ARTICLE 6 ECHR AND IMMUNITIES ARISING IN PUBLIC INTERNATIONAL LAW[1]

The procedural guarantees laid down in Article 6, European Convention on Human Rights[2] in relation to the fairness and expedition of legal proceedings would be meaningless if the Convention did not protect the right of access to the courts which is a precondition to the enjoyment of those guarantees.[3] As a result, the European Court of Human Rights has laid down the principle that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court. The right of access to the courts is not absolute. The Strasbourg case law acknowledges that it may be subject to limitations. Contracting States enjoy a margin of appreciation in this regard. However, national courts must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Moreover a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[4]

Article 6(1) is here concerned not with the substantive content of national law but with the existence of procedural bars. Article 6(1) does not guarantee any particular content for civil rights and obligations in the substantive law of Contracting States.[5] So far as procedural bars are concerned, the European Court of Human Rights has consistently held that it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) that civil claims must be capable of being submitted to a judge for adjudication if 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 on large groups or categories of persons.[6]

[1] This is a revised version of a paper given to the British branch of the International Law Association at its Annual Conference at Oxford in April 2002.

[2] The first sentence of Article 6(1) ECHR provides: '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.'

[3] *Golder v United Kingdom* (1975) EHRR 524., paras 28–36.

[4] *Ashingdane v United Kingdom*(1975) EHRR 528 at para 57; *Tinnelly & Sons and McElduff v United Kingdom* (1998) 27 EHRR 249 at para 72.

[5] The distinction drawn under Art 6 between procedural bars and substantive rights is sometimes difficult to apply. See, eg *Fayed v United Kingdom* (1994) 18 EHRR 393 at para 67; *Matthews v Ministry of Defence* [2002] 1 WLR 2621, CA (At the time of writing, an appeal to the House of Lords is pending.) It is clear that the immunities arising in public international law considered in this paper bar the remedy and not the right. See, eg, *Dickinson v Del Solar* [1930] 1 KB 376. However, in *Al-Adsani v United Kingdom* and *Fogarty v United Kingdom* the United Kingdom, while drawing attention to this fact, advanced further arguments based on the non-justiciability of the subject matter which, it maintained, went to the essential competence of the national court and which did not constitute a procedural bar within Art 6. (See generally Brownlie, *Principles of Public International Law*, 5th edn (1998), 326–8.) In rejecting these arguments, the Court merely referred to the fact that the immunity did not extinguish the right and that immunity could be waived. (*Al-Adsani v United Kingdom* at paragraph 48; *Fogarty v United Kingdom* at para 26.)

[6] *Fayed v United Kingdom* (1994) 18 EHRR 393 at para 65.

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The question arises as to how these principles apply with regard to the various immunities arising under public international law such as State immunity, diplomatic immunity, consular immunity, and the immunity of international organisations.[7] The question has recently been considered by the House of Lords and by the European Court of Human Rights. Their judgments reveal a striking difference of approach to the issue which, it is suggested, is likely to have an important bearing on future cases in which immunities arising in international law are asserted before national courts in States party to the European Convention on Human Rights.

Shortly before the Human Rights Act 1998 implemented the European Convention on Human Rights into the domestic law of the United Kingdom, the House of Lords considered this question in *Holland v Lampen-Wolfe*.[8] This was a claim in defamation brought by a US national, a civilian, who as part of her employment at a university in the United States gave lectures at a US military base in England. The Defendant, the Education Services Officer at the base, wrote a memorandum concerning the Claimant's conduct as a lecturer. The House of Lords upheld a plea of immunity at common law, the case falling outside the scope of the State Immunity Act 1978 by virtue of section 16(2).[9] The interest of the case for present purposes lies in an argument that the grant of immunity would infringe Article 6, ECHR. A difference in approach can perhaps be detected in the speeches in the House of Lords. Lord Clyde, described the case as one where as a matter of international relations between States, the domestic courts of the United Kingdom lack any jurisdiction to provide any remedy. He considered that a right of access in an international context by a citizen of one State to the courts of another State required to be measured against the demands of policy, comity and international law. He concluded that, at least in the circumstances of that case, the application of the established immunity would not be unreasonable or disproportionate.[10]

A rather different approach was followed by Lord Millett, with whom the other members of the House of Lords agreed.

