
Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights

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Abstract

The European Convention on Human Rights was adopted as an instrument to protect the rights and interests of individual human beings rather than of state parties. It thus embodies obligations which objectively protect human beings and are not reducible to mutual or reciprocal legal commitments of states. The jurisprudence of the Convention organs has recognized the importance of the nature of the Convention obligations, and has interpreted and applied a number of its substantive and procedural provisions accordingly. This has become possible through the use of appropriate methods of treaty interpretation, dictated by the character of the Convention obligations. In particular, the Convention organs refused to interpret the Convention restrictively, as this would endanger its integral application which is inherent to the Convention's object and purpose. However, the recent jurisprudence of the European Court of Human Rights indicates some trends which undermine the rationale of the Convention through the use of interpretive methods that are of doubtful value in cases in which they are applied. This article examines the Court's recent jurisprudence, and concludes that adherence to such interpretation approaches endangers the very rationale of the European Convention and its ability to effectively benefit those it has been designed to protect.

1 Introduction

At the end of 2001, the European Court of Human Rights rejected two human rights claims — with a very narrow majority on the merits in *Al-Adsani*¹ and unanimously

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¹ Judgment of 21 November 2001, 34 EHRR 11(2002).

on admissibility in *Bankovic*² — in terms which are significant both for the interpretation of the European Convention on Human Rights as an instrument of European public order, and for the status of European human rights in the international legal system.

In *Al-Adsani*, the Court was asked to declare that the failure of the British authorities to provide judicial remedies for a UK national, allegedly tortured in Kuwait by the authorities of that country, involved a violation of Article 3 (freedom from torture) and Article 6 (the right of access to a court). The Court found that Article 3 was not applicable to the failure of a state in providing remedies to a person allegedly tortured in another country, and that the guarantees under Article 6 had legitimately and proportionately been restricted by the respondent state to comply with international legal requirements concerning the immunity of foreign states.

In *Bankovic*, the Court was seised with a complaint by survivors and relatives of the victims of the NATO bombing of the Radio-Television Station (RTS) in Belgrade, which caused 16 deaths and injured a further 16 persons. The applicants complained of violations of Article 2 (right to life), Article 10 (freedom of information) and Article 13 (right to an effective remedy). The Court upheld the preliminary plea of the respondent Governments that the claims of the applicants did not fall within the jurisdiction of the respondents under Article 1 of the Convention and were therefore inadmissible.

The two cases differ from each other as to their subject-matter, but relate to a more general issue regarding the reach of the provisions of the European Convention and the question of their restrictive interpretation vis-à-vis issues of public order extending beyond the Member States of the Council of Europe. In particular, the Court's restrictive construction of the Convention's provisions was based on juridical factors external to the Convention's terms and inimical to its object and purpose (such as the concepts of jurisdiction and state immunity in general international law). In this context, the Court should have considered whether its specific instances of restrictive interpretation were compatible with the character of the European Convention as a human rights treaty and an instrument of the 'public order' of Europe.

Restrictive interpretation of treaties is not, as such, among the interpretive methods accepted in international law, and is not supported by the Vienna Convention on the Law of Treaties of 1969.³ In the specific context of the European Convention this would imply the duty of a supervisory body to guard the Convention's provisions and to apply them where appropriate; to resolve any doubts in the light of the object and purpose of the treaty; to examine scrupulously reasons advanced against the applicability of the Convention's provisions and to place them in the context of the Convention's objectives. Therefore, the non-applicability of a specific Convention provision to a specific situation arguably governed by the Convention may be affirmed

² Decision No. 52207/99 of 12 December 2001, available and quoted from the European Court's website: www.echr.coe.int.

³ I. Brownlie, *Principles of Public International Law* (1998), at 636; Bernhardt, 'Evolutionary Treaty Interpretation, Especially of the European Convention of Human Rights', 42 *GYIL* (1999) 14.

only in consequence of a complex process of reflection which takes into account the Convention's independent response to the pleas of non-applicability. Non-applicability cannot be presumed; on the contrary, reasons militating in favour of non-applicability must be found in the Convention's legal order.

In *Bankovic* and *Al-Adsani*, the Court arguably acted at the margins of its mandate. The assertion of the Convention's applicability in the two cases would have required the Court to pass judgment on, or overrule, legal principles and considerations arguably external to the Convention's legal order, such as state immunity, the use of force, the rights of third-party states and the jurisdiction of states. But the Court itself nowhere gives the impression that it presumed the abovementioned circumstances to preclude application of the Convention in a particular case. Instead, it justified its approach under the Convention as such. It is, therefore, the independent response of the Convention to the claims brought before the Court that is crucial in determining whether and to what extent that instrument applies to those claims. Since restrictive interpretation is rarely a useful tool, one could assume that if the Convention is *prima facie* applicable to a given claim, the contention whether some circumstances external to the Convention's legal order nevertheless militate against the application of its provisions must be assessed by reference to the nature of the European Convention and the methods of interpretation following from, or compatible with, that nature.

The following analysis focuses upon the specific situations in *Al-Adsani* and *Bankovic*, where the European Court used different methods of interpretation to clarify the content of particular provisions of the Convention. The focus will be on the interpretive methods the Court selected — whether their application was correct and the extent to which the methods were relevant — and other interpretive methods ignored by the Court, but which are nevertheless crucial for understanding the meaning of the Convention's provisions for the purposes of the two cases.

2 The Nature of the Obligations Embodied in Human Rights Treaties

It is currently part of conventional wisdom, and has repeatedly been affirmed by the European Commission and European Court of Human Rights, that the European Convention contains obligations implicating the 'public order' of Europe, which are of an objective nature and protect the fundamental rights of individuals rather than the interests of contracting states. The European Commission already affirmed this in the early years of operation of the Convention machinery, in the case *Austria v. Italy*.⁴ Later, in *Ireland v. UK*, the European Court emphasized that:

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.⁵

⁴ *Austria v. Italy*, 4 YB ECHR (1961), 140.

⁵ *Ireland v. UK*, 58 ILR (1980) 188, at 291.

These obligations of a special type are assumed by each contracting state to persons within its jurisdiction, and not to other contracting states.⁶

This special nature of the European Convention follows from its characterization as a human rights treaty, and is comparable with other conventions of a similar nature, whether regional or universal. It may be recalled that in its Advisory Opinion on *Reservations*, the International Court of Justice emphasized the similar character of the 1948 Genocide Convention. The Court stressed in particular that:

in such a convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.⁷

The Inter-American Court of Human Rights has said much the same thing of the American Convention of Human Rights: ‘the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of states, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality.’⁸ It went on to state that:

Modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.⁹

Furthermore, the Inter-American Court emphasized the similarity between regional human rights treaties and universal treaties such as the Genocide Convention.¹⁰ Similarly, the UN Human Rights Committee emphasized that the International Covenant on Civil and Political Rights is not a web of inter-state obligations, but is designed to safeguard individual human beings.¹¹ Humanitarian law treaties also possess a similar nature. They are not intended to benefit or protect state interests; they are primarily designed to protect human beings *qua* human beings.¹² Accordingly, the objective nature of a specific human rights treaty, and the consequences following therefrom, seem to be attributable to the character of the substantive obligations enshrined in the treaty and not to whether the treaty is universal or regional in scope. This is significant for the purpose of interpretation of

⁶ *Cyprus v. Turkey*, 8007/77, 13 DR, 147; P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), at 40–41.

⁷ ICJ Reports (1951), at 23.

⁸ *Effect of Reservations*, para. 27, 67 ILR (1984), at 568.

⁹ *Ibid.*, para. 29.

¹⁰ *Ibid.*, para. 30.

¹¹ General Comment 24(52), para. 17, 2 IHRR (1995) 10.

¹² *Kuprsekic*, IT-95–16-T, Judgment of 14 January 2000, para. 518.

clauses in such treaties. The nature of these obligations means that similar principles of interpretation are applicable to different treaties, whether universal or regional.

Moreover, the objective nature of Convention obligations mirrors their place and status in general international law, which is, as we shall see below, an important factor in their applicability in face of interaction or conflict with other principles of international law. The Convention protects individuals irrespective of their nationality. It does not give rise to bilateral or reciprocal legal relations between states, but protects common interests. This feature is identical to the characteristic of international public order in general international law. For instance, peremptory norms¹³ safeguard the interests of the international community as a whole. They give rise to *erga omnes* obligations, which vest legal interest in their protection in all states irrespective of their individual prejudice.¹⁴ This feature of the European Convention is similar in nature to features of certain universal treaties. As the International Criminal Tribunal for the Former Yugoslavia emphasized, the objective nature of the obligations embodied in humanitarian law treaties stems from their *erga omnes* character, in accordance with the dictum of the International Court.¹⁵

The objective nature of the obligations embodied in the European Convention — and the link between the obligations embodied therein and the norms of public order in general international law — is important in terms of its interpretation. In particular, this factor may influence the scope and reach of the Convention's specific provisions regarding their material or territorial applicability. In other words, the objective nature of an obligation influences the methods of interpretation applicable to a treaty and accordingly has an impact on the material or territorial scope of a treaty provision. It is crucial here that extraterritorial application and the non-reciprocity of obligations follow from the nature of those obligations. As we shall see below, non-reciprocity, which itself follows from the objective nature of the obligations, may and indeed does, imply extraterritorial applicability. Apart from the specific examples in practice to be dealt with below, such a perspective is supported by the attitude of the International Court of Justice which, by reference to the Advisory Opinion of 1951 affirming the objective nature of the obligations contained in the Genocide Convention, held that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*'. This entails, as a consequence, that 'the obligation each state thus has to prevent and punish the crime of genocide is not territorially limited by the Convention'.¹⁶

3 Applicable Methods of Interpretation

There is an established trend in the interpretation of human rights treaties and in the methods of interpretation which assume priority. General guidance is still provided by

¹³ Article 53 of the Vienna Convention on the Law of Treaties (1969).

