The European Journal of International Law Vol. 36 no. 1

Book Reviews

Ezgi Yildiz. ***Between Forbearance and Audacity: The European Court of Human Rights and the Norm against Torture***. Cambridge: Cambridge University Press, 2023. Pp. 276. €99.48. ISBN: 9781009103862.

In *Between Forbearance and Audacity: The European Court of Human Rights and the Norm against Torture*, Ezgi Yildiz advances a new generalizable framework to understand the conditions under which international courts can be expected to act conservatively (with 'forbearance' or otherwise restraint) or progressively (with 'audacity' or with an activist streak). Yildiz does this through the vast case law on Article 3 of the European Convention on Human Rights (ECHR) – namely, the prohibition of torture, inhuman and degrading treatment.[1] Altogether breaking new ground in the scholarship, particularly on international courts as well as 'law and torture', the explanatory power of the framework advanced requires a closer examination, which I turn to later in this review.

The contributions of the European Commission of Human Rights and the European Court of Human Rights (ECtHR) to the contemporary interpretation of torture and inhuman and degrading treatment cannot be understated. The 15-word prohibition in Article 3 of the ECHR belies an unparalleled force – with its jurisprudence leaving indelible imprints on the definition in the United Nations (UN) Convention against Torture as well as on the jurisprudence of the Inter-American Court of Human Rights (IACtHR).[2] Since the first European cases, the transformation of torture's interpretation has been global and mobile, with institutions drawing on one another's jurisprudences, albeit selectively.[3] Since the inception of the ECHR, significant geopolitical developments in post-World War II Europe have been viewed through the prism of torture's prohibition, including the Greek junta, the 'Troubles' in Northern Ireland, the Central Intelligence Agency's 'extraordinary rendition' programme, the Kurdish-Turkish conflict, the militarization of Europe's borders and, more recently, Russia's invasion of Ukraine.

Outside of these events, societal shifts concerning uses of state violence have also been argued and assessed through torture's prohibition, with the death penalty,

[1] 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

[2] M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (2010), at 195–202; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.

[3] See L. Oette, *The Transformation of the Prohibition of Torture in International Law* (2024), ch. 2.

deportation of non-citizens, irreducible life imprisonment, prolonged solitary confinement, prisoner voting rights, enforced disappearances, forced sterilization, involuntary psychiatric treatment and violence against women all subjected to judicial scrutiny at some point. These causes are reflected not only in the European case law but also in petitions especially before the UN Committee against Torture, the UN Human Rights Committee as well as the IACtHR. Whilst case law on the prohibition of torture would seem now to be relatively fixed on the context of detention, much more has been, and is likely to be, covered without foreseeable end. On such scores, the ECtHR cannot be celebrated solely as a 'master of characterisation' but, rather, as one of adaptation.[4]

This dynamic expansion was presciently predicted by Max Sørensen, then an established Danish legal academic and later a judge on the ECtHR. In 1975, Sørensen characterized torture's prohibition as a 'classic example of vague phraseology', susceptible to liberal social values.[5] That the 'living instrument' doctrine came to be enunciated in a case addressing the prohibition is telling in this respect.[6] This responsivity of the Court has engendered an unpredictability, with oscillations across similar cases perennially picked at by advocates, adjudicators and academics alike. Upon closer critical readings of cases, judicial recognition and adaptation appear more constricted and calculated than simply expansive and progressive. That is to say, there is also a long counter-history of denying, downgrading and delimiting in this terrain. However one characterizes the oscillations in its case law, the fact that the Court has not been a pathbreaker in numerous areas is without question, and it has needed to be relentlessly pushed in torture cases.

Beyond sweepingly celebratory accounts of the ECtHR's relevance and responsivity on the issue of torture,[7] how can its progress in relation to this norm be empirically measured? Where does one even begin in assessing such a hallowed institution as the ECtHR? What precisely explains the interpretive approach that the ECtHR, and its constitutive parts over its history, has taken, and what dictates its wavering discretion? What have really been the conditions for regressive and progressive anti-torture adjudication in its five decades? These questions can be equally asked of the courts and committees similarly authoritative to interpret the prohibition of torture. The experience elsewhere, particularly of the UN Committee against Torture, also speaks of a creeping conservatism on certain issues (gender and migration), displacing the progress of perceived previous decades. The question of how to account for such shifts, therefore, can easily be posed of that institution too.

Yildiz's scholarship, including in the pages of this journal,[8] has long asked and answered these questions in the European context. Taking the ECtHR's normative

4 ECtHR, *Scoppola v. Italy (no. 2)*, Appl. no. 10249/03, Judgment of 17 September 2009, at 54.

5 Sørensen, 'Do the Rights and Freedoms Set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975?', Fourth International Colloquy, Rome, 1975, at 89.

