ACCESS TO COURT v STATE IMMUNITY

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This comment discusses three recent judgments of the European Court of Human Rights in the cases of *McElhinney v Ireland*,[1] *Al-Adsani v UK*,[2] and *Fogarty v UK*.[3] All three applications concerned the dismissal by the courts of the respondent States of claims against a third State on the ground of that State's immunity from suit.[4] They thus raised important questions about the relation between the European Convention on Human Rights (the Convention)—especially the right to a fair trial and access to court enshrined in Article 6(1)—and the law of State immunity.

The applicants put forward two main submissions: first, that the respondent States had jurisdiction over their respective claims; and second, that the respondent States' failure to exercise jurisdiction breached their right under Article 6(1) to have their cases heard in a court of law.[5] As regards the jurisdictional issue, each application rested on different grounds. In *Al-Adsani*, the applicant argued that Kuwait was not entitled to claim immunity from UK jurisdiction as regards acts of torture, because the latter constitute violations of a peremptory norm of international law (*jus cogens*). In *Fogarty*, the applicant submitted that the US was not entitled to invoke immunity from UK jurisdiction in respect of certain claims arising from employment in a foreign diplomatic mission. In *McElhinney*, it was argued that Ireland had jurisdiction over the applicant's claim against the UK because that claim concerned damage to the person of the applicant in Irish territory. As regards Article 6(1) of the

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[1] *McElhinney v Ireland*, App no 31253/96, Judgment [GC], 21 Nov 2001. All ECHR documents referred to in the text are obtainable from the Court's web-site at <http://www.hudoc.echr.coe.int>.

[2] *Al-Adsani v UK*, App no 35763/97, Judgment [GC], 21 Nov 2001.

[3] *Fogarty v UK*, App no 37112/97, Judgment [GC], 21 Nov 2001.

[4] The Court treated the three cases as a whole. They were held admissible on the same grounds and were tried by the same Grand Chamber. Also, a substantial part of the judgments is identical in content.

[5] The three cases had been declared admissible on the ground that they raised questions of fact and law of such complexity that their determination depended on an examination of the merits, see *McElhinney v Ireland and the UK*, App no 31253/96, Decision as to Admissibility [GC], 9 Feb 2000; *Al-Adsani v UK*, App no 35763/97, Decision as to Admissibility [GC], 1 Mar 2000; *Fogarty v UK*, App no 37112/97, Decision as to Admissibility [GC], 1 Mar 2000. McElhinney's application against the UK was declared inadmissible because of his failure to exhaust local remedies.

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Convention, all three applications submitted that the respondent States' decision not to exercise jurisdiction imposed a disproportionate restriction on the applicants' right of access to court.

In all three cases the European Court of Human Rights, sitting as a Grand Chamber, declared that in upholding the defendant foreign States' claim to immunity the respondent Governments did not infringe the applicants' right of access to court. However, except for *Fogarty*, which was almost unanimous, the *McElhinney* and *Al-Adsani* judgments met with strong dissent from several members of the Court. Indeed, the *Al-Adsani* judgment was adopted by the slightest of majorities.

The following comment consists of two parts. The first summarises the Court's judgments and highlights some points in the minority opinions. The second part takes up two issues raised in the judgments. It discusses, first, the Court's treatment of the three applications under Article 6(1) of the Convention and, second, the contrasting opinions of the majority and the minority regarding the alleged exceptions from State immunity in *McElhinney* and *Al-Adsani*.

I. THE JUDGMENTS

A. Applicability of Article 6(1) ECHR

The first issue that the Court set out to discuss was whether the applicants' complaints fell under the scope of Article 6(1) of the Convention.[6] The respondent Governments argued that Article 6(1) was inapplicable because the applicants' domestic claims were not actionable under municipal law and thus did not concern a 'civil right' in the meaning of Article 6(1).[7] According to the respondents' submission, the restrictions imposed by the law of State immunity upon their jurisdiction affected not only their competence to enforce their municipal law but also their competence to prescribe substantive rights and duties *vis-à-vis* third States. In that sense, 'sovereign immunity . . . affected the substantive content of the right claimed and was not merely a procedural bar'.[8]

The Court dismissed the Governments' argument. Recalling that Article 6(1) does not guarantee any specific content of civil rights and obligations in the substantive law of the Contracting Parties[9], it nevertheless noted:

> Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the

[6] Art 6(1): 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[7] Para 44 (*Al-Adsani*), para 22 (*Fogarty*), para 21 (*McElhinney*).

[8] Para 21 (*McElhinney*).

[9] The Court adverted to its previous judgment in *Z and Others v UK*, App no 29392/95, Judgment [GC], 10 May 2001, para 87.

> State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying article 6(1)—namely that civil claims must be capable of being submitted to a judge for adjudication—if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.[10]
>
> The Court does not accept the Government's submission that the applicant's claim had no legal basis in domestic law since any substantive right that might have existed was extinguished by operation of the doctrine of State immunity. It notes that an action against a State is not barred *in limine*: if the defendant State waives immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.[11]

The Court concluded that there was a serious and genuine dispute over the extent of the rights conferred on the applicants in virtue of Article 6(1) ECHR.

B. Compliance with Article 6(1) ECHR

The Court then considered the compatibility of the Governments' decision not to exercise jurisdiction with the applicants' right to a fair trial and its corollary, the right of access to court.[12] It noted that Article 6 allows State parties a certain margin of appreciation, since the right of access to court 'by its very nature' calls for regulation by the State.[13] However, the Court made clear that the final determination as to the observance of the Convention's requirements must rest with the Convention enforcement bodies. As a matter of ECHR law, the Court held, a limitation of the right of access to court does not impair the very essence of the right if it satisfies the following requirements: (a) it pursues a legitimate aim and (b) there is a reasonable relation of proportionality between the means employed and aim pursued.[14]

[10] The Court quoted its judgment in *Fayed v UK*, App no 17101/90, Judgment, 21 Sept 1994, para 65.

[11] Paras 47–8 (*Al-Adsani*), para 26 (*Fogarty*), paras 24–5 (*McElhinney*). In *Fogarty* the UK also argued that the public nature of the posts for which Fogarty had applied excluded her claim from the ambit of Art 6(1). The Court chose to deal with the point in the context of its discussion of proportionality rather than as a preliminary consideration, paras 7–28 (*Fogarty*).

[12] Para 52 (*Al-Adsani*), para 34 (*Fogarty*), para 33 (*McElhinney*). The Court found that 'the procedural guarantees laid down in Art 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court.' The Court adverted to its judgment in the case of *Golder v the United Kingdom*, App no 4451/70, Judgment (Plenary Session), 21 Feb 1975, paras 28–36.

[13] Para 53 (*Al-Adsani*), para 33 (*Fogarty*), para 34 (*McElhinney*).

[14] Ibid. The Court quoted its judgment in the case of *Waite and Kennedy v Germany*, App no 26083/94, Judgment [GC], para 59.

1. *Legitimate aim*: The Court had little doubt that the limitation of access to court on grounds of State immunity pursued a legitimate aim. It noted that State immunity is a well-established concept of international law and that in acknowledging certain limits to their jurisdiction, the respondent States were pursuing 'the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.[15]

2. *Proportionality*: The Court then focused on whether the granting of immunity to foreign States was a proportionate measure under the Convention. For that purpose, the Court drew on the customary law of treaty interpretation, as codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which provides that the interpretation of a treaty provision should take into account 'any relevant rules of international law applicable to the relations between the parties'. Applying this rule to the Convention, the Court said:

> The Convention, including article 6, cannot be interpreted in a vacuum. The Court 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.[16] The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.[17]

The Court took the combined reading of the Convention and the law of State immunity to suggest the following rule of thumb:

> It follows that measures taken by a High Contracting Party, which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.[18]

C. State Immunity

The next question to determine was whether international law accorded immunity to the defendant third States in the cases brought before the Court. From this point on the three cases diverge, each application having relied on a different alleged exception in the law of State immunity.

[15] Para 54 (*Al-Adsani*), para 34 (*Fogarty*), para 35 (*McElhinney*).
[16] The Court adverted *mutatis mutandis* to its judgment in *Loizidou v Turkey*, App no 15318/89, Judgment [GC], 18 Dec 1996, para 43.
[17] Para 55 (*Al-Adsani*), para 35 (*Fogarty*), para 36 (*McElhinney*).
[18] Para 56 (*Al-Adsani*), para 36 (*Fogarty*), para 37 (*McElhinney*).

1. *Fogarty v UK*: The applicant argued that she had been discriminated against by the US Embassy in London on account of prior employment grievances, relating to sex discrimination, that she had brought successfully before UK industrial tribunals. After her initial contract expired, her applications for two secretarial posts with the US Department of Justice and the US Foreign Commercial Service were turned down. Fogarty alleged that the refusal to re-employ her was a consequence of her successful sex discrimination claim, and accordingly constituted victimisation and discrimination within the meaning of sections 4 and 6 of the Sex Discrimination Act 1975. When she brought proceedings before the North London Industrial Tribunal, the US successfully asserted its immunity from suit.

The near unanimous[19] Court found that the granting of immunity to the US was in conformity with general international law and therefore a proportionate measure in respect of Article 6(1). On the one hand, the Court noted that

> where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission.[20]

On the other hand, the Court pointed out that this restrictive trend had not yet hardened into a specific exception from State immunity:

> Certainly, it cannot be said that the United Kingdom is alone in holding that immunity attaches to suits by employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.[21]

At any rate, the Court continued, while it might be true that the immunity of foreign States has been curtailed regarding disputes about the contractual rights and duties of persons already employed in foreign diplomatic missions, no such restriction appeared to be established as regards recruitment to foreign diplomatic missions:

> Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, *inter alia*, to the diplomatic and organisational policy of a foreign State. The Court is not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions.[22]

[19] Judge Loucaides dissented on the ground that the rules of State immunity could not be taken into consideration in interpreting the ECHR insofar as they did not reflect international *jus cogens*.

[20] Para 37 (*Fogarty*).

[21] Ibid.

[22] Ibid, para 38. The Separate Concurring Opinion of Judges Caflisch, Costa, and Vajic put it very clearly: 'while immunity is complete when it comes to selecting diplomatic and consular personnel, this may no longer be the case, in certain situations, once the individual concerned has been hired.'

2. *McElhinney v Ireland*: McElhinney was an Irish police officer. In March 1991, he accidentally drove his car, which was towing a van on a trailer, into the checkpoint barrier between the Republic of Ireland and Northern Ireland. The exact facts of the case were disputed between the parties. It appears that a British soldier tried to approach the vehicle, which had turned round and headed for Irish soil, and was hit by the vehicle being towed. The British soldier first tried to stop the applicant by firing several shots at the vehicle and, that having failed, pursued the applicant into Ireland. When he was finally able to reach McElhinney's car, and in a state of 'blind panic', he ordered the passengers to get out of the car and stand against the wall with their hands in the air. According to the applicant, the soldier then aimed his gun at him and pulled the trigger twice, although the shots did not fire because the gun had jammed. When McElhinney brought an action before the Irish courts against the soldier and the UK, the latter successfully pleaded immunity from suit.

