15

Interpretative evolution of the norm prohibiting torture and inhuman or degrading treatment under the European Convention

EZGI YILDIZ

Norms are abstract standards that shape actors' expectations and behavior. As powerful as they are as tools of change, these standards are subjected to change themselves. Even those that are highly institutionalized are not set in stone and they may change in light of societal needs. In this chapter, I give an account of interpretive change—one of the ways in which norms may change—by focusing on the norm prohibiting torture and inhuman or degrading treatment under Article 3 of the European Convention on Human Rights (the Convention).[1] This norm embodies one of the core rights of the Convention: namely, freedom from being subject to torture and inhuman or degrading treatment. It is deeply institutionalized and incorporated in all of the domestic legislation of the Member States.[2] Nonetheless, the norm's definition has changed over time. The judgments delivered by the European Commission on Human Rights (the Commission) and the European Court of Human Rights (the Court)—which I refer to as the Strasbourg institutions—have been the vehicles of this transformation. That is, they have channelled the norm's

[1] See also, Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Oxford, UK ; New York, NY: Hart Publishing, 2021); Natalie R. Davidson, "Everyday Lawmaking in International Human Rights Law: Insights from the Inclusion of Domestic Violence in the Prohibition of Torture," *Law & Social Inquiry*, June 14, 2021, 1–31.

[2] A prohibition against torture can be found in the domestic systems of all of the Member States to the Convention. For more, see Aisling Reidy, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*, Human Rights Handbooks No.6, Directorate General of Human Rights, Council of Europe (July 2003).

Ezgi Yildiz, *Interpretative evolution of the norm prohibiting torture and inhuman or degrading treatment under the European Convention* In: *Language and Legal Interpretation in International Law*. Edited by: Anne Lise Kjær and Joanna Lam, Oxford University Press. DOI: 10.1093/oso/9780190855208.003.0016

evolution and confirmed that its definition is not 'fixed once and for all'.[3] Therefore, the change analysed here is the norm's interpretative evolution, which has been (re) produced in the jurisprudence of the Strasbourg institutions.

This development has taken place due to the fact that this norm–similar to many other norms in the Convention–is defined 'in sparse and abstract universal terms', and there are no 'objectively valid interpretations of what [it] mean[s] at all relevant times and in all relevant places'.[4] This has reinforced the Strasbourg institutions' key interpretative ethic, namely, the 'living instrument principle', which underscores that the Convention must be interpreted in line with present-day conditions.[5] Following this principle, which aimed at keeping 'the meaning of rights both contemporary and effective', the norm prohibiting torture and inhuman or degrading treatment has been interpreted in an evolutive manner.[6] Consequently, the norm's evolution has taken account of broader social change and the drafters' '*abstract* intention to promote and safeguard human rights in Europe'.[7]

This chapter contextualizes the norm's transformation by embedding it within the broader socio-political context.[8] As the chapter makes clear, legal interpretation does not take place in a void, and there are several influential factors enabling and constraining the Strasbourg institutions' interpretative preferences. I explain how these factors shape this norm's interpretation by looking at the international, institutional, and discursive factors. The aim of this study is to show the trajectory of the norm by contextualizing how the Strasbourg institutions have (re)defined the norm since the Convention system's inception in the 1950s.

The structure of the chapter is as follows. First, I introduce the key concepts. Second, I lay out the framework of analysis, which allows one to trace the evolution of the norm throughout the different phases of the Convention system's lifetime in light of the surrounding international, institutional, and discursive factors. Third, I analyse the change in understanding of the norm against torture and inhuman or degrading treatment by assessing how these factors have shaped the interpretation

[3] Eirik Bjorge, 'The Vienna Rules, Evolutionary Interpretation and the Intention of the Parties', in Andrea Bianchi et al., eds., *Interpretation in International Law* (2015), 191.

[4] Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?', *UCL Human Rights Review*, 3 (2010), 1.

[5] George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', *European Journal of International Law*, 21 (2010), 527.

[6] Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', *German Law Journal*, 12 (2011), 1730.

[7] Eirik Bjorge, *Evolutionary Interpretation of Treaties* (2014), 63.

[8] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007); George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in Andreas Føllesdal et al., eds., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013).

of this norm by reviewing such changes during the period between 1950 and the early 2000s.

The analysis presented here is, therefore, limited to period before the backlash against the European Court of Human Rights became a salient issue in European politics.[9] The so-called backlash period started in the 2010s and shaped the way the European Court has operated since.[10] Covering the period before the backlash politics began reiging over the European human rights system, the chapter seeks to offer insights into what came before backlash and how the norm against torture and inhuman or degrading treatment came to be (re)shaped within the European legal regime.[11]

15.1. Human rights as moving targets: Some definitions

The concept of 'norm' is used to explain different phenomena on different levels. On the one hand, norms refer to social customs or patterns of expected behaviour in a broader sense. On the other hand, they are utilized to talk about rights, rules, or contracts in a more specific sense. Friedrich Kratochwil clarifies this distinction by looking at the formulation and validity claims of norms. The validity of norms could be based on a variety of sources ranging from tacit rules, customs, and social conventions to contracts or treaties. Furthermore, norms could be formulated either explicitly or implicitly.[12] According to Kratochwil, well-codified norms which

[9] Mikael Rask Madsen, "Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights," *The British Journal of Politics and International Relations* 22/4 (November 1, 2020): 728–38; Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," *International Journal of Law in Context* 14/2 (June 2018): 197–220; Erik Voeten, "Populism and Backlashes against International Courts," *Perspectives on Politics* 18/2 (2020): 407–22.

[10] Laurence R. Helfer and Erik Voeten, "Walking Back Human Rights in Europe?," *European Journal of International Law* 31/3 (December 15, 2020): 797–827; Isabela Garbin Ramanzini and Ezgi Yildiz, "Revamping to Remain Relevant: How Do the European and the Inter-American Human Rights Systems Adapt to Challenges?," *Journal of Human Rights Practice* 12/3 (November 1, 2020): 768–80; Øyvind Stiansen and Erik Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights," *International Studies Quarterly* 64/4 (December 7, 2020): 770–84; Basak Cali, "Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights," *Wisconsin International Law Journal* 35/2 (2018): 237–76.

