Gerards 2018). A frequent reference to the subsidiarity principle and the margin of appreciation doctrine during these meetings and in the outcome documents of these High-Level Conferences were interpreted as a call for deference in the existing literature and have been shown to affect court behavior (see, for example, Stiansen and Voeten 2020; Helfer and Voeten 2021; Çali 2018; Hillebrecht 2021).

We consider these High-Level Conference as venues for states to communicate not only how they think the Court should behave in general, but also how it should treat certain issues important to them. This requires us to identify which issues have been explicitly raised by states. To do so, we have reviewed all High-Level Conference documents, which included official statements from state representatives and outcome declarations made in the name of all member states. We have found that out of 17 categories we have under Article 3 (see Appendix A1) the only one that was explicitly mentioned was the issue of refoulement. Refoulement is connected to the principle of non-refoulement, which in the context of Article 3 protections holds that individuals must not be returned or sent to any place where they may face torture or ill-treatment. It arises when a state wishes to deport, extradite, or expel usually refugees, asylum seekers, or irregular migrants to their home country or a third country where they risk facing ill-treatment.

The issue of returning or expelling irregular migrants, asylum seekers, and refugees was treated at length at the High-Level Conference in Izmir in 2011. Four countries—Sweden, Slovakia, Turkey and Russia—raised the issue and made strong statements. The Swedish representative expressed "concern over the role which the Court has assumed in asylum and migration cases, acting as a last resort for those who have been refused asylum or residence permits in a Convention state."[19] The Slovakian representative declared that "[the Court] cannot be seen as an immigration appeals tribunal or a court of fourth instance."[20] The Turkish and Russian representatives repeated these concerns and the plea that the Court should not turn into "an immigration appeal tribunal."[21]

These concerns were reflected in the Izmir Declaration, which "invites the Court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional

[19] Proceedings, High Level Conference on the Future of the European Court of Human Rights, Izmir 26-27 April 2011, p. 98.

[20] Proceedings, High Level Conference on the Future of the European Court of Human Rights, Izmir 26-27 April 2011, p. 93.

[21] Proceedings, High Level Conference on the Future of the European Court of Human Rights, Izmir 26-27 April 2011, p. 9.

circumstances."[22] At a later High-Level Conference in Copenhagen, such direct references were only made by Turkey and Hungary in the context of irregular migration.[23] Despite a lower degree of migration and asylum-related discussion during the conference, the leaked draft of the Copenhagen Declaration still included the following strong statement: "It is widely accepted that the Court should not act as a court of fourth instance, nor as an immigration appeals tribunal, but respect the domestic courts' assessment of evidence and interpretation and application of domestic legislation, unless arbitrary or manifestly unreasonable." This statement was later excluded from the final declaration. Yet, it still served its role in expressing a particular kind of vision for the Court, especially with respect to its migration-related caseload.[24]

Based on these considerations, we consider there to be a clear signal coming from states, singling out non-refoulement as a politically salient issue—something also acknowledged in the existing literature (see, for example, Gammeltoft-Hansen and Madsen (2021)). We also consider that this was clearly communicated to the Court in early 2011, during the Izmir Conference, after which time we can expect a difference in the treatment of claims about non-refoulement. This High-Level Conference treatment takes the value of 1 in cases involving non-refoulement claims after 2011, and 0 otherwise.

5.1.2 Third-party interventions

Third party interventions, which allow states that are not party to a case to intervene in judicial proceedings—also known as *amicus curiae* (friend of the court)—constitute another formal channel for states to communicate with courts. In addition to the Court, various international courts and tribunals, such as the ICJ or the IACtHR, allow third-party state interventions (Bartholomeusz 2005), which are increasingly a common feature of international adjudication (Farnelli and Sardu 2023).[25] Interventions are used when courts review issues that have implications on the "legal interest of other states" and with a view to avoiding "duplication of proceedings" (Chinkin 1986, 500). However, member states are known to use this opportunity politically to reinforce their claim for state sovereignty (Bürli 2017), "protect their own interest" (Wolfrum 2013, 229), or "to persuade the Court to develop the case law in a direction [that is beneficial for them]" (Dzehtsiarou 2023, 2). Since intervening in a case require states to mobilize their resources, we expect states to be selective in their interventions. The cases they intervene in should have a certain level of political salience to them and this can be registered as such by international courts. This is how interventions can serve to communicate political salience.

[22] High-Level Conference on the Future of the European Court of Human Rights, "Izmir Declaration" (2011), www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.

[23] Proceedings, High Level Conference on the Future of the European Court of Human Rights, Copenhagen 11-13 April 2018, Turkey (p. 109) Hungary (p. 60).

[24] For more on the effects of the leak, see Helfer (2012) and Donald and Leach (2018).

[25] For example, the *Ukraine v. Russia* case before the International Court of Justice seeing 33 states filing declarations of interventions at the preliminary stage.

The Court accepted third-party state interventions for the first time in 1979 in the *Winterwerp v. Netherlands* case. Later, in 1998, this procedure was integrated into the text of the Convention under Article 36.[26] Third-party state interventions were encouraged in the Copenhagen Declaration in 2018, which called on states to intervene to state their "views and positions," emphasizing that "[a]n important way for the States Parties to engage in a dialogue with the Court is through third-party interventions."[27] Thus, interventions have been thought to be a channel of communication for states to share their views on issues that matter to them. Interventions in cases touching upon a certain issue area can thus serve as a signal that the issue in question is politically salient.

Interventions, especially if concerted, can create pressure for the Court to change course. *Lautsi and Others v. Italy* exemplify a strong and concerted effort to change the Court's position on the display of crucifixes in state schools.[28] In 2009, the Court had unanimously found Italy in violation of freedom of religion and right to education for refusing to remove a crucifix that are usually placed classrooms in Italian schools. Italy appealed the case to the Grand Chamber (the appeal body within the Court),[29] which effectively reversed this decision in 2011.[30] While no state intervened when the case was being reviewed by the Chamber, ten member states (Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania, and the Republic of San Marino) and thirty-three members of the European Parliament acting collectively sent submissions in favor of the Italian government when the case was before the Grand Chamber. This concerted intervention signaled that this topic was politically salient for several states, which arguably contributed to reversing the Chamber's ruling. Indeed, in explaining the change, some judges referred to the role of pressure from member states as a factor (Yildiz 2023, 49). Our argument suggests that beyond leading to a reversal of a decision, such interventions can durably lower the probability of violation decisions when cases concerning the same type of issue comes before the Court again.

Interventions have taken place in the Court's Article 3 jurisprudence as well. *M.S.S. v. Belgium and Greece* concerned the EU's Dublin II Regulations and more specifically states' responsibility for direct refoulement (removing a person and sending them to a place where they risk ill-treatment or torture) and indirect refoulement (also known as chain refoulement—sending a person to a country that is expected to send them back to their

[26] According to this article, states whose nationals is an applicant or states not party to the case can submit written comments and participate in the hearings "in the interest of the proper administration of justice."

[27] High-Level Conference on the Future of the European Court of Human Rights, "Copenhagen Declaration" (2018), www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

[28] *Lautsi and Others v. Italy*, application no. 30814/06, ECHR (3 November 2009).

[29] Chambers are composed of seven judges that decide on the admissibility and merits of the (non-repetitive) cases, and Grand Chambers comprises seventeen judges that serve as an appeal mechanism and take over the relinquished or referred cases.

[30] *Lautsi and Others v. Italy*, application no. 30814/06, ECHR [GC] (18 March 2011).

country of origin).[31] The UK and the Netherlands intervened.[32] The Netherlands argued that it is "for the European Commission and the Greek authorities, with the logistical support of the other member States, and not for the Court, to work towards bringing the Greek system into line with Community standards."[33] The UK warned that such stringent procedures were "bound to slow down the whole process."[34] The Court found both Greece and Belgium in violation—Greece for keeping asylum seekers in unacceptable conditions and deficiencies in the asylum procedure and Belgium for transferring asylum seekers back to Greece. While it was celebrated by human rights groups, with some heralding it as a "victory for refugee protection in Europe" (Ferschtman 2011), some others interpreted the ruling as an instance of "judicial activism" and "interference with immigration policies" (Baumgärtel 2019, 2020). Thomas Hammerberg, then the Commissioner for Human Rights of the Council of Europe, spoke extensively about his involvement with the *M.S.S. v. Belgium and Greece* judgment in Izmir.[35] According to Commissioner Hammerberg, this ruling exposed the "flawed" asylum procedures in European countries and promised to have "a lasting impact on the protection of human rights of asylum seekers."[36] The decision arguably provoked some of the state reactions it received at the Izmir Conference (Gragl 2012).

We use a dataset of state interventions and present those falling under Article 3 in Table 1.[37] We exclude from our analyses interventions that are against the respondent state (as they are in favor of the Court finding the state in violation)[38] and focus on interventions that are *in favor of the respondent state* or at least *neutral*. Supportive interventions signal that the intervening state prefers rulings of no violation not only for the case at hand but also for similar cases in the future, aiming to shape the Court's approach to such issues. The greater the number of interventions on a particular issue, the stronger the indication of its political salience to states, reflecting their collective desire for the Court to exercise deference in its decisions. We include neutral interventions because they, too, serve as a communication tool, signaling that a specific topic has political salience for the intervening country. Even if a state does not explicitly side with the respondent, the very act of intervening demonstrates that the issue at hand is important enough to warrant the state's attention and resources.