The reasoning of the Court in *McElhinney* was not very different from that in *Fogarty*. To begin with the Court noted 'a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State'. However, the available evidence of State practice pointed to the conclusion that 'this practice is by no means universal'.[23] At any rate, cases involving 'acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security' had escaped that restrictive trend.[24] The Court eventually held that, in sustaining the UK claim to immunity, Ireland could not be said to fall outside any currently accepted international standards and that the refusal of Irish courts to entertain McElhinney's claim on lack of jurisdiction was not disproportionate.[25]

On the issue of proportionality, the Court also noted that the applicant had forgone the possibility of bringing an action in Northern Ireland against the UK Secretary of State, even though—as the Court had found in relation to McElhinney's application against the UK[26]—that course of action was open to him. In that sense, the refusal of Irish courts to hear his case did not totally deprive him of his right of access to court.[27]

Five Judges dissented. Judge Rozakis opined that the Court had not carried out a proper balancing of the interests of foreign States against those of aggrieved individuals, as required by the idea of proportionality. In the circumstances of the case, Judge Rozakis thought that the rather weak invocation of a

[23] Para 38 (*McElhinney*). While the Court did not refer to specific instances of State practice, the applicant had adverted to Art 11 of the European Convention on State Immunity (1972), Art 12 of the ILC Draft Articles on the Jurisdictional Immunities of State and Their Property (adopted in 1991), Art III(F) of the ILA's Revised Draft Articles for a Convention on State Immunity (1994) and a number of municipal instruments, notably the US Foreign Sovereign Immunities Act (1976), s 1605(a)(5); the UK Sovereign Immunities Act (1978), s 5; and the Australian FSIA, s 13. These provisions deny immunity for damage to persons or property caused by acts or omissions of organs of another State in the territory of the forum.

[24] Ibid.

[25] Ibid, para 40.

[26] See n 5 above.

[27] Para 39 (*McElhinney*).

State's interest in being immune from another State's jurisdiction was overridden by the right of the applicant to have access to court. That right was eventually reinforced by the existence of several kinds of jurisdictional bond between McElhinney's case and Ireland. The applicant was Irish; the alleged offence took place in Ireland; there were important difficulties in bringing a claim before UK courts. Judges Caflisch, Cabral Barreto and Vajic held that the Court had subscribed to the wrong view of customary international law on State immunity. The learned Judges argued that Article 11 of the European Convention on State Immunity and, most importantly, Article 12 of the ILC Draft Articles reflected general international law.[28] At the very least, they argued, these provisions strongly suggested that at present there is no international *duty* to grant immunity to other States for torts committed by their organs in the territory of the forum. Since the decision to exercise jurisdiction would not have been illegal under international law, the refusal of Irish courts to hear the applicant's claim breached his right of access to court. Judge Loucaides held that the ECHR was the sole instrument regulating the case in question. He believed that one should be reluctant to accept restrictions on Convention rights derived from principles of international law such as those establishing immunities, which at any rate did not enjoy the status of a peremptory norm of international law.

3. *Al-Adsani v UK*: The applicant was a dual Kuwaiti/British national, resident in the UK. He alleged that he had been subjected to extensive torture in the hands of Kuwaiti authorities and private individuals acting with the acquiescence of those authorities whilst he was in Kuwait. He also claimed that he had received serious threats against his life whilst in the UK. Relying on section 134 of the Criminal Justice Act 1988, which made torture wherever committed a crime under UK law,[29] in 1993 the applicant lodged a claim for compensation against the Government of Kuwait, the Sheikh of Kuwait, and two Kuwaiti nationals. Although the applicant was given leave to serve proceedings on all defendants,[30] his claim against Kuwait was eventually

[28] The learned Judges adverted to the international and municipal instruments adverted to by the applicants, see n 23 above. With regard to Art 31 of the ECSI, which excludes acts of armed forces from the scope of the Convention, they opined that that particular provision does not reflect customary international law.

[29] Criminal Justice Act 1988, s 134: '(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if— (a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence— (i) of a public official; or (ii) of a person acting in an official capacity; and (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.'

[30] *Al-Adsani v Government of Kuwait and Others* (*ex parte*) (Court of Appeal), 100 ILR 465. The High Court had denied leave to serve proceedings on Kuwait on the ground that the plaintiff had failed to show that Kuwait was not entitled to immunity.

dismissed on the ground that the latter was entitled to immunity from UK jurisdiction. As to the part of Al-Adsani's claim relating to torture committed in Kuwait, the Court of Appeal[31] held that the grounds for denying immunity to a third State were comprehensively stated in the Sovereign Immunities Act 1978.[32] Since the Act did not make an exception to the basic rule of immunity in respect of torture or other acts contrary to international law carried out outside UK jurisdiction, UK courts could not assume jurisdiction over the applicant's claim. As to the part of the claim relating to further threats against the applicant's life whilst he was in the UK, the Court of Appeal was not satisfied on the balance of probability that the threats in question emanated from the Kuwaiti Government.[33]

The applicant alleged that the decisions of the UK courts had violated his rights under Article 6(1) of the Convention.[34] The Court began by noting that that foreign States were generally immune as regards claims for personal injury not incurred in the territory of the forum.[35] What needed to be decided was whether the alleged acts, which the Court held could be properly categorised as torture in the meaning of Article 3 of the ECHR, were excluded from immunity because they were committed in violation of a *jus cogens* norm.

The prohibition of torture, the Court continued, was absolute in the ECHR and other international instruments.[36] Most importantly, the UN Convention Against Torture (CAT) had greatly extended criminal jurisdiction of State

[31] *Al-Adsani v Government of Kuwait and Others* (Court of Appeal), 107 ILR 536, at 537–45 (per Stuart-Smith LJ.) and 546–50 (per Ward LJ).

[32] State Immunity Act 1978, s 1(1): 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.'

[33] Ibid at 544–5 (per Stuart-Smith LJ) and 550–1 (per Ward LJ).

[34] The applicant also alleged that the UK had violated his right not to be subjected to torture (Art 3) and his concomitant right to an effective remedy (Art 13). The claim was rejected unanimously. The Court agreed that by virtue of these two provisions, 'States are required to take certain measures', including the conduct of a 'thorough and effective investigation', 'to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment'. However, it was held that Arts 3 and 13 establish those obligations only in respect of offences occurring within the jurisdiction of a State party and do not generally require States parties to provide a remedy for torture committed outside their jurisdiction, judgment, paras 38–9. In the same vein, the Court noted that the applicant's Art 3 complaint could not draw much support from the Court's judgment in *Soering v UK*, App no 14038/88, Judgment (Plenary Session), 26 June 1989, para 91. On the one hand, the Court affirmed that Art 3 has some extraterritorial application, especially in cases where a person is expelled by a State party even though there are 'substantial grounds for believing that the person concerned, if expelled, faced a real risk of being subjected to torture or to inhuman and degrading treatment or punishment in the receiving country'. On the other hand, it was pointed out that a State party would incur liability in such circumstances 'by reason of its having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment', judgment, para 39. The Court eventually found that there had been no violation of Art 3, since the applicant did not claim that he had suffered torture in the UK or that the latter had any causal connection with his predicament in Kuwait.

[35] Para 57 (*Al-Adsani*).

[36] Ibid, para 60. The Court mentioned Art 5 of the Universal Declaration of Human Rights, Art 7 of the International Covenant on Civil and Political Rights and Art 2 of the CAT.

parties in respect of acts of torture.[37] However, the Court found that the available practice of States concerned the criminal liability of individuals and not the immunity of States in a civil suit for damages:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[38]

The Court noted that none of the international instruments in question related to State immunity in civil proceedings. Moreover, even though there was some support for the argument that immunity should not attach to violations of *jus cogens* norms, the ILC Draft Articles of the Jurisdictional Immunities of States and Their Property did not contain any such exception.[39]

The Court was also not convinced by arguments based on the recent amendment to the US FSIA[40] and the *Pinochet* judgment.[41] With regard to the first, the Court drew attention to several considerations that weighed against regarding the US FSIA as expressing general international law. It noted, first, that the very fact that an amendment of the FSIA was necessary to exclude

[37] CAT, Art 4. The Court adverted to the judgment of the ICTY in *Prosecutor v Furundzija*, Case no IT-95-17/I-T, judgment of 10 Dec 1998, 38 ILM (1999) 317 and that of the UK House of Lords in *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3), judgment of 24 Mar 1999 [2000] AC 147.

[38] Para 61 (*Al-Adsani*).

[39] Ibid, para 62.

[40] 28 USCA §1605(a)(7): '(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(7) . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except . . .—(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 USC App 2405(j)) or s 620A of the Foreign Assistance Act of 1961 (22 USC 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia [the reference is to *Flatow v the Islamic Republic of Iran and others*, 76 F Supp 2d 16 at 18 (1999)]; and (B) even if the foreign state is or was so designated, if— (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in s 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred'. The exception in s 1605(a)(7) was introduced by s 221 of the Anti-Terrorism and Effective Death Penalty Act 1996. A concise account of this development is given by the Court of Appeals for the District of Columbia in *Price v Socialist People's Libyan Arab Jamahiriya*, 294 F 3d 82 at 87–90 (28 June 2002). See also JW Glannon and J Atik, 'Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act', 87 *Georgetown LJ* (1999) 675; LM Caplan, 'The Constitution and Jurisdiction over Foreign States: the 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective', 41 *Va J IL* (2001) 369.

[41] *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3), House of Lords, judgment of 24 Mar 1999 [2000] AC 147.

immunity from suit in respect of alleged torture would seem to confirm that immunity was still the norm in general international law. Moreover, the specific conditions attached to the exercise of jurisdiction by US courts were clearly peculiar to US law: the defendant State ought to have been designated as a sponsor of terrorism under US law and the claimant ought to be a US national. Finally, the Court pointed out that even after obtaining judgment against a foreign State for *jus cogens* violations, a plaintiff would not in principle be able to enforce it against State property used for governmental purposes.[42] As regards the *Pinochet* case, the Court noted that the decision of the House of Lords concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of State and did not in any way affect the immunity *ratione personae* of foreign States from civil jurisdiction in respect of such acts.[43] In sum, the Court held that the decision of UK courts to grant immunity to Kuwait was not inconsistent with general international law.[44]

Eight members of the Court dissented. Judges Rozakis and Caflisch, whose opinion was joined by President Wildhaber and Judges Costa, Cabral Barreto, and Vajic, held that the prohibition of torture, as a rule of *jus cogens*, prevailed

[42] Para 64 (*Al-Adsani*). The Court adverted to the judgment of the District Court of the District of Columbia in *Flatow*, n 40. While the Court's assessment of US law still holds true in practical terms, the authority of *Flatow* regarding attachment and execution against property of third States used for governmental purposes is now dated. A series of subsequent amendments to 28 USC § 1610(f) and Presidential Determinations made thereafter have prompted some further developments: as the 1996 amendment did not address issues of execution and attachment, in 1998 Congress decided to pass a further amendment (under s 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999) to allow enforcement against property of a third State used for governmental purposes in cases where US courts had jurisdiction under sec.1605(a)(7). Section 117(d) of the 1998 amendment gave discretion to the President to waive 'the requirements' of that section in the interest of national security. As soon as the 1998 amendment was made law on 21 Oct 1998, President Clinton issued Presidential Determination 99–1 and waived the 1998 amendment in its entirety, ie, including the provisions relating to attachment and execution against property of third States used for governmental purposes (a statement of reasons for the waiver can be found in 93 *AJIL* (1999) 185). However, in *Alejandre v Republic of Cuba et al*, 42 F Supp 2d 1317 the District Court for the State of Florida found that the President's waiver of the entire 1998 amendment was contrary to the purpose of the amendment and therefore no obstacle to enforcement according to the revised s 1610(f) (*Alejandre* was later vacated and remanded on different grounds, *Alejandre v Telefonica Larga Distancia de Puerto Rico Inc. et al.* (Court of Appeals—11th Circuit), 183 F 3d 1277. The Court of Appeals expressed no opinion on the validity of the President's waiver). Following the *Alejandre* ruling, in 2000 Congress passed a further amendment to s 1610(f), now giving express authority to the President to waive enforcement against property of third States used for governmental purposes, as provided in the revised s 1610(f)(1). On 28 Oct 2000 the President once more waived s 1610(f)(1) in the interests of national security.