> Article 6 of the Convention affords to everyone the right to a fair trial for the determination of his civil rights and obligations. . . . At first sight this 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 Article 6 is not absolute but subject to limitation, nor is it because the doctrine of state immunity serves a legitimate aim. It is because Article 6 forbids a contracting state from denying individuals the benefit of its powers of adjudication; it does not extend the scope of those powers.

[7] To this list might be added the immunity of a foreign head of State (see generally *R. v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147), the immunity of a Foreign Minister of a foreign State (see generally *Case concerning the Arrest Warrant of 11 April 2000*, International Court of Justice, 14 Feb 2002) and the immunity enjoyed by representatives of international organizations. Moreover, there is a growing trend in a number of jurisdictions to permit States to claim State immunity on behalf of individuals where the claim relates to acts performed by them in the exercise of sovereign authority. See, eg, *Trawnik v Lennox* [1985] 1 WLR 532; *Propend v Sing*, unreported, Court of Appeal, 17 Apr 1997; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (England); *Church of Scientology* (1978) 65 ILR 193 (Germany); *Jaffe v Miller* (1993) 13 OR (3d) 745 (Ontario); *Herbage v Meese* (1990) 747 F Supp 60 (US District Court, District of Columbia).

[8] [2000] 1 WLR 1573.

[9] Section 16 (2) provides: 'This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.'

[10] At 1581.

> 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 the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting states adjudicative powers which 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 which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself . . .

and he concluded;

> Where the immunity is available, then for the reasons I have endeavoured to give it prevails over the Convention rights contained in Article 6.[11]

The approach adopted by Lord Millett has much to commend it. On this basis, in circumstances where international law requires the grant of immunity Article 6 ECHR is not applicable. It is not a case of justifying a denial of access to the courts by reference to the proportionate pursuit of a legitimate aim.

The European Commission of Human Rights seems to have approached the problem on a similar, if not identical, basis. *Spaans v Netherlands*[12] concerned a claim for unlawful dismissal by an employee of the Iran—United States Claims Tribunal in The Hague. In 1985 the Hoge Raad upheld the decision of the Regional Court that the Tribunal, as an international organisation, enjoyed immunity before the courts of the Netherlands in respect of the claim, despite the Applicant's contention that at the date of his contract with the Tribunal no other legal remedy in labour disputes was available to employees of the Tribunal.[13] The Applicant then brought proceedings against the Netherlands before the European Commission of Human Rights alleging that the Netherlands had infringed his rights under Article 6, ECHR. The Commission, in dismissing the application as inadmissible, observed that under Article 1 ECHR the parties undertake to secure the rights and freedoms defined in section I of the Convention to everyone within their jurisdiction. Because of the immunity enjoyed by the Tribunal, its administrative decisions were not acts that occurred within the jurisdiction of the Netherlands within Article 1. Accordingly the responsibility of the Netherlands under the Convention was not engaged. The Commission added that it is in accordance with international law that States confer immunities and privileges on international bodies situated in their territory. The Commission did not consider that such a restriction of national sovereignty in order to facilitate the working of an international body gave rise to an issue under the Convention.

N, C, F, and AG v Italy[14] concerned the premises of a diplomatic mission. The Applicants had leased their villa in Rome to the Albanian mission to Italy that used it as its Embassy. Although, somewhat surprisingly, the Applicants obtained an eviction order and were awarded damages, the Magistrate of Rome held that the eviction order was unenforceable. The Applicants brought proceedings against Italy before the European Commission of Human Rights contending that the excessive length of the

[11] At 1588.