¹⁴ *Barcelona Traction*, ICJ Reports (1970), para. 33.

¹⁵ *Kupreskic*, *supra* note 12, at para. 519.

¹⁶ ICJ Reports (1996) 616.

the Vienna Convention on the Law of Treaties of 1969. In addition, human rights bodies have elaborated on the specific applications of the principles enshrined in the Vienna Convention.

As in general international law, restrictive interpretation is hardly ever admissible in the European Convention. In *Wemhoff*, the European Court held that it was necessary ‘to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.’¹⁷ As an alternative, Judge Fitzmaurice considered in *Golder* that the Convention, which makes heavy inroads into the domestic jurisdiction of states, not only justifies but also demands a restrictive, cautious and conservative interpretation.¹⁸ But the Convention organs have never approved this approach. It has been noted that ‘such an argument, which emphasizes the character of the Convention as a contract by which sovereign States agree to limitations upon their sovereignty, has now totally given way to an approach that focuses upon the Convention’s law-making character.’¹⁹ In this connection, it is relevant to note that the Convention is part of the public order of Europe and imposes objective obligations on states. Relying on this factor, Professor Bernhardt, a former President of the European Court, suggested that:

Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable conclusions for human rights conventions: Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on one hand and restrictions on State activities on the other.²⁰

Fitzmaurice himself later changed his point of view. In *Belgian Police*, he emphasized that he was not ‘suggesting that a Convention such as the Human Rights Convention should be interpreted in a narrowly restrictive way’ and that a liberal construction of the Convention’s provisions should be undertaken in the light of the legal environment prevailing at the time of interpretation.²¹

As for the value of restrictive interpretation, the European Commission has emphasized that ‘a restrictive interpretation of the individual rights and freedoms guaranteed by the European Convention on Human Rights would be contrary to the object and purpose of this treaty’.²² Having given an overview of the general approach underlying the Convention’s interpretation, it remains to examine the specific interpretive methods applicable to the Convention.

¹⁷ *Wemhoff*, Judgment of 27 June 1968, Series A No 7, para. 8.

¹⁸ Separate Opinion of Judge Sir Gerald Fitzmaurice, *Golder*, 57 ILR (1980), at 250–251.

¹⁹ D. J. Harris, M. O’Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (1995), at 7.

²⁰ Bernhardt, *supra* note 3, at 14.

²¹ Separate Opinion of Judge Sir Gerald Fitzmaurice, *Belgian Police*, 57 ILR (1980), at 295.

²² *East African Asians*, 3 EHRR 76, 80–81.

A The Plain Meaning as Understood in the Light of the Object and Purpose of a Treaty

Article 31(1) of the Vienna Convention requires that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' This method is most suitable for ascertaining the content of human rights treaties. As the Inter-American Court has explained,

This method of interpretation respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation. In the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;' rather 'their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States'.²³

In similar terms, the European Commission emphasized that the European Convention 'should be interpreted objectively and not by reference to what may have been the understanding of one Party at the time of its ratification'.²⁴

The object and purpose of human rights treaties, as described above, has to be consistently kept in mind when interpreting their clauses. To reiterate, reference to the object and purpose of a treaty assumes particular importance in the case of treaties of a humanitarian nature.²⁵ Consequently, 'any ambiguity in the terms must be resolved in favour of an interpretation that is consistent with the humanitarian character of the Convention'.²⁶

B Subsequent Practice

In accordance with Article 31§3(b) of the Vienna Convention, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is relevant for clarification of the meaning of that treaty. This method is not *per se* excluded under human rights treaties, including the European Convention.

The real utility of this principle in our context is, however, rather limited. Where treaties provide for a supervisory body entrusted with the function of interpretation and application of the treaty, it follows naturally that it is not only the practice and attitudes of the contracting states that matter, but also the attitudes expressed by the supervisory body itself. In the context of the European Convention, subsequent practice encompasses both the practice of the states and the practice of the Convention's organs.

²³ *Restrictions to Death Penalty*, para. 50, 70 ILR (1986), at 466.

²⁴ *East African Asians*, 3 EHRR 76, 81.

²⁵ Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* (2001), at 17.

²⁶ *Ibid.*, at 29.

But this is not the end of the matter. The nature of the substantive obligations embodied in human rights treaties also has to be considered. Subsequent practice may not validly curtail, in scope or effect, the substantive rights and guarantees embodied in a treaty such as the European Convention. In particular, derogatory agreements hardly have any legal value in the Convention's system. Since the Convention obligations are objective in character, a party to a derogatory agreement would still be obliged, vis-à-vis other parties to the Convention, to observe the Convention standards. Thus, subsequent practice can only be relevant here to the extent that it facilitates the effective operation or enforcement of the Convention.

C 'Relevant Rules' of International Law

The interpretation of a legal instrument in the light of any relevant rule of international law, as foreseen under Article 31§3(c) of the Vienna Convention on the Law of Treaties, is among the primary means of treaty interpretation. It is a method that has been neglected both in the 'doctrine' and in practice over the decades,²⁷ but it was applied by the International Court of Justice in the *Namibia* case. The Court held that the interpretation of instruments governing the institution of mandates, although established in 1919,

cannot remain unaffected by the subsequent developments of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.²⁸

Bearing in mind the overriding importance of peoples' right to self-determination, the International Court noted that the achievement of self-determination is the purpose of the 'Mandates'.

This method is not therefore in principle incompatible with the nature of human rights treaties. Moreover, it may prove useful, since the status of specific human rights norms in general international law may be of importance in the process of interpreting their content, scope and effect as they are enshrined in a given convention.

The jurisprudence of the European Court demonstrates a revived interest in this interpretive method.²⁹ The Court used it in *Loizidou*, where it emphasized that 'the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction'.³⁰ In all the cases cited, the notion of 'relevant rules' has

²⁷ Even in the final commentary of the International Law Commission on the relevant article of the law of treaties, this method of interpretation is not supported either by doctrinal or practical examples. 2 *YbILC* (1966), at 222.

²⁸ *Namibia* (Advisory Opinion), ICJ Reports (1971) 21.

²⁹ Such a resort to general international law may be necessary to clarify the scope of the rights and freedoms enshrined in the Convention, such as the freedom from torture, *Selmouni*, para. 97–98, and freedom of association, *National Union of Belgian Police and Swedish Engine Drivers' Union*, ECtHR, Ser. B17/18.

³⁰ *Loizidou* (Merits), para. 43, 108 ILR (1998), at 462.

been resorted to with a view to enhance the Convention's applicability with respect to claims brought before the Convention organs.

In the specific context of the European Convention, it must be asked whether the use of this method of interpretation makes the Court responsible for the application and observance of the 'relevant rule' as such, or whether its task is limited to clarifying the content and scope of the Convention provisions in the context of those 'relevant rules.' It has to be noted that the purpose of interpreting by reference to 'relevant rules' is, normally, not to defer the provisions being interpreted to the scope and effect of those 'relevant rules,' but to clarify the content of the former by referring to the latter. 'Relevant rules' may not, generally speaking, override or limit the scope or effect of a provision for whose clarification they are referred. The only exception seems to be the case where a 'relevant rule' possesses a higher hierarchical status than a provision which is being interpreted in a specific case.

D Preparatory Work

According to Article 32 of the Vienna Convention, 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'.

The extent to which preparatory work is relevant in the interpretation of the Convention has been sufficiently elaborated on in the Convention's jurisprudence, and there is a general tendency not to prioritise it: 'For very good reason, preparatory work always has had a doubtful place in treaty interpretation.'³¹

As the European Court emphasised in *Tyrer*, 'the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions'.³² In *Loizidou* and *Selmouni*, the European Court determined the role of preparatory work by reference to the objective character of Convention obligations, and declared that the Convention cannot solely be interpreted in accordance with the intentions its authors expressed more than forty years ago.³³ In sum, 'The special nature of the European Convention means that particular caution is necessary in relying on the preparatory work of the Convention. Preparatory work is notoriously unreliable as a general guide to treaty interpretation.'³⁴

To conclude, interpretive methods are laid down in the Vienna Convention in a certain order of priority. Tribunals rarely have a free reign in applying them; they have to follow the sequence laid down in the Vienna Convention. In addition, the

³¹ Bernhardt, *supra* note 3, at 14. See also Judge Spender in *Guardianship of Infants*, ICJ Reports (1958), suggesting that any recourse to preparatory work has to be done with caution, because one is always presented with the danger of interpreting a preparatory work instead of interpreting a treaty.

³² *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, Series A no. 26, at 15–16, para. 31.

³³ *Loizidou* (Preliminary Objections), paras 70–71; *Selmouni*, para. 101, 29 EHRR (2000) 442.

³⁴ F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (1996), at 33. *Travaux* are not often helpful also according to Harris, O'Boyle and Warbrick, *supra* note 19, at 17.

European Court may not use an interpretive method to interpret a Convention provision restrictively. As the above analysis demonstrates, restrictive interpretation is not among the available options, and the object and purpose of the Convention, which requires effective interpretation, assumes priority. This factor has a direct impact on the relevance of specific interpretive methods in specific cases, and is crucial in determining whether a decision taken by the European Court on the basis of a given interpretive method is consistent with the Convention. Having said that, it still remains to examine and assess how the European Court utilized these methods of interpretation in *Bankovic* and *Al-Adsani*.