[43] Especially per Lord Millett, n 39, 278. The House of Lords had cited with approval the judgment of the Court of Appeal in *Al-Adsani*.

[44] Para 66 (*Al-Adsani*). Judge Zupancic and Judges Pellonpää and Bratza appended concurring opinions. Judge Zupancic considered that the CAT was not intended to override the rules of State immunity. Judges Pellonpaa and Bratza considered the far-reaching consequences of the exercise of jurisdiction against foreign States for extra-territorial torture and noted the difficulties regarding issues of proof and execution. In the latter respect, they adverted to the suspension by President Clinton of the 1998 amendment to the FSIA that which allowed enforcement against foreign State property used for governmental purposes. See n 41 above.

over the law of State immunity. In the circumstances, they argued, Kuwait could not validly hide behind the rules of State immunity to avoid proceedings for a serious claim of torture before a foreign jurisdiction. Accordingly, the courts of that jurisdiction could not accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture claim. The five-Judge minority found that the Court's distinction between the civil liability of foreign States and the criminal liability of public officials effectively denied the status of *jus cogens* to the prohibition of torture. In their opinion, the civil or criminal character of the domestic proceedings ought to be immaterial, since the legal effects of a *jus cogens* rule as a matter of international law could not be made dependent on the nature of the proceedings in municipal law. In his dissenting opinion, Judge Ferrari Bravo held that the UK should have exercised jurisdiction in compliance with its obligation under the CAT to contribute to the punishment of torture. Judge Loucaides held that, as a rule, measures according blanket immunity without a proper balancing of the competing interests of the individual and the foreign State contravene Article 6(1).

II. COMMENT

A. A Dispute Under Article 6(1)?

The three cases concerned the extent of national jurisdiction over third States. In its judgments, the Court upheld the applicants' contention that they also concerned the right to a fair trial under Article 6(1) of the Convention. Somewhat surprisingly, the respondent States' did not contest that construction. They only argued that the applicants could not claim violation of Article 6(1) because the law of State immunity restricted any 'civil rights' that the applicants might have had under municipal law, or that in any event the their decision not to exercise jurisdiction imposed a proportionate restriction on the applicants' right of access to court. Both submissions conceded that the three disputes concerned Article 6(1) of the Convention.

With respect, this reasoning seems to conflate different categories of limitations to a State's jurisdiction. Some such limitations are *internal*, in the sense that they may be agreed on by States even though they are not prescribed by general international law. In that respect it is generally recognised that States have the ability to limit the ambit of their legislation *ratione loci*, *materiae*, or *personae*, as well as to refrain from exercising enforcement jurisdiction in certain classes of cases.[45] In contrast, other limitations to a State's jurisdiction

[45] The application of the doctrine of absolute immunity by national courts is a well-known case in point. For example, in *Ramos et al v United States*, the Lisbon Court of First Instance held that 'foreign States are immune from jurisdiction unless they expressly or implicitly but always unequivocally, waive immunity. Such waiver cannot be presumed. Immunity exists as regards both acts of foreign States performed *jure imperii* and also acts performed under private law', 87 ILR 29 at 34–5. Such decisions would seem to give immunity a scope wider than currently

have an *external* character, in the sense that they are imposed as a matter of general international law and obligate each State to exercise its jurisdictional competence within certain outer limits. These limits are by and large territorial, but may also concern personal or subject matter jurisdiction.

The point of the respondent States' submission appears to have been that they were bound to accord immunity to the defendant third States as a matter of customary international law.[46] They thus claimed that the limitation on their national jurisdiction was external rather than internal in character. It is hard to see how that contention could be meaningfully construed under Article 6(1) of the Convention. On a proper reading, it would appear that Convention rights such as Article 6(1) tell a State how to exercise its jurisdiction but cannot extend that jurisdiction beyond what is allowed by international law. The opinion of Lord Millett in *Holland v Lampen-Wolfe*, where the House of Lords dealt with the argument that the granting of immunity to another State infringes Article 6(1) of the ECHR, is worth citing at length for its clarity:

> At first sight [Art 6(1)] may appear to be inconsistent with a doctrine of comprehensive and unqualified State immunity in those cases where it is applicable. But in fact there is no inconsistency. This is not because the right guaranteed by art 6 is not absolute but subject to limitations, nor is it because the doctrine of State immunity serves a legitimate aim. It is because art 6 forbids a contracting State from denying individuals the benefit of its powers of adjudication; it does not extend the scope of those powers.
>
> Article 6 requires contracting States to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting States have

accepted in general international law. The blanket immunity from execution granted to foreign central banks under UK law [s 14(4) of the SIA 1978] provides a further example in that respect. The current rule of international law seems to be that property of foreign States used for commercial purposes may be subject to attachment and execution, see Art 18 of the ILC Draft Articles on the Jurisdictional Immunities of States and Their Property, esp. Seventh Report of the Special Rapporteur, Mr. Sompong Sucharitkul, Yearbook of the ILC (1985), vol II (Part One), 28 ff; Second Report of the Special Rapporteur, Mr Motoo Ogiso, *Yearbook of the ILC* (1989), vol II (Part One), 64, para 43.

[46] The submission of the UK in *Al-Adsani* put this in rather clear terms. In the words of the Court, the UK claimed that 'Article 6 could not extend to matters outside the State's jurisdiction, and that as international law required an immunity in the present case, the facts fell outside the jurisdiction of the national courts and, consequently, Article 6', Judgment, para 44. The respondents' submissions in *Fogarty* and *McElhinney* are arguably less clear. In *Fogarty*, the UK submitted that 'Article 6 § 1 of the Convention did not apply, because the applicant had no actionable domestic claim. The principle of sovereign immunity removed the dispute from the competence of the national courts, which could not assert jurisdiction over the internal affairs of foreign diplomatic missions', Judgment, para 22. Whereas in *Al-Adsani* the UK submission seemed to focus on the general relation between the Convention and the law of State immunity, in *Fogarty* more emphasis was placed on the actionability of the applicant's domestic claim. On the other hand, Ireland's argument in *McElhinney* was explicitly structured according to the requirements for a legitimate restriction of the right of access to court, as laid down in the Court's jurisprudence. Ireland argued that 'the limitation on the applicant's right of access to court had a legitimate objective' and that 'Ireland was entitled to a margin of appreciation', Judgment, para 28.

> the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting States adjudicative powers that they do not possess. State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign States. It is not a self-imposed restriction on the jurisdiction of its courts that the United Kingdom has chosen to adopt. It is a limitation imposed *from without* upon the sovereignty of the United Kingdom itself.[47]

There is reason to think that the Court misapplied, rather than missed, the distinction between external and internal limitations. The judgments warned that State parties cannot 'remove' a range of civil claims from the jurisdiction of their courts or 'confer' immunities from civil liability on large groups or categories of persons.[48] In other words, the Court tried to emphasise that States parties cannot *give away* part of their jurisdiction without being potentially liable under the Convention. But true as that proposition might be, it is nevertheless clear that it refers only to self-imposed, ie, internal, limitations to a State party's jurisdiction. Any internal limitation presupposes that a State party was otherwise entitled to exercise jurisdiction over the claims and groups of persons involved; that was exactly what the respondent States denied.

Given that the rules of general international law impose an external limitation on the jurisdiction of States parties to the Convention, it is quite surprising that neither the Court nor the respondent States adverted to that provision in the Convention which purports to deal with such limitations, namely Article 1.[49] If anything, a jurisdictional limitation imposed as a matter of general international law would seem to entail that the area covered by that limitation does not lie 'within the jurisdiction' of the State party concerned.[50] The Court

[47] *Holland v Lampen-Wolfe*, [2000] 3 All ER 808 at 846–7 (emphasis added). Cf the decision the European Commission of Human Rights in the case of *N* (*et al*) *v Italy*, App No 24236/94, Decision of 4 Dec 1995: 'the right of access to court does not require that courts shall have unlimited jurisdiction; in particular, Art 6 of the Convention should be interpreted with due regard to parliamentary and diplomatic immunities as traditionally recognised: in such cases, the defendant is inaccessible and it is for the domestic court to apply the corresponding limitation of its jurisdiction'. See also Council of Europe, Art 6 of the European Convention on Human Rights: the right to a fair trial, Human Rights files No 13, Council of Europe Press (1994), 30–1.

[48] Para 47 (*Al-Adsani*), para 26 (*Fogarty*), para 24 (*McElhinney*).

[49] Art 1 reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' The failure of the Court to address the applicability of the Convention as a whole is even more bewildering if one considers the particular subject-matter of the three applications, namely the extent of national jurisdiction over third States. The Court's view is not unique, though. A recent monograph devotes the best part of a chapter to the relation between the ECHR and the law of State immunity without making a single mention of Art 1, J Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague: Kluwer, 1997), ch 3, 143–88.

[50] This view seems to have found favour with the European Commission on Human Rights in the case of *Spaans v Netherlands*, App no 12516/86, Decision, 3 Nov 1986. The applicant, a former employee of the Iran–US Claims Tribunal, alleged that in granting immunity from suit to the Tribunal the Netherlands had violated his right of access to court. The Commission found the application inadmissible, holding that the administrative decisions of the Tribunal were not acts that occurred 'within the jurisdiction' of the Netherlands in the meaning of Art 1.

itself has recently had occasion to emphasise that Article 1 should be interpreted in the light of the rules of public international law regarding State jurisdiction.[51] Although the Court's jurisprudence on Article 1 has so far only involved external limitations of a territorial character (*ratione loci*),[52] there is little reason to suppose that other kinds of limitations imposed by general international law, namely those *ratione personae* or *materiae*, should not be considered under the same heading.