6 ECtHR, *Tyrer v. United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978.

7 See, e.g., A. Carcano and T. Scovazzi, *Upholding the Prohibition of Torture: The Contribution of the European Court of Human Rights* (2023).

8 Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights', 31(1) *European Journal of International Law* (2020) 73.

development of torture's prohibition over five decades as the object of study, her recent book *Between Forbearance and Audacity* advances the 'law and torture' scholarship in important ways. Yildiz charts how prevailing conditions pertaining to three periods in the Court's lifetime (as accepted generally in the broader scholarship on the ECtHR as the 'Old Court' [1959–1998], 'New Court' [1998–2010] and 'Reformed Court' [2010–present]) have impacted the 'norm against torture' over time. She undertakes this task by coupling extensive interviews with judges at the ECtHR, which provide great insights into judicial attitudes, together with a (painstakingly) comprehensive content analysis of almost the entirety of Article 3 case law. The resulting mix of the historical, institutional, legal-doctrinal, political and empirical is a first for a 'law and torture' monograph, which in itself sets this book apart from other invaluable contributions to the field.[9]

In an introduction and eight chapters, Yildiz uses the broader scholarship on international courts to inform her forbearance-audacity continuum. This is a framework that she then uses to explain torture's normative development witnessed in the ECtHR's Article 3 case law. 'Forbearance', for Yildiz, refers to judicial interpretations showing restraint and deference to states. 'Audacity', on the other hand, refers to judicial interpretations opting for expansive conceptualization and adopting additional state obligations. Two additional markers are introduced between these two poles: '(1) general forbearance to (2) selective audacity, (3) selective forbearance, and finally, (4) general audacity' (at 26). Two additional measures determine whether a decision is characterized as either forbearing or audacious: the 'first is the willingness to recognise new obligations or new rights (*novel claims*); the second is the propensity for finding a violation overall (*propensity*)' (at 21). Yildiz also helpfully disaggregates the case law beyond negative and positive obligations, innovatively indexing a wide array of issues such as police brutality and non-refoulement under negative obligations, adding a welcome level of precision to her findings.

Chapter 1 provides an overview of scholarship on international organizations, particularly of courts beyond the anti-torture norm (broadly sketching out how international courts have strategically manoeuvred to ensure autonomy, authority, relevance and survival in the face of their member-states' interventions and influence), followed by an overview of internal processes and internal perceptions of the ECtHR in Chapter 2 (situating the vast and invisible machinery producing decisions). Chapter 3 addresses the methodological choices made by the author in mapping out norm change. The book then shifts gears to offer a systematic review, both qualitatively and quantitatively, of what the Commission and Court have chosen to recognize under Article 3. Chapter 4 focuses on the 'Old Court', Chapter 5 on the 'New Court', Chapter 6 on the embrace of the positive obligations doctrine and Chapter 7 on how the 'Reformed Court' has been rattled by recent political pushback. A useful exegesis concludes the book in Chapter 8. These different pieces of the puzzle come to fit neatly

[9] N. Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (2021); C. Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (2021).

(and novelly) together, with the concepts of forbearance and audacity, as found in the title, doing some heavy lifting and weaving.

Yildiz opens on the 'audacious' note struck in *Opuz v. Turkey*,[10] where the ECtHR delivered an exemplary decision concerning the Turkish authorities' passivity concerning violence against women. This decision is exemplary primarily because the Court attended to the systemic dimensions of the harms brought before it. The Court looked to developments in international law, considered third-party evidence of systemic gender discrimination and ultimately introduced the doctrine of positive obligations into the Court's jurisprudence. The Court in *Opuz*, writes Yildiz, 'effectively took *thou shalt not torture* and made it *thou shalt prevent torture*' (at 6) and served to implicate the Turkish state. The Court could well have chosen not to break new ground. So why did it decide to flex such discretion? Yildiz offers complex explanations here, making connections between legal and non-legal readings, between doctrinal and empirical material and between different periods in the life of the Court. Yildiz generalizes that audacity is 'likely to increase when its decisions are: (1) in line with widespread societal needs, (2) supported by legal principles and jurisprudence developed by other courts or institutions, and (3) actively promoted by civil society groups' (at 29). She finds that these conditions were aligned in *Opuz.* A comparison can readily be drawn here with the IACtHR, an institution that comprehensively canvasses international standards in its judgments as a rule (not selectively as is apparent in the workings of the ECtHR).