[12] Application No 12516/86; European Commission of Human Rights, 12 Dec 1988. 107 ILR 1.

[13] *Iran–United States Claims Tribunal v AS*, 94 ILR 321; 18 NYIL (1987) 357.

[14] Application No 24236/94; European Commission of Human Rights, 4 Dec 1995. 111 ILR 153.

eviction proceedings violated Article 6(1), ECHR. They did not dispute the unenforceability of the eviction order against the premises of the diplomatic mission but alleged that the Italian authorities had failed to provide suitable alternative accommodation for the Embassy in breach of Article 21 of the Vienna Convention on Diplomatic Relations 1961. The Commission dismissed the application as inadmissible. In its judgment it noted that the right of access to a court does not require that the court shall have unlimited jurisdiction. In particular Article 6 should be interpreted with due regard to Parliamentary and diplomatic immunity as traditionally recognised. In such cases, it considered, the Defendant is inaccessible and it is for the domestic court to apply the corresponding limitation of its jurisdiction. Although it observed that the particular circumstances of the case would have justified a limitation on the Applicants' right of access to the Courts, it also considered that the Applicants could not invoke Article 6 to complain about the length of proceedings because Article 6(1) was not applicable to those proceedings. Although the Italian courts had not denied their jurisdiction and had ruled on the merits of the Applicant's claims, the Applicants were not entitled under Article 6 to have access to the courts.

The approach of the European Commission of Human Rights in these cases must now be contrasted with that of the European Court of Human Rights. *Waite and Kennedy v Germany*[15] concerned the immunities of an international organisation, the European Space Agency (ESA). The Applicants, employees of a company incorporated in the United Kingdom, were placed at the disposal of the ESA to perform services at the European Operations Centre in Darmstadt. After thirteen years, during which there were a number of changes of contractual relationships, the Applicants and the company they had set up were informed by the successor to their original employer company that cooperation with their company would terminate when the term of the contracts expired. The Applicants brought proceedings against the ESA before the Darmstadt Labour Court contending that they had acquired the status of employees of the ESA. The ESA invoked its immunity from jurisdiction under the ESA Convention and that plea was upheld. The Applicants then brought proceedings in Strasbourg against Germany pursuant to Article 6. A Grand Chamber of the European Court of Human Rights approached the question of the applicability of Article 6 on the following basis:

> The Government did not dispute that the Labour Court proceedings instituted by the Applicants involved 'determination of [their] civil rights and obligations'. This being so, and bearing in mind that the parties' arguments before it were directed to the issue of compliance with Article 6(1), the Court proposes to proceed on the basis that it was applicable to the present case.[16]

The Court then went on to consider the question of compliance with Article 6. It recalled that the right of access to the Courts is not absolute but may be subject to limitations. It stated that Contracting States enjoy a certain margin of appreciation in this regard.[17] The essential questions were therefore whether the German law which gave effect to the immunity of the international obligation sought to achieve a legitimate aim and whether it did so in a manner which was proportionate. The Court considered that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral

[15] Application No 26083/94, Judgment of 18 Feb 1999. See also *Beer and Regan v Germany*, Application No 28934/95, Judgment of 18 Feb 1999.
[16] At para 49.
[17] At para 59.

interference by individual governments. It noted that the immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long standing practice established in the interest of the efficient working of these organisations. Accordingly it concluded that the rule of immunity from jurisdiction had a legitimate objective.