On the whole, the Court's construction of the three applications as raising issues under Article 6(1) cannot be commended. External constraints on the jurisdiction of a State party to the ECHR do not seem to affect individual rights under the Convention but rather the applicability of the Convention as a whole, therefore raising issues under Article 1.

B. Legitimate Aim—Proportionality

Having found that the Convention was applicable, the Court went on to treat the respective municipal court decisions granting immunity from suit as any other national measure alleged to have violated Article 6(1). Accordingly, the Court had to be satisfied that the decision to exercise jurisdiction pursued a legitimate aim and that it was proportionate.[53]

There are a number of reasons to think that the tests of Article 6(1) were ill-suited to the issues raised by the three applications. To begin with, it must be doubted whether the granting of immunity in accordance with international law can be said to reflect a 'legitimate aim' for the purposes of the ECHR. The concept of 'legitimate aim' has generally been used to denote policy objectives pursued by national Governments, such as public safety, national security, the protection of public health and economic well-being of the country, or the rights of other individuals.[54] The Court too seems to have used the term in that sense. The judgments held that the granting of immunity to foreign States pursued 'the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.[55] The Court thus suggested that the respondent States did not exercise jurisdiction because they pursued the *policy* of

[51] *Bankovič and Others v Belgium and 16 Other Contracting States*, App no 52207/99, Decision as to Admissibility [GC], 12 Dec 2001, paras 57, 59–62; *Loizidou v Turkey*, App No 15318/89, Judgment [GC], 28 Nov 1996, para 43.

[52] Eg, *Matthews v UK*, App no 24833/94, Judgment [GC], 18 Feb 1999, paras 29–35; *Loizidou v Turkey*, App no 15318/89, Decision as to Admissibility [GC], 23 Mar 1995, paras 62–4.

[53] Cf *Waite and Kennedy v Germany*, App no 26083/94, Judgment [GC], 3 Feb 1999, para 59.

[54] Eg, *Gillow v UK*, App no 9063/80, Judgment, 23 Oct 1986, paras 53–4; *Campbell v UK*, App no 13590/88, Judgment, 28 Feb 1993, pars 39–41; *Vogt v Germany*, App no 17851/91, Judgment [GC], 2 Sept 1995, paras 49–51; *Barthold v Germany*, App no 8734/79, Judgment, 25 Feb 1985, para 51; *Müller and Others v Switzerland*, App no 10737/84, Judgment, 28 Apr 1988, para 30.

[55] Para 54 (*Al-Adsani*), para 34 (*Fogarty*), para 35 (*McElhinney*).

complying with international law.[56] What that argument overlooks, however, is that the third States concerned advanced their claim to be exempt from the jurisdiction of the State of the forum as a claim of *right*. They did not contend that it would be worthwhile for the State of the forum to adopt policies which promote international comity, but that the State of the forum was bound to accord them specific entitlements as a matter of international law.[57] With that in mind, the three applications did not concern a conflict between the applicants' right of access to court and the respondent States' policy of promoting international comity. They rather concerned a straight conflict between the respondents' obligation under the Convention to adjudicate the applicants' claims and their obligation under general international law to accord immunity from jurisdiction to the defendant foreign States. Considering that Article 6(1) provided support for only one of these competing obligations, the Court should have inferred that a resolution of their conflict could not be reached using the tests of Article 6(1). As it stands, the Court's holding to the contrary seemed to 'rig' the conflict at its very outset.

Having found that the restriction of the applicants' right of access to court pursued a legitimate aim, the Court went on to consider the question of proportionality. It was held that there must be a 'reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[58] Then, applying this reading of proportionality to the disputes in question, the Court found that 'measures taken by a High Contracting Party, which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1)'. This is a very curious reading of the idea of proportionality, though. In effect, the Court says that if a State party is bound to accord immunity to a foreign State as a matter of general international law, the decision to do so will not 'in principle' be disproportionate to the aim of complying with the law of State immunity. But the use of proportionality seems misplaced here. At best, the Court seemed to argue in favour of a presumption that legally adopted measures are also proportionate in character, thereby conflating two concepts that the Court's own jurisprudence has striven to distinguish. The Court has repeatedly held that, for the purposes of the ECHR, the idea of proportionality involves the

[56] Here the Court relied substantially on its findings in *Waite and Kennedy v Germany*, n 14 above. In that judgment, the Court held: 'To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in matters [for which the organisation enjoys immunity] would, in the Court's view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation.' This passage construes the granting of immunities to foreign States as a question of policy in even clearer terms.

[57] The International Law Commission has pointedly noted that '[p]rivileges and immunities constitute a right not a courtesy', Fourth Report on the Relations between States and International Organisations, UN Doc A/CN 4/424 (24 Apr 1989), *Yearbook of the ILC* (1989), vol II (Part One), 160.

[58] Eg, *McElhinney*, para 34.

weighing of competing interests and in that sense raises questions of degree.[59] On the one hand, it requires the balancing of three distinct 'quantities': the legitimate aim of the contested measure, the means by which that aim has been pursued and the potential adverse consequences of those means on Convention rights. On the other hand, determining the proportionality of a measure requires an assessment of the degree to which the legitimate aim could lawfully be pursued without impairing the essence of a Convention right, ie, whether the State party could have pursued its legitimate aim in a manner more consistent with the Convention.[60]

By the Court's own standards, its analysis can hardly be said to have applied a test of proportionality. Aside from a puzzling reference in *McElhinney*,[61] the Court never took up the task of weighing the State parties' claim to comply with international law against the applicants' right of access to court.[62] More importantly, as regards the question of degree it was clear that the respondent States could not have pursued the legitimate aim of complying with their international obligations—assuming that those obligations did exist—except by not exercising jurisdiction and thereby completely depriving the applicants of their right of access to court. Were the Court to apply the usual tests of proportionality here, it is difficult to see how it could avoid finding that virtually all measures granting immunity to foreign States or international organisations impose a disproportionate restriction on the right of access to court.[63]

[59] Cf. *Soering v UK*, App no 14038/88, Judgment (Plenary Session), 26 June 1989, para 89: 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.' See also DJ Harris, M O'Boyle, and C Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), 11–12.

[60] This does not preclude the possibility that a measure might be proportionate under the Convention even though there are no reasonable alternative ways to pursue the legitimate aim involved, *James and Others v UK*, App no 8793/79, Judgment (Plenary Session), 22 Jan 1986, para 51.

[61] The Court pointed out that the applicant had voluntarily foregone the possibility of bringing an action in Northern Ireland against the UK Secretary of State for Defence, Judgment, para 39. The relevance of this point is questionable. It is certainly true that any person who lodges a claim against a State before foreign courts might alternatively pursue that claim in the courts of the defendant State. But this seems totally beside the point in respect of the duty of the State of the forum to provide access to its courts—whatever the extent of that duty. Here the judgment appears to have been influenced by some special circumstances noted in the Irish submission, namely that 'the courts in Northern Ireland were easily accessible to the applicant [and that] the relevant law was substantially identical to that in Ireland', Judgment, para 29. Still, the judgment itself did not advert to such special reasons. It merely noted that 'there was no bar to an action in Northern Ireland', Judgment, para 39. One wonders whether the Court would have taken this into account if the foreign organ involved was, eg, Australian.

[62] The minority Judges in *McElhinney* and *Al-Adsani* were quick to seize on that point. See especially the opinion of Judge Rozakis in *McElhinney*.

[63] The contrast with the Court's judgment in *Waite and Kennedy v Germany*, n 14 above, is startling to say the least. There the Court found that 'a material factor in determining whether granting ESA immunity from German jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention', Judgment, para 68.

On the whole, therefore, the Court's attempt to achieve a harmonious interpretation of the Convention and the law of State immunity in terms of Article 6(1) was not successful. Once the Court had determined that the relation between the two bodies of law raised issues with Article 6(1), it was bound look for a fair balance between the law of State immunity and the right of the applicants to have access to court. By failing to take proper account of the applicants' rights, the Court's chosen approach either renders the concepts of legitimate aim and proportionality meaningless or misapplies them. These shortcomings confirm the view that the tests of Article 6(1) were ill-suited to the problems raised by the three applications and that the Court ought to have dealt with the relation between the Convention and State immunity in the context of Article 1. As noted above, this does not suggest that the issues of legitimacy of aim and proportionality will never arise in the relation between the Convention and the law of State immunity. It is rather submitted that whether these issues do arise will normally depend on the character, external or internal, of the alleged limitation to a State party's jurisdiction. If a State party has jurisdiction under international law, any limitations that it decides to place upon its jurisdiction are subject to Convention rights and therefore to a test of legitimacy of aim and proportionality. Under that interpretation, a State that chooses to waive its jurisdiction, say with regard to an act which was performed *jure gestionis*, could possibly be held liable for breach of Article 6(1) *vis-à-vis* individuals who will not be able to sue a foreign State.[64] On the other hand, when the limitations concerned are external, the pertinent question is not whether such limitations pursue a legitimate aim and impose proportionate restrictions in respect of individual Convention rights but whether the Convention as a whole is applicable in the first place.

C. Exceptions to Immunity from Suit

Since *Fogarty* did not give rise to any serious controversy,[65] this section takes up only issues involved in the *McElhinney* and *Al-Adsani* cases. The comment concentrates on the arguments of the minority, since they took the task of establishing that the respective exceptions from immunity are part of general international law.

1. McElhinney v Ireland: *The Tort Exception*

It is difficult to understand why the minority Judges spent so much effort referring to the restrictive trend in respect of State immunity. After all, the flagship

[64] The UK practice of according blanket immunity from execution to foreign central banks would appear suspect from that point of view, see n 45.

[65] For a thorough discussion of the issues pertaining to State immunity in respect of employment disputes see H. Fox, 'Employment Contracts as an Exception to State Immunity: Is All Public Service Immune?', 66 *BYIL* (1997) 97.

of the restrictive trend has been the distinction between acts *jure imperii* and acts *jure gestionis*. In this particular case, the distinction could work only in favour of and not against the respondent State. If anything was clear about the facts in *McElhinney*, the British soldier had acted in his official capacity.

To support their dissent, the minority should have been looking towards more than the general restrictive trend. More specifically, the minority needed to establish that in general international law immunity does not attach to damage to persons or property caused by members of foreign armed forces in the territory of the forum, regardless of the *jure imperii* or *jure gestionis* character of the acts involved. Judges Caflisch, Cabral Barreto and Vajic thus adverted to Article 11 of the European Convention on State Immunity and Article 12 of the ILC Draft Articles on the Jurisdictional Immunities of States and Their Property. Indeed, both provisions prescribe an exception from immunity in respect of damage to persons or property in the territory of the forum, whether or not the damage involved was caused in the exercise of governmental functions.

