

*The Reception of International Law in the European Court of Human Rights*, by MAGDALENA FOROWICZ. Oxford, Oxford University Press, 2010, xxxiii + 405 + (bibliography and index) 15pp (£80 hardback). ISBN : 978-0-19-959267-8.

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‘The relationship of general international law with the Convention<sup>1</sup> is a dynamic and evolutive one, in the sense that the Convention and international law find themselves in a kind of interactive mutual relationship, checking and building on each other’<sup>2</sup>. This book, *The Reception of International Law in the European Court of Human Rights*, seeks to empirically and comparatively assess this interactive mutual relationship to definitively ascertain the reception of international law by the European Court of Human Rights<sup>3</sup> and the European Commission on Human Rights<sup>4,5</sup>. From an academic perspective, this book fills a significant gap in the current scholarship<sup>6</sup> relating to the openness of the Strasbourg bodies to international human rights law principles and provides an ‘an important theoretical focus on the recent evolution of fragmentation at the European level’<sup>7</sup>. Similarly, from a lawyer’s perspective, knowledge of the reception of international law before the Strasbourg bodies is an essential tool in developing legal arguments and advising clients and this

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<sup>1</sup> European Convention on Human Rights and Fundamental Freedoms. Hereinafter referred to as the ECHR.

<sup>2</sup> L. Wildhaber ‘The European Convention on Human Rights and International Law’ (2007) 56 ICLQ 217 at p. 230-231.

<sup>3</sup> Hereinafter referred to as the ECtHR.

<sup>4</sup> Hereinafter referred to as the Commission.

<sup>5</sup> These bodies, the ECtHR and the Commission will be jointly referred to as the Strasbourg bodies.

<sup>6</sup> A very similar book by F Vanneste, *General International Law before Human Rights Courts* (Netherlands: Intersentia Publishing, 2009) also deals with this topic. However, Vanneste’s book focuses more on general international law principles before human rights courts rather than specific human rights issues. See also the excellent earlier work of J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press: 1st edn 1988, 2nd edn 1993).

<sup>7</sup> M Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford, OUP, 2011) at p. vii.

book successfully marries the theoretical framework with ‘practical information on the use of international law before the ECtHR’.<sup>8</sup>

### *1. The Reception of International Law: General and Specific*

The ECtHR has held in numerous decisions that it ‘must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account’.<sup>9</sup> Yet despite this assertion, it is very difficult to adequately assess the extent to which the Strasbourg bodies have not only received, but also applied or considered, international law in their decision making process. In this book, Forowicz evaluates the tendency of the Strasbourg bodies towards the reception of international law in six special regimes (child rights, refugee rights, civil and political rights, state immunity, international humanitarian law, and prohibition against torture) and two general regimes (the Law of Treaties and the decisions of the International Court of Justice<sup>10</sup>),<sup>11</sup> compares the level and substance of such reception and provides a synthesis of factors which influence the willingness, or otherwise, of the ECtHR towards the application and consideration of international law.

Forowicz’s research expertly reveals that, in general, the level of reception of special regimes before the Strasbourg bodies is substantially higher than that of the general regimes<sup>12</sup> due to the fact that ‘important differences that still exist between the ECtHR

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<sup>8</sup> Forowicz, *supra* n. 7 at p. vii.

<sup>9</sup> See *Fogerty v United Kingdom*, judgment of the 21 November 2001, (Application no. 37112/97) at paragraph 35. See also *Loizidou v Turkey* judgment of 18 December 1996, (Application no. 15318/89) at paragraph 43.

<sup>10</sup> Hereinafter referred to as the ICJ.

<sup>11</sup> Forowicz, *supra* n. 7 at p. 352.

<sup>12</sup> Forowicz, *supra* n. 7 at p. 372.

and the ICJ systems'<sup>13</sup> and 'it was easier to refer to other specialised international human rights systems' because they 'relate to a similar subject-matter'<sup>14</sup>.