In coding the timing of interventions, we focus on the end year of the cases in which the interventions take place. We do this for two reasons. First, the timing of the interventions is not clearly stated in the judgments, so we are not sure when they must have taken

[31] *M.S.S. v Belgium and Greece*, application no. 30696/09, ECHR[GC] (21 January 2011), para. 286.
[32] *M.S.S. v Belgium and Greece*, application no. 30696/09, ECHR[GC] (21 January 2011).
[33] *M.S.S. v Belgium and Greece*, application no. 30696/09, ECHR[GC] (21 January 2011), para. 330.
[34] *M.S.S. v Belgium and Greece*, application no. 30696/09, ECHR[GC] (21 January 2011), para. 331.
[35] Another important contemporaneous case is *Hirsi Jamaa and others v. Italy*, application no. 27765/09, ECHR[GC] (23 February 2012).
[36] Proceedings, High Level Conference on the Future of the European Court of Human Rights, Izmir 26-27 April 2011, p. 26.
[37] We thank Oana Ichim for this dataset.
[38] We list these interventions in Appendix A2, explaining why do not consider them to communicate the political salience of issues to the Court.

place. We use this as a conservative measure—by the year of judgment, the intervention will have surely taken place. Second, we consider that even if an intervention happened and relevant statements were delivered in the earlier years of proceedings, the information would take time to travel. The spread of information is a gradual process, often mediated by interpersonal communication, internal discussions, and bureaucratic processes. Focusing on the end year also allows us to account for the time it takes for these signals to be fully recognized and processed by all judges and law clerks involved in judicial decision making.

Table 1: State interventions in Article 3 cases that are either in favor of a respondent state or neutral. The years of neutral interventions are indicated in italics.

Issue	**State**	**End year of case with intervention**
Detention conditions	Slovakia	2009
	Hungary	2019
Legal Protection/Remedy	France	2016, 2020
	Italy	*2016*
	Bulgaria	2020
	Czechia	2020
	Germany	2020
	Denmark	2020
	United Kingdom	2020
	Croatia	2020
	Hungary	2020
	Latvia	2020
	The Netherlands	2020
	Norway	2020
	Slovakia	2020
Non-Refoulement	Russia	2001, 2010, 2014
	United Kingdom	2008, *2010*, 2010, 2011, 2014
	Lithuania	2010, *2010*
	Portugal	2010, *2010*
	Slovakia	2010, *2010*
	Russia	2001, 2010, 2014
	Turkey	2012
	The Netherlands	2011, 2011, 2014
	Italy	2014, *2014*, *2016*
	Norway	2014
	Sweden	2014

How the Court can learn from state interventions differs in a fundamental way from what it can from interstate meetings. The key difference is the *precision* with which the court can identify issues to be politically salient to states. If states could perfectly communicate political salience through their third-party interventions, we would expect the courts to update their assessment about which issues matter to which states after each intervention. However, it is more plausible that the Court does *not* keep track of which state intervened,

and with what arguments, in each case. For this reason, it would be a mistake to create strict cut-off points from interventions and expect court behavior to be different around them. As the information about them does not travel precisely, we focus oncumulative number of interventions, arguing that the Court would eventually come to understand that certain issues matter more for states based on how such issues attract more interventions.

We present the cumulative number of interventions in the types of claims they were made in Figure 1 (which also graphs interventions against for reference). What is of note here is that a specific claim type, *non-refoulement*, stands out as being subject to interventions more than the other two claim types that also witness interventions—already by 2010, there were more than 10 interventions made over this claim type. The other claim types stay below 3 favorable or neutral interventions until 2020, and only one of them (*legal protection/remedy*) goes beyond 10 interventions after that year.

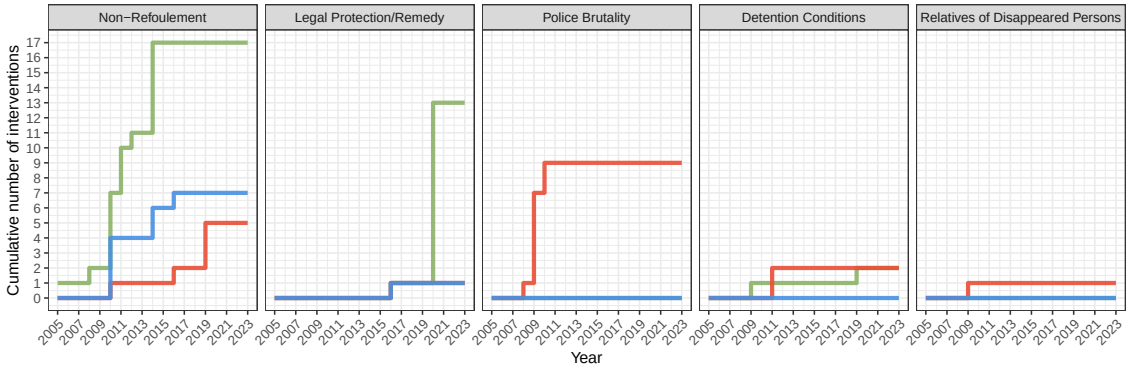

Figure 1: Interventions in favor of respondent states (green) interventions against respondent states (red) and neutral interventions (blue) over time.

We recapitulate the ways in which we operationalize communications of political salience in Table 2 below. The signals from the High-Level Conferences are sure to reach the Court, with precision and almost immediately. This is why they are taken to be cut-off points, or treatments, from the time of their occurrence. For interventions, the signal will need to be repeated to some extent to reach the Court, which is why we focus on cumulative number of interventions instead of identifying the first intervention as a clear cut-off point after which we look for effects. This distinction determines the different ways in which we operationalize signals depending on their type.

Table 2: Operationalizing the political salience treatments through high-level conferences and interventions.

Source	Operationalization
High-Level Conferences	*Salience* coded as 1 from the year a claim about issue I was raised explicitly in a high-level conference (Non-Refoulement after 2011 Izmir Conference)
Interventions	*Salience* proxied by the cumulative number of favorable or neutral interventions made about claim about issue I by each year Y

5.1.3 Restraint

Restraint, our dependent variable, can be thought to be any method by which the court avoids ruling against the state. This has been mostly reduced to deference in studies of the European Court. In earlier work concerning the Court, deference is usually measured as a non-violation decision (see, for instance, Stiansen and Voeten 2020). This is also our strategy. Reducing restraint to a binary measure of violation versus no violation simplifies the analysis but introduces certain limitations. It overlooks instances of judicial avoidance, such as cases dismissed or resolved through friendly settlements, which do not reach the ruling stage. However, a decision of no violation remains a meaningful indicator of judicial restraint. Cases that meet the admissibility criteria and progress to the ruling stage must satisfy stringent evidentiary standards, demonstrating significant gravity and strong arguments. As such, these cases are more likely to result in violation rulings. Consequently, a no violation decision in such circumstances is a strong signal of judicial restraint. We thus operationalize restraint as a *non-violation* decision.

5.1.4 Other variables

H2 suggests heterogeneous treatment effects on the basis of rule of law (or some other measure of consolidated democracy, with strong procedural guarantees). To test this hypothesis, we use, in addition to the consolidated democracy variable provided by Stiansen and Voeten (2020), the rule of law index offered by the Varieties of Democracy project which covers the years between 1789 and 2023 and ranges from 0 to 1 (Pemstein et al. 2024; Coppedge et al. 2024). We use this measure for its extensive coverage.

Furthermore, we use past violation decisions and features about the case (whether it is a key a case or a Grand Chamber decision) as control variables.

5.2 Empirical strategy

Our empirical strategy to get at the impact of political salience depends on the way it is communicated: through interstate conferences or interventions.

If salience is communicated clearly at a precise point in time, we take it as a treatment after which we can expect the treated group (the claim which is marked to be salient) to evolve differently than the rest. We use a differences-in-differences design to test the effect of the communication of salience during the 2011 High-Level Conference in Izmir in which several states raised non-refoulement as a salient issue. Our model is the following:

$$Y = \beta_0 + \beta_1 \text{NonRefoulement} + \beta_2 \text{Year} + \beta_3 (\text{NonRefoulement} \times \text{Year}) + \varepsilon$$

Where Y is a (non-)violation decision (a binary indicator taking the value of 1 if the claim is ruled to be violated by the Court and 0 otherwise), NonRefoulement is an indicator taking the value of 1 if the claim in question is non-refoulement and 0 otherwise, and Year is a categorical variable with the treatment year—2011—as the reference. This specification allows us to assess dynamic effects, as an interaction term is created between NonRefoulement and each year (except for the reference year). The parameters of interest are the coefficients of the interaction terms post-treatment, which are represented as β_3 for convenience.

When salience is not communicated precisely, as is the case with interventions, we adopt a different approach to assess whether signals of salience translate into fewer violation decisions. First, focusing on the claims themselves, we consider whether violation decisions become more likely to be avoided as interventions about a specific claim accumulate. To do this, we run a simple logistic regression, taking a violation decision as the outcome variable. The independent variable is the cumulative number of interventions regarding each claim. We introduce this as a cubic polynomial to take into account the possibility of a nonlinear relationship between cumulative violations and violation probability.