Turning to proportionality, the Court drew particular attention to the fact that the Applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. The ESA Convention expressly provided for various modes of settlement of private law disputes in staff matters as well as in other litigation. The Applicants could and should have had recourse to the ESA Appeals Board. This Board, which was independent of the ESA, had jurisdiction to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between itself and a staff member. Accordingly the Court concluded that, bearing in mind the legitimate aim of immunities of international organisations, the test of proportionality could not be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed in national labour law. To read Article 6(1) as necessarily requiring the application of national legislation in such matters would, it considered, thwart the proper functioning of international organisations and run counter to the trend towards extending and strengthening international cooperation. Accordingly it concluded that in giving effect to the immunity from jurisdiction of the ESA the German Court had not exceeded its margin of appreciation. When one had regard, in particular, to the alternative means of legal process available to the Applicants, it could not be said that the limitation on their access to the German courts with regard to the ESA impaired the essence of the Applicants' right to a court or was disproportionate for the purposes of Article 6(1).[18]

In three cases decided in 2001—*Al-Adsani v United Kingdom*,[19] *Fogarty v United Kingdom*,[20] and *McElhinney v Ireland and United Kingdom*[21]—a Grand Chamber of the European Court of Human Rights held that Article 6 was applicable notwithstanding a plea of State immunity but, by a differing majority in each case, held that the grant of immunity did not constitute an infringement.[22] These cases arose from very different factual situations and raised very different questions as to the scope of State immunity in international law.

In *Al-Adsani v United Kingdom*, Mr Al-Adsani alleged that he had been tortured in Kuwait by the Government of Kuwait. He subsequently returned to the United Kingdom and brought proceedings there against the Government of Kuwait. When the proceedings were eventually struck out on grounds of State immunity he brought proceedings against the United Kingdom for infringement of his Article 6 right of access to the courts.

Fogarty v United Kingdom was an Embassy employment dispute. Miss Fogarty had

[18] See, however, the criticism of this decision and *Beer and Regan v Germany* by Gaillard and Pingel-Lenuzza, (2002) 51 ICLQ 1 on the ground that the Court should have affirmed more clearly that only particularly convincing reasons could justify subordinating the principle of access to justice to the immunity of the organization.

[19] Application No 35763/97, Judgment of 21 Nov 2001.

[20] Application No 37112/97, Judgment of 21 Nov 2001.

[21] Application No 31253/96, Judgment of 21 Nov 2001.

[22] *Fogarty* was decided by a majority of 16 to1, *McElhinney* by a majority of 12 to 5, and *Al-Adsani* by a majority of 9 to 8.

previously held a number of posts as an administrative assistant at the United States Embassy in London. She applied unsuccessfully for further secretarial posts. She claimed that the refusal of the Embassy to re-employ her in two of those posts was a consequence of a previous successful sex-discrimination claim that she brought against the United States, in which the United States had waived immunity, and accordingly constituted victimisation and discrimination. The United States claimed immunity under the State Immunity Act 1978. On advice Miss Fogarty accepted that she had no remedy in domestic law. She then brought proceedings against the United Kingdom for infringement of her Article 6 rights.

McElhinney v Ireland and United Kingdom arose out of an incident at a border checkpoint in County Londonderry. A British soldier on duty at the checkpoint was carried on the tow bar of a vehicle about 2 miles into the Republic. Mr McElhinney, the driver of the vehicle, alleged that, when he had stopped, the soldier had aimed his gun at him and pulled the trigger twice but the gun had jammed. Mr McElhinney brought proceedings in the Irish courts against the United Kingdom Ministry of Defence. The Supreme Court struck out the proceedings on grounds of State immunity. Mr McElhinney then brought proceedings against both Ireland and the United Kingdom alleging infringement of his Article 6 rights. The proceedings against the United Kingdom were held inadmissible.[23] The plea of immunity by the United Kingdom before the Irish courts could not constitute an infringement of Article 6 by the United Kingdom. The proceedings against Ireland were held admissible.

In none of the cases did the Court address the argument on the part of the United Kingdom that Article 6 was inapplicable because international law required the grant of immunity. In each case the Court stated that it was satisfied that there existed a serious and genuine dispute over civil rights and it therefore followed that Article 6(1) was applicable to the proceedings in question.[24]

In each case the Court went on to consider the question of compliance with Article 6(1). It considered that the limitation on access to the courts imposed by national law rules of State immunity pursued a legitimate aim. It noted that sovereign immunity was a concept of international law developed out of the principle *par in parem non habet imperium*. It considered that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and relations between States through the respect of another State's sovereignty.