*a. The Reception of Special Regimes of International Law*

Of the six special regimes considered by Forowicz in this book, the Strasbourg bodies operated an open paradigm (i.e. high to moderate reception of international law) to four specific regimes (civil and political rights, child rights, prohibition on torture and state immunity) and a closed paradigm to two specific regimes (refugee rights and international humanitarian law).<sup>15</sup>

In the area of civil and political rights, the reaction of the Strasbourg bodies to the International Covenant on Civil and Political Rights 1966<sup>16</sup> and to the decisions of the United Nations Human Rights Committee<sup>17</sup> has been impressive and the court has operated an open paradigm to the reception of international law. While this conclusion on behalf of Forowicz could be considered obvious, considering the primacy guaranteed to first generation rights by the ECHR, the importance of Forowicz's research is revealed in the identification of a higher level of reception in cases where issues of international procedural law<sup>18</sup> as opposed to international substantive law<sup>19</sup> are being addressed. In the former case, the Strasbourg bodies have been much more receptive to a consideration of international law, possibly bourn out of a 'structural or procedural need to prevent the same case from reaching both

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<sup>13</sup> Forowicz, *supra* n. 7 at p. 372.

<sup>14</sup> Forowicz, *supra* n. 7 at p. 372.

<sup>15</sup> Forowicz, *supra* n. 7 at p. 405.

<sup>16</sup> Hereinafter referred to as the ICCPR.

<sup>17</sup> Hereinafter referred to as the HRC.

<sup>18</sup> Forowicz's definition of 'international procedural law' refers to treaties 'which set[s] up a given procedure to follow in order to resolve a dispute'. Forowicz, *supra* n. 7 at p. 366.

<sup>19</sup> Forowicz's definition of 'international substantive law' refers to treaties 'granting concrete rights and obligations to states and individuals'. Forowicz, *supra* n. 7 at p. 366.

bodies'<sup>20</sup>, whereas in the latter case, the Strasbourg bodies have been much less receptive. Forowicz expounds the credible theory that this divergence is due to the fact that the Strasbourg bodies are acutely aware of the substantial differences in ratification and enforcement mechanisms of the ICCPR and the ECHR and consider it 'more legitimate for the Court to use the ICCPR when a certain reference is required or necessary'<sup>21</sup> or when 'there are no international policy issues involved in the case'<sup>22</sup>. Forowicz's call for a more coherent approach between the ECtHR and the HRC that would 'render the coordination between the institutions more viable and strengthen the protection of the rights enshrined in the ECHR and the ICCPR'<sup>23</sup> is a laudable one.

Despite the fact that child rights are not expressly mentioned in the ECHR and the scope of the ECHR for 'enforcing and protecting the rights of children is not immediately evident'<sup>24</sup>, the international human rights instruments relating to child rights, such as the United Nations Convention on the Rights of the Child<sup>25</sup>, the Hague Convention on the Civil Aspects of International Child Abduction<sup>26</sup> and the International Labour Organisation Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour<sup>27</sup> have received an impressive reception before the ECtHR.<sup>28</sup> Possibly, the failure of the ECHR to deal more specifically with child rights has forced the Strasbourg bodies to

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<sup>20</sup> In this instance, Forowicz is referring to the ECtHR and the HRC. Forowicz, *supra* n. 7 at p. 186.

<sup>21</sup> Forowicz, *supra* n. 7 at p. 186.

<sup>22</sup> Forowicz, *supra* n. 7 at p. 186.

<sup>23</sup> P. 189.

<sup>24</sup> U. Kilkelly, 'The Best of Both Worlds for Children's Rights: Interpreting the European Convention on Human Rights in the Light of the United Nations Convention on the Rights of the Child' (2001) 23 HRQ 308 at p. 308.

<sup>25</sup> Hereinafter referred to as the UNCRC.

<sup>26</sup> Hereinafter referred to as the Hague Convention.

<sup>27</sup> Hereinafter referred to as ILO Convention No. 182.

<sup>28</sup> Forowicz, *supra* n. 7 at p. 145.