4 ‘Jurisdiction’ of Contracting States under Article 1 of the European Convention: *Bankovic*

Before *Bankovic*, the European Convention was generally capable of extraterritorial application and thus able to cover the actions of contracting states beyond their territory. But in *Bankovic* the Court adopted a different approach. One may enquire endlessly as to the motives which led the Court to adopt a restrictive approach towards the scope of ‘jurisdiction’ under Article 1. These could have included, for example, the Court’s reluctance to deal with a situation related to an armed conflict, or to assess questions related to the use of force, such as justifications and proportionality. Neither the Convention’s text and practice, however, nor even the reasoning of the Court in *Bankovic*, demonstrates that the Court would have been incompetent to examine these issues had its task so required, or suggests that these issues contributed to the conclusions of the Court.³⁵ Instead, the decision is clearly based on certain methods of interpreting the Convention that the Court considered appropriate.

Consequently, the only plausible approach is to examine the actual reasons the Court gave in its decision, and to determine whether they are consistent with the Convention’s requirements. These reasons involve questions such as whether the Court interpreted correctly the notion of ‘jurisdiction’ by reference to general international law; whether it assessed correctly the subsequent practice of its jurisprudence on the subject; and whether its reasoning is consistent with the object and purpose of the Convention and its public order character. Although these questions are interrelated, since they all impact on the scope of Article 1 they will, for the sake of analysis, be dealt with separately, within the framework of the principles of interpretation applicable to the European Convention.

³⁵ The same reasoning would hold true for the Respondents’ argument related to the absence from the proceedings of certain states involved in the NATO air campaign against the FRY, *Bankovic*, para. 31. Nothing in the Decision shows that this factor contributed to the Court’s reasoning, or would succeed before the Court. The Respondents referred to the *Monetary Gold* doctrine as further embodied in *East Timor*, ICJ Reports (1995). But both in factual and juridical aspects, the situation in *Bankovic* resembles *Nauru*, ICJ Reports (1992), rather than *East Timor*, in that it relates to joint and several, and not consequential, liability. In *Nauru*, the *Monetary Gold* pleas failed and it would be hard to see how they could succeed in *Bankovic*.

A The Court's Reference to 'Relevant Rules' of International Law

As already emphasized, in *Bankovic* the Court found the case inadmissible because in its view the complaints submitted to it did not fall within the respondent states' 'jurisdiction' under Article 1. The Court reached this conclusion by interpreting Article 1 in the light of 'relevant rules' of international law under Article 31§3(c) of the Vienna Convention and, in particular, by reference to the rules and principles governing the jurisdiction of states in general international law.³⁶ The Court emphasized the primarily territorial character of the jurisdictional competence of states and held that concrete evidence is necessary to prove that a state may exercise jurisdiction beyond its own territory.³⁷ Having found no evidence that the respondent Governments' actions involving the bombing of the RTS in Belgrade were actions taken in exercise of those Governments' territorial or other jurisdictions, the Court concluded that they did not fall within the 'jurisdiction' of those Governments under Article 1.

While the reference to 'relevant rules' of international law is among the legitimate methods of interpretation of the European Convention, the meaning of 'jurisdiction' under Article 1 has to be identified by reference to the text of the relevant clause as understood in the light of the object and purpose of the Convention; or at least, a conclusion reached through reference to 'relevant rules' must be compatible with that object and purpose. This begs the question whether the notion of 'jurisdiction' under Article 1 is necessarily identical with the general concept of jurisdiction in general international law.

The concept of jurisdiction serves to determine whether a state may legitimately perform a certain act; i.e. whether its performance is permitted or, at least, not prohibited in international law. Substantive — territorial or other — jurisdiction normally provides a framework for the exercise by a State of its sovereign prerogatives through specific powers of legislation, adjudication and administration. Jurisdiction involves 'a state's *right* to exercise certain of its powers. ... like all attributes of sovereignty this liberty is subject to the overriding question of entitlement'.³⁸ Jurisdiction is generally associated with the concept of sovereignty and a state's personal and territorial limits.³⁹ Furthermore, 'the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable and almost platitudinous, for to the extent a state is sovereign it necessarily has jurisdiction'.⁴⁰

Consequently, while a primary function of substantive jurisdiction is to allocate competences between states — delimiting the scope of their freedom of action — the exercise of jurisdiction in the light of general international law is a criterion for determining the legitimacy of a state's action. Where a State possesses jurisdiction

³⁶ *Bankovic*, para. 56.

³⁷ *Ibid.*, para. 59–60.

³⁸ Mann, 'The Doctrine of Jurisdiction in International Law', in *Studies in International Law* (1973) 3 (emphasis in original); R. Jennings and A. Watts, *Oppenheim's International Law* (1992) 456.

³⁹ Mann, *supra* note 38, at 9; Brownlie, *supra* note 3, at 301; R. Jennings, 'General Course of International Law', *RdC* (II-1967) 516.

⁴⁰ Mann, *supra* note 38, at 22; Jennings and Watts, *supra* note 38, at 457.

under one or another heading, its actions in exercising such jurisdiction are lawful or, at least, their legality cannot be contested by reference to the alleged absence of jurisdiction.

For instance, when a state engages in ‘stop and search’ of a foreign vessel on the high seas, its conduct is unlawful, because states are not entitled — with the specific exception of piracy — to exercise jurisdiction on the high seas. If a state undertakes the same action with a foreign vessel in its territorial sea — in compliance with the standards laid down in relevant provisions of the Law of the Sea Convention — its conduct is lawful, since it is acting under one of the headings of jurisdiction recognized in international law, namely territorial jurisdiction. Therefore, the general concept of jurisdiction in international law is a criterion for the lawfulness of certain acts and conduct of states. It is a substantive legal concept, which determines areas within which individual States may lawfully act. Outside its jurisdiction ‘a State measure which is not supported by international law may involve an international delinquency’.⁴¹

The notion of ‘jurisdiction’ under Article 1 of the Convention is not necessarily identical to the general concept of jurisdiction. Article 1 does not purport to determine the substantive limits to the jurisdiction of contracting states. Its purpose is to delimit an area within which the Convention obligations operate, and to limit the freedom of action of contracting states without, *prima facie*, laying down any limits in terms of substantive, or territorial, jurisdiction.

Thus, ‘jurisdiction’ under Article 1 is a tool for identifying whether alleged violations of the Convention may be imputable to one or another contracting state. This is a remedial, as opposed to a substantive, notion of jurisdiction. Its function is to ensure that breaches of the Convention are duly attributed to the relevant contracting state and that therefore responsibility is assumed and remedies implemented. This does not in any way depend on whether the action of a state is within the limits of its substantive — territorial or other — jurisdiction or, in other words, whether the act in question lawfully comes within the jurisdiction of that state. Thus, we may distinguish jurisdiction as entitlement, from jurisdiction as actual control. The former is a jurisdiction based on title, while the latter is a jurisdiction derived from fact.

International law beyond the European Convention is not unfamiliar with the difference between substantive and remedial notions of jurisdiction. In *Namibia*, the International Court deduced South Africa’s responsibility for acts which occurred in Namibia from the fact that the former was in actual control of the territory. The substantive jurisdiction of South Africa with regard to Namibia was clearly non-existent, since its administration was illegal, and its acts — with certain humanitarian exceptions, such as registration of marriages and births — were void. The Court nevertheless went on to emphasize that, while in possession of the territory of Namibia, South Africa

remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory

⁴¹ Mann, *supra* note 38, at 5.

does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of a title, is the basis of State liability for acts affecting other States.⁴²

Therefore, a State may exercise actual control or jurisdiction with regard to a certain territory, without any substantive jurisdiction, and vice versa.

If 'jurisdiction' under Article 1 is understood in the sense of jurisdiction in general international law, then the contracting states of the Convention should be held responsible for violations on their territories which are out of their actual control. This is not justified by the established approach of the Convention's organs. For example, the European Commission refused to attribute responsibility to the government of Cyprus for alleged violations of the Convention which took place in northern Cyprus, since this was outside the actual control of the Cypriot government.⁴³ The events occurred on a territory over which Cyprus had a clear jurisdictional title in international law, but responsibility could not be attributed since its actual control of the events, and thus its 'jurisdiction' under Article 1 was lacking. The resulting interpretation of Article 1 seems to have been reached through reasoning based on attribution and due diligence, and not on substantive jurisdiction.

There is indeed an established trend of defining 'jurisdiction' in Article 1 in a way that is different from the concept of state jurisdiction in international law. The two notions fail to overlap, not only in determining whether 'jurisdiction' in Article 1 extends to a given conduct, but also regarding whether a given act or action is outside this 'jurisdiction'. The concept of jurisdiction is therefore multi-faceted in general international law, and may serve different purposes and functions. The European Court in *Bankovic* was thus hardly justified in identifying 'jurisdiction' so strictly within the meaning of Article 1 by using the notion of substantive jurisdiction, since it is beyond doubt that the latter is not the only concept of jurisdiction recognized in international law.

In addition, the specific context of human rights norms does not permit the assimilation of 'jurisdiction' in Article 1 with the jurisdiction of states in general international law. Presence or absence of the latter jurisdiction is irrelevant for the legality of acts such as torture or the unlawful deprivation of life. A state may not justify such actions by reference to the question whether the situation falls, territorially or otherwise, within its jurisdiction. The subject-matter of fundamental human rights is simply outside the scope of state prerogatives. Thus, unlike ordinary international obligations, where the question of substantive jurisdiction is a factor in determining the legality of certain acts (as illustrated above by the case of 'stop and search' of a foreign vessel), fundamental human rights exist and operate independently of the principles of general international law governing state jurisdiction. They may, in specific situations, render inoperative an otherwise valid jurisdictional title — since they are outside the domestic jurisdiction of a state (no State may claim, for

⁴² *Namibia*, ICJ Reports (1971), at 44.