[11] Ezgi Yildiz, *Between Forbearance and Audacity: How the European Court Redefined the Norm Against Torture and Inhuman or Degrading Treatment* (Cambridge: Cambridge University Press, Forthcoming).

[12] Friedrich Kratochwil, *Rules, Norms, and Decisions:On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1991), 55.

are grounded in contracts or treaties and which require explicit commitment are the clearest norms, whereas norms which entail implicit social rules are the least clear.[13]

The norm against torture and inhuman or degrading treatment, emanating from a treaty and requiring explicit commitment, falls under Kratochwil's 'clearest norms' category. As a codified norm, it has a characteristic of a contractual agreement, namely, it requires explicit commitment and prescribes obligations. Stephen Krasner's definition of norms corresponds to this logic. Krasner identifies norms as 'standards of behaviour defined in terms of rights and obligations'.[14] Kratochwil's and Krasner's definitions of norms help one understand what the norm prohibiting torture and inhuman or degrading treatment under Article 3 of the Convention entail. In so doing, they offer a useful starting point of inquiry.

However, studying norms' interpretive evolution requires a reference to another concept: 'evolution'.[15] I define evolution as the change in the definition of a norm, which is reflected in the scope of the rights and obligations it prescribes. Human rights norms may be moving targets since they change in light of societal needs; yet their trajectory can still be traced by focusing on their transformation of the rights and obligations they entail.[16]

15.2. Framework of analysis

Legal interpretation, which brings out the general normative position systematically endorsed by Strasbourg institutions,[17] has been the driving source of the evolution of norms under the European Convention. However, norms' interpretation must be read in context. For this purpose, I develop an analytical framework that contextualizes legal interpretation in reference to various factors at the international, institutional, and discursive levels.

First, the international level refers to the broader political context within which the Convention system operates. The Convention's lifetime includes historic events such as the creation of post-Second World War institutions, the decolonization movements, the start and end of the Cold War, and the eastward expansion of

[13] Ibid.

[14] Stephen D. Krasner, 'Structural Changes and Regime Consequences: Regimes as Intervening Variables', in Stephen D. Krasner, *International Regimes* (1983), 2.

[15] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (2010); and Jonas Christoffersen and Mikael Rask Madsen, eds., *The European Human Rights Between Law and Politics* (2013).

[16] Ezgi Yildiz, "A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights," *European Journal of International Law* 31/1 (August 7, 2020): 73–99.

[17] Letsas, *A Theory of Interpretation of the European Convention on Human Rights,* 511.

the Council of Europe. These events have shaped the design and operation of the Strasbourg institutions to a great extent.

Second, the institutional level concerns the Member States' relation to the Strasbourg institutions. The evolution of the norm against torture and inhuman or degrading treatment must be situated within the institutional evolution of the Convention system. The system has evolved from one with limited autonomy to one with substantial autonomy. The main hurdle affecting this process was the Member States' reluctance to be reviewed by a supranational body, which could potentially infringe on their sovereignty.[18] This fear was more dominant during the drafting of the Convention and the earlier years of the Convention's lifetime. At the time of the Convention's inception, it became clear that the system's autonomy was linked to two conditions: (1) the jurisdiction of the Court, which would subject the Member States to supranational review, and (2) the individual right to petition, which according to opponents could render the Convention system vulnerable to abuse by communist sympathizers or other figures aiming to discredit the West.[19] These clauses were initially optional to appease the Member States that shared such concerns and they remained so until 1998. Hence, when the Member States demonstrated resistance in accepting these clauses, the institutional autonomy of the Convention system was undercut.[20] Accordingly, there is a negative correlation between the Member States' resistance to these conditions and the institutional autonomy of the Convention system. Moreover, as will be explained in the analysis section, the scope of the norm against torture and inhuman or degrading treatment expanded as the system gained more institutional autonomy.

Finally, the discursive level concerns the interpretive community's prevailing view on what torture and inhuman or degrading treatment signify at a particular period in time.[21] This dominant view shapes legal discourse and, ultimately, the way the Strasbourg institutions define torture and inhuman or degrading treatment.

Accordingly, temporality is an important element in this story of change. In order to show how these factors have come into play at different periods of the Convention system, I adopt a rubric of periodization. I draw inspiration from the works of Jonas Christoffersen and Mikael Rask Madsen[22] and Ed Bates[23] in

[18] Ed Bates, 'The Birth of the European Convention on Human Rights', in Christoffersen and Madsen, eds., *The European Court of Human Rights between Law and Politics*, 41.

[19] Bates, *The Evolution of the European Convention on Human Rights*, 96.

[20] Mikael Rask Madsen, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in Christoffersen and Madsen, eds., *The European Court of Human Rights between Law and Politics*, 47.

[21] The concept of interpretive community signifies a group of intellectuals sharing 'interpretive strategies not for reading but for writing texts, for constituting their properties'. Stanley Fish, *Is There a Text in this Class* (Cambridge, MA, 1980), 14.

[22] Christoffersen and Madsen, eds., *The European Human Rights between Law and Politics*.

[23] Bates, *The Evolution of the European Convention on Human Rights*.

formulating this. Looking at the period from the drafting of the Convention in 1950 until the early 2000s, I have identified four stages: (1) the genesis of the Convention (1950), (2) the legal diplomacy phase (1950–1974), (3) the progressive court phase (1975–1998), and (4) the new permanent court phase (1998–2010).