‘look beyond the Convention for guidance on certain matters’<sup>29</sup>. The ECtHR has been most responsive to the Hague Convention, and has, in many cases, applied the principles expounded therein directly. More impressively, Forowicz discovered that unlike other international treaties, the Strasbourg bodies were even willing to invoke the Hague Convention even if the state involved had not ratified it.<sup>30</sup> This may be due to the fact that the cases involved were so closely entwined with the Hague Convention that the ECtHR may have had no other choice but to refer to it. Also the Hague Conventions are ratified by most ECHR Contracting States and the principles have become the standards by which such cases are dealt with internationally. A more moderate reception has been given to the UNCRC and to ILO Convention No. 182. Forowicz rightly concludes that overall, this reduction in fragmentation on issues relating to child rights can only be desirable and will maximise ‘the potential of international treaties in order to protect and promote children’s rights’<sup>31</sup>.

This book also deals with specific areas of human rights law that are central to the ECHR and international human rights law treaties, including the principle of the prohibition on torture. Article 3 of the ECHR which prohibits torture is an absolute right, mirrors the prohibition on torture that is recognised internationally and the decisions of the ECtHR have equally been described as ‘drifting towards the language of UNCAT’<sup>32</sup>. Unsurprisingly, Forowicz confirms that the Strasbourg bodies have ‘followed the open paradigm in this strand of its jurisprudence’, marked by a ‘level of

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<sup>29</sup> Kilkelly, *supra* n. 24 at p. 314.

<sup>30</sup> Forowicz, *supra* n. 7 at p.146. See the case of *Barjami v Albania*, judgment of the 12 December 2006 (Application no. 35853/04).

<sup>31</sup> Kilkelly, *supra* n. 24 at p. 326 see also Forowicz, *supra* n. 7 at p. 148.

<sup>32</sup> United Nations Convention Against Torture. Hereinafter referred to as UNCAT.

<sup>33</sup> M. Evans, ‘Getting to Grips with Torture’ (2002) 51(2) ICLQ 365 at p. 381.

reception beyond average'<sup>34</sup>. However, the real benefit of Forowicz's analysis is in her exposition of the manner in which the Strasbourg bodies have dealt with UNCAT and the international principles. Forowicz discovered that even where the court does not specifically consider UNCAT, 'its case law nonetheless converged with the standards set'<sup>35</sup> under UNCAT, and where references were made to UNCAT, these are substantial 'going even as far as directly incorporating certain standards into its case law'<sup>36</sup>. Once again, Forowicz accurately commends the court on this approach which maximises the harmonisation of cases and the protection of human rights<sup>37</sup>.

An area of significant controversy in recent years before the ECtHR is the doctrine of state immunity, which while broadly compliant with the current status of state immunity under international law (the doctrine of restrictive state immunity), does raise issues of the prioritisation of state interests over the protection of individuals. The approach adopted by the ECtHR in *Bankovic*<sup>38</sup> and *Al-Adsani*<sup>39</sup> has been considered to be 'radically at variance with the ideas and principles underlying human rights in general and the European Convention in particular, and serves as a typical situation to justify the claim that 'If the idea of human rights reassures governments it is worse than nothing''<sup>40</sup>. Forowicz reviews the reception of the Strasbourg bodies to this 'highly problematic'<sup>41</sup> specific international law principle and concludes that the ECtHR has, in 'balancing state and individual interests'<sup>42</sup>, including practical state

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<sup>34</sup> Forowicz, *supra* n. 7 at p. 231.

<sup>35</sup> Forowicz, *supra* n. 7 at p. 229.

<sup>36</sup> Forowicz, *supra* n. 7 at p. 231.

<sup>37</sup> Forowicz, *supra* n. 7 at p. 231.

<sup>38</sup> *Bankovic v Belgium*, decision of the 12 December 2001 (Application no. 52207/99).

<sup>39</sup> *Al-Adsani v United Kingdom*, decision of the 1 March 2000 (Application no. 35763/97).