However, several considerations militate against accepting those provisions as part of general international law, at least in respect of acts of foreign armed forces. With regard to the European Convention on State Immunity (ECSI), this is clearly stated in the very text of the Convention: Artricle 31 provides that the Convention as a whole does not apply in respect of acts of armed forces in the territory of another State.[66] The situation is arguably different in respect of the ILC Draft Articles, since neither the text of the Convention nor the commentary to Article 12 contain a provision equivalent to Article 31 of the ECSI.[67] Still, and despite the claims of the three-Judge minority, there are significant doubts as to whether Article 12 reflects general international law. The learned Judges argued that the tort exception in Article 12 of the ILC Draft 'is firmly rooted in practice' and that 'nothing suggests that the Commission intended to propose Article 12 as *lex ferenda*, that is, as a development rather than a codification of international law'. In support of their view, they noted that 'criticisms were levelled at various provisions of the Draft, but not article 12, which gave rise to little or no discussion'. However, their claims stand

[66] ECSI, Art 31: 'Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.' It should also be noted that the Convention has not been very popular with members of the Council of Europe, having so far attracted only eight ratifications.

[67] While there are indications that exceptions from immunity in the ILC Draft Articles are meant to apply in respect of acts of members of a State's armed forces too (see esp Art 1(b)(iv) of the Draft Articles), there is strong support for the view that the ambit of Art 12 is limited to everyday torts, notably traffic accidents, see the Proposal of the Drafting Committee on a Second Reading, *Yearbook of the ILC* (1990), vol I, 288, at 314, para 74 and the Report to the General Assembly on the 42nd session of the ILC, *Yearbook of the ILC* (1990), vol II, Part Two, 36, para 190. It must be borne in mind, though, that both views derive from work in progress.

at odds with the position adopted by the Special Rapporteur of the ILC at the start of his survey:

> It should be stated at the outset that, whatever the legal basis for the existence or assumption of jurisdiction by the forum loci delicti commissi or the application of the lex loci delicti commissi . . . the basis for actual exercise of jurisdiction when the act or omission complained of is attributable to a foreign State *cannot be found in customary international law*.[68]

As to the alleged general acceptance of Article 12, it should suffice to note the comments of the Second Special Rapporteur as late as 1990:

> The views of members of the Commission were also divided on article 13 [as it was numbered at the time]. Some proposed the deletion of the entire article, since in their view it was based on the legislation of a few States and such cases could be settled through the diplomatic channel; others held the view that disputes of this nature were not uncommon and diplomatic protection was not a viable alternative. It was also pointed out that, if the act or omission which caused the injury or damage was attributable to a State, the question of State responsibility would arise and the matter could be resolved only by international law and not by a national court.[69]

Existing State practice also suggests that the withdrawal of immunity for acts of foreign armed forces in the territory of the forum does not reflect customary international law. Apart from the pronouncement of Irish courts in *McElhinney v Williams*,[70] recent decisions of municipal courts have upheld that foreign armed forces are as a rule exempt from the jurisdiction of the forum. In the case of *Holland v Lampen-Wolfe* the House of Lords held that where the UK SIA 1978 does not apply, as with regard to acts of foreign armed forces (section16 para 2), the test for determining the existence of immunity is the distinction between acts *jure imperii*/*gestionis*.[71] Similarly, in the case of *FRG v Prefecture of Voiotia*, the Greek Court of Cassation held that Article 11 of the ECSI, to the extent that it may be said to reflect customary international law, does not apply in respect of acts of foreign armed forces in the territory of the forum.[72] Lastly, a clear rejection of Article 11 as customary international law

[68] *Yearbook of the ILC* (1983), vol II (Part One), 39, para 68 (italics added).

[69] *Yearbook of the ILC* (1990), vol II (Part One), 14. Art 12 still elicits strong reactions in some quarters. As late as 2000 the Pakistani delegation observed: 'The dilution of State immunity in respect of claims for pecuniary compensation for death or injury to the person, or damage to or loss of tangible property . . . would cause a great deal of friction between some developed countries where there is a strong tradition in tort litigation and developing countries. Moreover, the provision makes no distinction between *acta jure imperii* and *acta jure gestionis*. It should therefore be deleted in order to make the draft Convention acceptable to a majority of States', Fifty-Fifth Session (2000), UN Doc A/55/298, 11, para 3–4.

[70] *McElhinney v Williams* (Supreme Court of Ireland), judgment of 15 Dec 1995, 104 ILR 691 at 700–3.

[71] [2000] 3 All ER 808, at 837–40 (per Lord Clyde) and 843–5 (per Lord Millett).

[72] Unreported, see I Bantekas and M Gavouneli, Case Note, 95 *AJIL* (2001) 198. The Greek Court of Cassation eventually held that in cases of armed conflict the exception from immunity applies in respect of criminal acts that are not part of the conflict.

is found in the judgment of the Dutch District Court of Haarlem in the case of *LF & HMHK v Germany*.[73] The District Court said:

> It is not reasonable to assume that an opinion on jurisdiction must be formed by reference to Article 11 of the European Convention. It is evident . . . that the practice adopted by the members of the Council of Europe . . . on this point is far from uniform; this in itself is not a reason for accepting this Convention as a source of unwritten international law (regional customary law).

In all, the minority was not able to support the claim that foreign States are not immune as regards *jure imperii* acts of their armed forces in the territory of the forum. The better view is arguably that endorsed by the Court, namely that most States apply the *imperium*/*gestio* distinction in relation to the civil liability of foreign States for acts of their armed forces in the territory of the forum.

2. Al-Adsani v UK: *the* jus cogens *exception*[74]

The concept of *jus cogens* has been steeped in controversy ever since it was laid down in Article 53 of the 1969 Vienna Convention on the Law of Treaties. In *Al-Adsani* the Court had to deal with only one aspect of that debate. It was never disputed that the prohibition of torture has attained the status of a peremptory norm of international law. The learned Judges of the ECHR were only divided on what that status entailed for the rules of State immunity. In the following sections, this comment discusses two related issues: first, the function of the concept of peremptory norms in the majority and minority opinions and, second, the character of their disagreement.

(a) The Vienna Convention regime and recent developments

Most discussions of *jus cogens* rules in international law take their cue from the provisions of the Vienna Convention.[75] Article 53 of the latter provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, which it defines as 'a norm accepted and recognized by the international community of States as a whole as a norm

[73] *LF & HMHK v Germany*, 94 ILR 342, at 347 (1986). Dutch practice is all the more important because the Netherlands later became party to the ECSI.

[74] I am grateful to Ms Rukhsana Ali (UCL) for her comments on an earlier draft of this section.

[75] See generally J Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Wien; New York: Springer-Verlag, 1974); Ch Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (Amsterdam; Oxford: North Holland Pub, 1976); L Hannikainen, *Peremptory Norms* (*Jus Cogens*) *and International Law: Historical development, Criteria, Present Status* (Helsinki: Finnish Lawyers Pub Co, 1989); N Rao, '*Jus Cogens* and the Vienna Convention on the Law of Treaties', 14 *Ind YIL* (1974) 362; G Danilenko, 'International Jus Cogens: Issues of Law-Making', 2 *EJIL* (1991) 42; M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', 66 *Nordic JIL* (1997) 211. Among writings predating the Vienna Convention, see A Verdross, 'Jus Dispositivum and Jus Cogens in International Law', 60 *AJIL* (1966) 55; E Schwelb, 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission', 61 *AJIL* (1967) 946.

from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Moreover, Article 64 provides that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Generally speaking, once it has come into existence a *jus cogens* rule overrides any previous or subsequent rule to the contrary. In that sense, it reigns supreme.

Of course, that does not take one very far. Although the Vienna Convention rules on *jus cogens* are often invoked to support arguments of international law, international practice yields hardly any examples of a treaty or other international agreement that was held invalid or terminated because it contravened a rule of *jus cogens*.[76] To a considerable extent, the rather marginal role of Articles 53 and 64 in current international practice could be attributed to the very context in which these provisions find themselves placed. As they stand, Articles 53 and 64 are expressly directed against certain *rules* rather than the *practices* that those rules involve. At the end of the day, all that the Vienna Convention says is that States may not *agree* to carry out acts in violation of peremptory norms. But although such a prohibition is perhaps logically sufficient to secure a higher legal standing for *jus cogens* norms, one cannot help observing that it responds to a largely uninteresting challenge. A State which practices torture or genocide might perhaps seek to deny its actions, disclaim political responsibility for them, or keep a low profile concerning confirmed violations. It will hardly ever claim a *right* to torture individuals or, at that, a right to agree to engage in such practices. The Vienna Convention rules thus seem to miss what looms as the more pressing task for the international community, namely to impose an effective and absolute ban on the practice of torture rather than its potential legalisation.

Since the time of the Vienna Convention the tide has arguably turned from the absolute sanctioning of certain rules to the search for alternatives means of eradicating the practices that they would serve to license. During the last two decades the international community has sought to bring the absolute and universal condemnation of torture, genocide and other such practices to bear more strongly on the content and interpretation of a variety of international legal rules. The most notable development in that respect has been the idea of individual criminal responsibility for violations of humanitarian law[77] and acts

[76] The 1960 Treaty of Guarantee of Cyprus, Art IV of which provided for a right of unilateral intervention on the part of the Guarantor States (Greece, Turkey, and the UK) is sometimes considered a case in point, although no Party has declared either the whole Treaty or Art IV to be invalid or terminated on grounds of conflict with *jus cogens*, see M Mendelson, *Opinion on the Application of the Republic of Cyprus to Join the European Union*, 59–60, paras 84–5 obtainable (together with Professor Mendelson's Further Opinion on the matter) at <http://www.un.org/documents/ga/ docs/56/a56451.pdf>.

[77] Cf. Art 6 of the Charter of the International Military Tribunal at Nuremberg, Arts 1–7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, Arts 1–6 of the International Criminal Tribunal for Rwanda and Arts 5–8 of the 1998 Rome Statute of the International Criminal Court.

of torture.[78] As regards the latter, State parties to the CAT have undertaken a general obligation either to prosecute individuals suspected of torture or to extradite them to a State that has jurisdiction over the alleged offence.[79] To facilitate prosecution of suspected offenders, the CAT has also extended the criminal jurisdiction of States beyond the traditional territorial bounds, even allowing its exercise in respect of acts of torture committed outside their territory by foreign nationals.[80] Recent authority suggests that a foreign public official who has engaged in torture cannot invoke immunity before the courts of any State party to the CAT.[81]

(b) The competing arguments

Majority and minority disagreed about how far these developments had affected the rules of State immunity. The argument of the majority was straightforward: the prohibition of torture may be a *jus cogens* rule but there is little authority to suggest that the violation of *jus cogens* rules has the legal effect of suspending the immunity of States in civil suits before foreign courts.[82] The majority implied that, even though the aforementioned developments have given added bite to the absolute and universal condemnation of torture, they should not be seen as merely 'spelling out' legal consequences already immanent in the recognition of the prohibition of torture as a peremptory norm. Such a view, it was suggested, would attribute too much weight on the label 'peremptory norm' without adequate support in the practice of States. To bypass the well-established obligation to accord immunity to foreign States, one would need to show that State practice has somehow recognised a jurisdiction-conferring rule to the contrary.

The minority argument was no less clear in outline.[83] Since the prohibition

[78] See CAT Art 4(1): 'Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.'