	The Phases of the Evolution of the Norm Prohibiting Torture and Inhuman or Degrading Treatment			
Influential Factors	***Genesis 1950***	***Legal Diplomacy 1950–1974***	***Progressive Court 1975–1998***	***New Permanent Court 1998–2010***
Broader Socio-political Context	Post-WWII/ threat of Communist expansion	Cold War/ decolonization	Cold War (Helsinki Final Act)/end of Cold War	Post-Cold War/eastward expansion
Institutional Evolution	Institution-building	Institution is insecure	Institution is less insecure	Institution is secure
Prevailing View on Torture	Principles of Natural law/ 'evil men do evil'	Secular and victim focused understanding/ 'banality of evil'	Secular and victim focused understanding/ absolute ban on torture	Secular and victim focused understanding/ comprehensive definition of torture

The genesis phase corresponds to the drafting of the Convention. The legal diplomacy phase refers to the first fifteen years during which the Commission and the Court carefully balanced administering individual justice with national and geopolitical interests of the Member States. Therefore, they assumed not only a legal, but a diplomatic role. [24] The progressive court phase is the period during which the Court gave several landmark judgements and began to establish its authority. Finally, the Court increased its autonomy during the new permanent Court phase started with the enactment of Protocol 11—which instantiated the Court as a permanent body and secured individuals' direct access to the Court (i.e. the right of individual petition became mandatory)—and it corresponds to the period until 2010.

In the following section, I will explain how the definition of the norm against torture and inhuman or degrading treatment changed in each phase, together with the reconfiguration of various factors at international, institutional, and discursive levels. This will allow me to show that understanding the evolving internal dynamics of the Convention system is crucial to situate and trace the interpretive evolution of the norm.

[24] Madsen, 'The Protracted Institutionalization of the Strasbourg Court', 45.

15.2.1. Episode I: Back to the beginning—A look into the drafting of the Treaty

The provision on torture and inhuman or degrading treatment—which states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'—has an open definition. That is to say, it does not list the types of acts falling under it. Therefore, the Convention itself does not offer a clue about what kind of acts the drafters of the Convention had in mind when they formulated this provision. However, looking at the *travaux préparatoires*, one can understand the essence of this provision.[25]

The surrounding broader socio-political context essentially shaped not only the institution-building process, but also the general understanding of what 'torture' or 'inhuman or degrading treatment' meant at the time. One must keep in mind that the memories of the Second World War triggered the creation of the Convention system. One of the main objectives behind drafting the Convention was to ensure that liberal democracies prevailed in Europe, which was under the threat of Communist expansion.[26] The Convention was instituted as a 'type of collective pact against totalitarianism',[27] and drew inspiration from the Universal Declaration of Human Rights.

Although Sir David Patrick Maxwell-Fyfe and Pierre-Henri Teitgen were the 'Convention's two founding fathers',[28] Seymour Cocks from the British delegation, a journalist and a Labour MP from Broxtowe, was one of the most proactive figures when it came to drafting the provision on torture and inhuman or degrading treatment. Finding the text adopted not sufficiently explicit, Cocks proposed a set of amendments expounding on the absolute nature of this prohibition on 7 September 1949.[29]

The next day, Cocks moved his amendment to the Consultative (today Parliamentary) Assembly, where he also delivered a touching speech. He outlined how torture had been perceived during different periods of history. Discussing Athens, where torture was seen as an 'oriental depravity', and the Middle Ages, when torture was a 'common instrument of power and authority', he argued that 'with the development of civilization, torture disappeared' in the West, only to be returned by Nazi Germany.[30] Cocks accounted on some of the atrocities committed by the Nazis:

[25] This observation is only limited to torture, as there was no discussion on inhuman or degrading treatment.

[26] Madsen, 'The Protracted Institutionalization of the Strasbourg Court', 43.

[27] Bates, 'The Birth of the European Convention on Human Rights', 40.

[28] Bates, *The Evolution of the European Convention on Human Rights*, 76.

[29] DH (56) 5, pp. 2–3.

[30] Ibid., 4.

> Cases occurred in Greece during the Nazi invasion of naked girls being placed on electric stoves and burnt in order to make them disclose the whereabouts of their friends. There was the deliberate infliction upon women of the bacteria and loathsome diseases. All kinds of ghastly mutilations were perpetrated upon thousands of men and women. . . .
>
> I say that to take the straight beautiful bodies of men and women and to maim and mutilate them by torture is a crime against high heaven and the holy spirit of man. I say that it is a sin against the *Holy Ghost* for which there is no forgiveness. I declare that it is incompatible with civilization.[31]

Subsequently, Maxwell-Fyfe André Philip and Teitgen took the floor and congratulated Cocks for his moving speech, to which they entirely subscribed.[32] Then the discussions about whether and how to include Cocks's proposal in the draft Convention started. The deciding argument was put forward by Teitgen, who called for an open definition, underlining 'it is dangerous to want to say more, since the effect of the Convention is thereby limited'.[33]

Following the negotiations, Cocks withdrew his amendment, yet he submitted a draft resolution that noted: '[t]he Assembly records its abhorrence at the subjection of any person to any form of mutilation or sterilization or beating'.[34] The representatives of Denmark, Sweden, and Norway were opposed to this, stating that sterilization was legally allowed in their countries. The British delegation also raised an objection by noting that corporal punishment still existed in the UK.[35] These discussions attested that reaching a consensus on the types of acts that should be considered torture was challenging.

Finally, Cocks's suggestions were not included in the draft text. However, his contribution is still highly important in understanding what the drafters had in mind when drafting this prohibition. Seeing that Cocks's sentiments were not challenged, but supported in principle, indicated a form of consensus concerning the dominant understanding of torture. However, one can infer a couple of points from the speech and the proposal made by Cocks, together with the follow-up discussions in relation to the general nature of this prohibition.

First, this prohibition was written in a reactionary manner. The drafters reacted to the atrocities that took place during the Second World War. Their immediate frame of reference was the war crimes of the Third Reich, and their main principle was 'evil is done by evil men', namely the Nazis.

[31] Ibid.
[32] Ibid., 4–7.
[33] Ibid.
[34] Ibid., 9.
[35] Ibid., 11–13.