⁴³ *An v. Cyprus*, 13 HRLJ, 153.

example, a territorial jurisdiction to torture) — and in other cases they may themselves provide the basis for a jurisdictional title which would otherwise be non-existent (as in the case of universal jurisdiction).

Even in general international law, a State incurs international responsibility in accordance with the rules of attribution for violation of human rights such as those embodied in the Convention, whether or not a given act was performed within its substantive jurisdiction. Bearing this in mind, it is rather curious to interpret the scope of ‘jurisdiction’ in Article 1 as referring to the substantive jurisdiction of a state. The purpose of a clause in a human rights treaty such as Article 1 of the European Convention, is to apply to, and outlaw a state’s conduct — irrespective of whether or not that state is acting within the limits of its substantive jurisdiction as recognized in general international law. It is the question of attribution and causation which is relevant here; this has to be established without any reference to the issue of substantive jurisdiction. *Bankovic* fails to reflect this distinction, and is hardly an acceptable decision either in the context of the Convention or in general international law.

B The Relevance of Subsequent Practice

The Court noted the lack of derogation by contracting states with regard to their extraterritorial actions under Article 15 as evidence militating against the Convention’s extraterritorial applicability.⁴⁴ It is questionable, however, whether this factor can be regarded as conclusive. The fact that states choose not to derogate for a certain circumstance does not necessarily mean that they do not consider themselves bound by the Convention with regard to the situation in question; it could also mean that the states concerned simply do not expect their action in that specific situation to result in violation of Convention rights. Purely political reasons may also be involved. If a state that is engaged in armed conflict outside its territory lodged a formal declaration under Article 15, the public may feel that it really does intend to violate human rights in the course of its operations. There is no doubt that states would prefer to avoid the embarrassment of this negative public opinion. The reasons for not derogating are many; no single one may categorically be inferred.

In addition, although the attitudes of contracting states — whatever their merits — may serve as evidence of subsequent practice within the meaning of Article 31 of the Vienna Convention, the value of such attitudes is substantially diminished where the enforcement of a treaty is entrusted to a judicial supervisory body, such as the European Court. The Vienna Convention requires existence not merely of subsequent practice as such, but of practice which provides evidence of an agreement between the parties. The occasional and fragmentary behaviour of a very limited number of contracting states hardly furnishes evidence of the attitude of the membership of the Convention as a whole. On the other hand, since contracting states have delegated the task of interpretation and application of the Convention to the European Court, this may imply that they have also delegated the competence to act on behalf of the

⁴⁴ *Bankovic*, para. 62.

Convention as a whole. The practice of the Court may at least indirectly constitute subsequent practice, expressing the agreement of parties as regards the application of the European Convention.

In numerous cases, Convention organs have extended the operation of the Convention to acts committed by a state where that state was not empowered in international law to exercise substantive jurisdiction. Conversely, acts committed outside the substantive jurisdiction of the State have been considered to be acts falling within the ‘jurisdiction’ of that State under Article 1. The understanding of ‘jurisdiction’ in these cases is similar to the reasoning of the International Court in *Namibia*, where, despite the absence of substantive jurisdiction on the part of South Africa, the illegality of its conduct was proclaimed.

In *Drozd*, the Court emphasized that concerning the scope of ‘jurisdiction’ under Article 1 the question is ‘whether the acts complained of by Mr Drozd and Mr Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States.’⁴⁵ The controversy concerned the question whether the Andorran courts acted as organs of either France or Spain, and not whether the situation came within the substantive jurisdiction of those states in international law.

Having established that Andorran courts were not organs of France or Spain, the Court decided that the acts complained of did not fall within the ‘jurisdiction’ of either of these states under Article 1.⁴⁶ The reason for this finding seems to be that there was no French or Spanish conduct to be assessed in the light of the Convention — unlike the situation in *Bankovic*, which clearly involved the conduct of the respondent states — and not whether France or Spain had jurisdiction, in international law, in Andorra. The judicial decisions complained of were Andorran, and not French or Spanish. At the same time, there was no action on the part of France or Spain that allegedly constituted an excess of the state’s substantive — territorial or other — jurisdiction in international law in terms of the applicant’s complaint of an alleged breach of Article 6. Thus, *Drozd* offers the simple perspective of the situation where the respondent states did not have substantive jurisdiction, nor did they undertake any act not encompassed by their substantive jurisdiction, nor did their conduct therefore involve any inconsistency in general international law. Consequently, such situations do not exhaust the scope of either Article 1 or the related jurisprudence of the Convention organs.

This inference is further confirmed by the acknowledgment of the Court that there is ‘nothing in the case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants’ trial’.⁴⁷ Thus, had those authorities so interfered, the Court might have considered that the action was within their ‘jurisdiction’ under Article 1, even if Andorran courts are not the organs of France or Spain. ‘Jurisdiction’ of the respondent states under Article 1 would be inferred even in the absence of jurisdiction in international law, merely by virtue of the extra-

⁴⁵ *Drozd*, para. 91.

⁴⁶ *Ibid.*, paras 92–96.

⁴⁷ *Ibid.*, para. 96.

territorial conduct of those States, which resulted in influence and control over the trial in Andorra.

The absence of French and Spanish ‘jurisdiction’ within the meaning of Article 1 is due not to the fact that the two states were not entitled in international law to exercise jurisdiction in Andorra with respect to the situation brought before the Court, but to the fact that the organs of the two states simply did not in practice do anything that infringed the rights of the applicants. A causal link was not established between the conduct of the two states and the violation of the rights of the applicants. The whole controversy in *Drozdz* was about attribution and not about substantive jurisdiction. Had France and Spain been found to possess substantive jurisdiction in international law with regard to the subject-matter of the complaint, such jurisdiction would merely have served as factual evidence for attributing conduct to them.

Other decisions of the Convention organs relate to more complicated situations involving the actions of a respondent state clearly going beyond that state’s substantive — territorial or otherwise — jurisdiction in international law. In *Cyprus v. Turkey*, the European Commission stressed that the term ‘jurisdiction’ under Article 1 ‘is not limited to the national territory of the High Contracting party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their territory or abroad’.⁴⁸ The Commission added, and reaffirmed in a later case, that where the agents of a state, including armed forces, affect, by their acts or omissions, persons and property beyond the territories of that state, these actions bring the persons and property within the ‘jurisdiction’ of that State and the ‘responsibility of the State is engaged’.⁴⁹ The Commission spoke only about actual control and not about the need to establish that, in Northern Cyprus, Turkey had jurisdiction — territorial or otherwise — in general international law.

In *Drozdz*, *Chrysostomos*, and *Loizidou*, the Court stressed in almost identical language that, since the concept of ‘jurisdiction’ under Article 1 of the Convention is not restricted to a state’s national territory, ‘the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory’.⁵⁰ The Court in *Loizidou* considered that whether a situation falls within a state’s ‘jurisdiction’ under Article 1 depends on whether that state exercises actual control with regard to an area beyond its national territory and added that ‘obligation to secure the rights and freedoms set out in the Convention derives from the fact of such control’.⁵¹ At the merits phase of the same case, the Court considered that such an application of Article

⁴⁸ *Cyprus v. Turkey*, 6780/74 & 6950/75, 2 DR 125, at 136–137; *Cyprus v. Turkey*, 8007/77, 13 DR 145, at 148–149.

⁴⁹ *Cyprus v. Turkey*, 6780/74 & 6950/75, 2 DR 125, at 137; *Cyprus v. Turkey*, 8007/77, 13 DR 145, at 149.

⁵⁰ *Drozdz*, para. 91; *Chrysostomos*, 12 HRLJ (1991), 121; *Loizidou* (Preliminary Objections), para. 62, 103 ILR (1996), at 642; *Loizidou* (Merits), para. 52, 108 ILR (1998), at 465.

⁵¹ *Loizidou* (Preliminary Objections), para. 63, 103 ILR (1996), at 642.

1 derives from 'the relevant principles of State responsibility'.⁵² The Court in *Bankovic* required the presence of 'exceptional circumstances' which could amount to the extra-territorial exercise of jurisdiction by a contracting State.⁵³ But *Droz* and *Loizidou* suggest that extra-territorial applicability is a normal consequence of Article 1 — it applies merely by virtue of the state's conduct having consequences outside the territory of that state.

In *Cyprus v. Turkey*, the applicant Government submitted that even if Turkey had no legal title in international law to northern Cyprus, Turkey did have legal responsibility for that area in Convention terms, given that she exercised overall military and economic control over the area.⁵⁴ The Court's response is framed not in terms of substantive jurisdiction, but in terms of purely factual circumstances, which are considered sufficient for attribution of the relevant acts to the respondent state and thus for bringing the matter into its 'jurisdiction' under Article 1.⁵⁵

To conclude, the Convention organ's practice before *Bankovic* clearly demonstrates that 'jurisdiction' under Article 1 is not identical to the concept of substantive jurisdiction in international law; rather, 'jurisdiction' is a notion relating to the responsibility of a state for breaches of the Convention. The Court's denial in *Bankovic* that Article 1 has to be conceived in terms of state responsibility⁵⁶ is therefore difficult to accept. Before *Bankovic*, neither the plain text of Article 1, nor the jurisprudence of the Convention organs, supported the view that complaints such as those arising out of the bombing of the Belgrade RTS would be inadmissible before the European Court. Thus, *Bankovic* is at variance with the Convention organ's previous jurisprudence, even though it gives the appearance of adhering to that jurisprudence.⁵⁷

The Court's argument in *Bankovic*, however, goes further. The Court decided that Article 1 would apply extraterritorially only in exceptional circumstances, where the respondent state exercises, through military occupation, some or all of the public powers normally exercised by the territorial sovereign. The Court, moreover, considered such approach to be supported by previous jurisprudence, in particular *Loizidou*.⁵⁸ However, *Loizidou* does not necessarily suggest that which is ascribed to it in *Bankovic*. In *Loizidou*, the Court referred first to a general principle that acts of states which produce effects outside their own territory fall within the scope of Article 1, then asserted that the responsibility of a State may *also* arise where effective control over a territory is exercised as a result of military action.⁵⁹ The significance of the word 'also', in this context should not be ignored, since this expressly affirms that the exercise of effective control in consequence of military action is not the only circumstance that gives rise to responsibility for extra-territorial acts under the

⁵² *Loizidou* (Merits), para. 52, 108 ILR (1998), at 465.