[79] CAT, Art 7(1).

[80] CAT, Art 5: '1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.'

[81] *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 3), House of Lords, Judgment of 24 Mar 1999, [2000] AC 147.

[82] Cf the recent judgment of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000* (Congo *v* Belgium), Judgment, 14 Feb 2002, para 58, obtainable from the Court's web-site at <http://www.icj-cij.org>.

[83] The full passage reads: 'The basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null

of torture is a *jus cogens* rule, it follows that a State which has allegedly violated it cannot invoke hierarchically lower rules, such as State immunity, to avoid the consequences of the illegality of its actions. The minority submitted that if the overwhelming recognition of the prohibition of torture as a peremptory norm of international law is to be given any meaning, it must at least be able to override any standard rules with which it happens to conflict. According to its view, 'peremptory status' *is* 'overriding status'; one cannot accept the former without accepting the latter as well.[84] Furthermore, given that States have manifested their determination to eradicate not only the rules but above all the practices that serve to violate peremptory norms of international law, it would be arbitrary to claim that legal effects may attach only to the former kind of violation. The minority thus thought that no sound distinction could be drawn between the criminal liability of individuals and the civil liability of States as regards their immunity before foreign courts. If anything, both kinds of liability arose out of the same acts and were equally contrary to the peremptory prohibition of torture.

(c) Pedigree and substance: the function of the jus cogens *concept*

For the most part of their respective opinions, majority and minority discussed whether the prohibition of torture, by virtue of its higher standing as a rule of *jus cogens*, could suspend the immunity of foreign States in respect of torture claims. The phrasing of the question itself reveals that both groups viewed their disagreement as concerning an issue of formal pedigree rather than substantive content, ie, not the formulation of the applicable rules of State immunity and the prohibition of torture but their formal ordering. Construing the disagreement in this fashion seems to account for the two sides' respective conclusions. The majority rejected the view that the prohibition of torture enjoyed a general advantage of pedigree against the rules of State immunity and decided the case on the basis of the latter. The minority accepted that the prohibition of torture had such an advantage and reached the contrary conclusion.

At this point a casual observer might think that the appeal to the concept of *jus cogens* was crucial only in respect of the minority argument, which relied heavily on it in order to justify the suspension of the rules of State immunity. It is certainly true that, were the minority argument to prove unsuccessful, the claim that the prohibition of torture overrides the law of State immunity could not be sustained; in that sense the *jus cogens* concept was indeed central to the

and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory norm. . . . The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.'

[84] The minority Judges noted that 'the majority, while accepting that the rule on the prohibition of torture is a *jus cogens* norm, refuse to draw the consequences of such acceptance'.

minority submission. But it is hard to see how the majority argument could succeed without making a similar appeal to the primacy of State immunity over other norms, *including* the prohibition of torture. To begin with, the majority could certainly not sustain its position by mere default, ie, by simply denying that the prohibition of torture enjoyed no advantage of pedigree over the law of State immunity. To deny the formally superior status of a rule in relation to another can only be equivalent to saying that the two stand on an a more or less *equal* footing. The majority could only justify its position by means of the following positive claim: that *unless* the prohibition of torture enjoyed an advantage of pedigree over State immunity, the obligation to accord immunity to foreign States prevailed over the obligation to exercise jurisdiction over torture claims. This claim is not different in kind from that of the minority, though. By positing a presumption in favour of full applicability of the rules of State immunity, the majority attached a superior status to the rules of State immunity in exactly the same manner that the minority had done for the prohibition of torture.

The assumption that the *jus cogens* concept relates to the formal pedigree of international norms was central in both the majority and the minority opinions. However, that assumption is not free from difficulty, not least because it seems to start from square two, so to speak. Talk of any sort of ordering amongst legal rules makes sense only if those rules are in conflict at the level of substance. To say, for example, that the prohibition of torture suspends the rules of State immunity makes sense only if the two norms make conflicting substantive demands, for example, the prohibition of torture demands access to court whereas the rules of immunity serve to bar such access. In that sense, before considering whether the peremptory prohibition of torture may override the law of State immunity on account of its superior formal standing, one must consider whether the two rules do in fact make incompatible demands on States. As stated by both majority and minority, the 'pedigree' thesis is certainly incomplete.

This is not to suggest that this weakness is irremediable. There is a lot to suggest that, despite appearances, the disagreement between majority and minority concerned not only the formal pedigree but also the substantive content of the competing norms. In particular, the two sides appear to have construed the prohibition of torture and the relevant rules in the law of State immunity in quite opposite ways. The majority held that compliance with the prohibition of torture did not necessarily entail the suspension of whatever measure of immunity foreign States would otherwise enjoy before the courts of the forum. Under that interpretation, the obligation of the State of the forum to exercise jurisdiction over torture claims ended where the immunity of foreign States began. The minority took the opposite view. It found little evidence suggesting that the effectiveness of measures aiming to eradicate the practice of torture was in any sense conditional on the status of the alleged offender. It therefore concluded that the obligation to accord immunity to

foreign States did not necessarily entail the suspension of whatever jurisdiction the forum might otherwise have over the acts of torture involved. In complete contrast to the majority, the minority submitted that the obligation to accord immunity to foreign States ended where their duty to exercise jurisdiction over acts of torture began.

Seeing the substantive aspect of the disagreement between majority and minority might seem to reinforce the idea that *jus cogens* norms raise questions of formal pedigree. It will be recalled that according to the 'pedigree' approach one first needs to determine that there exists a substantive conflict between the rules involved and then decide that conflict on the basis of their relative formal pedigree. In that sense, having ascertained a conflict between the prohibition of torture and State immunity, the 'pedigree' argument now appears complete.

That view is severely mistaken, though. A closer look at the two groups' substantive interpretations of the prohibition of torture and State immunity suggests that the stage of comparing the relative formal pedigrees of the rules involved, which forms the heart of the 'pedigree' approach, is largely superfluous. For example, if one agrees with the minority that the immunity of foreign States stops where the prohibition of torture begins, the conflict between the two rules is *already* resolved at the level of substance, ie, as a matter of the substantive requirements of the rules of State immunity and the prohibition of torture. There is no need to make the further claim that those rules have a lower pedigree *vis-à-vis* the peremptory prohibition of torture; the conflict is smoothed out long before the issue of form can ever arise. It would thus seem that the 'pedigree' thesis supported by the majority and minority opinions is only intelligible as an argument about how the conflicting rules should be interpreted and not as a formal test to be applied once the task of interpretation is complete. To that extent, the function of the *jus cogens* concept in the two sides' arguments needs to be redefined. It should not be regarded as a test of formal pedigree but as an interpretative tool for resolving conflicts between different rules. It does not convey how strong a formal standing a rule has, but rather how widely or narrowly that rule ought to be construed when it stands in conflict with others.

(d) The conflict: rules and principles

The disagreement between majority and minority concerned the substantive interpretation of the prohibition of torture and the law of State immunity, not a formal hierarchy between them. Having said that, one cannot help noticing a certain asymmetry between the two sides' interpretative arguments. In particular, it is not at all clear how the prohibition of torture and the law of State immunity could collide in the first place. To risk some triviality, the prohibition of torture seems to be mainly about prohibiting the practice of torture, whereas the rules of State immunity are mainly about the exercise of jurisdiction over foreign States. Some interpretative work is

clearly needed to show that a conflict between their respective demands does indeed exist.

It is not self-evident how one should proceed. A closer look at the competing arguments reveals that their asymmetry also extends to the *kind* of claims made by each. In particular, it would seem that the majority argument was concerned with finding the applicable *rule* of State immunity, ie, with stating a proposition of law that dictated a particular 'end-result' for the dispute at hand. From that perspective, all that the majority had to do in order to decide whether the UK had a duty not to exercise jurisdiction was to find out whether the requirements for according immunity to a foreign State were present. Once that was done, the end-result to *Al-Adsani* followed as a matter of course. In contrast, the minority seems to have appealed to the peremptory prohibition of torture as a *principle* of law. It did not so much consider the prohibition to dictate an end-result to the conflict at hand, as offer a substantive reason why a particular end-result should be preferred.[85] Indeed, although the mere invocation of the peremptory prohibition of torture could hardly offer a 'yes or no' answer about whether the UK had jurisdiction in *Al*-Adsani,[86] not all end-results would contribute equally to the purpose of eradicating the practice of torture.

It is important at this point to see how the two levels of argument relate. To begin with, although rules and principles belong to different logical categories of legal proposition, there is little reason to think that they are independent of each other in the normative sense. As end-results can only be reached on the basis of reasons, to apply a rule without justification would be simply arbitrary. With that in mind, neither the majority nor the minority argument could hope to be convincing unless they both suggested an end-result *and* justified it in principle. Both sides had to provide not only a concrete answer about whether the UK could exercise jurisdiction in *Al-Adsani*, but more importantly a reason why that answer had the better claim to reflect international law. Majority and minority achieved this to arguably different degrees. In particular, although the minority was explicit about the principles which it took into account, it seems to have failed to articulate a concrete rule following from the principle prohibiting torture. It attached an overriding importance to the peremptory prohibition of torture without telling us what else, apart from acts of torture and agreements to commit torture, the prohibition actually

[85] The logical distinction between end-result and justification is a particular aspect of the distinction between rules and principles of law, see R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), ch 2, 22–8; NE Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (London: Sweet & Maxwell, 1986), ch 6, 97–113. For a critique of the distinction see N MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 153–94.

[86] This seems to explain why the minority's assertion that the prohibition of torture overrides the law of State immunity looked impossibly broad to accept as a plausible end-result, as was pointed out in the Concurring Opinion of Judge Pellonpää, joined by Judge Bratza.

proscribes or demands.[87] In contrast, the majority position was very clear in respect of the rules of State immunity that it applied, but provided little justification for its choice of end-result. In particular, as will be suggested, its broad claim that the UK had a duty to accord immunity to Kuwait because the *practice of States* so dictated could serve to justify the minority view in at least equal measure.

The next two sections undertake to flesh out the respective arguments: the first sets out to discover what particular rule would justified by the principle prohibiting torture, as adopted by the minority. In providing such a focus, it aims to defuse the objection that the minority argument was too sweeping and unworkable in respect of the end-results that it prescribed. The second takes up the more important task of tracing the deeper justification for the majority decision to apply the rules of State immunity. The remainder of the comment is devoted to discussing the eventual conflict of justifications between majority and minority and whether *that* conflict could be resolved by reference to the 'pedigree' thesis.