Second, this reference point influenced the way they described torture. They identified torture as mutilation, beating, sterilization, as well as subjecting an individual to medical experimentation. These acts were, indeed, committed by the Nazis. This is another indication that Nazi war crimes shaped their viewpoint about the scope of this norm at that time.

Third, there was a religious element to their understanding of torture. Torture is a crime against humanity because it is a 'crime against high heaven'.

Fourth, there was an emphasis on maiming and mutilating the victim's body. The torture victim was seen not as 'the subject' but as 'the object' that was destroyed and deformed. This formulation revolved around the sacredness of the human body, which had its roots in the natural law tradition. One of its foundations was the idea that the body and soul are in unity,[36] created in God's own image.[37] Therefore, deforming it would be a crime against God or 'high heaven', which Cocks mentioned in his speech.

Therefore, it is no surprise that Teitgen wrote in his report that the Convention's text was drafted 'in accordance with the principles of natural law, of humanism and of democracy'.[38] Furthermore, the connection between natural law and human rights can be traced in the works of Hersch Lauterpacht, who was the 'leading intellectual force' behind the Universal Declaration and the Convention to a great extent.[39] According to him, natural law, natural rights and human rights are cut from the same cloth, and the moral force of human rights is grounded in their religious foundations.[40] Consequently, this also explains the religious tone observed in the legal discourse that was dominant during this period.

Accordingly, the Genesis of this prohibition was shaped by the memories of Nazi atrocities and the principles of natural law. Additionally, the overarching concern regarding the possible impact of this Convention on sovereignty was influential when drafting this prohibition. As Bates notes, 'the member States to the Council, who determined that any document produced would have to be agreeable to all participating nations, were only prepared to accept a European Human Rights guarantee that had a limited impact on their sovereignty'.[41] Hence, the definition had

[36] Robert Pasnau, *Thomas Aquinas on Human Nature, A Philosophical Study of Summa Theologiae* (2002), 73.

[37] David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition* (2009).

[38] Quoted in Bates, *The Evolution of the European Convention on Human Rights*, 63.

[39] J. Harcourt Barrington, who was involved with drafting the version of the Convention authored by the European Movement, acknowledged '[their] debt to [Lauterpacht] because [they] did quite shamelessly borrow many ideas from his draft Convention on the Rights of Man prepared for the International Law Association in 1948. H. Lauterpacht et al., "The Proposed European Court of Human Rights," *Transactions of the Grotius Society* 35 (1949): 25–47.

[40] Hersch Lauterpacht, *An International Bill of Rights of the Man* (1945), 9.

[41] Bates, *The Evolution of the European Convention on Human Rights*, 56.

to be carefully crafted with a view to receive the Member States' blessings. Having the Nazi atrocities as frame of reference, the drafters set the bar high. Having been guided by the condition to avoid any infringements on sovereignty, the drafters chose a parsimonious and open definition.

15.2.2. Episode II: Legal diplomacy phase (1950–1974)

The legal diplomacy phase transpired in the context of the Cold War, during which Europe remained divided between the West and the East. The ideological battle between these blocs extended to human rights, with each side advocating separate classes of rights. While the West championed civil and political rights, which are embodied in the Convention, the East promoted social and economic rights. As Madsen rightly argues, the human rights agenda was more a matter of politics than of law during this period.[42] The decolonization movements in Africa and Asia were other important developments at the time. The controversy of several Member States' engagement in colonial policies continued to overshadow the European human rights regime.[43]

As for institutional dynamics, the distinguishing feature of the period was 'legal diplomacy'.[44] The Convention system was built on three pillars: the Commission, the Court and the Committee of Ministers. The Commission was in charge of the initial filtering of cases. It would receive applications, decide on their admissibility, and write a report with its non-binding opinion. The Court would receive cases only from the Commission or High Contracting parties, and its jurisdiction was extended to interpretation and application of the Convention. The Committee of Ministers was the executive organ of the Council of Europe and it would supervise the execution of judgments.[45] As mentioned earlier, both accepting the jurisdiction of the Court and granting individual right to petition were optional. The Member States' initial reluctance to accept these conditional clauses meant that the essential functions of the Court were subjected to serious limitations. To overcome this, the Strasbourg institutions undertook 'legal diplomacy', providing both legal and extralegal solutions to the disputes at hand in order to build trust in the Convention system and bring major players on board.[46]

[42] Madsen, 'The Protracted Institutionalization of the Strasbourg Court', 48.

[43] Mikael Rask Madsen, 'France, the UK and the "Boomerang" of the Internalization of Human Rights (1945–2000)', in Simon Halliday and Patrick Delbert Schmidt, eds., *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context* (2004), 57.

[44] Madsen, 'The Protracted Institutionalization of the Strasbourg Court'.

[45] Bates, *The Evolution of the European Convention on Human Rights*, 120–126.

[46] Madsen, 'The Protracted Institutionalization of the Strasbourg Court', 46.

This manoeuvre was much needed, as until 1966 only nine Member States recognized the Court's jurisdiction.[47] The Convention system initially attracted only small European States, with the exception of Germany. When the United Kingdom joined this club in 1966, the tides turned.[48] However, these countries' acceptance of the Court's jurisdiction was not unconditional; it was limited to two to five years on renewable terms. Hence, legal diplomacy was a necessary tool.

At this stage, the Court had a limited role, and the Commission was the driving force of the Convention system during this period.[49] Sir Humphrey Waldock, then President of the Commission, stated that the main function of the Commission was 'to conduct confidential negotiations with the parties and to try and set right unobtrusively any breach of human rights that may have occurred'.[50] Underlining its diplomatic role, he argued that the Commission 'was not primarily established for the purpose of putting states in the dock and registering convictions against them'.[51] Evidently, they could not openly discredit the West at the height of the Cold War. Following this logic, the Commission adopted a stringent approach when it came to deciding on the admissibility of cases and referring them to the Court by the early 1970s.[52]

Among a handful of decisions given during this period, *the Greek Colonels case* was the probably most influential one in shaping the prohibition of torture and inhuman or degrading treatment. This case was brought by Denmark, Sweden, Norway, and the Netherlands against the Greek military junta. It was the first case in which an international tribunal decided that a State had practised torture.[53] Additionally, this case served as the basis for the definition of torture and inhuman or degrading treatment under the United Nation Convention Against Torture.[54]

The Greek Colonels case stands out compared to earlier cases. For example, in *Greece v. the United Kingdom*, a case concerning British counter-insurgency operations in the then British colony of Cyprus, the Commission found no violation under Article 3.[55] Similarly, in *Lawless v. Ireland*, the first case referred to the Court,

[47] Belgium, Denmark, Ireland, Luxembourg, the Netherlands, Norway, Iceland, Germany, and Austria.