⁵³ *Bankovic*, para. 74.

⁵⁴ *Cyprus v. Turkey*, para. 71.

⁵⁵ *Ibid.*, para. 77.

⁵⁶ *Bankovic*, para. 75.

⁵⁷ *Ibid.*, para. 71.

⁵⁸ *Ibid.*, paras 70–71, 74.

⁵⁹ *Loizidou* (Preliminary Objections), para. 62, 103 ILR (1996), at 642.

Convention. The latter is not restricted to the former; the former is rather a particular incidence of the latter.

It remains to conclude that no decision before *Bankovic* laid down a requirement that Article 1 applies extraterritorially only to situations involving effective control of a territory. Furthermore, none of the earlier decisions elaborates upon the structural characteristics of such ‘effective control’ or sets any requirements as to its kind or duration. The jurisprudence suggests that extra-territorial applicability is a normal consequence of Article 1 and this arises merely by virtue of the state’s conduct having consequences beyond its territory. A logical assumption is therefore that any control over an area where alleged breaches are committed, and where such breaches are sufficient, brings the matter within the ‘jurisdiction’ of the state under Article 1. But if the necessity of ‘effective control’ is insisted upon, the bombing of the RTS in Belgrade may also be considered to be an exercise of effective control by the respondent states. For if the capacity — whether lawful or unlawful — to cause great damage to the lives and property of a population during a military operation — including damage likely to result in serious violations of the European Convention — is not considered to be ‘effective control’, then it really has to be asked what would constitute effective control at all.

Another general shortcoming of the Court’s analysis of the subsequent practice is that it seems to have ignored the fact that Article 1 might have its own meaning, inferable from the clause itself and independent of how and to what extent it had been dealt with in the previous jurisprudence of the Court. Elementary methods of treaty interpretation require ascertainment of the independent meaning of a treaty provision in the light of its object and purpose (Article 31 VCLT). The Court, in interpreting and applying Article 1, refers merely to certain examples of the operation of this provision, as illustrated by its territoriality, or its extra-territorial applicability in certain cases of involvement of consular action or military occupation. The Court seems to be mistaken in that it treats its earlier jurisprudence not as an expression of specific incidences of a general rule enshrined in Article 1, but as the exclusive source of such specific incidences.

From a practical point of view as well, judicial practice of interpreting Article 1 does not necessarily exhaust the meaning of that provision. The scope of such practice is not by definition identical to the scope of the Convention clauses, but involves only those aspects of the operation of these clauses which have been brought before the Convention organs by states and individuals. Article 1, both as a treaty provision and as a general clause, must be taken as embodying a principle of general applicability; this is inherently and undoubtedly present in Article 1. Existing practice merely specifies that certain situations in a given case do or do not fall within the ‘jurisdiction’ of the state under Article 1. It does not, however, prejudice other situations not directly connected with a previous case. Thus, the fact that a *Bankovic*-like situation had not earlier been brought before the Court does not necessarily suggest that such situations do not fall within the scope of Article 1.

B Preparatory Work

As we have seen, the Court has repeatedly affirmed that the Convention, as a living instrument, should be interpreted in accordance with present-day conditions, and not merely with the intentions of its drafters. It was confirmed in *Bankovic* that the *travaux préparatoires* were not decisive.⁶⁰ Nevertheless, at least twice in the same case the Court accorded decisive importance to the preparatory work. The Court referred to the intention of the drafters with regard to the scope of Article 1 by arguing that they could have adopted, if they had wished, a provision similar to Article 1 of the Geneva Conventions instead of the existing Article 1, but failed to do so.⁶¹ In addition, by stating that ‘The Convention was not designed to be applied throughout the world, even in respect of the conduct of the contracting States’,⁶² the Court accords priority to the intentions of the drafters.

This attitude is hardly compatible with the nature of the European Convention. Even if the drafters understood the scope of Article 1 to be limited to the situation where the state is entitled under international law to exercise territorial or other jurisdiction, this intention is clearly superceded by the object and purpose of the Convention as understood in the jurisprudence subsequent to its adoption. The Convention organ’s repeated affirmation of their competence in several inter-state and individual applications relating to the events in the Northern Cyprus directly contradicts the *travaux* and diminishes their importance.

The Court’s approach is categorically incompatible with the principle that the Convention should be interpreted as a living instrument and in the light of present-day conditions. If, in present-day circumstances, action by contracting states leads to *prima facie* serious violations of the Convention whose extraterritorial applicability is not expressly ruled out either by the text or by subsequent practice, the object and purpose of the Convention necessitates a presumption that the Convention applies to such action.

C The Object and Purpose of the Convention

The proper construction of the scope of Article 1 and of the situations to which it applies would necessarily refer to the object and purpose of the Convention. It has to be presumed that Article 1 exists to enhance the notion of the ‘object and purpose’ and not to impede it. In the jurisprudence preceding *Bankovic*, the specific nature of the European Convention was referred to as a factor favouring the extra-territorial application of the Convention.⁶³ But in *Bankovic*, the Court referred to the regional remit of the Convention’s public order and thereby used it as a factor precluding the extra-territorial application of the Convention. It held that the principles embodied in earlier practice were not applicable because the FRY was not a party to the

⁶⁰ *Bankovic*, para. 65.

⁶¹ *Ibid.*, para. 75.

⁶² *Ibid.*, para. 80.

⁶³ *Loizidou* (Preliminary Objections), para. 62, 103 ILR (1996), at 642.

Convention at the material time, and thus the acts complained of were performed outside the legal space covered by the Convention.⁶⁴

It is questionable whether such an approach is consistent with the principle that the Convention imposes objective obligations assumed by contracting states towards human beings. *Bankovic* fails to proceed with this assumption because it assumes that the inhabitants of a State enjoy Convention rights only where their national state or their state of residence is a party to the Convention, which reduces the matter to a pure reciprocity of rights and obligations — a notion rejected within the Convention's legal order.

This is well illustrated by *Austria v. Italy*, which involves a situation where the applicant state (Austria) became a party to the Convention subsequent to the occurrence of the alleged violations. The respondent state (Italy) contended that the European Commission's competence did not cover these allegations, since the Convention was not in force between Austria and Italy at the relevant time.⁶⁵ The Court dismissed this objection. Although this is an inter-State case, it undoubtedly embodies general principles relevant for the admissibility of individual applications as well.

According to *Austria v. Italy*, the Convention establishes not reciprocal rights and obligations between states, but a veritable European public order.⁶⁶ The Commission explained that in becoming a Party to the Convention a state undertakes to secure Convention rights and freedoms 'not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons'.⁶⁷ This is a feature of human rights treaties in general, as subsequently affirmed by the Inter-American Court, which stated that 'the [American] Convention [of Human Rights] was designed to protect the basic rights of individual human beings irrespective of their nationality, against States of their own nationality or any other State Party'.⁶⁸ In *Austria v. Italy*, the only independent relevance of the applicant state being a party to the Convention was that that state was able to institute proceedings before the Convention organs. The issue of the applicability of the Convention to the conduct of the respondent did not depend on whether the applicant was a party to the Convention at the material time. Italy was a party at the relevant time and that is all that mattered; the case was therefore admissible. This could be derived from the objective, or 'public order', nature of the Convention obligations, which do not operate as a network of bilateral and reciprocal obligations between the contracting states, but rather as integral obligations towards the individuals protected by the Convention.

Bearing in mind the character of the Convention obligations, the question whether

⁶⁴ *Bankovic*, paras 42 and 80.

⁶⁵ *Austria v. Italy*, 4 YB ECHR (1961), 136–138.

⁶⁶ *Austria v. Italy*, 4 YB ECHR (1961), 138.

⁶⁷ *Austria v. Italy*, 4 YB ECHR (1961), 138–140; By reference to the public order character of the Convention, the Commission held that the right to application under Article 24 is unqualified, *Austria v. Italy*, 4 YB ECHR (1961) 142.

⁶⁸ *Effect of Reservations*, para. 33, 67 ILR (1984), at 568.

the FRY was party to the Convention is irrelevant as regards the scope and degree of protection the Convention affords to persons within the FRY's territory. The issue of the respondents' liability under the Convention has to be judged independently of the status of the FRY with regard to that instrument. It is decisive that the respondent states were parties to the Convention at the material time. If in *Austria v. Italy* the European Commission had held, as the European Court did in *Bankovic*, that the victim's national state must necessarily be a party to the Convention at a material time, it would not have been in position to adopt a decision on Austria's claims in the way that it did. The reason is that in *Austria v. Italy* the Convention was applied to acts which occurred outside what was designated in *Bankovic* as the *espace juridique* within which the Convention applies.