With regard to the question of whether the restriction was proportionate to the aim pursued, the Court, in each case, first referred to Article 31(3)(c), Vienna Convention on the Law of Treaties and the obligation to take account of any relevant rule of international law applicable to the relations between the parties. It considered that the European Convention on Human Rights should, so far as possible, be interpreted in harmony with other rules of international law including those relating to the grant of State immunity.

In *Al-Adsani* the majority of the Court considered that measures taken by a Contracting State which reflect generally recognised principles of international law on State immunity cannot, in principle, be regarded as imposing a disproportionate restriction on the right of access to the courts within Article 6(1). Some restrictions on access

[23] Decision of 9 Feb 2000.

[24] In *Fogarty* the Court referred to a distinct argument advanced by the United Kingdom, on the basis of *Pellegrin v France* Application 28541/95, Judgment of 8 Dec 1999, that there was no 'civil' right involved. It did not consider it necessary to decide the point.

must be regarded as inherent in the right of access to a court, an example being those limitations generally accepted by the State as part of the doctrine of State immunity. The majority then examined the considerable body of material placed before it in the form of judicial decisions and State practice. It accepted that the prohibition on torture had achieved the status of a peremptory norm in international law. However, notwithstanding this fact, it was unable to discern 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.[25] It noted the growing recognition of the overriding importance of the prohibition of torture but did not find it established that there was yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. It therefore concluded that the State Immunity Act 1978, which grants immunity to States in respect of personal injury claims unless the injury was caused by an act or omission in the United Kingdom, is not inconsistent with those limitations generally accepted by States as part of the doctrine of State immunity.[26]

In *Fogarty* the majority considered that there was a trend in international law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings related to employment at an Embassy, international practice was divided on the question whether immunity applied and, if so, whether it covered disputes relating to contracts of all staff or only the more senior members of a mission. The majority observed that the United Kingdom was not alone in holding that immunity attached to suits by employees of diplomatic missions. Nor could it be said that, in affording such immunity, the United Kingdom fell outside any currently accepted international standard. The majority also noted that that case was concerned with the recruitment of staff and stated that it was not aware of any trend in international law towards a relaxation of the rules of State immunity as regards issues of recruitment to foreign missions. Accordingly, in this case, the majority concluded that in granting immunity the United Kingdom could not be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to the courts.[27]

In *McElhinney* the majority noted that there was a trend in international law towards limiting State immunity in respect of personal injury caused by an act or omission within a foreign State. However that practice was by no means universal. That trend might be regarded as relating primarily to insurable personal injury, ie, incidents arising out of ordinary road traffic accidents, rather than matters relating to 'the core area of state sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between states and national security'. It could not be said that Ireland was alone in granting immunity in respect of such sovereign acts or that in doing so it fell outside any currently accepted international standards.[28] In these circumstances the decisions of the Irish courts upholding the immunity of the United Kingdom could not be said to have exceeded the margin of appreciation allowed to States in limiting an individual's right of access to the courts.[29]

It is suggested that the approach of Lord Millett in *Holland v Lampen Wolfe* is to be preferred to that of the European Court of Human Rights in these four cases. The relevant

[25] At para 61. [26] At para 66. [27] At para 39.

[28] At para 38. The Court also referred, at para 39, to the fact that in the circumstances of that case it would have been open to the Applicant to bring an action in Northern Ireland against the United Kingdom Secretary of State for Defence. [29] At para 40.

obligation under Article 6(1) is to grant access to the adjudicative powers possessed by a State. The supervening effect of the various immunities arising in international law is to deny to that State the power to adjudicate in certain proceedings. Article 6 does not confer on Contracting States adjudicative powers that they are denied by international law. Indeed, even if it did so among States parties to the European Convention on Human Rights, this could not confer on a Contracting State a power of adjudication over a non-Contracting State such as the United States (as in *Holland v Lampen-Wolfe* and *Fogarty*) or Kuwait (as in *Al-Adsani*). As a matter of principle therefore, Article 6 should have no application where international law requires the grant of immunity.