6 Data

Our dataset consists of 3,905 cases and 6,430 claims under Article 3, concluded between 1967 and June 2023 concerning 44 member states. A claim is a complaint of violation related to a particular category of actions that fall under one or more provisions. Each case may, and often does, contain more than one claim. In the context of Article 3, the maximum number of claims involved in a case is 14 (*Sh.D. and others c. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*), and the mean number of claims is 1.65. A little more than half of the cases have only one claim, and about 90% of them have up to two claims. Table 3 lists the different claim types and their frequencies. The most frequent four claims (failure to provide acceptable *detention conditions*, to fulfill *procedural obligations*,

or to provide *legal protection/remedy*) make up about 70% of all claims whereas the rest add up to around 30%.

Table 3: Distribution of Article 3 claims (1967–2023), focusing on the 10 most frequent claim types.

Rank	Specific claim under Article 3	Frequency	Proportion
1	Detention Conditions	1589	0.25
2	Procedural Obligations	1155	0.18
3	Legal Protection/Remedy	922	0.15
4	Ill-Treatment During Custody	657	0.11
5	Police Brutality	401	0.06
6	Medical Care	401	0.06
7	Intrusive Detention Measures	337	0.05
8	Non-Refoulement	325	0.05
9	Relatives of Disappeared Persons	277	0.04
10	Torture	193	0.03
	Other	173	0.02
	Total	**6430**	**1.00**

In Appendix A3, we present the evolution of Article 3 claims both globally and in various issue areas and present the 10 most common respondent states.[39]

Our main dependent variable, violation decision, can be aggregated and presented in various ways. We first present how violation rates (proportion of violation decisions) evolve over time both globally and in specific issue areas. Figure 2 shows the evolution of violation rates (proportion of violation decisions) over time in the entire Article 3 caseload, and Figure 3 breaks it down different claim types. The main trend is one of an increase followed by stabilization from 2011 onwards at a very high level of violation rate (with little room to increase further up). Early 2000s begin with a violation rate of about 50% before reaching a rate of about 80% a decade later, and more recently, from 2020 onwards, seeing levels as high as 95%. These figures suggest that the likelihood of a violation decision (among cases that make it to the decision stage) is very high overall.

[39]The *Other* category in Table 3 includes 87 claims codes as "Discrimination", 51 as "Extrajudicial Acts", 21 as "Destruction of Property", 8 as "Family Separation", and 1 claim each as "Euthanasia" and "Healthy Environment".

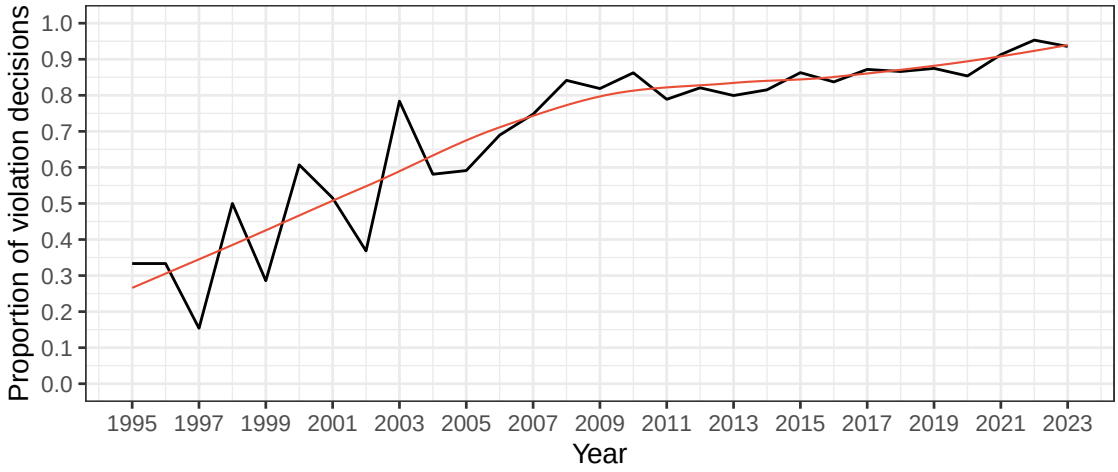

Figure 2: Proportion of violation decisions (in the post-2005 period). To highlight broad patterns over time, the representation includes a red loess curve fitted with a smoothing parameter $\alpha = 0.75$.

When it comes to violation rates calculated for different claim types (see Figure 3), we see similar moves towards a higher level of violation rates with particular fluctuations or leveling off patterns for different types of cases. In a few cases, such as police brutality and non-refoulement, the violation rate appears to have stabilized at a relatively lower level compared to others. For some other areas, especially those that occupy the Court's docket the most (procedural obligations and detention conditions), the violation rate is consistently high, never falling below 70% after 2005 and reaching as high as 90% on more than one year, including in the past few years.

Figure 3: Proportion of violation decisions broken down by claim type over time (in the post-2005 period). To highlight broad patterns over time, the representation includes red loess curves fitted with a smoothing parameter $\alpha = 0.75$.

7 Results

Our theory suggests that, all else equal, claims that are marked to be politically salient by states will witness encounter restraint more than other claims and have a lower probability of resulting in violation decisions. We begin by presenting results from our differences-in-differences. We first focus on the claim-based criticism directed against the Court in 2011 (the treatment year), specifically focusing on Non-Refoulement claims. We are interested in finding out if violation decisions for Non-Refoulement evolve differently from the rest after 2011. Figure 4 presents the average treatment effects on the treated (ATT) calculated for each year around treatment.[40] We observe a clear decrease in the violation rate in the years following the treatment for the non-refoulement group compared to the rest of the claim types. The effect is clearly present for the 6-7 years after this treatment. On average, the difference between non-refoulement and other claim types increase by about 0.27 points after treatment (the overall ATT calculated is -0.27). Importantly, this difference is due to a reduction in the violation rate in cases concerning non-refoulement. In Appendix A5.1 we show that while the violation rate of other claims increase, non-refoulement decreases from 2011 onwards and stays below the rest. Thus, the treated cases subject to significantly fewer violation decisions. We thus find initial support for H1.[41]

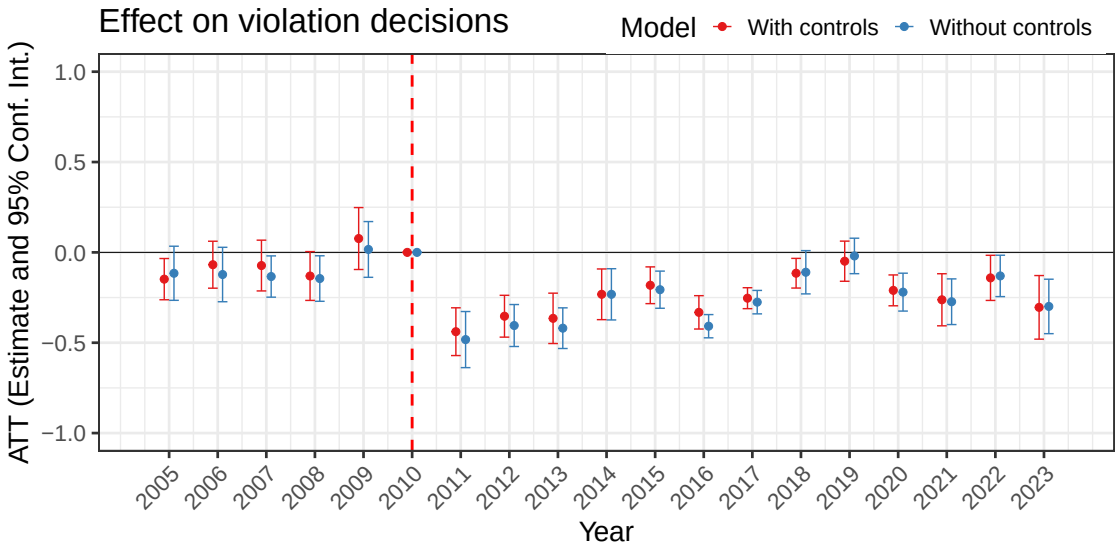

Figure 4: Dynamic average treatment effects on the treated based on the claim (Non-Refoulement, considered to be treated after the Izmir conference in 2011).

Now we move onto our expectations about interventions as a way of signaling political salience and possibly provoking changes in violation decisions of the court. We begin our

[40] We implement the estimator proposed by Sun and Abraham (2021) using the **fixest** package in R. The regression output is presented in Appendix A4.

[41] We fail to find support for additional benefits for consolidated democracies, but this is likely do the number of cases. See Appendix A4 and Figure A5.4 specifically.

examination with a simple test, using violation decisions as the dependent variable, and the cumulative interventions on each claim/issue as the independent variable. The predicted probabilities calculated based on the resulting model are presented in Figure 5. The figure suggests that the number of interventions has to reach 5 for the violation probability to stabilize and exceed 10 for us to note any reduction in that probability. Recall that in the three claims subject to interventions under Article 3, only non-refoulement reaches the number of interventions (exceeding 10 by 2010). This level of repeated intervention may contribute to a reduction of violation decisions, potentially through a possible mechanism where the Court recognizes the salience of the issue over time. But even in the case of non-refoulement, we are careful not to attribute the reduction to interventions alone, as non-refoulement was signaled out to be salient in the Izmir conference at around the same time as it exceeds 10 interventions. We also cannot rule out that interventions and communications in High-Level Conferences coincided to single out non-refoulement as a salient issue area in a way that the Court found difficult to ignore. This could explain why non-refoulement received a different treatment than the other two claims where interventions also happened but did not overlap with High-Level Conferences, and other claims which were not subject to any intervention or communication in High-Level Conferences.