Inter-state application procedure does not contain an indication of reciprocity, which follows from the objective nature of the Convention obligations.⁶⁹ Human rights norms and obligations are not reciprocal, but represent the adherence of the state to a normative system of public order that is not conditioned by the parallel obligation of any other states.⁷⁰ Therefore, it must be asked whether such an objective, 'public order' system could justify the introduction of reciprocity through the back door, by asserting that individuals deserve protection under the Convention only if the state of their nationality or residence is a party to the instrument. Regrettably, this is what the Court has done in *Bankovic*, with a total and arbitrary disregard for the Convention's object and purpose.

Another point of neglect of the Convention's object and purpose in *Bankovic* is that the Court deduced the limited applicability of Article 1 from a comparison with the common Article 1 of the Geneva Conventions of 1949. The latter clause differs from Article 1 of the European Convention in that it imposes a duty on states not only to respect the Conventions but also to ensure respect for them. This involves the two-sided duty of the State to ensure a default is corrected by a defaulting State and to ensure that the Convention rules are respected by all.⁷¹ It is the presence of the words 'to ensure respect' which distinguishes the scope of the common Article 1 from Article 1 of the European Convention. These words are not, however, the source of the so-called 'cause-and-effect' notion of jurisdiction attributed by the European Court to the common Article 1. Consequently, if these words were absent from the common Article 1, the provision would nevertheless include the notion of 'cause-and-effect' jurisdiction; and so does Article 1 of the European Convention.

⁶⁹ *Austria v. Italy*, 4 YB ECHR (1961), 142. The Commission did not even consider whether the final stage of alleged violations — the decision of Italy's Court of Cassation — took place after Austria's accession to the Convention. The Court considered this issue not as a question of competence *ratione temporis*, but as a question of absence of reciprocity due to the objective nature of the European Convention, *Austria v. Italy*, 4 YB ECHR (1961) 142.

⁷⁰ Provost, 'Reciprocity in Human Rights and Humanitarian Law', *BYbIL* (1995) 404.

⁷¹ Chazournes and Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', 82 *International Red Cross Review* (2000) 69, at 72. For the particular modalities of ensuring respect by other states for the Geneva Conventions see *ibid.*, at 76–77.

Common Article 1 requires respect for the Geneva Conventions ‘in all circumstances’, but this is also inherent in Article 1 of the European Convention. The Geneva Conventions and the European Convention have in common that, subject to their terms, they have to be observed both in war and in peacetime, both within and outside the territory of, and with respect to both nationals and non-nationals, of the state in question. Furthermore, neither the European Convention nor the Geneva Conventions may be breached by way of reciprocity or reprisal, or terminated in response to their original breach by another contracting state. They fall within the notion of humanitarian treaties in terms of Article 60(5) of the Vienna Convention of 1969. Furthermore, a non-derogable right to life (Article 2 of the European Convention), whose breach was involved in *Bankovic*, obviously fulfils the criteria stipulated by the rules embodied in the Geneva Conventions, both in terms of territorial application and the absence of reciprocity: this is a right to be respected ‘in all circumstances’.

It may be concluded that the common Article 1 of the Geneva Conventions and Article 1 of the European Convention do not in principle differ in scope in terms of ‘cause-and-effect’ jurisdiction; the obligations they contain are similar in nature, and any difference between them is empirical rather than categorical. The Court in *Bankovic* did not even attempt to compare the scope of these provisions by reference to their clear wording as understood in the light of the object and purpose of each treaty. Bearing all this in mind, the value and correctness of the Court’s decision is doubtful.

The regional character or vocation of the European Convention, and the limited number of parties contracting to it, has to be understood in a way that is not prejudicial to the objective character of the obligations the Convention embodies. In that it only applies to the conduct of contracting states which happen to belong to the region of Europe, the Convention, along with the conception of European public order itself, is no doubt regional. But the substantive obligations — which apply to those states only, apply to them as obligations of an objective character based on norms of public order. The fact that the Geneva Conventions are universal in scope and apply to more states than the European Convention, does not mean that the latter cannot apply to the conduct of its contracting states in the way the former do, and have the appropriate effects. These effects mean, in particular, that the obligations (a) apply not only to acts and events on contracting state’s territory but also extraterritorially, and (b) are not reciprocal, which means that they are by their nature applicable to the violation of the rights of persons whose national state is not party to the Convention, since they safeguard human beings as such. Such scope of applicability of the Convention’s provisions could only have been precluded by an express provision in the Convention itself, which does not exist. In other words, extraterritorial applicability to nationals of non-contracting states is a feature consistent with the nature of the Convention’s obligations, and moreover, follows from that very nature.

To conclude, the general nature of the European Convention and the European ‘public order’ does not prevent the Convention’s applicability to events such as the bombing of the RTS in Belgrade, and the Court fundamentally erred in construing the scope of the Convention in the way that it did. The ‘regional vocation’ of the Convention as understood in *Bankovic* — probably inspired by numerous factors,

including those of policy — might be a consideration, but hardly a legal one. Human rights obligations — whether conventional or customary — protect human beings as such. If extraterritorial application is in principle permitted and even dictated by the nature of the Convention, it is unclear why responsibility should be limited to the territories of contracting states. This is not a question of applying the Convention to the entire world, but of how and in what manner it applies to the conduct of states which are parties to it, and of how this issue is influenced by the nature of substantive obligations. It is not a question of Europe legislating for the world, but of the accurate assessment of the conduct of contracting states in the light of requirements imposed on them by the Convention.

5 Scope and Effect of the Prohibition of Torture under Article 3 of the Convention: *Al-Adsani*

In *Al-Adsani* the applicant submitted that Article 1, in conjunction with Articles 3 and 13 ‘required the British Government to assist one of its citizens in obtaining an effective remedy for torture against another State’.⁷² The Court recognized that, in general, the duty to conduct effective investigation in connection to arguable claims relating to torture forms part of the prohibition of torture under Article 3, but added that the United Kingdom was not bound to provide a civil remedy for torture with which it had no causal link.⁷³ It is the compatibility of this approach with the meaning of Article 3, and the applicable standards of interpretation, which is to be assessed here.

A Plain Meaning of the Convention

The Court recognized that Article 3, read in conjunction with the general obligation to secure rights under Article 1, stipulates a duty to provide remedies for the victims of torture. Hardly any limitations to this principle — *ratione loci* or *ratione personae* — may be inferred from these provisions. Article 1, read in conjunction with Article 3, is clear in requiring that remedies for torture must be provided to ‘everyone’, and not only to those victims whose torture involves the respondent state. In other words, the scope of Article 1 extends to everyone who is under the jurisdiction of the state when claiming that their rights guaranteed by the Convention, such as freedom from torture, have been violated, and it is not necessarily limited to situations where a victim is actually tortured within the jurisdiction of that state. Article 1, although fundamental in the Convention system, is supplementary to specific substantive rights guaranteed under the Convention, and its content in specific cases has to be determined by reference to the scope of specific rights whose alleged violations are brought before the European Court. In the case at hand, it is relevant that Article 3

⁷² *Al-Adsani*, 34 EHRR 11 (2002) 284, para. 35.

⁷³ *Ibid.*, at 285, paras 38–40.

includes a prohibition to engage in actual torture as well as a duty to provide remedies for the victims of torture. Article 1 therefore requires states to observe Article 3 ‘within their jurisdiction’ in all its dimensions. If a victim raises an arguable claim of torture within the jurisdiction of a state, Article 3 obliges that state to provide appropriate remedies.

Nor does Article 13 link the question of remedies for torture to the causal involvement of a state which has been asked to provide remedies. The text of Article 13 is broad enough to encompass any case of torture; it speaks — in a similar way to Article 1 — of ‘everyone’ rather than of persons allegedly tortured by the respondent state itself. Moreover, the irrelevance under Article 13 of the fact that torture was committed by persons acting in an official capacity indicates that even a plea of state immunity should not preclude national courts from providing remedies for torture.

Certain rights under the Convention have substantive and procedural aspects that are separate from each other. Lack of effective investigation or the failure to award remedies may on their own account amount to a breach of certain provisions of the Convention, such as Articles 2 and 3, respectively safeguarding the right to life and freedom from torture.

In *Cyprus v. Turkey*, the Court decided that the killing of the missing Greek Cypriot persons by Turkish or Turkish Cypriot armed forces could not be proved and therefore no breach of Article 2 could be found on this account. Nevertheless, the Court examined the applicant Government’s allegations ‘in the context of a Contracting state’s procedural obligation under Article 2 to protect the right to life’.⁷⁴ From Article 2, in conjunction with Article 1, the Court inferred a duty of the State to conduct an official and effective investigation when the killing of an individual is alleged. Although the Court found no proof that any of the missing persons had been unlawfully killed, it concluded that the above-mentioned procedural obligation may arise merely upon proof of an arguable claim in this respect.⁷⁵ The same approach was reaffirmed in *Assenov* with regard to the scope of Article 3. The Court decided that Bulgaria had breached Article 3 merely by its failure to investigate claims of alleged torture, despite the fact that the actual fact of torture was never proved.⁷⁶

The consequential procedural obligation under certain provisions of the Convention, such as Articles 2 and 3, is not linked to the actual violation of a primary substantive obligation safeguarded by those provisions. In other words, under Article 3 of the Convention, a state must provide due remedies to the alleged victims of torture, irrespective of its own involvement in torturing them. The context of the actual occurrence of torture is hardly relevant for construing the scope of Article 3, and therefore the Court in *Al-Adsani* was not justified in such a narrow construal of

⁷⁴ *Cyprus v. Turkey*, para. 131.