[48] Bates, *The Evolution of the European Convention on Human Rights*, 186.

[49] Ibid., 181.

[50] Quoted in ibid., 223.

[51] Ibid.

[52] For example, in 1966, out of 303 applications five were declared admissible, and in 1974, out of 445 applications only six were declared admissible. Ibid., 241–245.

[53] Ibid., 267.

[54] United Nations Voluntary Fund for Victims of Torture, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, available at http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

[55] *Greece v. the United Kingdom*, app. no. 176/56, the European Commission of Human Rights (26 September 1958).

the Court did not find a violation in the Irish government's practice of detaining Irish Republican Army (IRA) suspects without trial.[56] In both cases, the Commission and the Court accepted the responding States' derogation claims, which evoked the 'public emergency threatening the life of a nation' argument. Finally, in the *East African Asians case*, which was brought by British protected persons and the citizens of the United Kingdom and Colonies, the applicants complained about the discriminatory legislation and policies of the British government.[57] The Commission found a violation and declared that 'to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity'.[58] Interestingly, this case was never referred to the Court, and the Commission report, which was delayed for a long time in the hope of securing a friendly settlement, was never made public.[59]

These cases exemplify various legal diplomacy methods the Strasbourg institutions adopted. *Greece v. the United Kingdom* and *Lawless v. Ireland* revealed that the Commission and the Court were willing to prioritize the Member States' national security interests over the protection of individual rights, in order to mitigate the Member States' resistance. The *East African Asians* case indicated the Strasbourg institutions' reluctance to publicize human rights violations arising from the colonial practices of a Member State. Such extra-legal concerns seem to have influenced legal interpretation and sidelined the development of the prohibition against torture and inhuman or degrading treatment to a certain extent.

The Greek Colonels case, on the other hand, provided a good opportunity to clarify and develop this norm further. However, the special circumstances of this case should be noted. The case concerned the very thing the Convention system was designed to prevent: the emergence of totalitarianism in Europe. This explains the relatively bold attitude taken in this case.[60] However, its conceptual contribution is just as important, because the definition of torture and inhuman or degrading treatment provided in this case is strikingly different from the one observed in the discussions of the Convention's drafters.

The Commission defined this prohibition in three parts: (1) inhuman treatment is 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable', (2) torture is 'inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment',

[56] *Lawless v. the United Kingdom (No.3)*, app. no. 332/57, ECHR (1 July 1961).

[57] *East African Asians v. the United Kingdom*, the European Commission of Human Rights Report of 14 December 1973, §1.

[58] Ibid. § 207.

[59] Bates, *The Evolution of the European Convention on Human Rights*, 245.

[60] Legal diplomacy was still at play because the Commission's report was sent to the Committee of Ministers with proposals made for the Greek government in the spirit of legal diplomacy. Ibid., 268.

and (3) a treatment is degrading when 'it grossly humiliates [a person] before others or drives him to act against his will or conscience'.[61] As seen, the Commission provided a more precise definition than did the drafters of the Convention.

This new definition relied on a secular understanding that primarily focused on the psychology of victims. It did not include religious references to prohibit torture on moral grounds, and its focus extended beyond a victim's physical integrity. It identified torture by looking at the physical and psychological pain and suffering felt by the victim. That is, the criterion used to establish which acts would fall under this prohibition is how these acts made victims feel. Therefore, it gave more room to a victim's perspective, rendering the victim a 'subject'.

This subjectivist understanding constituted a paradigm shift in portraying the prohibition on torture and inhuman or degrading treatment. It relied on common emotions that make us human, such as empathizing with the pain and suffering of victims when identifying violations. Therefore, in contrast to the natural law tradition that refers to religious morals to establish why certain acts are wrong, this more contemporary understanding relied on empathy and reason to identify torture and inhuman or degrading treatment.

This paradigm shift in conceptualizing torture and inhuman or degrading treatment occurred as a result of several developments that shaped the dominant legal discourse. Primarily, psychology as a discipline matured. Studies conducted by psychologists, such as Milgram's studies of obedience and the Stanford prison experiment, became known and publicly discussed. These experiments not only sparked a greater interest in human psychology, but also confirmed Hannah Arendt's 'banality of evil' thesis.[62] Watching Eichmann's trial in 1961, Arendt argued that what led Eichmann to commit heinous crimes was not his fanaticism or sociopathic tendencies, but his inability to have moral judgement about his job, the routines of which he obsessively followed.[63] Accordingly, anyone had the capacity to do evil. This was the antithesis of the 'evil is done by evil men' thesis dominant in the previous period.

Second, the discipline of psychology started to be closer to that of legal studies. In the 1960s, the psycho-legal field emerged, and experimental methods became available to investigate legal issues.[64]

Third, the field of victimology also emerged during this period with the works of several *émigré* lawyers in the United States who studied Holocaust victims.[65]

[61] 'The Greek Case', *Year Book of European Convention on Human Rights*, 12 (1969), 186.

[62] S. Alexander Haslam and Stephen Reicher, 'Beyond the Banality of Evil: Three Dynamics of an Interactionist Social Psychology of Tyranny', *Personality and Social Psychology Bulletin*, 33 (2007), 616.

[63] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (2006).

[64] June Louin Tapp, 'Psychology and the Law: An Overture', *Annual Review of Psychology*, 27 (1976) ; Andreas Kapardis, *Psychology and Law: A Critical Introduction* (2010).

[65] Sandra Walklate, *Imagining the Victim of a Crime* (2007), 2.

Beginning in the 1960s, a victim-focused agenda surfaced, particularly due to media attention that increased the visibility of victims.[66] Consequently, these different elements created the conditions for a change in legal discourse, which led to the reformulation of the prohibition on torture and inhuman or degrading treatment in more secular terms. This discourse has remained dominant until the present time.

15.2.3. Episode III: Progressive court phase (1975–1998)

The beginning of this phase coincided with the Helsinki Accords at the Conference on Security and Cooperation in Europe, where the West met the East. According to Sarah Snyder, the Helsinki Final Act 'spurred the development of a transnational network that significantly contributed to the end of the Cold War'.[67] Although the Final Act was a non-binding declaration of intent, it shaped the relation between the East and the West and gave rise to transnational contacts among NGOs, human rights activists, journalists, and politicians engaging in human rights issues.[68] This incidentally certified the European nations' commitment to human rights and increased human rights awareness both in the East and in the West.

On the institutional evolution front, there was an increasing willingness to accept the optional clauses of the Convention, namely the jurisdiction of the Court and the individual right to petition. As Bates argues, 'there was a sudden revival of interest in the Convention' in the early 1970s.[69] With Italy accepting the optional clauses in 1973 and France ratifying the Convention in 1974, the last remaining obstacles to making the system fully operational disappeared.[70] By 1974, thirteen of eighteen Member States had accepted the optional clauses,[71] which ensured the institutional autonomy of the Convention system and decreased the need for legal diplomacy. As expected, upon solidifying its autonomy, the Court assumed firmer standing,[72] issued several landmark cases, and defined many key Strasbourg concepts.[73] It now could afford to be more progressive.

One of the leading cases of this period was *Ireland v. the United Kingdom*. The case concerned the treatment of detainees linked to the IRA in Northern Ireland. The allegations included five techniques, namely wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. The Court argued

[66] James Dignan, *Understanding Victims and Restorative Justice* (2005), 14.

[67] Sarah Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (2011), 2.

[68] Ibid., 8.

[69] Bates, *The Evolution of the European Convention on Human Rights*, 278.

[70] Madsen, 'The Protracted Institutionalization of the Strasbourg Court', 53.

[71] Bates, *The Evolution of the European Convention on Human Rights*, 283.

[72] Ibid. 343.

[73] Ibid., 327.

that 'the five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering', thereby constituting inhuman treatment.[74] Additionally, the Court declared them degrading, as these acts generated feelings of fear, anguish, and inferiority in the victims, breaking their physical or moral resistance.[75] With this case, the Court found a violation of this prohibition for the first time, and in so doing, it departed from the drafters' understanding that this prohibition concerned primarily bodily injury.

Another case signifying the changing conceptions was *Tyrer v. the United Kingdom*. This case concerned a fifteen-year-old who had been subjected to corporal punishment. The National Council for Civil Liberties (today Liberty) brought the case to the Commission.[76] This was an early example of civil society participation in human rights litigation, which became a more frequent practice later on. Upon assessing the case, the Court held that the punishment did not cause serious or lasting physical damages, yet it objectified him and impaired his dignity and physical integrity.[77]

Tyrer represents a drastic change in understanding what types of acts were to be covered under this provision. Corporal punishment was a subject of discussion during the drafting of the Convention, and the British delegation raised objections against listing corporal punishment as a prohibited act. In the twenty-eight years after this incident, the Court declared corporal punishment as a violation of Article 3. As seen, human rights abuses raised in these cases were not nearly as grave as was foreseen in the 'original collective pact against totalitarianism'.[78]

As for the legal discourse at the time, it was a continuation of the secular and victim-focused understanding, which emerged in the previous period. The main difference was, however, the emphasis on the absolute nature of this prohibition. As mentioned in the previous section, in *Greece v. the United Kingdom* or *Lawless v. Ireland*, the Commission and the Court admitted the responding States' derogation claims. They did not find a violation, as the measures that gave rise to the complaints were taken in the context of a public emergency. In *Ireland v. the United Kingdom*, the Court did not take this argument into consideration. It underlined that torture and inhuman or degrading treatment was prohibited in absolute terms, and 'there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation'.[79] The Court, with an increasing institutional

[74] *Ireland v. the United Kingdom*, app. no. 5310/71, ECHR (18 January 1978), §167.

[75] Ibid.

[76] However, the Court refused the NCCL's request for an oral submission. Anna Wilkowska-Landowska, '"Friends of the Court": The Role of Human Rights Non-governmental Organisations in the Litigation Proceedings', *Human Rights Law Commentary*, 2 (2006), 106.

[77] *Tyrer v. the United Kingdom*, app. no. 5856/72, ECHR (25 April 1978), §33.

[78] Bates, *The Evolution of the European Convention on Human Rights*, 385.

[79] *Ireland v. the United Kingdom*, §163.

autonomy and progressive spirit, thereby declared that the prohibition of torture and inhuman or degrading treatment was absolute.

15.2.4. Episode IV: New permanent court phase (1998–)

The defining moment of this phase took place towards the end of the previous phase: the end of the Cold War. Reconfiguration of the political landscape created new opportunities and challenges for the Convention system. The system opened its doors to the newly independent Eastern European countries, a development known as 'the eastward expansion'. The first ratification came in 1992 by Hungary. Then others followed suit.

However, this process gained momentum with the war in the former Yugoslavia. Appalled by the outbreak of yet another war in Europe, the Member States of the Council of Europe issued the Vienna Declaration of 9 October 1993. They extended their invitation to the newly independent countries, saying they would be welcomed 'on an equal footing and in permanent structures', and their accession to the Convention system would be 'a central factor in the process of European construction'.[80] This indicated a colossal shift in the objectives of the Convention system, which was created to prevent the emergence of totalitarianism. With the Vienna Declaration, the Council of Europe pledged not only to facilitate a reconstruction of Eastern Europe, but also the transition of these countries to democracy.

By 1998, the number of parties to the Convention rose to forty-one. When Russia, the largest country in Europe, ratified the Convention in 1998, the Convention system significantly broadened its geographical extent. The new members accepted the jurisdiction of the Court and individual right to petition within a short period after ratification.[81] This translated into an increase in the number of applications. The existing structure of the Convention system was not equipped to cope with this change. The solution to this problem was introduced in Protocol 11. With its enactment in 1998, the Commission and the old Court were abolished, and a new Court was instituted as a permanent body. The jurisdiction of the Court and individual right to petition became obligatory. Without any direct interference in its autonomy, the Court now could engage in judicial activism even more.

However, this new situation came with different challenges. The increased number of applications became a concern, which came to be known as the backlog problem. What changed was not merely the number of applications, but also the nature of issues brought before the Court. As Bates rightly points out, until the 1990s, the Court received cases only from the States with long democratic traditions. Thus,

[80] The Council of Europe, Vienna Declaration of 9 October 1993, available at https://wcd.coe.int/ViewDoc.jsp?id=621771.

[81] Bates, *The Evolution of the European Convention on Human Rights*, 447.

the old Court functioned 'as a tool for the fine-tuning of the democratic engine'.[82] After the enlargement, the Court had to take a pedagogical role to cultivate a human rights tradition in newly independent countries.[83] Therefore, the Court coupled its activist intentions with pedagogical purposes when interpreting this provision, especially when it came to countries with poor human rights records.

Kurt v. Turkey was one of the earliest examples in which the Court practised this double approach. In this case, the applicant complained that she had been subjected to inhuman or degrading treatment due to the government's failure to investigate her son's disappearance, and inform her about the fate of her son, among others. Amnesty International intervened in the proceedings by submitting an *amicus curiae* brief. Citing the jurisprudence of the Inter-American Court of Human Rights and the UN Human Rights Committee on this issue, Amnesty argued that disappearance cases concern complex violations, which include the rights of the family who undergo severe mental anguish due to the uncertainty surrounding the fate of their disappeared relatives.[84]

The Court agreed with this view and found that the State's omission—namely, its inability or unwillingness to fulfil its procedural obligation to investigate into the allegations and duly inform the family of the disappeared person—inflicted anguish and distress on the applicant over a prolonged period of time.[85] It was the first case in which the Court found violation under Article 3 arising from the omission of a State. Hence, this case signalled that not only commissions but also omissions might give rise to violations under Article 3. Additionally, it was one of the first cases in which a third party submitted written comments, a practice that would become more common later on.

Furthermore, the case of *Selmouni v. France* signalled another change in the Court's attitude with respect to the interpretation of Article 3. This case was about ill treatment under custody during which the applicant was subjected to a large number of physical blows and insults. The Court established that the treatment was intentional for the purpose of extracting a confession and declared that it amounted to torture.[86] In response to France's claims that similar acts had not been considered as torture in previous case law (referring in particular to *Ireland v. the United Kingdom*), the Court argued that certain acts which had been defined as inhuman or degrading treatment in the past could be defined as torture in the future. Moreover, it underlined the need for increasingly higher standards with respect to the protection of human rights, and 'greater firmness in assessing breaches of the fundamental

[82] Bates, *The Evolution of the European Convention on Human Rights*, 473.

[83] Robert Harmsen, 'The European Convention on Human Rights after Enlargement', *The International Journal of Human Rights*, 5 (2010), 33.

[84] *Kurt v. Turkey*, app. no. 15/1997/799/1002, ECHR (25 May 1998), §68–71.

[85] Ibid., §134.

[86] *Selmouni v. France*, app. no. 25803/94, ECHR (28 July 1999), §98.

values of democratic societies'.[87] Therefore, the Court expressed its willingness to lower thresholds when it came to interpreting the provision in the future.

The essentiality of elevating human rights standards has dominated the Convention system's legal discourse during this period, to which the following observations attest: (1) the scope of Article 3 has expanded, covering violations arising from omissions and emphasizing procedural obligations, as seen in *Kurt v. Turkey*, and (2) the threshold to define acts as torture and inhuman or degrading treatment has been lowered, as seen in *Selmouni v. France*. This approach was shaped by a couple of developments. First, upon certifying its ultimate autonomy, the new Court began to take a more activist stand. Second, the Court assumed a more pedagogical role with the change in the Member State profiles after the eastward expansion, giving more weight to States' procedural obligations to instil the rule of law. Third, the broader political context was suitable for such a change. The Convention system, which was tested against the Cold War bipolarity, was now equipped to work for the (re)construction of new Europe whose founding myth would be human rights.

15.3. Conclusion

In this chapter I have contextualized the interpretative evolution of the norm prohibiting torture and inhuman or degrading treatment, looking at how the broader political context, the Convention system's institutional evolution, and the dominant legal discourse have influenced the interpretation of this prohibition. These factors have shaped the character of the interpretative body and, thereby, its interpretative output. In order to illustrate how these extra-legal factors have guided the interpretative evolution of this norm, I have analysed various phases of the Convention system's lifetime, looking at the period between 1950 and the early 2000s.

The genesis phase was dominated by a reactionary understanding of the prohibition. The drafters of the Convention formulated this prohibition, in light of the principles of natural law, while still reeling from the Nazi atrocities. This early understanding lacked the victims' perspective and relied on religious grounds. During the legal diplomacy phase, a secular and victim-focused understanding emerged. However, this novel approach had to be cautiously balanced with national security interests of the Member States, as the Convention system had limited institutional autonomy. In the progressive court phase, the Convention system strengthened its autonomous standing and national security concerns ceased to be the defining argument. In this period, the absolute nature of the ban on torture was affirmed. Finally, the new permanent court phase was marked by a more dynamic interpretation, as

[87] Ibid., §101.

the new Court assumed a more audacious stand and a pedagogical role. During this phase, the definition of the norm against torture and inhuman or degrading treatment became more comprehensive, especially with the introduction of procedural obligations, and the threshold to identify the acts falling under this prohibition was lowered.

Dynamism has always been the essence of the interpretative logic defining the Convention system, and its inevitable outcome has been the evolution of norms safeguarded under the Convention. This transformation, however, is not simply an outcome of a linear progression of interpretative preferences. Rather, the sophistication of norms protecting human rights is not only a moral and legal matter, but one of political expediency as well.

References

Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, 2006).

Bates, Ed, 'The Birth of the European Convention on Human Rights', in Jonas Christoffersen and Mikael Rask Madsen, eds., *The European Court of Human Rights Between Law and Politics*, 17–42 (Oxford, 2013).

Bates, Ed, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, 2010).

Bjorge, Eirik, 'The Vienna Rules, Evolutionary Interpretation and the Intention of the Parties', in Andrea Bianchi, Daniel Peat and Matthew Windsor eds., *Interpretation in International Law*, 189–204 (New York, 2015).

Boucher, David, *The Limits of Ethics in International Relations: Natural Law, Natural Rights and Human Rights in Transition* (Oxford, 2009).

Cali, Basak, 'Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights,' *Wisconsin International Law Journal* 35 (2018): 237–76.

Christoffersen, Jonas and Mikael Rask Madsen, eds., *The European Human Rights Between Law and Politics* (Oxford, 2013).

Davidson, Natalie R., 'Everyday Lawmaking in International Human Rights Law: Insights from the Inclusion of Domestic Violence in the Prohibition of Torture,' *Law & Social Inquiry* (2021), doi: https://doi.org/10.1017/lsi.2021.20

Dignan, James, *Understanding Victims and Restorative Justice* (New York, 2005).

Dzehtsiarou, Kanstantsin, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', *German Law Journal*, 12 (2011): 1730–45.

Fish, Stanley, *Is There a Text in this Class* (Cambridge, MA, 1980).

'The Greek Case', *Year Book of European Convention on Human Rights*, 12 (1969).

Greer, Steven, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?', *UCL Human Rights Review*, 3 (2010): 1–13.

Harmsen, Robert, 'The European Convention on Human Rights after Enlargement', *The International Journal of Human Rights*, 5 (2010): 18–43.

Haslam, S. Alexander and Stephen Reicher, 'Beyond the Banality of Evil: Three Dynamics of an Interactionist Social Psychology of Tyranny', *Personality and Social Psychology Bulletin*, 33 (2007): 615–22.

Helfer, Laurence R. and Erik Voeten, 'Walking Back Human Rights in Europe?,' *European Journal of International Law* 31 (2020): 797–827.

Kapardis, Andreas, *Psychology and Law: A Critical Introduction* (New York, 2010).

Krasner, Stephen D., 'Structural Changes and Regime Consequences: Regimes as Intervening Variables', in Stephen D. Krasner, *International Regimes*, 1–22 (New York, 1983).

Kratochwil, Friedrich, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge, 1991).

Lauterpacht, Hersch, *An International Bill of Rights of the Man* (New York, 1945).

Lauterpacht, Hersch, J. Harcourt Barrington, Norman Bentwich, W. Harvey Moore, Patrick Spens and Mr. Barrington, 'The Proposed European Court of Human Rights,' *Transactions of the Grotius Society* 35 (1949): 25–47.

Letsas, George, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in Andreas Føllesdal, Birgit Peters, Geir Ulfstein eds., *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, 106–41 (Cambridge, 2013).

Letsas, George, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', *European Journal of International Law*, 21 (2010): 509–41.

Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford, 2007).

Madsen, Mikael Rask, 'France, the UK and the "Boomerang" of the Internalization of Human Rights (1945–2000)', in Simon Halliday and Patrick Delbert Schmidt, eds., *Human Rights Brought Home: Socio-legal Perspectives on Human Rights in the National Context*, 57–86 (Oxford and Portland, OR, 2004).

Madsen, Mikael Rask, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts,' *International Journal of Law in Context* 14 (2018): 197–220.

Madsen, Mikael Rask, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in Jonas Christoffersen and Mikael Rask Madsen, eds., *The European Court of Human Rights between Law and Politics,* 43–60 (Oxford, 2013).

Madsen, Mikael Rask, 'Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights,' *The British Journal of Politics and International Relations* 22 (2020): 728–38.

Mavronicola, Natasa, Torture, *Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (New York, 2021).

Pasnau, Robert, *Thomas Aquinas on Human Nature, A Philosophical Study of Summa Theologiae* (New York, 2002).

Ramanzini, Isabela Garbin and Ezgi Yildiz, 'Revamping to Remain Relevant: How Do the European and the Inter-American Human Rights Systems Adapt to Challenges?,' *Journal of Human Rights Practice* 12 (2020): 768–80.

Reidy, Aisling, *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*, Human Rights Handbooks No.6, Directorate General of Human Rights, Council of Europe (July 2003).

Snyder, Sarah, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge, 2011).

Stiansen, Øyvind and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights,' *International Studies Quarterly* 64 (2020): 770–84.

Tapp, June Louin, 'Psychology and the Law: An Overture', *Annual Review of Psychology*, 27 (1976): 359–404.

Voeten, Erik, 'Populism and Backlashes against International Courts," *Perspectives on Politics* 18 (2020): 407–22.

Yildiz, Ezgi, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights,' *European Journal of International Law* 31 (2020): 73–99.

Yildiz, Ezgi, *Between Forbearance and Audacity: How the European Court Redefined the Norm Against Torture and Inhuman or Degrading Treatment* (Cambridge, Forthcoming).

Walklate, Sandra, *Imagining the Victim of a Crime* (New York, 2007).

Wilkowska-Landowska, Anna, '"Friends of the Court": The Role of Human Rights Non-governmental Organisations in the Litigation Proceedings', *Human Rights Law Commentary*, 2 (2006): 99–119.