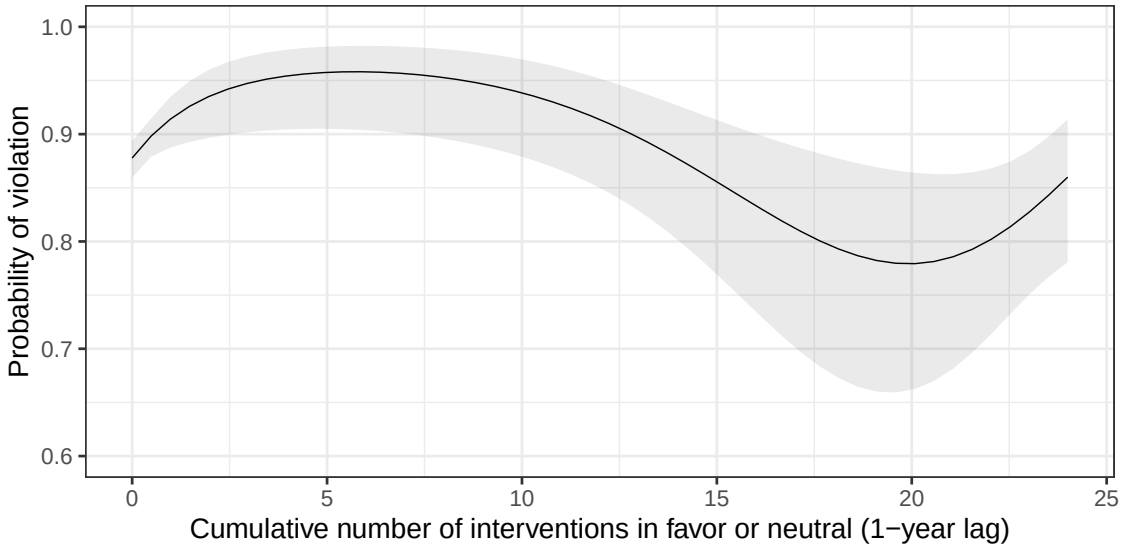

Figure 5: Evolution of violation probability as interventions (in specific issue areas) increase.

Finally, we use interventions to assess **H2**—the idea that salience communicated through repeated interventions will reduce violations more for states that are consolidated democracies and have good rule of law records. To do this, we run two models with interactions. The first one includes interaction between the consolidated democracy status and cumulative number of interventions. The second includes an interaction term between rule of law and cumulative interventions in that issue area. To specifically examine the interaction effect, we derive and plot predicted probabilities, presented in Figure 6.

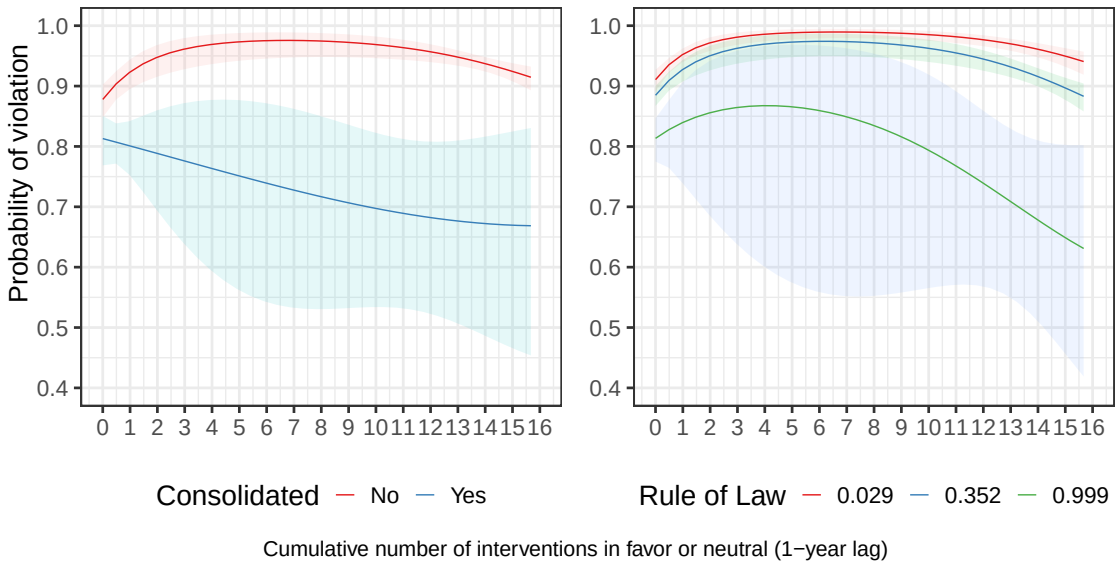

Figure 6: Interventions and the probability of violation decisions for different groups of countries according to their consolidated democracy status (Stiansen and Voeten 2020) or rule of law record (V-Dem).

We observe that consolidated democracies, or those with the highest respect for rule of law, are more likely to benefit from restraint that may be a reaction to a build-up of interventions in certain issue areas.

Overall, these results suggest that the Court receives and responds to signals about issue salience, and give hints as to the mechanism at play. Restraint in an issue area benefits all states within that area, albeit disproportionately favoring those states better positioned to capitalize on the adjusted criteria. We provide one piece of evidence to support this mechanism, already suggested by Stiansen and Voeten (2020). After deciding to show restraint in certain issue areas, the Court increases deference to domestic procedures, and those states that have better domestic procedures reap the benefit of fewer violation decisions. Figure 7 is a breakdown of non-violation decisions, categorizing them according to whether they show procedural deference to the state or not.

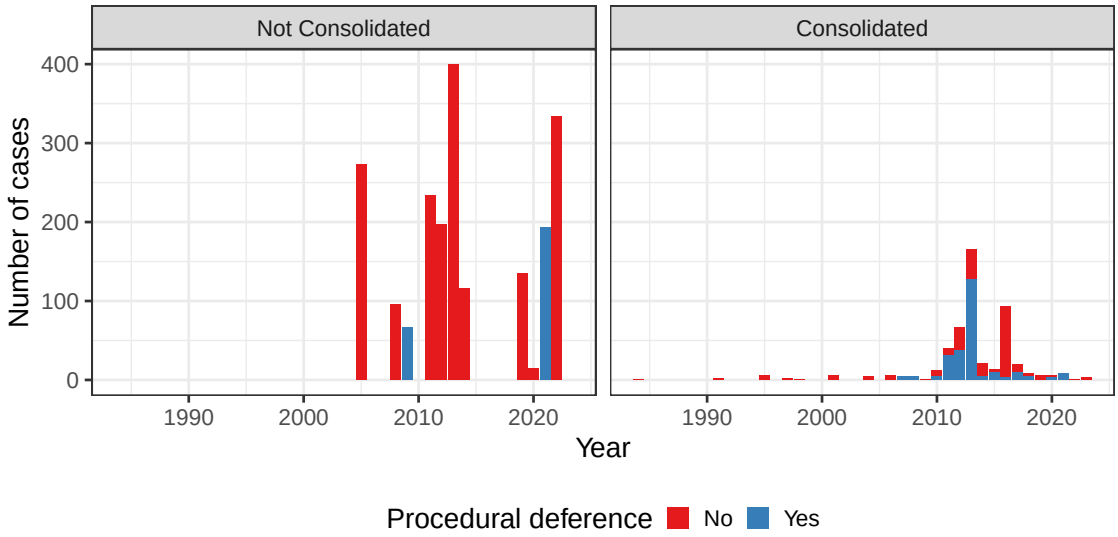

Figure 7: Procedural deference as a mechanism.

As it is clear, procedural deference is far more likely to be employed as a means to avoid finding a state in violation. This suggests that procedural deference is a plausible mechanisms that accounts for why some states benefit more than others as the Court shows more restraint in some issue areas.

8 Limitations and alternative explanations

We contend that the Court is reacting to criticism and becoming more lenient to states in politically salient issue areas. While our results are consistent with this story, and we have anecdotal evidence for judges taking notice of state criticism, we lack direct evidence for whether the court allocates restraint based on issue characteristics (such as salience) or state types. Related with this limitation, our findings are consistent with two plausible alternative explanations. First, the Court may be acting with restraint with regard to certain states or groups of states, rather than in certain issues. Second, the observed restraint—measured by reduction in violation rates—may be due to states improving their human rights records and facing fewer violations than before. We take these up in turn.

First, the Court may be acting with restraint towards certain states instead of lowering standards in specific issue areas. The reason we observe additional restraint in certain issue areas is not because the Court registers those issues as salient and behaves differently. Instead, it is because these issues areas are marked by an overrepresentation of states that tend to be the actual beneficiaries of restraint. This accords with explanations involving state or state-type based deference, according to which the Court may be becoming more lenient to some states by lowering standards in a way that makes it easier for them to escape violation decisions. Stiansen and Voeten (2020) argue along these lines to suggest

that consolidated democracies receive better treatment. We conduct a series of robustness checks to assess this possibility.

We consider whether the issues that saw reduction in violation decisions are those where consolidated democracies are overrepresented. Figure A5.2 shows that Non-Refoulement is indeed one of the five issue areas where consolidated democracies are respondents in more than half of the claims. So it may be that the reduction in Non-Refoulement is driven by the increased deference towards consolidated democracies. However, we see that this is not the entire story—Figure A5.3 shows that the post-2011 drop in violation rates is also visible in non-consolidated democracies. This suggests that our findings are not entirely driven by deference towards consolidated democracies—issue-based deference is present too, favoring non-consolidated democracies as much as consolidated ones, at least during a window of a few years after the Izmir conference.