⁷⁵ *Ibid.*, at para. 132; lack of investigation with regard to disappearances and alleged killings further resulted in violation of Article 3 with regard to the victims’ relatives in that the latter were subjected to moral agony and pressure arising from the lack of information about the alleged victims, *ibid.*, para. 156–157.

⁷⁶ *Assenov*, Judgment No. 24760/94 of 28 October 1998, paras 90–106, 28 EHRR (1999), 698–702.

Article 3. Such is the outcome of a textual interpretation of Article 3 in conjunction with Articles 1 and 13 of the Convention.

B Object and Purpose of the Convention

The next step of the analysis is to ascertain whether it is consistent with the object and purpose of the Convention to assume that a state is not obliged under Article 3 to provide remedies for the victims of torture in another state. The object and purpose of the Convention seems to be relevant in ascertaining the scope of Article 3.

In *Selmouni*, while discussing the scope of the Article 3 prohibition, the Court considered that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions'. In this context, the Court referred to the need for an 'increasingly high standard' in the area of protection of human rights safeguarded by the Convention, which 'correspondingly and inevitably requires greater firmness in assessing breaches of fundamental values of democratic societies'.⁷⁷ In this regard, it must be noted that Article 3 may inherently contain safeguards that it does not explicitly lay down; adherence to such 'increasingly high standards' has at least arguably contributed to the Court subsuming procedural and consequential obligations within the meaning of Articles 2 and 3 of the Convention, as mentioned above. This question was also touched upon in *Soering*, where the Court faced the plea that Article 3 did not indicate that an extradition likely to lead to a result outlawed under Article 3 would itself be prohibited by that Article. References were even made to other treaties, such as the 1984 UN Convention against Torture, Article 3 of which — unlike Article 3 of the European Convention — prohibits such extradition in express terms. The Court replied to that argument by holding that: 'The fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention.' The Court further adopted a teleological perspective and noted that: 'Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intention of the Article.'⁷⁸

It is hardly disputable that the refusal by the United Kingdom to provide remedies to Al-Adsani, while arguably not directly inferable from the wording of Article 3, was clearly contrary to the spirit and objective of the Article, and of the Convention as a whole. The Court barely took this factor into account, and erred in its construction of the scope of Article 3.

C 'Relevant Rules' of International Law

Having erred in interpretation of the plain meaning of Article 3 as understood in the light of the Convention's object and purpose, the Court did not even bother to examine whether its restrictive construction of Article 3 is warranted in the light of 'any applicable rule of international law' in terms of Article 31§3(c) of the Vienna

⁷⁷ *Selmouni*, para. 101, 29 EHRR (2000), 442.

⁷⁸ *Soering*, 98 ILR (1995) 302, para. 88.

Convention, which in the case at hand would refer to the principles concerning torture in general international law. Generally, in the Court's practice, it is not uncommon to refer to sources external to the Convention in order to clarify the scope of Article 3. In *Selmouni*, the Court did examine the provisions of the UN Convention against Torture for the purpose of determining what is encompassed by Article 3 of the European Convention.⁷⁹

In general international law it is accepted that a state is obliged to provide remedies to the victims of torture whether or not the initial act of torture took place on their territory or within their jurisdiction. As the International Criminal Tribunal for the Former Yugoslavia affirmed, the act of torture is reprehensible in itself, regardless of its perpetrator.⁸⁰ The same tribunal confirmed that the victims of torture — where they are unable to obtain remedies in the country in which they have allegedly been tortured — are entitled in general international law to bring a civil suit in a foreign court.⁸¹ There is indeed a considerable body of practice of municipal tribunals on this subject. In *Filartiga*, the District and Circuit Courts of the United States condemned torture committed in Paraguay, by a Paraguayan against a Paraguayan, and awarded punitive damages to the victims.⁸² Similar decisions in civil cases have been taken by courts in several other cases affirming that the customary prohibition of torture entitles a domestic court to award damages to the victims of torture abroad, despite the fact that the forum state had no connection with the actual torture of victims. In *Trajano v. Marcos* and *Hilao v. Marcos*, the Court of Appeals for the Ninth Circuit dealt with the issue of extraterritorial torture, as conduct outlawed under *jus cogens*, which provided the basis for the Court's jurisdiction to award pecuniary damages in a civil case.⁸³ All these cases are based on universal customary law and the status of the prohibition of torture therein. In addition, *Filartiga* suggests that a torturer is a *hostis humani generis* for the purposes of civil liability,⁸⁴ as well as for cases of criminal prosecution.

This runs counter to a narrower positivist perspective indicating that universal jurisdiction over torture follows from the express terms of the Torture Convention of 1984, which grants criminal jurisdiction over torture wherever it is committed in the world.⁸⁵ However, this Convention contains the grant of civil jurisdiction as well: according to Article 14, contracting states must ensure in their legal systems that 'the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation'; in the event of the death of the victim, 'his dependants shall

⁷⁹ *Selmouni*, paras 97 *et seq.*, 29 EHRR (2000).

⁸⁰ *Kunarac*, Judgment of 22 February 2001, case no. IT-96-23-T, para. 428.

⁸¹ *Furundzija*, Judgment of 10 December 1998, case no. IT-95-17/I-T, para. 155.

⁸² 77 ILR (1988), at 169.

⁸³ 103 ILR (1996), at 526–527, 104 ILR (1997), at 126–128; See also *Forti v. Suarez-Mason*, 81 ILR 631–633, *Xuncax v. Gramajo*, 104 ILR (1997), at 184 *et seq.*, and *Alvarez-Machain v. US*, 41 ILM (2002), 130, supporting the same principles.

⁸⁴ 77 ILR (1988), at 184.

⁸⁵ *Pinochet*, 2 All ER (1999), 114 (per Lord Browne-Wilkinson).

be entitled to compensation'. This provision does not require the occurrence of an original act of torture within the territory or under the jurisdiction of the forum State.

In principle, whether or not the Torture Convention provides for universal criminal or civil jurisdiction is hardly crucial for determining whether Article 3 of the European Convention requires a state to provide remedies for extraterritorial torture; this issue can only be determined by reference to the nature and effects of the prohibition of torture as understood under the Convention in the light of international law. The Torture Convention serves only as evidence of an otherwise valid principle. One may indeed ask why there is no universal jurisdiction — both civil and criminal — with regard to torture irrespective of the Torture Convention; and whether such jurisdiction is not inherent in the prohibition of torture itself, given its special hierarchical status and capacity to override conflicting norms. Furthermore, a strict division between criminal and civil jurisdiction in the case of torture would be formalistic, for most if not all types of jurisdiction cover both criminal and civil aspects. If a state may establish its territorial or other jurisdiction over a specific situation, it may do so both in the civil and criminal law context; it is difficult to explain why this is not the case of universal jurisdiction.

Nor is the restrictive view advocated in *Al-Adsani* supported by the content of other human rights treaties. Article 7 of the International Covenant on Civil and Political Rights (1966) serves as evidence in this regard. In interpreting it, the UN Human Rights Committee held that in cases of torture, 'the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation'.⁸⁶ The Committee does not require that an initial act of torture must occur within the jurisdiction of the state in question in order to trigger the applicability of these consequences.

Existing practice and its normative framework is thus clear. The reference to 'relevant rules' reaffirms the outcome reached above with regard to a textual interpretation of Article 3, indicating that a consequential procedural obligation to treat the claims of alleged torture does not depend upon the occurrence of torture on the territory, or within the jurisdiction, of the Respondent.

6 Scope of the Right of Access to the Court under Article 6 of the Convention: *Al-Adsani*

This section examines whether the European Court was correct in *Al-Adsani* to hold that the guarantees under Article 6 were legitimately and proportionately restricted by the respondent state to comply with international legal requirements concerning the immunity of foreign states.

⁸⁶ General Comment 7, para. 1.

A ‘Relevant Rules’ of International Law

In order to clarify whether sovereign immunity constitutes a valid and legitimate limitation on the scope of Article 6 of the European Convention, the European Court went on to examine Article 6 in the light of ‘relevant rules’ of international law in the sense of Article 31§3(c) of the Vienna Convention. Generally, resort is made to ‘relevant rules’ in order to support the Convention’s effective operation and applicability where it is challenged. For example, in *Selmouni*, the Court referred to the definition of torture under the CAT 1984 to affirm that the suffering of the applicant amounted to torture; in *National Union of Belgian Police and Swedish Engine Drivers’ Union*, the European Commission of Human Rights affirmed the role of various ILO conventions in interpreting Article 11 of the Convention (freedom of association), and concluded that it applies not only to interference by a state, but also to ‘private’ interference by employers.⁸⁷ But the use of this interpretive method in *Al-Adsani* was specific in that the Court referred to ‘relevant rules’ not primarily to clarify what the Convention provisions mean, but to establish to what extent they can be applied in the context of, arguably conflicting, rules of general international law. The Court is looking for some existing external factors to qualify the scope of the Convention’s provisions, and states its policy in the following terms: ‘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.’⁸⁸ But the Court did not clarify whether such a policy of interpretation ‘in harmony’ with a given rule — not mentioned in Article 31§3(c) of the Vienna Convention — means the deference of a Convention provision to that rule.

In using this method of interpretation, the Court had to ascertain two things: first, whether international law contains a general rule concerning the scope and effects of state immunity, notably in cases of alleged torture; second, whether such a rule, if it exists, is of such a nature as to prevail over or qualify Article 6 of the Convention in the circumstances involved in *Al-Adsani*.

