

## BETWEEN FORBEARANCE AND AUDACITY

When international courts are given sweeping powers, why would they ever refuse to use them? The book explains how and when courts employ strategies for institutional survival and resilience: forbearance and audacity, which help them adjust their sovereignty costs to preempt and mitigate backlash and political pushback. By systematically analysing almost 2,300 judgements from the European Court of Human Rights from 1967 to 2016, Ezgi Yildiz traces how these strategies shaped the norm against torture and inhumane or degrading treatment. With expert interviews and a nuanced combination of social science and legal methods, Yildiz innovatively demonstrates what the norm entails and when and how its contents changed over time. Exploring issues central to public international law and international relations, this interdisciplinary study makes a timely intervention in the debate on international courts, international norms, and legal change. This book is available as Open Access on Cambridge Core.

EZGI YILDIZ is an Assistant Professor at California State University, Long Beach, and a Research Associate at the Geneva Graduate Institute. She is a member of the Expert Group for the EU's Anti-Torture Regulation (2019/125) and the Coordinating Committee of ESIL's Interest Group on Social Sciences and International Law.

## ENDORSEMENTS

“*Between Forbearance and Audacity* meticulously explains how and why the European Court of Human Rights has expanded the prohibition on torture from a narrow negative interpretation that bans government agents from using torture during interrogations to a broader understanding that includes positive government obligations to prevent torture and protect victims in multiple contexts, such as domestic abuse and medical settings. However, the Court has not always followed an expansive approach. Using in-depth interviews and a systematic content analysis, Yildiz demonstrates that pushback from Western European governments has at times curtailed the Court, such as on cases involving refugees. Deeply rooted in both law and political science, this is a masterful book that should be of interest to those interested in human rights, international courts, and the development of international legal norms.”

Erik Voeten, Peter F. Krogh Professor of Geopolitics and  
Justice in World Affairs, Edmund E. Walsh School of  
Foreign Service and Government Department,  
Georgetown University

“Ezgi Yildiz’s carefully researched book is the crucial text on changing norms against torture and inhumane and degrading treatment. But it also offers the most impressive evidence to date of how human rights can evolve through the audacious interpretations of a court.”

Kathryn Sikkink, Ryan Family Professor, Kennedy School of  
Government, Harvard University

“*Between Forbearance and Audacity* tells the story of how the European Court of Human Rights has developed the norm against torture over the past five decades. It shows how courts are always situated in history and that the development of the law necessarily has to be tailored to the constraints that courts face at given moments of time. This is neither an

optimistic nor pessimistic account of the European Court of Human Rights; it is a realistic account that considers all the complexity of making torture illegal in Europe.”

Mikael Rask Madsen, Professor and Director of iCourts,  
Faculty of Law, University of Copenhagen

“*Between Forbearance and Audacity* is an insightful and ambitious analysis of how the European Court of Human Rights has transformed the norm against torture and renegotiated its own position in the process. This book brings together rich empirical analyses and a novel conceptual framework to advance the current thinking about how human rights courts work and how they respond to pressure from member states and beyond. This is a must-read for anyone interested in understanding how international human rights courts shape, and are shaped by, evolving human rights norms.”

Courtney Hillebrecht, Hitchcock Family Chair in  
Human Rights and Humanitarian Affairs and  
Professor of Political Science, University of  
Nebraska-Lincoln

“In *Between Forbearance and Audacity*, Ezgi Yildiz chronicles and explains an international legal revolution, in which the European Court of Human Rights expanded the meaning of torture and the responsibility of states to prevent it. Drawing on a range of quantitative, qualitative, and interpretive methods, Yildiz provides the definitive account of the transformation of the law against torture in Europe. Essential reading for political scientists, lawyers, and anyone who wants to understand the conditions for the protection of human rights around the world.”

Mark Pollack, Jean Monnet Chair and Professor of  
Political Science and Law, Temple University

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BETWEEN  
FORBEARANCE  
AND AUDACITY

The European Court of Human Rights  
and the Norm against Torture

EZGI YILDIZ  
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To my grandparents,  
Naciye and Ali Dede Yıldız



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## FOREWORD

The European Convention of Human Rights is a short document, and its text is often vague and somewhat open-ended. But today, it is widely seen as a quasi-constitutional instrument for Europe, with precise prescriptions on issues ranging from voting rights to environmental protection, the treatment of refugees, and the status of transsexuals. When the Convention was drawn up in 1950, few observers could have imagined (or did, in fact, foresee) that the Convention could gain such breadth and depth, nor that it would exert the influence it has today on national courts and legislatures of the 46 states that form the Council of Europe today.

How did this transformation happen? For a long time, neither international lawyers nor international relations scholars had convincing answers to this question – legal scholars were less interested in the political dynamics behind legal change than in the interpretation of the law itself, and students of international politics found law and courts not sufficiently relevant to their pursuits. This has changed over the past twenty years, with much more engagement at the boundary of the two disciplines and a significantly deeper understanding of many of the processes around international law, especially around international courts.

Ezgi Yildiz's book takes this line of research into a new and fresh direction, and she advances a bold account of how the European Court of Human Rights – the “Strasbourg Court” – has reshaped the European Convention over time, how it has expanded its requirements to cover many of the most controversial issues in European politics. It does so especially by focusing on the way in which judges approach the cases before them – with audacity or forbearance – and on the changes in this approach over time. The book takes us through more than a half-century of development, structured through three crucial phases, punctuated by the creation of the Court, the radical shift to a permanent Court in the late 1990s, and the rise of fundamental contestation of the Court by several important member states around 2010.