Second, the reduction in violation decisions in certain issue areas may be because states begin to do better in those issue areas. That is, they manage to improve their human rights records in certain areas and thereby receive fewer violations in them. Unfortunately, we lack indicators relevant to each of our issue areas that we could use to trace state performance. Yet we can still test, first, if the state has done better on some general measures, and second, if the fewer violations in its asylum-related cases can be due to improvements in asylum procedures. In terms of with general measures, there is little change over time in how states fare in their rule of law scores.

On asylum specifically, qualitative evidence suggests that European countries' policies concerning asylum seekers have not gotten softer over time. On the contrary, several states have actively pursued increasingly more draconian strategies aimed at curbing the number of asylum applications and limiting access for refugees. This include border control arrangements such as the 2015 Turkey-EU border control agreement, or Swedish border control policy that targeted its southern border with Denmark between 2015 and 2021 (Solodoch 2021), as well as laws that curtail asylum seekers' freedom, such as Italy's recent detention policy requiring asylum seekers to be detained until their claim is processed, which usually takes up to two years (Pianigiani 2023). Since the 1990s, detention has been a central feature of migration management across Europe; however, it reached unprecedented levels in the 2000s (Badar 2004, 163). The Parliamentary Assembly of the Council of Europe in a 2010 resolution draw attention to rapidly increasing numbers of detained asylum seekers and irregular migrant in all Council of Europe states and explained that this is "due to the growing number of arrivals of irregular migrants and asylum seekers in certain parts of Europe, it is also to a large extent due to policy and political decisions resulting from a hardening attitude towards irregular migrants and asylum seekers." In addition, there are also much more subtle strategies such as the 2016 Danish legislative amendment that limited free legal aid offered to asylum seekers (Stappert and Gammeltoft-Hansen 2024, 104).

A final alternative explanation is worth considering—the use of friendly settlements. One can argue that one of the drivers of fewer violation decisions for high rule of law countries is their tendency to seek friendly settlements, resolving disputes amicably without requiring a formal judgment from the Court. However, this explanation is unlikely. Veronika Fikfak, in her comprehensive study on friendly settlements, finds that old member states, such as France, Germany, Switzerland, Denmark, the UK, or Spain, are three times less likely to utilize this procedure compared to new member states, such as Romania, Bulgaria, Poland, Slovenia, or Georgia—8% and 24% respectively (Fikfak 2022, 965). Countries that tend to benefit from more judicial restraint in our study belong to the former category. That is to say, their lower violation rates are less a product of friendly settlement practices and more a reflection of their legal and political strategies.

9 Conclusion

We have argued that international courts may adopt selective restraint as a strategy to mitigate and prevent backlash in response to criticism and negative feedback. Our analysis is supported by a disaggregated dataset covering various issue areas under the prohibition of torture and inhuman or degrading treatment—a particularly hard case for studying restraint. While the absolute prohibition of torture typically affords states little discretion in defining the scope of their obligations, our findings provide evidence that the Court has demonstrated restraint even in this context. Consistent with our expectations, this restraint has been selective, most notably in cases where the political salience of non-refoulement was clearly communicated, such as during a High-Level Conference. Our study highlights the critical role of issue characteristics in shaping judicial decisions and offers valuable insights into how courts navigate challenges to their authority while striving to uphold human rights protections.

This study has several implications. First, the most immediate consequence of this restraint is its impact on vulnerable groups, particularly migrants, asylum seekers, and refugees. When states benefit from favorable rulings, it is often the complainants who bear the burden of adverse outcomes. The European Court's inconsistent enforcement of the non-refoulement principle has created a notable shift, prompting applicants to seek recourse through other specialized bodies, such as the UN Human Rights Committee or the UN Committee Against Torture (Scott Ford 2024).

Second, by shedding light on the strategies employed by international courts in response to state criticism, our study contributes to a deeper understanding of the dynamics between courts and member states. Issue-based restraint can appear to serve as a tool for international courts to navigate politically sensitive issues while maintaining perceived neutrality and equal treatment. By strategically compromising in selected issue areas, courts can signal their willingness to consider member state concerns, thereby potentially mitigat-

ing criticism and preventing backlash. This means that the effects of political pushback and backlash might not have to be wholesale. Instead, courts may operate at two speeds: showing restraint for some issue areas while following an expansionist line of reasoning for others.

Selective restraint might be good temporarily for international courts. Yet, in the long run, this kind of restraint could also chip away at their authority. If international courts are seen as bending to state pressures, it could weaken their perceived independence and impartiality. This could be dangerous for international courts like the European Court. This shift could lead to a gradual disengagement from international courts as reliable forums for impartial adjudication. Civil society organizations and human rights advocates, often vital for the enforcement and legitimacy of court rulings, may turn away and seek alternative avenues for justice and accountability.

Third, this study essentially portrays the continuous involvement of member states in shaping norms and rules. The typical delegation story places states at the beginning of the lawmaking journey, whereby they negotiate and draft treaties and then leave it to international courts to interpret. International courts then exercise their functions somewhat autonomously and independently. What we show here indicates, however, that member states may occasionally get more involved in judicial lawmaking in a targeted manner around issues of interest with a view to generating more favorable outcomes. Further studies may usefully examine the extent to which our findings travel to other issues and other courts, and the role of states in steering judicial lawmaking.

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Appendix

The Law Behind Dispute International Courts and Selective Restraint in Times of Backlash

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2 January 2025

Contents

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A1 Definition and Classification Decisions Concerning Different Issues

In what follows, we present the different types of claims we identify under Article 3. These categories are based on the original dataset provided by Yildiz (2023) and extended through 2023.

- **Procedural obligations** are violated when states are unwilling or unable to carry out timely and effective investigations into arguable claims of the victims or when they obstruct the proper administration of justice. That is, this category encompasses states' duty to carry out effective and timely investigations and create procedures to administer justice.
- **Relatives of disappeared persons** relate to states' obligations towards the relatives of disappeared persons. Violations occur when states fail to conduct an effective investigation and inform the relatives (and sometimes the larger public) about the whereabouts of the disappeared persons in due course.
- **Detention conditions** relate to the material conditions in detention settings. Violations arise when a state is either unwilling or unable to provide detention facilities that comply with the minimum standards for the treatment of prisoners or detainees. This category also covers the detention of irregular migrants, refugees, and asylum seekers.
- **Legal protection/remedy** This category concerns states' unwillingness or inability to offer a sufficient legal remedy or an effective recourse to legal remedy. Violations also arise when a state refuses to protect, or its efforts fall short of protecting victims from abuse perpetrated by public officials or private individuals.
- **Medical care** refers to deficiencies in supplying necessary medical assistance or appropriate conditions for sick and disabled inmates.
- **Ill-treatment during custody** refers to a range of physical or mental abuse inflicted on victims after their arrest, namely during interrogation, detention, or imprisonment.
- **Intrusive detention measures** are unjustifiably stringent procedures imposed on inmates, such as strip searches, genital inspections, and solitary confinement, without any compelling reason.
- **Police brutality** is excessive violence used during arrest attempts, police raids, security checks, road controls, or riot control operations.
- **Refoulement** relates to potential violations that may occur if a state extradites a person to a country where they might be tortured or ill-treated.
- **Torture** is a (deliberate) infliction of severe pain to extract information or confession, to punish, or to intimidate.
- **Corporal punishment** refers to judicial or administrative orders that aim at punishing or disciplining individuals in various settings, such as households, schools, and detention centers.

- **Destruction of property, homes, and livelihood of victims** is a violation not due to the actual loss of property – which could be considered as a violation under other provisions of the Convention such as Article 8 (right to respect for private and family life), or Article 1 of Protocol 1 (protection of property). Rather, it is due to the destruction's effect on the victim's psychology and the extreme distress and hardship it generates.

- **Discrimination** refers to measures that are directed at certain groups or minorities based on their gender, sexual orientation, ethnicity, religion, or political beliefs.

- **Extrajudicial acts** (unacknowledged detention and extrajudicial killings) category concerns physical attacks, abductions, or extrajudicial killings that take place with direct involvement or acquiescence from state agents.

- **Family separation** refers to states' unjustified decision to remove children from the custody of parents and place them with foster parents or childcare institutions. This category also includes expelling unaccompanied minors – or at least one of their parents – from the country, causing family separation and economic hardship.

- **Euthanasia** concerns states' unwillingness to facilitate euthanasia by not legalizing or decriminalizing euthanasia or removing the responsibility of those who facilitate it.

- **Healthy environment** refers to state obligations to provide a healthy environment free from hazardous substances, toxins, or pollution that could impair their well-being and dignity or lead to severe health problems, which amounts to inhuman or degrading treatment.