(e) The prohibition of torture and access to court

What end-result should the minority have suggested on the basis of its professed justification? It is important to note at the outset that *Al-Adsani* did not raise an issue that might otherwise have proved highly contentious, namely whether the UK had a duty to *claim* jurisdiction over torture committed abroad. It will be recalled that secion 134 of the UK Criminal Justice Act 1988 made torture, wherever committed, a criminal offence triable in the UK.[88] But as the Government of Kuwait did not dispute that the UK had material jurisdiction over the applicant's claim, there was no need to consider whether the peremptory prohibition of torture made it anyway obligatory for the UK to establish such jurisdiction.[89] The minority position could therefore afford to

[87] This questionable tendency is also reflected in part of the literature regarding the relation between the prohibition of torture and the law of State immunity. One recent comment on the judgment of the English Court of Appeal in *Al-Adsani* reads: 'It is . . . widely accepted that *jus cogens* rules are rules of customary international law which have effects additional to those identified in the 1969 Vienna Convention on the Law of Treaties. English courts, when dealing with questions in respect of which the legislator has not spoken, should therefore take into account the development of the concept of *jus cogens* and the fact that certain rules of customary international law now possess a *jus cogens* character. In cases involving torture outside the UK, the *jus cogens* character of the prohibition against torture may have rendered void any rule of customary international law which might otherwise have required English courts, when applying the common law of State immunity, to grant immunity to foreign States', M Byers, 67 *BYIL* (1996) 539–40; A Bianchi, 'Immunity versus Human Rights: the Pinochet case', 10 *EJIL* (1999) 237, at 265. Neither commentator explains how the claim of a foreign State to immunity collides with the prohibition of torture.

[88] See above, 8.

[89] The question was comprehensively discussed in the Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant* case, n 78 above, 5–10, paras 19–41, obtainable from the Court's web-site at <http://www.icj-cij.org>. The learned Judges concluded that States do not have a general obligation to exercise extra-territorial jurisdiction over acts recognised to constitute international crimes.

be more limited in scope. It would be content to claim as an end-result that whenever a State claims jurisdiction over an alleged act of torture, it has an obligation to provide access to its courts to the complainant.

Here is how the minority would perhaps have gone about justifying that contention. To begin with, the most clear-cut instance of a duty to provide access to court in respect of torture claims relates to torture committed in the territory of the forum. Article 13 of the CAT obligates States parties 'to ensure that any individual who alleges to have been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities'. Moreover, Article 14 requires that 'the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'. One could therefore safely suggest that when a State claims jurisdiction on territorial grounds, the prohibition of torture and the effective adjudication of torture claims go hand in hand.

Having said that, the CAT provisions display a certain gap between the extent to which they allow States to exercise jurisdiction over claims of torture (Article 5) and the duty to provide access to court and just satisfaction in respect of torture claims (Articles 13–14). In particular, the CAT leaves unclear whether the forum has an obligation to provide access to court for all claims of torture over which it purports to exercise jurisdiction, including those relating to torture committed outside its territory. Here the minority argument would maintain that the forum has an obligation to provide access to court in respect of all allegations of torture upon which it has claimed jurisdiction. It would suggest that, properly interpreted, the obligations of States under Articles 13 and 14 shadow the *actual* limits of a State's jurisdiction, and not only those prescribed by Article 5 of the CAT. More specifically, considering the desire of CAT parties 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'[90], the minority would submit that the forum may not bar access to court in respect of torture claims over which it has asserted jurisdiction.[91] It would point out that once a State declares that it regards torture committed outside its territory a crime under its laws, it proclaims an essential equivalence between the evils involved in both intra- and extra-territorial torture. To that extent, it is only consistent with that proclaimed value-judgement to consider that State bound to afford the same treatment to both categories of claims. The minority argument would therefore suggest that, properly interpreted, the peremptory prohibition of torture demands as an end-result, access to court for all persons over whose torture claims the forum has asserted jurisdiction.

[90] CAT, Preamble.

[91] It should perhaps be noted that reference to Art 6 ECHR would be ill-suited to the purposes of the present section. The point here is to show that access to court is a corollary of the peremptory prohibition of torture, not that the respondent State in *Al-Adsani* had a treaty obligation to provide such access.

(f) The equivocal appeal to State practice

For its part, the majority thought that unless it could be shown that the prohibition of torture —and the concomitant duty to provide access to court—had a higher standing in relation to the rules of State immunity, the latter continued to apply. The present comment has submitted that this contention was no different in structure from that of the minority. The majority's presumption accorded primary status to the rules of States immunity in much the same way that the minority did for the prohibition of torture, except that the former took the form of an assumption whereas the latter was expressly put forward. It has also been suggested that this common contention concerned the substantive interpretation rather than the formal pedigree of the conflicting norms. This section discusses the arguments that would serve to justify the particular interpretation proposed in the majority opinion.

The majority supported its decision to apply the normal rules of State immunity by adverting to the practice of States.[92] It claimed that since there was no practice pointing to a jurisdiction-conferring rule in respect of civil claims for torture against foreign States, the forum had a duty not to exercise jurisdiction over such claims. The majority was arguably correct in pointing out that the denial of immunity for acts of torture has not been generally applied as an end-result by municipal courts. However, for reasons already familiar, the appeal to State practice alone cannot set the majority argument apart from its opponent view. For the minority too appealed to State practice in support of its argument, albeit from a totally different perspective. Whereas the majority looked for practice that supported a jurisdiction-conferring *rule* in the specific case at hand, the minority looked for practice that supported its preferred *justification*. To corroborate the apparent stalemate, each appeal seemed to have much going for it in its own terms.[93] Although there is indeed little evidence to support a jurisdiction-conferring rule to the effect that States can exercise jurisdiction over *jus cogens* violations committed outside their jurisdiction, there is a wealth of State practice suggesting that the prohibition of torture has achieved the status of a universal value.[94] It would therefore be mistaken to conclude that the appeal to international practice provided support for one view rather than the other. The real disagreement between majority

[92] 'Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged', Judgment, para 61.

[93] This would appear to set *Al-Adsani* from *McElhinney*, where the minority was not able to provide more than a nominal footing for its opinion in State practice.

[94] In addition to the materials cited in the Judgment, para 60, the minority adverted to the Statutes of the *ad hoc* Tribunals for [sic] Former Yugoslavia and Rwanda, the Statute of the International Criminal Court and, as an example of judicial practice, to the judgment of the Swiss Federal Tribunal in the case of *Seber c. Ministère public de la Conféderation et Département fédéral de justice et police*, 109 AFT Ib 64 at 72.

and minority appears to have been about *how*, and not whether, their arguments ought to defer to the practice of States.

Since each group of Judges thought that the other was looking at State practice from the wrong perspective, the two groups needed to make further claims *outside* that practice to support their respective interpretations. Both sides had to produce reasons that *justified* the weight—ie, the meaning and value—that each of them attached to the facts of State behaviour relating to State immunity and the prohibition of torture. Therefore, as already noted, the disagreement between majority and minority in *Al-Adsani* could eventually be resolved only on the level of principle and justification.

(g) State immunity, sovereignty, and political independence

If a general appeal to State practice could not serve to justify the majority position in principle, what further claims did the majority need to make to obtain such support? In that respect it would be fair to suggest that much of the majority opinion finds its justification in the idea that State sovereignty is primary amongst the values of international law.[95] Indeed, according primacy to the idea of State sovereignty would seem to justify both the end-result and the method of appeal to State practice favoured by the majority. On the one hand, the idea of sovereignty entails that each State must be accorded a minimum of international rights in order to exercise its independence. As the history of international relations leaves little doubt that the granting of immunities to foreign States serves this necessity to a considerable extent,[96] the rules of State immunity may be said to reflect the fundamental duty to respect the political independence of foreign States.[97] On the other hand, according proper respect to the independence of other States entails that restrictions to their rights, including their right to a measure of immunity, may only be

[95] The argument here adverts to the idea of State sovereignty in the 'external' sense, ie, as absence of superior political power or legal authority exercised on the State from without. For the distinction between internal and external sovereignty see N MacCormick, *Questioning Sovereignty: Law, State and Practical Reason* (Oxford: OUP, 1999), 129–31.

[96] J Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague: Kluwer, 1997), 9–14; H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *BYIL* (1951) 220; P Trooboff, 'Foreign State Immunity: Emerging Consensus on Principles', 200 *Recueil des Cours* (1986-V), 235, at 252 ff.; DHN Johnson, 'The Puzzle of Sovereign Immunity', 6 *Australian YIL* (1974–5), 1 at 5–8.

[97] Cf the important decision of the Hague Court of Appeal in the case of *Republic of Zaire v Duclaux* (1988), 94 ILR 368, at 369. Duclaux had petitioned for the Republic of Zaire to be declared bankrupt under Dutch law for its failure to pay him 6 months' arrears of wages. The Court of Appeal, overturning a decision by the District Court, held: 'It cannot be denied that if a Dutch court were to declare a sovereign State (which has an embassy or a diplomatic mission in the Netherlands) bankrupt, as the Court of first instance did to the Republic of Zaire, this would in no small measure impede the efficient performance of the functions of that State's official diplomatic representation in the Netherlands. . . . Since such a bankruptcy would therefore entail a by no means insubstantial infringement of the independence of the sending State vis-à-vis the receiving State, given that, at the very minimum, the diplomatic mission would not be able to function properly, the sending State can, under the generally recognized rules of international law, invoke its immunity from execution in proceedings before a court in the receiving State.'

imposed as a result of a process which takes account of their interests in equal measure to the interests of other States. Since the international community does not feature any institutions which would guarantee such equality of respect through a centralised political process, the most reliable indication that a restriction of a State's rights has taken equal account of that State's interests is to be found in that State's *consent* to the restriction in question.[98]

The minority claims are familiar. The minority did not question the place of State sovereignty and political independence in the catalogue of values embodied in international law. It accepted that as a matter of course States are entitled to some measure of immunity in order to exercise their political independence. It also seemed to accept that most restrictions on the right of States to such immunity should be based on their consent. Its central objection appears to have been that State sovereignty is not the only value in the international system by far. Certain fundamental norms of human dignity, such as the prohibition of torture and genocide, are universally recognised to have attained that status too. But in claiming superior status for the prohibition of torture the minority took a further step. Whereas the majority believed that the prohibition of torture is under constant check from the principle of State sovereignty, the minority seems to have thought that the ordering among them should go the other way around.[99] Its opinion suggested that the sovereignty of States—and the concomitant requirement of consent—might serve to justify particular international rules only to the extent that those States abide by a core of fundamental norms of human dignity, including the prohibition of torture. In that sense, the minority implied that States whose practice violates those norms could not claim rights on the basis of their sovereignty and political independence.

(h) Prohibition of torture versus State sovereignty: does one trump the other?

The majority and the minority in *Al-Adsani* seemed to share the view that the conflict between State sovereignty and the prohibition of torture should be settled by finding which value eventually trumps the other. Should one place State sovereignty at the top, States will be immune from the jurisdiction of foreign courts in respect of torture allegedly committed outside the territory of

[98] Cf *The SS Lotus*, PCIJ, Ser A, No 10 (1927), 18: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.' P Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413, at 441 at para 41 draws specific attention to the egalitarian current underlying the *Lotus* principle.

[99] 'The prohibition of torture, being a rule [*sic*] of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of *all* its legal effects in that sphere', Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajic (emphasis added).

the forum, as the majority of the Court held. Conversely, should one find that the prohibition of torture trumps the principle of State sovereignty, the forum will have an obligation to provide access to court against foreign States in respect of extra-territorial torture, as the minority thought. It has been suggested that such a 'pedigree' thesis could not provide a convincing account of conflicts between international rules. Does it make sense to recycle it in respect of conflicts between international values?