<sup>40</sup> A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14(3) EJIL 529 at p. 568.

<sup>41</sup> Forowicz, *supra* n. 7 at p. 310.

<sup>42</sup> Forowicz, *supra* n. 7 at p. 309.

interests such as the potential for floodgate litigation<sup>43</sup>, ‘privileged the former over the latter’.<sup>44</sup> Although Forowicz’s research reveals that the ECtHR did employ an open paradigm in this area of law, the ECtHR ‘did not act as an innovator of international law and did not use the most progressive interpretations available’.<sup>45</sup>

Forowicz also undertakes a consideration of the reception of international law relating to refugees. However, one significant omission in this context is the failure to consider migrant rights more generally as there a number of very important international law principles in this area and a review of their reception before the court would have been very interesting. The European Court of Human Rights has always been commended for being ‘instrumental in creating the human rights refugee protection jurisprudence’<sup>46</sup> and this is certainly reflected in the cases studied by Forowicz. However, Forowicz’s research reveals that the case law is marked by a ‘variable deference to states’ margin of appreciation’<sup>47</sup>, due to the very clear link between immigration control and state sovereignty and this has had an impact on the ECtHR’s willingness to refer to international law in its decisions. There is a distinction in the case law between decisions under Article 8, where states are given a wide margin of appreciation, and Article 3, where the ECtHR is ‘more attentive to individual needs’<sup>48</sup> of the applicants. However, Forowicz concludes that by and large the court operates a ‘closed paradigm’ in this area of law.

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<sup>43</sup> Forowicz, *supra* n. 7 at p. 309.

<sup>44</sup> Forowicz, *supra* n. 7 at p. 309.

<sup>45</sup> Forowicz, *supra* n. 7 at p. 312.

<sup>46</sup> Kjaerum at p. 534.

<sup>47</sup> P. 280

<sup>48</sup> Forowicz, *supra* n. 7 at p. 282.

Another area where the Strasbourg bodies operate a closed paradigm is in international humanitarian law, although the ECtHR has managed to reduce fragmentation by incorporating certain standards of international humanitarian law into the ECHR framework.<sup>49</sup> Unusually, this has often been achieved without reference to the international sources from which it was obtained. However, Forowicz does not appear to consider this development to be unduly negative as she convincingly argues that both frameworks can complement each other and maximise the protection available.<sup>50</sup>

*b. The Reception of General Regimes of International Law*

In striking comparison to the more open approach to international human rights law principles, the Strasbourg bodies have operated a closed paradigm (low to moderate reception of international law) to both the law of treaties and the decisions of the ICJ.

In regards to rules of interpretation, academics have often criticised the ECtHR for feeling free to ‘pick and choose between different methods of interpretation, as if there were no order or hierarchy between these methods’,<sup>51</sup> despite the fact that the ECtHR has held that it would ‘so far as possible be interpreted in harmony with other rules of international law’<sup>52</sup>. The role of international law rules of interpretation, in particular those laid down by the Vienna Convention on the Law of Treaties 1969<sup>53</sup>, appear to have influenced the Strasbourg bodies initially but as the years passed, the Strasbourg bodies have devised their own rules of interpretation without any specific

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<sup>49</sup> Forowicz, *supra* n. 7 at p. 351.

<sup>50</sup> Forowicz, *supra* n. 7 at p. 351.

<sup>51</sup> Orakhelashvili, *supra* n.40 at p. 567

<sup>52</sup> *Fogerty v United Kingdom*, judgment of the 21 November 2001, (Application no. 37112/97) at paragraph 35.

<sup>53</sup> Hereinafter referred to as the VCLT.

reference to the VCLT. Forowicz appears concerned by this lack of reference as it does not provide a strong example to national courts on issues of interpretation.<sup>54</sup> However, this concern may be overstated when one considers that the rules currently operating in the ECtHR are in fact very close, if not identical, to the rules of interpretation laid down in the VCLT and have played a positive role in the development of principles before the ECtHR.