A2 Interventions against states

We list below the interventions made against respondent states (that is, interventions that ask the Court to find the respondent state in violation) in cases dealing with various issues under Article 3:

Police Brutality (9 cases/interventions)

- Cyprus (2008 – *FOKA v. Turkey*)
- (6x) Cyprus (2009 – *ANDREOU PAPI v. Turkey*, *OLYMBIOU v. Turkey*, *CHRISTODOULIDOU v. Turkey*, *PROTOPAPA v. Turkey*, *STRATI v. Turkey*, *VRAHIMI v. Turkey*)
- (2x) Cyprus (2010 – *ASPROFTAS v. Turkey*, *PETRAKIDOU v. Turkey*)

Non-Refoulement (3 cases, 5 interventions)

- Azerbaijan (2010 – *JOESOEBOV v. Netherlands*)
- Georgia (2016 – *PAPOSHVILI v. Belgium*)
- Bulgaria (2019 – *ILIAS and AHMED v. Hungary*)

- Poland (2019 – *ILIAS and AHMED v. Hungary*)
- Russia (2019 – *ILIAS and AHMED v. Hungary*)

Failure to Provide Acceptable Detention Conditions (1 case, 2 interventions)

- Romania (2011 – *IVANŢOC and Others v. Moldova and Russia*)
- Turkey (2011 – *IVANŢOC and Others v. Moldova and Russia*)

Failure to Inform Relatives of Disappeared Persons (1 case, 1 intervention)

- Cyprus (2009 – *VARNAVA and Others v. Turkey*)

Failure to Provide Legal Protection/Remedy (1 case, 1 intervention)

- Georgia (2016 – *SHIOSHVILI and Others v. Russia*)

We observe that there are not many such interventions. We have identified only 18 of them, half of which belong to one state, Cyprus. Moreover, a cursory look at these interventions suggests that they are driven by relations between states and the intervening states' willingness to support their nationals before the Court. For instance, all the interventions made by Cyprus are made against Turkey in cases involving Cypriot nationals. Such interventions are not concerned with or critical about the development of the Court's jurisprudence dealing with particular issues. We also find no Article 3 case which attracted both an intervention against the respondent and other types of interventions (a neutral one or an intervention in favor of the respondent state). This suggests that the Court cannot learn much about how states on the whole view the case and the issues involved. For all these reasons, we exclude interventions against respondent states from our analyses.

A3 Descriptive graphs

Figure A3.1 provides an overview of Article 3 related claims over time, as recorded in the year of the final ruling. From the first case when they were invoked in 1967, Article 3 related claims were rare until the early 2000s, when they began to increase significantly. After a period of increase at a slower pace from the 2010s, and we can observe a post-Covid peak in the cases concluded between 2021/2022.

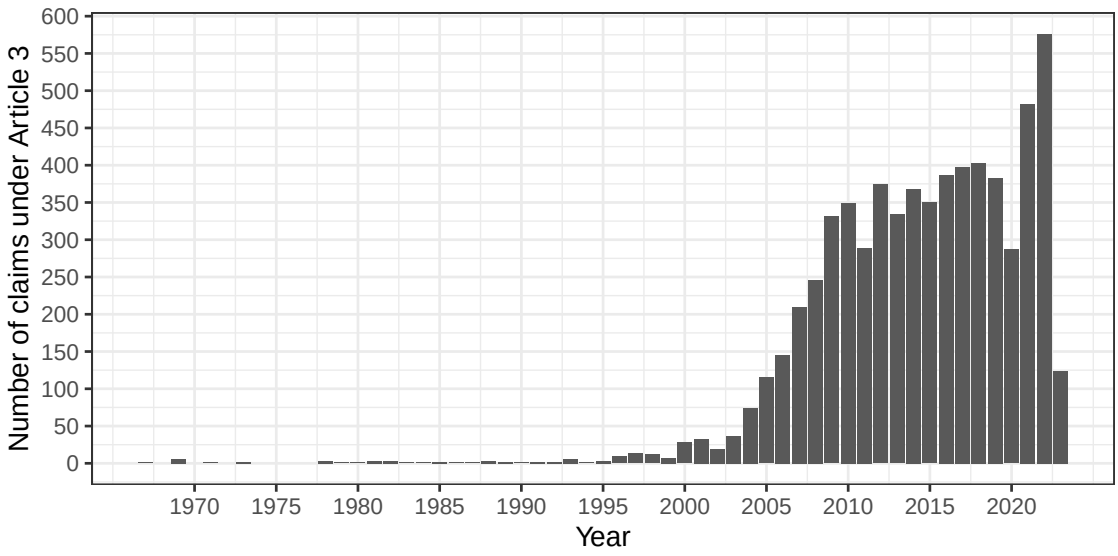

Figure A3.1: Number of Article 3 related claims over time.

Figure A3.2 shows the top 10 respondent states and counts the number of claims under Article 3 they had to respond for in the entire time period. We have a skewed distribution in which a good plurality of Article 3 claims concerned Russia, followed by high numbers of claims in Turkey, Ukraine, and Romania. Greece, Bulgaria, France and Poland follow, with between 100 and 300 claims each.

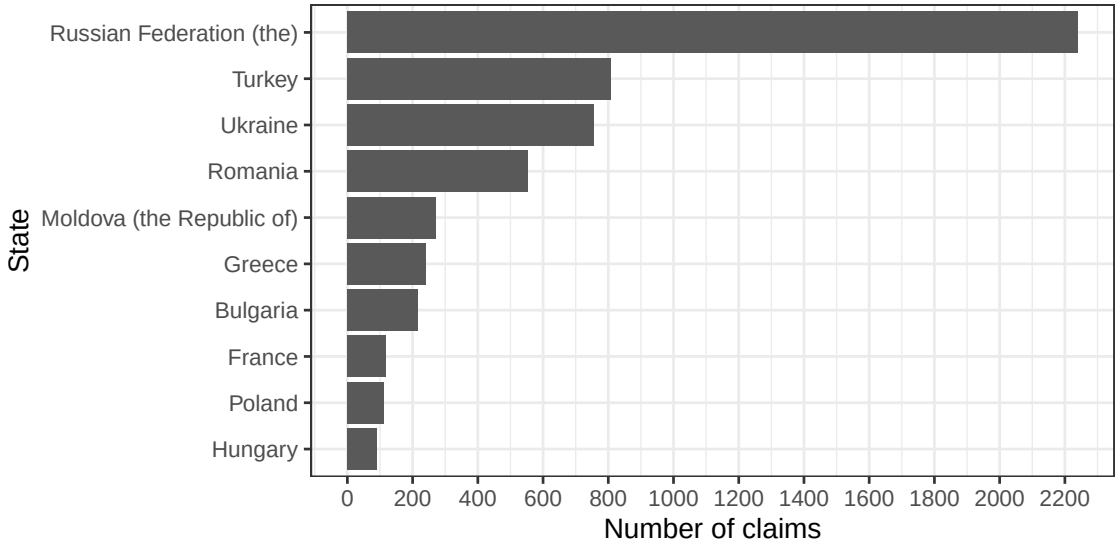

Figure A3.2: Top 10 respondent states in Article 3 cases, according to number of claims they are concerned with.

Figure A3.3 breaks down this evolution in the Article 3 case load according to the 10 most common claim types. We observe a steady increase in the two most popular types of claims: detention conditions and legal protection/remedy, and an exceptionally significant

jump in the intrusive detention measures category after 2020. In others, there seems to be a leveling-off effect after an initial rise (see, for instance, ill-treatment during custody and non-refoulement).

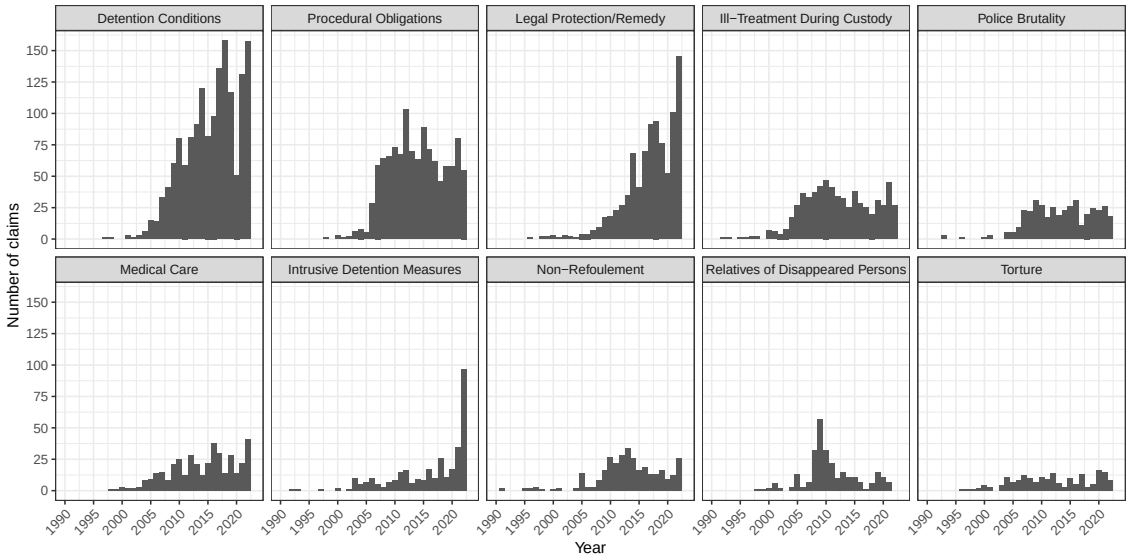

Figure A3.3: Evolution in the occurrence of different claims over time, focusing on the most frequent nine claim types.

A4 Regression output

The regression output for the difference-in-differences models used to assess the signals made during High-Level Conferences are presented below.