Nevertheless, there may be certain practical advantages in the approach adopted by the European Court of Human Rights. In *Holland v Lampen-Wolfe* the House of Lords was firmly of the view that international law required the grant of immunity in the circumstances of that case. However, State immunity is a subject of great difficulty. The scope of immunities required by international law is the subject of considerable uncertainty and the borderlines between immunity and non-immunity will often be very difficult to draw. The distinction between sovereign and non-sovereign acts is easy to state but notoriously difficult to apply in practice. Moreover, as Judge Higgins, Judge Kooijmans, and Judge Buergenthal observed in their Separate Opinion in *Case concerning the Arrest Warrant of 11 April 2000*, the meaning of the concepts of *acta jure imperii* and *acta jure gestionis* is not carved in stone; it is subject to a continuously changing interpretation which varies with time reflecting the changing priorities of society.[30] In areas where the sovereign/non-sovereign distinction has been eroded, if not yet displaced, for example in relation to acts of a foreign State within the forum State resulting in death or personal injury, it is unclear how far the trend towards the denial of immunity has advanced, as the Court observed in *McElhinney*.[31] Similarly, national decisions on Embassy employment disputes reveal a very wide variety of different approaches from which it is extremely difficult, if not impossible, to extract any consensus. While there will be many cases in which the existence of an obligation in international law to grant immunity will be clear, there will be many more where the issue is not free from doubt. In this regard it is interesting to note that the House of Lords in *Holland v Lampen-Wolfe* felt able to distinguish *Al-Adsani*, *Fogarty*, and *McElhinney*, all then pending before the European Court of Human Rights, on the ground that these were cases where it was contended that the immunity in question went further than international law required. This is, inevitably, an area where States may legitimately hold different views on the scope of immunity required by international law. In such situations, it may not be possible for a Respondent State to demonstrate that the grant of immunity is required by international law and that therefore the case falls outside the scope of Article 6. Nevertheless, on the basis of the reasoning of the European Court of Human Rights in these recent cases, it seems that these differing but legitimately held views could be accommodated. It seems that Article 6 may in future be applied in a way which allows a margin of appreciation to States to act on their own view of the extent of their obligations in international law, at least within the area of reasonably tenable views, and to permit limitations on access to their courts by reference to the criteria of legitimate aim and proportionate response.

It appears therefore to be a further practical consequence of the approach of the

[30] *Case concerning the Arrest Warrant of 11 April 2000*, International Court of Justice, 14 Feb 2002, Separate Opinion of Judge Higgins, Judge Kooijmans,and Judge Buergenthal at para 72.

[31] At para 38.

European Court of Human Rights in these cases that it may be unnecessary for the Court to make definitive rulings as to the scope of immunity required by international law. If States are to be granted a margin of appreciation in the determination of the extent of their obligations under international law, the European Court of Human Rights will normally be relieved of the burden of deciding the precise extent of the obligation in international law. It would only be in cases where that margin of appreciation has been exceeded that the Court might proceed on the basis that international law does not require the grant of immunity.

This leads, however, to the further question of whether a court applying Article 6 may hold a rule of international law to be disproportionate so that its application gives rise to an infringement of that provision. Such a question could not arise on the approach favoured by the majority in the House of Lords in *Holland v Lampen-Wolfe*; on that basis international law denies the national court jurisdiction and Article 6 is not engaged. However, once it is accepted that Article 6 is applicable, the possibility arises, in theory at least, of an undoubted rule of international law being held to be disproportionate. In this way, the Convention could be brought into conflict with public international law. It is suggested, however, that the judgments of the majority in *Al Adsani*, Fogarty, and *McElhinney* do not go so far. In each case the legitimate aim is identified in identical terms:

> The Court considers that the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.[32]

The legitimate aim is compliance with international law. This does not suggest that the Court was claiming the power to go behind the rules of international law, or what may reasonably be taken to be those rules. Moreover, the reasoning of the majority in these cases suggests a more restricted role for courts applying Article 6. In all three cases the majority observed that measures taken by a Contracting State which reflect generally recognized 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.[33] Thus in *Al-Adsani* the majority held that it was not established that there was yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.[34] The majority did not go further and consider whether the more extensive view of immunity could be regarded as proportionate. Rather it drew from the proposition that the grant of immunity under the State Immunity Act 1978 was not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity, the conclusion that it could not be said to have amounted to an unjustified restriction on access to the courts.[35] It is suggested therefore that the

[32] *Al Adsani* at para 54; *Fogarty* at para 34; *McElhinney* at para 5. Cf *Waite and Kennedy* at para 63 where the Court defined the legitimate interest as ensuring the proper functioning of international organisations free from unilateral interference by individual governments.

[33] *Al Adsani* at para 56; *Fogarty* at para 36; *McElhinney* at para 37.

[34] At para 66.

[35] At paras 66–7. See also *Fogarty* at paras 37–9, *McElhinney* at parag 38, 40. Cf *Waite and Kennedy* at para 68 where the Court considered that a material factor in determining whether granting the ESA immunity from German jurisdiction was permissible under the Convention was whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. See generally Gaillard and Pingel-Lenuzza, (2002) 51 ICLQ 1.

Court of Human Rights did not intend to assume the role of ruling on whether a rule of international law is itself a proportionate restriction for the purposes of Article 6.

It is unclear whether, following these decisions, it may remain open to a State, in conformity with Article 6, to grant immunity not only where it is required or where it may reasonably be considered to be required by international law, but also in circumstances where, although not required by international law, the grant of immunity may promote the legitimate aim of the achievement of good relations between States through respect for another State's sovereignty. We have seen that in *Al Adsani*, *Fogarty* and *McElhinney* the legitimate aim is identified as compliance with obligations imposed by public international law, but in terms which link this with the promotion of comity and good relations between States through the respect of another State's sovereignty However, a State may choose to grant immunity where it is not required to do so by international law. Were it not for Article 6 or some comparable provision, there would, in general, be no obligation on a State to limit the scope of immunity in its domestic law to that required by, or reasonably considered to be required by, public international law. Indeed, even now it might be arguable that the promotion of international comity might in certain circumstances justify the grant of immunity notwithstanding the fact that it is not required by international law. However, in view of the great importance attached in the Strasbourg jurisprudence to access to the courts, it seems unlikely that in future the grant of immunity will be considered compatible with Article 6 unless it is at least reasonably arguable that it is required by international law.

The reasoning of the European Court of Human Rights in the three most recent cases appears to lead to the result that it will now be necessary to justify the grant of immunity in national law not only by reference to the criterion of the legitimate aim of compliance with international law but also by reference to the concept of proportionality of response. The requirement of proportionality could result in provisions of national law being held to be incompatible with Article 6 because they go further than is necessary to achieve the permitted objective. In *Fogarty* the Applicant complained of the broad approach employed by the United Kingdom State Immunity Act 1978 to Embassy employment disputes.[36] Although that argument failed, it is not difficult to imagine circumstances in which a statutory rule granting immunity is formulated in terms which can be shown to be wider than required for the purposes of conformity with international law and therefore disproportionate to the achievement of the legitimate aim. There may be considerable scope for argument on these lines in future cases both before national courts and in Strasbourg.

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[36] The effect of s 16 (1) (a) is to remove from the exception to immunity created by s 4 in the case of employment disputes proceedings concerning the employment of the members of a mission within the Vienna Convention on Diplomatic Relations, 1961 or of the members of a consular post within the meaning of the Vienna Convention on Consular Relations, 1963.

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