Forowicz's findings in relation to the reception of the decisions of the ICJ are very positive in some respects. The Strasbourg bodies rarely disagree with the findings of the ICJ and any occasional unwillingness to follow a decision is justified 'by the need to reinforce and not weaken the protection of human rights within its special regime'<sup>55</sup>. However, in the area of human rights, the ECtHR has operated a closed paradigm in order to protect human rights standards which are stronger under the ECHR, despite the fact that this can lead to fragmentation. Forowicz convincingly argues that this is a small price to pay for the protection of the rights under the ECHR.

### *Conclusions*

This research provides a very meticulous analysis of the reception of international law into the ECtHR and provides a fascinating investigation of the manner in which this is achieved, the approach of the ECtHR to certain areas of international law and a remarkable synthesis of factors influencing the decision of the ECtHR to be receptive, or not, to principles of international law. While some of these influencing factors are readily apparent to most academics and lawyers, (eg the fact that (a) international law

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<sup>54</sup> Forowicz, *supra* n. 7 at p. 53.

<sup>55</sup> Forowicz, *supra* n. 7 at p. 102.

was invoked at a domestic level,<sup>56</sup> (b) the case was intertwined with international law<sup>57</sup>, (c) the principle of international law concerned was used in the drafting of the ECHR provision currently at issue<sup>58</sup>, (d) there are textual and substantive similarities between the ECHR and the international principles,<sup>59</sup> or (e) there are more specific or extensive guidelines available in international law<sup>60</sup>), others are more atypical and as such are worthy of significant consideration (eg the fact that in certain cases the ECtHR (a) feels the need to harmonise a provision with international law,<sup>61</sup> (b) clarify any uncertainty regarding the international legal principles,<sup>62</sup> (c) regards that there is a need to fill in a gap in the ECHR,<sup>63</sup> (d) feels there is a need to assess the specific human rights situation in a country,<sup>64</sup> (e) decides that certain political or state interests are at play<sup>65</sup> or (e) feels there are certain advantages to using the ECHR rather than international law in the particular context<sup>66</sup>). Other extra-legal factors influencing the decisions of the ECtHR include ratification records, the universal reach of certain international instruments and the background of judges.

This book is a welcome addition to the scholarship on the ECtHR and the role of the ECtHR in reducing the fragmentation of international human rights law. While there is little to criticise, an analysis of the decisions and principles expounded by other regional bodies or other significant specific issues such as migrant rights, would have been an important and interesting addition to the text. However, this slight criticism

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<sup>56</sup> Forowicz, *supra* n. 7 at p. 353.

<sup>57</sup> Forowicz, *supra* n. 7 at p. 354.

<sup>58</sup> Forowicz, *supra* n. 7 at p. 357.

<sup>59</sup> Forowicz, *supra* n. 7 at p. 361.

<sup>60</sup> Forowicz, *supra* n. 7 at p. 361.

<sup>61</sup> Forowicz, *supra* n. 7 at p. 355.

<sup>62</sup> Forowicz, *supra* n. 7 at p. 358.

<sup>63</sup> Forowicz, *supra* n. 7 at p. 360.

<sup>64</sup> Forowicz, *supra* n. 7 at p. 362.

<sup>65</sup> Forowicz, *supra* n. 7 at p. 365.

<sup>66</sup> Forowicz, *supra* n. 7 at p. 366.

should not detract from the overall achievements of the book and its author. This is an interesting, instructive and excellent book and is one that will undoubtedly become a leading authority on this essential concern. Fragmentation of human rights principles is a significant worry and it is important to ‘work towards the convergence of the two systems, and to accept that the building up of closed regimes or even fiefdoms is not desirable per se, but only if it contributes to the evolution of international law at large, including the international law of human rights’<sup>67</sup>. This book certainly contributes to a closer understanding of this matter and paves the way for future research aimed at achieving appropriate convergence of human rights principles internationally.

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<sup>67</sup> Wildhaber, *supra* n. 2 at pp. 230-231.