The first output represents models with (1) and without (2) controls. The second output runs the test with only the rule of law score as a control variable in two subsets: consolidated democracies and others. We also present a graphical representation of this latter test (with two subsets) in Figure A4.1.

Dependent Variable:	Violation decision	
Model:	(1) Without controls	(2) With controls
2005 × Non-Refoulement	-0.1156 (0.0693)	-0.1481** (0.0528)
2006 × Non-Refoulement	-0.1225 (0.0697)	-0.0682 (0.0602)
2007 × Non-Refoulement	-0.1336** (0.0529)	-0.0729 (0.0650)
2008 × Non-Refoulement	-0.1447** (0.0583)	-0.1307* (0.0625)
2009 × Non-Refoulement	0.0163 (0.0714)	0.0766 (0.0793)
2011 × Non-Refoulement	-0.4826*** (0.0719)	-0.4389*** (0.0612)
2012 × Non-Refoulement	-0.4048*** (0.0537)	-0.3533*** (0.0536)
2013 × Non-Refoulement	-0.4195*** (0.0521)	-0.3651*** (0.0645)
2014 × Non-Refoulement	-0.2321*** (0.0656)	-0.2320*** (0.0649)
2015 × Non-Refoulement	-0.2064*** (0.0476)	-0.1819*** (0.0471)
2016 × Non-Refoulement	-0.4085*** (0.0298)	-0.3319*** (0.0427)
2017 × Non-Refoulement	-0.2754*** (0.0300)	-0.2535*** (0.0268)
2018 × Non-Refoulement	-0.1100* (0.0554)	-0.1153*** (0.0380)
2019 × Non-Refoulement	-0.0197 (0.0454)	-0.0487 (0.0514)
2020 × Non-Refoulement	-0.2200*** (0.0485)	-0.2102*** (0.0395)
2021 × Non-Refoulement	-0.2731*** (0.0585)	-0.2623*** (0.0667)
2022 × Non-Refoulement	-0.1302** (0.0530)	-0.1410** (0.0578)
2023 × Non-Refoulement	-0.2991*** (0.0698)	-0.3042*** (0.0815)
Consolidated democracy		-0.1722** (0.0589)
Key case		-0.0348 (0.0595)
Grand Chamber decision		-0.0302 (0.0990)
ATT	-0.2877*** (0.0298)	-0.2633*** (0.0311)
Claim (Issue) FEs	Yes	Yes
Year FEs	Yes	Yes
Observations	6,151	6,150
R^2	0.12360	0.14446
Within R^2	0.01058	0.03456

Clustered (state & issue) standard-errors in parentheses.

Signif. Codes: ***: 0.01, **: 0.05, *: 0.1

Table A4.1: The main tests about the impact of the High-Level Conferences, with and without controls.

Dependent Variable:	Violation decision	
Model:	(1) Consolidated	(2) Not onsolidated
2005 × Non-Refoulement	0.8176*** (0.0984)	-0.3640** (0.1285)
2006 × Non-Refoulement	0.0177 (0.0961)	0.0924 (0.0628)
2007 × Non-Refoulement	-0.1518 (0.1652)	0.0668* (0.0339)
2008 × Non-Refoulement	0.1422 (0.1967)	-0.2358*** (0.0549)
2009 × Non-Refoulement	0.1838 (0.2107)	-0.2233* (0.1075)
2011 × Non-Refoulement	-0.2117 (0.1781)	-0.5542*** (0.0703)
2012 × Non-Refoulement	-0.2845** (0.1151)	-0.3209*** (0.0495)
2013 × Non-Refoulement	-0.0178 (0.1545)	-0.5658*** (0.0611)
2014 × Non-Refoulement	-0.0933 (0.2041)	-0.2110*** (0.0665)
2015 × Non-Refoulement	-0.1098 (0.1718)	-0.0360 (0.0464)
2016 × Non-Refoulement	-0.1966* (0.0922)	-0.0186 (0.0399)
2017 × Non-Refoulement	-0.2288 (0.1317)	-0.0243 (0.0451)
2018 × Non-Refoulement	-0.0700 (0.1485)	0.0102 (0.0364)
2019 × Non-Refoulement	0.0911 (0.1676)	-0.0928* (0.0442)
2020 × Non-Refoulement	-0.0387 (0.1558)	-0.1914*** (0.0535)
2021 × Non-Refoulement	0.0999 (0.2979)	-0.2981*** (0.0593)
2022 × Non-Refoulement	0.3889** (0.1332)	-0.2344*** (0.0407)
2023 × Non-Refoulement	-0.8481*** (0.2510)	-0.1080*** (0.0336)
Rule of Law (V-Dem)	-1.363 (1.293)	-0.1072** (0.0475)
ATT	-0.1129 (0.0919)	-0.2220*** (0.0210)
Claim (Issue) FEs	Yes	Yes
Year FEs	Yes	Yes
Observations	698	5,451
R^2	0.13679	0.13514
Within R^2	0.05090	0.01451

Clustered (state & issue) standard-errors in parentheses.

Signif. Codes: ***: 0.01, **: 0.05, *: 0.1

Table A4.2: The main tests about the impact of the High-Level Conferences run for consolidated democracies and other separately.

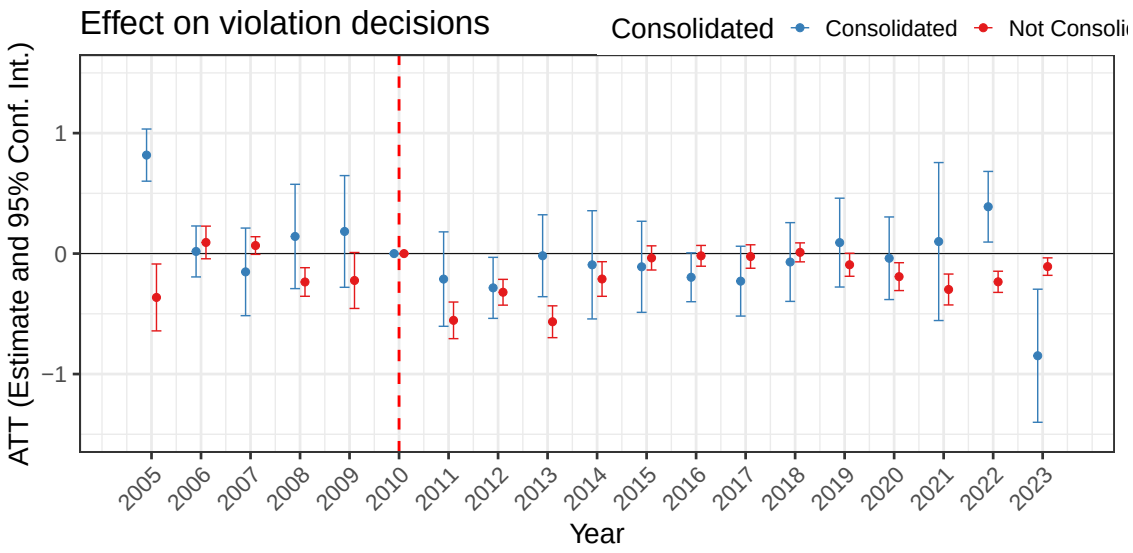

Figure A4.1: Graphic representation of dynamic difference-in-differences used in two subsets: consolidated and non-consolidated democracies.

A5 Robustness checks

A5.1 The drivers of the difference (in differences)

We show in Figure A5.1 that the significant difference between treated and control groups post-treatment is driven by the reduction in the violation rate of Non-Refoulement cases rather than an increase in the violation rate of cases concerning other claims.

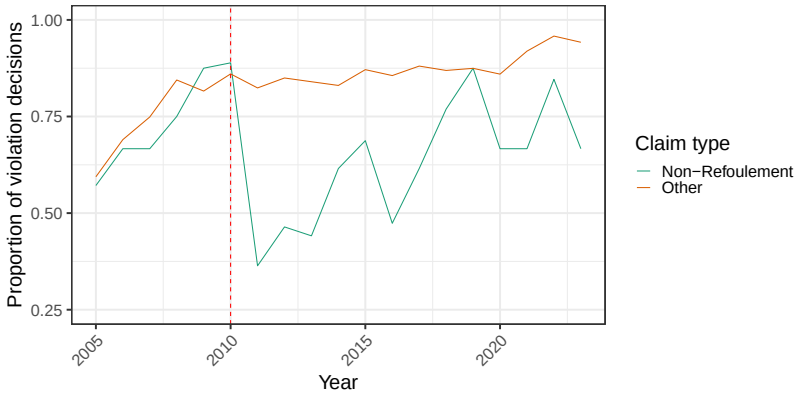

Figure A5.1: Violation rates for Non-Refoulement cases and the rest over time.

A5.2 Overrepresentation of some states in some issues

We consider whether some types of states, notably, consolidated democracies, are overrepresented in some areas, and the Court may therefore be showing restraint towards them in a way that would reflect on our results at the issue-level. In Figure A5.2, we present the

distribution of respondent states according to whether they are consolidated democracies or not (as per Stiansen and Voeten (2020)). We only consider the 10 most common issues.