Dr. Yildiz's interest is in understanding how the strategies of judges have changed through these phases and how we can account for those changes. She does so by focusing on a particular – and particularly important – set of cases, those around Article 3 of the European Convention on Human Rights, the prohibition on torture. This prohibition has given rise to a significant reinterpretation over time through which the Court has developed a range of different aspects related to torture, including positive obligations to protect persons from threats. Focusing on this set of cases allows Yildiz to not only take into view an important subset of the jurisprudence, but also to inquire into them with significant attention to detail and granularity. As a result, she manages to achieve what few scholars of either international law or relations have achieved, namely, to marry a deep understanding of the substance and arguments of the cases with a bird's eye view, underpinned by statistical analysis, of trends in these cases over time.

This allows her to trace, with substantial evidence, the major shift in jurisprudential approach that occurred with the turn to a permanent Court from the late 1990s onward. Two main factors can help us account for the more expansive, “audacious” stance of the new Court, she claims: a wide discretionary space created by the new institutional underpinning, and a (relative) absence of negative feedback from states at the time. This set judges free to establish broader obligations for states in a way the more “forbearing” court of the previous period – much more similar to other international courts – could hardly contemplate. On the other hand, Dr. Yildiz shows a more cautious attitude returns after 2010 in response to the backlash from countries such as the UK, Switzerland, but also Russia. This does not lead to “forbearance” across the board, though. Instead, the book shows how selective forbearance operates in that period, with continuity or even expansion on a number of issues, such as police brutality, but a significantly less strict reading of the implications of Article 3 for the refoulement of refugees. The Court seems thus much more responsive to challenges from Western European countries – for whom refugee issues were one of the central bones of contention – than from others.

Dr. Yildiz's account opens up many avenues for further research, with respect to the Strasbourg Court just as well as other international courts and the development of international law in general. It makes us think about the role and positioning of judges in the making of transnational adjudication and about the role of states. For many international lawyers just as well as scholars of international relations, states stand at the center of the field, dictating how it operates and changes. In Yildiz's story, states

are important, but over time they move to a background role. Having created and sustained a powerful court for long, they now find it difficult to regain control over it – even if the Court is somewhat responsive to challenges, it continues on its audacious path in many areas despite significant backlash. This points to a broader picture in which states remain in secondary roles while change is propelled on paths no longer controlled by them – an issue Dr. Yildiz and I have worked on for several years as part of our PATHS project. This picture varies, of course, across issue areas and institutional contexts, but it signals a significant reorientation and flexibilisation of the international legal order well beyond the realm of courts.

The European Court of Human Rights sits on one end of the spectrum of this order, and Dr. Yildiz's book presents us with a strong account of how it came to occupy and fill the central role it has now. With its focus on judicial strategies, it also reminds us that the story of the Court's transformation is not only one of the external conditions and formal institutional development, but that it is, to a significant extent, the result of choices made by individuals (and by judges as a collective). This is important well beyond the realm of specialists in European human rights law. It is a reminder that, and how, individual agency matters in international politics – and that there is often a choice between audacity and forbearance that can determine the course of international norms and law.

Nico Krisch  
*The Geneva Graduate Institute,*  
*November 2022*



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Writing this book was like an archaeological dig, not only through the history of the European Court of Human Rights and its anti-torture jurisprudence but also a dig through my own drafts that took shape over years and years of work. While the initial idea behind this book was my doctoral dissertation that I wrote at the Geneva Graduate Institute, to my chagrin, I ended up writing an entirely new manuscript – one that truly reflected the maturation of my knowledge of the Court and the norm against torture and inhuman or degrading treatment. My analysis and findings were shaped in different sites of research with the support of several co-conspirators. I am particularly indebted to my interviewees, including the judges and the Registry lawyers at the European Court of Human Rights, as well as human rights experts and members of civil society organisations. My understanding of the issue got sharpened in the course of our conversations. I am also grateful for the financial support from the Swiss National Science Foundation (grant agreement no. 149034), which allowed me to spend some time at the Court and undertake these interviews, and complete my dissertation research.

I began thinking about the book and the main argument during my research stay at the iCourts at the University of Copenhagen under the supervision of Mikael Rask Madsen. Later, in 2016, I spent a semester at the Institut für die Wissenschaften vom Menschen (Institute for Human Sciences) (IWM) in Vienna, where I presented an early idea and received excellent feedback from my colleague and friend Aspen Brinton. Then, I moved to the Carr Center for Human Rights at the Harvard Kennedy School, again with the generous support of the Swiss National Science Foundation (grant agreement no. 168282). I had several opportunities to discuss my book with Douglas Johnson, Alberto Mora, and Avery Schmidt in the context of their Costs and Consequences of Torture project and with the Center's directors, Sushma Raman and Matthias Risse. I am particularly indebted to Kathryn Sikink, who took the time to read and comment on the earlier versions and helped me navigate the book publication

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## ABBREVIATIONS

<b>Abbreviation</b>	<b>Definition</b>
APT	Association for the Prevention of Torture
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIA	Central Intelligence Agency
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DHRA	Diyarbakir Human Rights Association
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRAC	European Human Rights Advocacy Centre
ERRC	European Roma Rights Centre
ETA	Basque Country and Freedom
IACtHR	Inter-American Court of Human Rights
IRA	Provisional Irish Republican Army
KHPR	Kurdish Human Rights Project
NGO	Non-governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
OSJI	Open Society Justice Initiative
PKK	Kurdistan Workers' Party
RAF	Red Army Faction
Romani CRISS	Roma Center for Social Intervention and Studies
UDHR	Universal Declaration of Human Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties