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The Reception of International Law in the European Court of Human Rights

MAGDALENA FOROWICZ

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Preface

This volume aims to provide a comprehensive overview of the reception of international law in the case law of the European Commission on Human Rights and the European Court of Human Rights (ECtHR). It evaluates whether the Strasbourg bodies have been able to create a coherent and comprehensive approach to the interpretation and evaluation of international law. A fresh look at the approach of the Commission and the Court to international law is now required amidst the fragmented realities of the international legal order. Their interactions with the international legal order and other special regimes reveal important lessons for the good functioning of the ECHR and some areas of international law. This volume probes whether the Strasbourg bodies were able to contribute to international law and to the resolution of the fragmentation problem. It assesses fragmentation in specific areas of international human rights law and general international law, as it manifests itself in the European public order. In this context, an important question to consider is the extent to which the Court behaves autonomously and/or falls back on international law, either special or general. Further, the volume discusses the question of whether the Court or the Commission have sufficiently recognized that international law is a system, whether they have integrated the ECHR into this framework or whether they have created their own autonomous regime.

Six international human rights special regimes and two other areas of general international law were chosen as representative samples for the study of this reception process. Each chapter evaluates the case law referring to a special or general regime, and each regime includes one or more international instrument. The assessment is conducted on several levels. Although each chapter contains a summary of the findings, there is also a general comparative synthesis which incorporates the research results of all chapters. The six special regimes covered include international civil and political rights,¹ international child rights,² international refugee rights,³ international humanitarian law,⁴ the prohibition against

¹ United Nations Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976).

² United Nations Convention on the Rights of the Child, 1577 UNTS 3 (entered into force 2 September 1990); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182), 38 ILM 1207 (entered into force 19 November 2000); The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (1993) 32 ILM 1134 (entered into force 1 May 1995); The Hague Convention on the Civil Aspects of International Child Abduction, 1343 UNTS 89 (entered into force 1 December 1983).

³ United Nations Convention Relating to the Status of Refugees, 606 UNTS 267 (entered into force 22 April 1954).

⁴ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (entered into force 21 October 1950); Convention for the Amelioration

torture,⁵ and state immunity. The two areas of general international law analysed here are the law of treaties and the case law and Statute of the International Court of Justice.⁶

The special and general regimes evaluated in this study were chosen due to the frequent references made to them in the Strasbourg case law. The starting premise was that frequently mentioned instruments would accurately reflect the trends in the approach of the Court and Commission to international law. In addition, the special regimes selected were preferred over others due to their similarities to the ECHR and to the fact that they belong to the same branch of international law. It was believed, however, that the analysis of general international law would provide a useful contrast to the evaluation of special regimes. It would thus be possible to verify whether the approach of the Strasbourg bodies has varied in accordance with the nature of international law considered.

It is important to note that the case law of both the Commission and the Court are evaluated. Further, while some implicit references to international law are analysed, the volume focuses on explicit references since these display a more definite intention on the part of the Strasbourg bodies to rely on these sources. An important limitation of this approach is that not all influential material is cited in the case law. For instance, some material may be part of the judges' general understanding or may be referred to in argument but not cited for various reasons in the judgment. These latent influences are not considered in this volume, but it must be kept in mind that they do exist. Due to limitations of space, the relations between the ECHR, the Council of Europe, and the EU are also excluded from the analysis. For the same reason, the role of general international law in the ECHR special regime is not examined in greater detail. Given that only two general regimes are considered, the conclusions regarding their function in the ECHR system are necessarily limited.

The research methodology used consists of empirical, analytical, comparative, and theoretical approaches. From the empirical perspective, the study evaluates references to international law in the Strasbourg case law in order to deduce trends in judicial reasoning. In this manner, it aims to verify whether the Commission and the Court have adopted a coherent approach to international law. As part of

of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (entered into force 21 October 1950); Convention relative to the treatment of prisoners of war, 75 UNTS 135 (entered into force 21 October 1950); Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (entered into force 21 October 1950); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1123 UNTS 3 (entered into force 7 December 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 (entered into force 7 December 1978).

⁵ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (entered into force 26 June 1987).

⁶ Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat 1055; TS No 993 (entered into force 24 October 1945).

this process, several variables are evaluated, such as the nature of the case, the nature of the international instrument involved, the relevant ECHR article, and public policy considerations. Further, the volume evaluates decisions, reports, and judgments in order to get an all-encompassing view of the Strasbourg bodies' approach.

Using a comparative approach, the volume attempts to evaluate the reception of international law in the Strasbourg jurisprudence in light of the approaches taken by other international courts. Each chapter therefore sets the ECHR against the background of the relevant regime that it considers. This perspective makes it possible to establish whether the ECHR system is keeping up to speed with international law and whether there is a need to harmonize the Convention with the international standards. In addition, the final chapter compares the various special and general regimes in order to evaluate the differences in the reception process. Thus, the comparative method is used as a means of documenting and explaining the Court's approach to international law.

The analytical perspective assesses the current state of reception of international law in the Strasbourg case law in order to determine the extent to which the ECHR is open to external sources. The various policy reasons prompting references to international law are analysed with the aim of demonstrating that the reception process is greatly conditioned by them. The individual predisposition of judges and the self-conception of the Court also play an important role in this framework. Finally, taking a theoretical approach, the volume attempts to define more specifically the nature of the ECHR special regime. In this context, it aims to determine the extent to which the Court has affirmed its role in the context of the international legal order. Further, the study intends to establish whether the Court can act as an anti-fragmentation body in the future.

The subject of this volume is of interest to academics and practitioners alike. While it has an important theoretical focus on the recent evolution of fragmentation at the European level, it also provides practical information on the use of international law before the ECtHR. In addition, the study sits at the apex of ECHR and international law and explores both perspectives. Lawyers wishing to strengthen their argumentation can use the volume as a guide to the Court's practice. Academics interested in fragmentation at the European level will also find an analysis of the recent trends.

Magdalena Forowicz
31 January 2010

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