The different periods are characterized at some length: the 'Old Court' operated safely and largely appeased member states; the 'New Court' started lowering the minimum threshold of severity for harms to enter the prohibition's purview and took strides forward in more closely scrutinizing state practices on a number of new fronts (preserving the prohibition's absolute nature against national security arguments), though it still proved slow on some issues (the recognition of discriminatory character of certain instances of police abuse, particularly against the Roma); while the 'Reformed Court' stepped back on politically charged fronts (non-refoulement) whilst selectively expanding on others (police brutality). Expectedly, there are exceptions and anomalies, such as when the ECtHR pulled in opposite directions months apart, as in *Ireland v. United Kingdom* and *Tyrer v. United Kingdom*.[11] These are acknowledged and addressed but partly so. One nevertheless wonders about the more recent jumbled jurisprudence on irreducible life sentences[12] and the deportation of non-citizens.[13] That the Court has embodied (and continues to embody) both 'audacious' and 'forbearing'

[10] ECtHR, *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009.

[11] ECtHR, *Ireland v. United Kingdom*, Appl. no. 5310/71, Judgment of 18 January 1978; *Tyrer*, *supra* note 6.

[12] ECtHR (GC), *Vinter and Ors v. United Kingdom*, Appl. no. 66069/09, Judgment of 9 July 2013; ECtHR, *Hutchinson v. United Kingdom*, Appl. no. 57592/08, Judgment of 3 February 2015; ECtHR *Petukhov v. Russia (no. 2)*, Appl. no. 41216/13, Judgment of 12 March 2019.

[13] ECtHR, *N. v. United Kingdom*, Appl. no. 26565/05, Judgment of 27 May 2008; ECtHR, *Paposhvili v. Belgium*, Appl. no. 41738/10, Judgment of 13 December 2016; ECtHR (GC), *Savran v. Denmark*, Appl. no. 57467/15, Judgment of 1 October 2019 and 7 December 2021.

impulses in the same period – in the same year even – remains difficult to definitively reconcile.

Notwithstanding such long-standing critique, Yildiz presents some significant findings: that how states will potentially receive any given judgment has direct influence on judges' decision-making; the lack of resistance internally to the ECtHR's incorporation of positive obligations; that the ECtHR has long resisted acknowledging a discriminatory dimension to police violence across the three periods; the still very high proportion of inadmissibility decisions (at 149); the issue-specific lowering of thresholds (especially where political stakes are viewed as low); and the increased number of violations for inactions rather than actions. Overall, it is evidence that the prohibition has seen vast change through many means and modes. The ECtHR is willing to find violations of Article 3, especially where it concerns positive findings of procedural violations (as opposed to substantive) and where those generally qualify as degradation (as opposed to torture).

Yildiz overlooks, however, a significant lack of change at the prohibition's core: how (and how rarely) the ECtHR has specifically used the category of torture (as compared to inhuman and degrading treatment). The symbolically charged category of torture, my own research reveals, remains closely guarded.[14] The 1978 *Ireland* judgment, with its characterization of torture as needing a 'special stigma', still casts a long shadow over torture-specific qualifications, associating the concept with physically overt manifestations to this day.[15] Psychological suffering, on its own, in the absence of physical marks, is yet to be understood as torture, particularly in the vast case law on solitary confinement. This is all to say that the Court has not come far in at least one important way in five decades. Comparable international courts and committees have followed the ECtHR's failures on these fronts. This is a frontier for future research as well as legal practice.

Indeed, there are many directions for future research that arise as a result of this book. Further empirical and critical scholarship can conceivably widen Yildiz's examination of the related registers of regress and progress. There is a fascinating connection made by Yildiz, for instance, in how evidentiary practices have directly impacted norm development. This is identified by Yildiz in how psychological evidence entered into the Court's vision in the *Greek Case* leading to the Commission's emphasis on psychological suffering (at 112).[16] It is unclear, however, how evidentiary practices have changed over time in the Court's use of third-party submissions in such instances. Thus, 'how evidentiary practices have impacted norm development', as with the torture norm specifically as well as more generally, would make for important future research.

[14] Cakal, 'Registering Time in Recognising Torturous Harm: Figuring the Single, Plural and Historical in Torture's Adjudication', 33(2) *Social and Legal Studies* (2024) 276.

[15] Farrell, 'The Marks of Civilisation: The Special Stigma of Torture', 22(1) *Human Rights Law Review* (2022) 1.

[16] *Denmark, Norway, Sweden and Netherlands v. Greece* [The Greek Case] [1969] ECtHR Appl no 3321/67, 3322/67, 3323/67, 3344/67, Report of 5 November 1969.