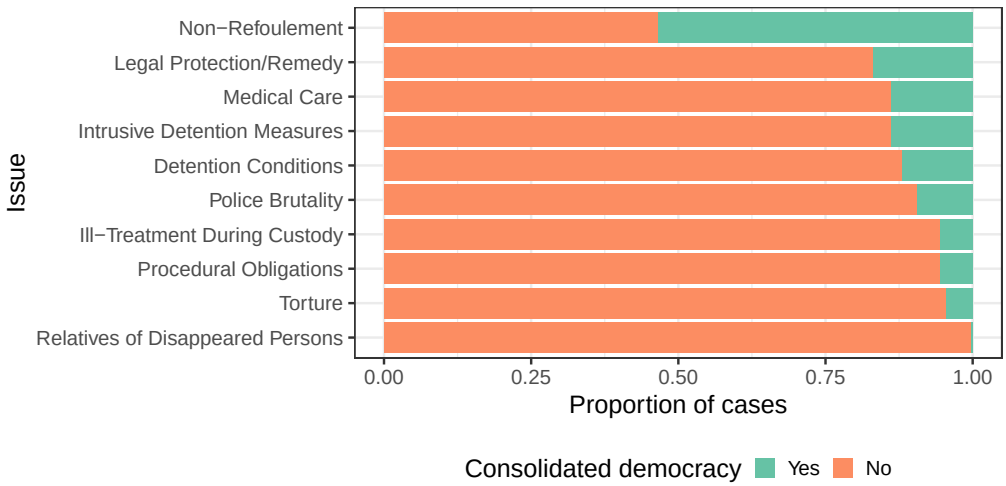

Figure A5.2: The distribution of cases within each issue area according to whether the respondent state is a consolidated democracy—as categorized by Stiansen and Voeten (2020)—or not.

It appears that Non-Refoulement is the one issue area (among the ten most common ones) that has the highest share for consolidated democracies.

In the descriptive Figure A5.3, we show that the decrease we not in the violations of the Non-Refoulement principle are not entirely driven by reduction in violation decisions for consolidated democracies.

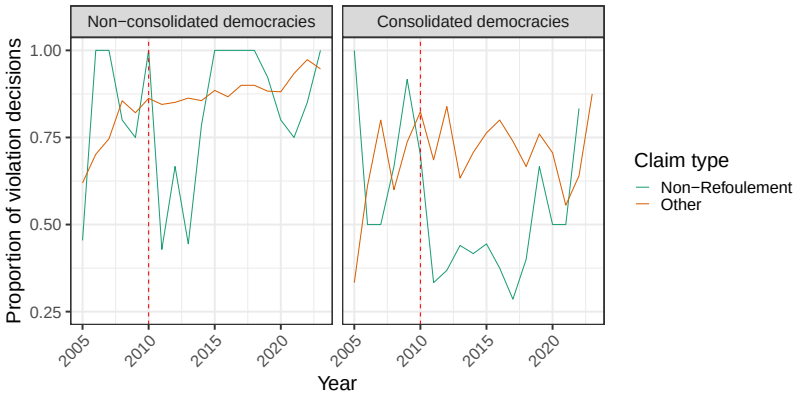

Figure A5.3: Violation rates for Non-Refoulement cases and the rest over time, presented for consolidated and non-consolidated democracies.

A5.3 Removing outliers

To verify that our results about Non-Refoulement are not driven by certain states, we run tests without potential outliers. The three potential outliers are Russia (with 88 cases),

Sweden (with 36 cases), and France (with 31 cases). We present our results in Figure A5.4 below.

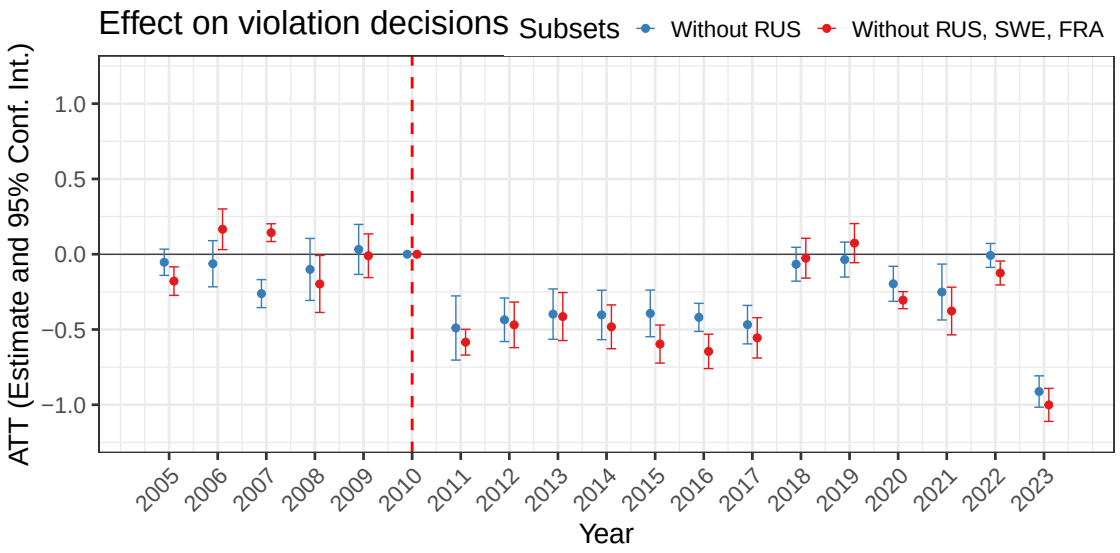

Figure A5.4: Main tests about the impact of the High-Level Conferences without potential outliers.

We observe that the patterns we have in our main tests about the impact of the High-Level Conferences are even clearer when we remove outliers. Although there appear some pre-treatment differences, the 6-year period from 2011 clearly stands out for its low probability of violation in Non-Refoulement cases compared to other issues.

A5.4 Does criticism matter

Our argument focuses on issue-based dividends states would obtain because the issue is recognized as politically salient by the Court. Still, there is value in exploring if being the ones to raise criticism—and thus contribute to making an issue salient—provides additional benefits to states. To do so, we use a triple-differences regression with the following equation:

$$Y = \beta_0 + \beta_1 \text{NonRefoulement} + \beta_2 \text{Year} + \beta_3 \text{Critics} + \beta_4 (\text{NonRefoulement} \times \text{Year}) + \beta_5 (\text{NonRefoulement} \times \text{Critics}) + \beta_6 (\text{Year} \times \text{Critics}) + \beta_7 (\text{NonRefoulement} \times \text{Year} \times \text{Critics}) + \varepsilon$$

In this case, the *Critics* variable takes the value of 1 if the state in question is one of the four explicitly raising non-refoulement as a salient issue in the Izmir conference (Sweden, Slovakia, Russia, and Turkey). The parameter of interest is represented by β_7. We again look for dynamic effects using the categorical *Year* variable with 2011 as the reference year.

Figure A5.5 depicts the estimated ATT based on a triple-differences regression.

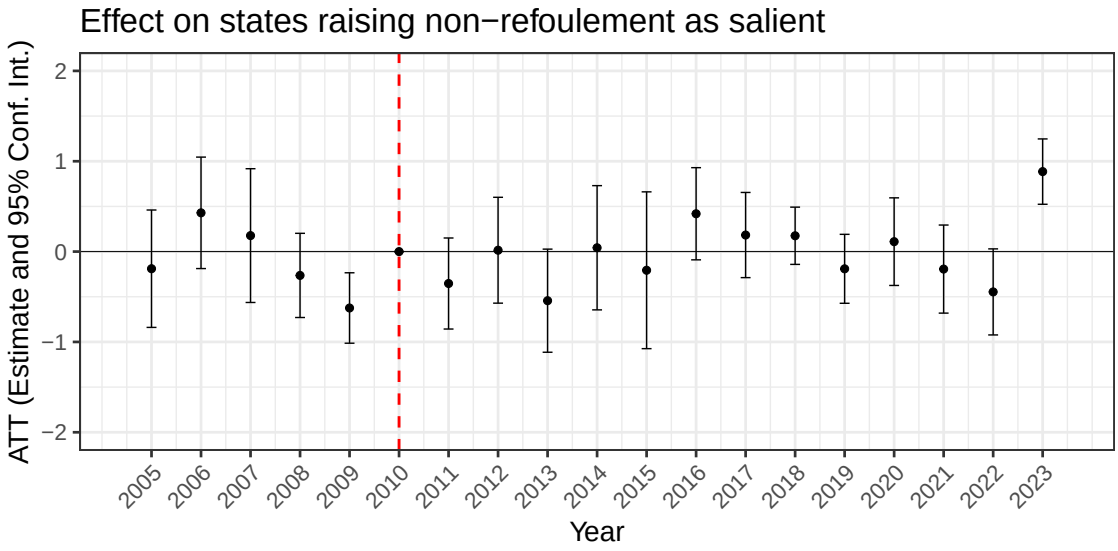

Figure A5.5: Investigating the possible effect of direct criticism from states.

We fail to observe any notable decrease in the violation rate of concerned states relative to others. States specifically raising non-refoulement during the Izmir Conference do not seem to receive additional benefit from raising the issue. Overall, the two tests suggest that while states can communicate the salience of an issue, the Court's response does not specifically favor those states raising the issue. Instead, its action benefits all sorts of states having to deal with non-refoulement claims.

References

Stiansen, and E. Voeten (2020). Backlash and Judicial Restraint: Evidence from the European Court of Human Rights. *International Studies Quarterly 64*(4), 770–784.

Yildiz, E. (2023). *Between Forbearance and Audacity: The European Court of Human Rights and the Norm against Torture*. Studies on International Courts and Tribunals. Cambridge University Press.