If anything, that thesis sets a very tall order for its justification. Take the claim that State sovereignty is supreme amongst international legal values. A defender of the primacy of State sovereignty could begin to justify this claim by demonstrating that it has a footing on even higher and more abstract values, such as personal autonomy and self-governance, that other international values such as the prohibition of torture lack. That person would then have to argue that the prohibition of torture cannot be justified by reference to the most fundamental principles that eventually give prominence to State sovereignty. If anything, however, such an argument would be deeply counter-intuitive. A conception of international society in which torture would, at some remote level, be justifiable as an expression of State sovereignty cannot be a serious contender for explaining our deepest held convictions about the inherent wickedness of torture.

Perhaps it is unfair to assume that a defender of the 'pedigree' thesis would be attracted by that argument in the first place. But what else is there to justify that thesis? If State sovereignty has no 'edge' on other international values in terms of its substantial justification, what kind of edge can it possibly have? There is hardly any argument that one could offer to support the primacy of State sovereignty that does not eventually collapse into an argument about substantive justification. Claims about the 'systemic' or 'functional' importance of State sovereignty are very much in point here. One might be tempted to claim that the primacy of State sovereignty is due to its pervasive functions in the international society. State sovereignty, the argument might run, is apparent in every corner of international affairs: it permeates the making and application of international law and the terrain on which international political arguments develop and conflict. In the end, one might argue, State sovereignty reigns amongst other international values not because of its substantive merits, but because it defines the very language that we use to debate about the whole of international law. It does not so much reflect an evaluative judgment as a kind of 'normative fact' about the international community. The defender of the 'pedigree' thesis cannot hope to rescue his or her position in such a fashion, though. First, the arguments that draw attention to the pervasive systemic or functional role of State sovereignty in international affairs cannot be taken as making an intelligible judgment of fact. They too purport to make demands, ie arguments of substantive justification and are thus susceptible to the objections outlined above. Second, such reliance on the pervasive functional role of State sovereignty does not even come close to offering an argument in favour of the

higher pedigree of that value amongst others. One might well grant that State sovereignty has a broader reach than other international values and still deny that the former necessarily has the last word on every question of international law. What the defender of the primacy of State sovereignty—or, at that, the prohibition of torture—needs here is an argument about the relative *weight* rather than *breadth* of these international values. This comment has suggested that no such argument is forthcoming. The defender of the 'pedigree' thesis will eventually be unable to avoid the truth that his or her argument can only obtain an edge on others on grounds of substantive justification.

On the whole, it would seem that arguments based on the concept of *jus cogens* are unrelated to ideas of formal pedigree and hierarchy amongst norms of international law either at the level of rules or at that of principles. At no point do they settle conflicts by reference to the form of the competing rules of principles. They rather serve to interpret the requirements of each particular rule or principle in the light of any other rules or principles at play. In that sense, arguments about *jus cogens*, one might say, are interpretative *all the way down*.

(i) Values on par

State sovereignty is an international value and the prohibition of torture is another. Whenever these values conflict, none trumps the other. Is there an interpretative way out of their conflict?[100] In a different context, John Rawls has famously used a gripping intuitive metaphor to propose a method for resolving such conflicts. He suggested that rational agents should strive to reach a state of 'reflective equilibrium' between their deepest held convictions or values and the principles of action that they extract from them.[101] A basic precondition for achieving that state is that neither the agents' convictions nor the principles that they derive from them can be considered immune from reconsideration. Each conviction must be interpreted in the light of the others

[100] Constraints of space do not permit consideration of a further alternative. A number of contemporary philosophers believe that the only way to avoid an impasse when an agent's two genuinely held values collide is to reconsider the stakes of the conflict. Our whole discussion so far, they argue, has assumed that such values are *objective*, that they have truth-values that do not depend of what any single international actor or group of actors might believe. Such reliance on objectivity, the argument runs, has saddled us with an irreconcilable conflict of equally legitimate claims, for we cannot uphold either of those values without feeling genuine regret for not having lived up to the other. But if for every 'objective' value that we consider ourselves to have our intuition exercises an equally strong pull to the other direction, it makes little sense to claim objective truth for any of our values in the first place. We may still argue with undiminished conviction that some values are true and others are false, but we should not suppose that our arguments are better than others because they are 'objectively true', see especially JL Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977), ch 1, 15–48; B Williams, *Morality* (Cambridge: CUP, 1972), 13–19, 27–39. Although this commentator does not share this view, the main text has not provided any argument against it. Suffice it to point out that an argument against the possibility of objectivity would have to be very peculiar indeed, if only because it would necessarily have to avoid claiming that its own submission is true.

[101] J Rawls, *A Theory of Justice* rev edn (Oxford: OUP, 1999), § 4, 17–19.

in order to achieve as much coherence and consistency among them as is possible in the circumstances. Furthermore, once attained, a reflective equilibrium is not static. Changes or deeper insights into the agents' convictions or the circumstances of their deliberation are always likely to upset it.

The 'reflective equilibrium' metaphor offers a promising prospect for resolving conflicts among international values. If, all things considered, an international lawyer cannot help valuing both State sovereignty and the prohibition of torture, his or her best course of action would be to try to reach such an equilibrium by interpreting each value in the light of the other. In one respect, claiming as much should not come as a great surprise. International lawyers are well acquainted with that exercise under the ubiquitous name of 'balancing' of interests.[102] The last part of this comment could then perhaps be best described as an effort to highlight the pervasive character of the 'balancing' exercise and to outline—albeit in a very compressed manner—its broader philosophical underpinnings. But it also aimed to show that both majority and minority failed to recognise that balancing exercise as an inherent part of the concept of *jus cogens*. In its submission, to claim peremptory status for certain norms of international law is to claim a relation of equivalence between those norms and State sovereignty. Neither trumps the other, but each defines the other's interpretative outer limits.

One last issue must be considered. How would a fuller argument aiming at a proper balance between State sovereignty and the prohibition of torture develop and to what end-result would it point? On an abstract level, it would try to show that, properly interpreted, each value coheres with the other. It would thereby suggest that the sovereignty and independence of States cannot justify the practice of torture and, conversely, that the prohibition of torture cannot lead to restrictions which deny the independence and sovereignty of States. The argument could then draw on a more concrete interpretation of the two values and claim, first, that States have to provide access to court in respect of torture claims over which they have claimed jurisdiction and second, that foreign States are entitled to a measure of immunity from that jurisdiction. At that stage, a successful reconciliation of these competing claims would already seem far more feasible. For example, it would be possible to put forward the tentative claim that torture claims should generally fall within the exclusive jurisdiction of the allegedly responsible State, which in turn is bound to provide the complainant with access to its courts. Establishing a presumption of coincidence between the allegedly responsible State and the

[102] Cf *Arrest Warrant* case, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, n 78 above, para 75, 18. In discussing the relation between the immunity of high State officials and peremptory norms of international criminal law, the learned Judges noted: 'These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance must therefore be struck between the two sets of functions which are both valued by the international community.'

State of the forum would seem to secure the adjudication of torture claims and at the same time safeguard the political independence of the allegedly responsible State. However, the same interpretation would then have to stress that the allegedly responsible State may only claim exclusive jurisdiction on the condition that it actually provides access to its courts in respect of torture claims. Insofar as it bars such access or grants only an illusory right to it, the allegedly responsible State cannot claim to be exercising its sovereignty and political independence properly. To the extent that that State upsets the balance between the exercise of sovereignty and the demand for access to court in respect of torture, it cannot put forward a claim to immunity before the courts of third States which have asserted jurisdiction over the act of torture involved.

It cannot be emphasised too greatly that any such interpretative proposition requires more argument than can be offered here. Furthermore, even a well-argued interpretation of the respective duties will not be cast in stone.[103] The gradual move from the absolute to the restrictive theory of State immunity suggests that the extent to which State immunity currently is seen as a reflection of political independence might shrink considerably in the future. The chances are that the duty to provide access to court in respect of torture claims will gradually gain in weight and dictate the applicable rules in more and more cases. But whichever direction these developments take, the challenge for international lawyers is to construct a sound framework for analysing them. In the submission of this comment, that task involves seeing those changes as modifying the interpretative balance among the fundamental values of the international community.

III. CONCLUSION

The judgments of the Court in *Al-Adsani v UK*, *Fogarty v UK* and *McElhinney v Ireland* went a long way toward clarifying the relation between the right of access to court and the law of State immunity. The Court found that insofar as the courts of the State of the forum do not fall outside generally accepted standards relating to State immunity, the granting of immunity will not in principle impair the essence of the right of access to court under Article 6(1). There can be little doubt that the three judgments have set a very important precedent for subsequent cases in terms of ECHR law.

Their contribution to general international law was no less distinctive. The Court had occasion to pronounce upon the status of three controversial exceptions from immunity from suit. It held that foreign States are generally immune in respect of disputes involving recruitment to foreign diplomatic

[103] Ibid, para 75, 18: '[W]hat is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights of the two scales are not set in all perpetuity'.

missions (*Fogarty*) and *jure imperii* acts of their armed forces in the territory of the forum (*McElhinney*). With regard to the most heated item on the agenda, the Court found—by the slightest of majorities—that foreign States are also immune from the jurisdiction of foreign courts in respect of alleged violations of the peremptory prohibition of torture (*Al-Adsani*).

The Court's findings were subject to much criticism, even within the Court's quarters. The present comment suggested that the Court's construction of the relation between the ECHR and the law of State immunity under Article 6(1) is too sweeping to be commended. It argued that certain kinds of jurisdictional limitations concern the applicability of the Convention as a whole and therefore raise issues under Article 1.

As regards particular exceptions from State immunity, *McElhinney* and *Fogarty* leave one little to argue with. In contrast, *Al-Adsani* was almost certain to cause a stir, if only because it required the Court to take a stand in relation to one of the most heated subjects in current international law. The eventual close division between majority and minority was but a reflection of a more widespread disagreement amongst international lawyers on what it means for an international norm to be 'peremptory' in character.

To illustrate this conflict, the present comment has tried to trace the majority and minority views back to their theoretical underpinnings and fundamental assumptions. It suggested that, in their respective ways, both sides adverted to the concept of *jus cogens* in support of their respective conclusions. It then argued that the two sides' common appeal to *jus cogens* concerned the substantive interpretation of the competing norms rather than their formal ordering. To justify the way in which they interpreted those norms, the two sides then had to resort to more fundamental arguments. In that respect, although both sides purported to defer to the practice of States to support their positions, the majority appealed very strongly to the primacy of State sovereignty whereas the minority made a similar appeal to fundamental norms of human dignity, including the prohibition of torture. It was finally submitted that, contrary to both sides' submissions, neither of these justifications could be shown to 'trump' the other in either formal or substantive terms. The reconciliatory approach suggested towards the end of this comment purports to avoid the shortcomings of the majority and minority opinions, though an adequate defence of it would require far more interpretative work than one could hope to deliver in the present context.