Like the institutional, legal and political contexts covered by Yildiz, the field could further connect and ground the ECtHR to its broader socio-cultural context. That the Court seems to make most advances when a broader socio-political 'consensus' is reached indicates that the Court is not so much proactive as it is reactive. To momentarily recentre *Opuz*, why was it that the Court had not ruled in the same fashion before, stepping in only following international developments relating to the recognition of torturous experiences of women?[17] Should expansions by the Court even merit praise when broader conditions are ripened elsewhere and by others? Societal shifts are in motion often long before international law generally channels and consolidates them. It is important to assess the Court's responsivity to these shifts and the time it takes to follow these developments. Speaking of time, how long it takes for states to comply with a judgment – here, we continue to bear Turkey in mind[18] – could be used to reflect on the Court's performance. What are the domestic consequences of the Court's actions, whether intended or unintended? Scholarship attests, for instance, to the coercive consequences of positive obligations in strengthening states' carceral apparatus to potentially do more harm.[19] Relatedly, added measures of progress can be found away from the state–Court interface and closer to the ground where judgments take effect, such as in homes, institutions, communities and societies. Progress, therefore, requires us to pursue consequences beyond the text of the judgment.

Last but not least, the question of whether the forbearance-audacity framework adds much to well-worn activism and restraint is also begged. Yildiz's is an institutional account and not, as is usually the case, judge-centric. The ECtHR's Registry is thrust front and centre and importantly so, given that it has unquestionably shaped the jurisprudence through deciding the Court's working methods. Thus, given how tailored the framework is to this unique apparatus, a critical question remains whether the framework can readily be transposed to other human rights adjudicatory bodies that are not as sophisticated.

In all, Yildiz's account is far from celebratory of the ECtHR and rightfully so. What she offers is a fresh contextualization of the magnitude and pace of torture's normative developments in the scheme of European human rights law. This is as much a book about the development of positive obligations on states to prohibit torture as it is about institutional histories, processes and conditions and as much about backlash to international courts as it is about torture's normative development. Navigating the trickiest of terrains and pushing beyond the doctrinal, *Between Forbearance and Audacity* is an out-and-out unparalleled contribution to the 'law and torture' scholarship, equipping and enriching its empirically impoverished shelves. It is a rigorously researched resource with an assured theoretical and methodological grounding and a

[17] The Court itself referred to the work of the Committee on the Elimination of All Forms of Discrimination against Women, the UN Special Rapporteur on Violence against Women, the Committee of Ministers of the Council of Europe and the Inter-American Court on Human Rights in its decision.

[18] ECtHR, *Kavala v. Turkey*, Appl. no. 28749/18, Judgment of 10 December 2019; ECtHR, *Demirtaş v. Turkey (No. 2)*, Appl. no. 14305/17, Judgment of 22 December 2020.

[19] L. Lavrysen and N. Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (2020).

seamless presentation of interview material, which conveys its findings with balance and clarity.

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https://doi.org/10.1093/ejil/chaf010

Charalampos Giannakopoulos. ***Manifestations of Coherence and Investor-State Arbitration***. Cambridge: Cambridge University Press, 2022. Pp. 356. £85.00. ISBN: 9781009153850.

Legal systems are built upon abstract concepts that are notoriously difficult to generally define. It is unsurprising that some of the most cutting-edge issues in law and policy-making hark back to fundamental questions that zero in on the meaning of justice and fairness. As a result, legal studies traditionally oscillate between general theories in law, on the one hand, and understanding their real-life manifestations, on the other. Coherence is one such concept. It is a pervasive ideal in law and beyond. It is an intuitive, innate foundation upon which our personal and societal structures are built. We recognize it when we see it, and we protest its absence. Yet it eludes a precise definition. We recognize it by its shadow – or, when we are too close to it, by its constituent parts. We see and note its patterns, we identify its manifestations, and contend that it is somehow there. A conceptual dark matter, an omnipresent fabric woven across the legal universe, which can only be observed indirectly through its effects on material (in this case, judicial) structures.

Charalampos Giannakopoulos, with his book *Manifestations of Coherence and Investor-State Arbitration*, gives us an informed, informative and well-grounded account of the many faces of this elusive concept. In his words, the core question of the book is to understand how 'considerations of coherence manifest in international adjudication and in [investor-state dispute settlement (ISDS)] in particular', buttressed by inquiries into the content of coherence, its relation to legal reasoning, its role in legal interpretation (in particular, the law of treaties and analogical adjudicatory processes) as well as the 'moral and ethical dispositions' of arbitrators (at 8).

Giannakopoulos is all too aware of the limitations, conundrums and possible pitfalls one faces when engaging concepts such as coherence. He begins by arguing that we take coherence for granted, possibly because we assume it comes to us naturally. The book sets the scene by elaborating on the differences between coherence, on the one hand, and adjacent concepts such as consistency, correctness and comprehensiveness, on the other. This distinction is instrumental to the subsequent inquiry, as conflation of these terms renders our understanding of coherence 'incomplete' (at 5). He also contends that our current understanding misses the many nuances etched into the fabric of coherence because, most of the time, we adopt a top-down, monolithic