Some authors submit that state immunity is based on customary international law.⁸⁹ Others refer to the lack of uniformity of practice as a circumstance which may possibly lead to a questioning of the existence of a general rule on state immunity.⁹⁰ In practice, the existence of international legal rules on state immunity was most vigorously asserted by Lord Millett, who suggested that immunity is a creature of

⁸⁷ See *supra* note 29 and the accompanying text.

⁸⁸ *Al-Adsani*, 34 EHRR 11(2002), 289, para. 55.

⁸⁹ Jennings and Watts, *supra* note 38, at 342–343. Admitting that national decisions allegedly forming that practice vary in points of detail and even in substance, *ibid.*, at 342. See also Jennings, ‘The Pinochet Extradition Case in the English Courts’, L. Boisson de Chazournes and V. Gowlland-Debbas, *The International Legal System in Quest of Equity and Universality*. Liber Amicorum Georges Abi-Saab (2001) 677.

⁹⁰ D. P. O’Connell, *International Law* (1970), 846. Lack of uniformity and consistency of practice is also emphasized in R. Higgins, *Problems and Process* (1994), at 81. See also 1 Lauterpacht (ed.), *Oppenheim’s International Law* (1955), at 274, expressing doubts on whether the question may be regarded as affirmatively regulated by international law and whether a state would incur international responsibility for its courts’ assumption of jurisdiction.

customary international law, not a self-imposed restriction on the jurisdiction of the courts which a state chooses to adopt, but a limitation imposed from without, upon the sovereignty of a state,⁹¹ without elaborating on the evidence supporting this view. Similarly, *Al-Adsani* refers to ‘generally recognized rules of public international law on state immunity’,⁹² without, however, illustrating the ways in which those rules acquired their ‘generally recognized’ character.

The existence of legal rules can not, however, be assumed; it must be established through clear and concrete evidence. Doubts arise as to whether there is a clearly established rule on state immunity. Judicial practice stems predominantly from national courts operating on the basis of the diverse substantive and jurisdictional prerequisites of national legal systems. Compelling guidance in international law is practically non-existent. Whether certain treaties, such as the European Convention on State Immunity of 1972, embody general, or customary international law has to be clarified by reference to the requirement of uniformity in state practice, supplemented by respective *opinio juris*. In addition, the nature of a conventional instrument is also important, and Lord Wilberforce refused to treat the European Convention on State Immunity of 1972 and the 1926 Convention on the Immunity of State-Owned Ships as evidence of customary law on State immunity, because in order to be capable of custom-generation, a convention must ‘bear a legislative character and there must be a wide general acceptance of it as law-making, before that condition is satisfied’.⁹³

In addition, states rarely legislate or adjudicate in the area of state immunity in terms of their international obligations. In certain cases, national legislatures are guided by what is required or permitted by international law,⁹⁴ but even here it is difficult to deduce a uniform legal conviction among states. It is true that states adopt legislation on the immunity of foreign sovereigns; it is equally true that they are at liberty not to adopt such legislation (many states indeed do not), or even to abolish existing legislation, for whatever reason or pretext they choose.

As a consequence, judicial practice is hesitant in considering domestic state immunity statutes as evidence in international law. In *I Congreso*, the House of Lords was asked to decide that the State Immunity Act of 1978, which was not directly applicable because of its non-retroactivity, embodied applicable international law. Lord Wilberforce refused, considering that ‘to argue from the terms of a statute to establish what international law provides is to stand the accepted argument on its head,’ and added that ‘if one state chooses to lay down by enactment certain limits, that is by itself no evidence that those limits are generally accepted by States. And particularly enacted limits may be (or presumed to be) not inconsistent with general

⁹¹ *Holland v. Lampen-Wolfe*, 3 All ER (2000), at 847–848. Lord Millett also referred to the 1972 European Convention on State Immunity as evidence of general international law and the 1978 State Immunity Act of the UK, *ibid.*, 843.

⁹² *Al-Adsani*, 34 EHRR 11(2002), at 289, para. 56.

⁹³ *I Congreso* (HL), 1 AC 1983, 260–261.

⁹⁴ Higgins, *supra* note 90, at 81.

international law — the latter being in a state of uncertainty — without affording evidence what that law is.⁹⁵

In the same spirit, Lord Denning doubted that the doctrine of sovereign immunity derives from general international law at all and also doubted whether its scope is agreed upon.⁹⁶ The absence of such a general rule is evidence that there is nothing in general international law specifically *requiring* states to grant immunity to foreign states for one act or another or determining the scope of acts with respect to which a state is *empowered* to grant immunity to foreign states. States may happen to grant immunity to other foreign states, both for sovereign and non-sovereign acts, but in so doing they should not be seen as acting outside the context of ‘rules’ on state immunity, but within a more general context of rules governing the jurisdiction of states, as masters of their general territorial jurisdiction. While acting in this context and deciding to grant state immunity with regard to one type of act or another, states must exercise their rights in such a way as not to run counter to their *specific* obligations in international law. This dictates that the preferred approach has to be of those authors who conceive the issue in terms of comity rather than obligation and thus refrain from advocating the existence of any general rule on state immunity.

The scope of state immunity, whether as part of the law or as comity, is an issue of independent relevance. It was traditionally assumed that a state cannot be impeached before a foreign court, because states are equal and do not have authority over each other (*par in parem non habet imperium*). In the 20th century, however, courts started to distinguish between acts *jure imperi* and acts *jure gestionis*, and laid the basis for a functional, as opposed to a status-based or sovereignty-oriented, concept of state immunity. The resulting principle is not that a State cannot be impeached before a foreign court, but that it depends on the nature of the act complained of before the court.⁹⁷ As Lord Wilberforce submitted, ‘(1) a sovereign state will not sit in judgment on acts of sovereignty of another state; (2) nor will it do anything to impede another sovereign state in the exercise of its sovereign powers’.⁹⁸ Courts should demonstrate that ‘the act is truly an act of sovereignty. One must look at the precise act complained of,’ because ‘there is no answer which is consistent right across the board’.⁹⁹

The concept of an act *jure imperi* must be construed on the basis of a descriptive analysis undertaken in specific cases and in the context of interaction with all relevant juridical considerations. Acts *jure imperi* may attract immunity not because they are performed by a state, but because they are performed by a state in the exercise of its sovereign authority. For instance, acts which a private person could also perform fall outside this category, such as breach of contract. Similarly, acts which by their nature are outside the State’s prerogatives cannot attract immunity. There is a difference between the legality of an act — whether on the national or international level — and

⁹⁵ *I Congreso* (HL), I AC 1983, 260.

⁹⁶ *Trendtex Trading v. Bank of Nigeria*, 1 QB 1977, 552–553.

⁹⁷ See Higgins, *supra* note 90, at 78 *et seq.*; O’Connell, *supra* note 90, at 844 *et seq.*

⁹⁸ *I Congreso* (HL), I AC 1983, 251, 262.

⁹⁹ *Ibid.*, at 252, 262.

its exercise in the pursuance of sovereign authority. To illustrate, it is clear that the enactment of a law, conclusion of a treaty, declaration of war, expropriation of property — whether illegal or not under international law — may *prima facie* fall within the sovereign authority of a state, while torture, enslavement, rape, unlawful killing or deprivation of liberty and racial discrimination may not.

These criteria are not least dictated by humanitarian considerations, which arguably provide for certain inherent limits on the sovereign powers or authority of a state. But pragmatic considerations are also relevant: conduct outlawed under humanitarian norms, such as torture, enslavement or war crimes may be committed even by a private person; such conduct rather resembles acts *jure gestionis* than acts *jure imperi*. On the other hand, a typical non-sovereign act, such as breach of contract may fall outside state prerogatives in the same way as torture or enslavement. Considerations underlying acts *jure gestionis* apply also to certain non-commercial acts, sometimes assumed to belong to the category of acts *jure imperi* as non-commercial acts.¹⁰⁰ Thus, the law of state immunity, if it exists at all, ‘covers only a very narrow field of governmental activity’.¹⁰¹

It may also be crucial whether an act in question is claimed by a state to be an act performed in pursuance of its governmental authority or, more importantly, whether the governing framework of international law accepts this act as an act of state authority. For example, the House of Lords in *I Congreso* held that the conduct of a state is not a sovereign act and attracts no immunity if the act is one which could be performed by any private actor, and the state invokes no governmental authority, even if the circumstances concern a highly contingent political context.¹⁰² On this view of things, the category of *acta iure imperi* would only encompass a narrow category of acts inherent to the sovereign authority of a state.¹⁰³ Such factors are no doubt relevant in terms of immunity pleas in the context of obligations of states under Article 6 of the European Convention and under peremptory norms of international law such as the prohibition of torture.

It is now pertinent to examine whether and to what extent a general rule of international law, if it exists, could impact on the scope of Article 6. The Court acknowledged that ‘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.’¹⁰⁴ Therefore, it held that Article 6 was applicable, despite the contention that sovereign immunity is an exception to the right to a fair trial. This finding is hardly compatible with the Court’s assertion that it reached its conclusion in *Al-Adsani* through interpretation, notably by reference to Article 31§3(c) of the

¹⁰⁰ As *Empire of Iran* (German *Bundesverfassungsgericht*), 45 ILR (1972), at 80, demonstrates, the distinction between sovereign and non-sovereign acts does not depend ‘on whether the State has acted commercially. Commercial activities of States are not different in their nature from other non-sovereign State activities.’

¹⁰¹ O’Connell, *supra* note 90, at 846.

¹⁰² *I Congreso* (HL), 1 AC 1983, 268.

¹⁰³ Higgins, *supra* note 90, at 84.

¹⁰⁴ *Al-Adsani*, 34 EHRR 11(2002), 287, para. 48.

Vienna Convention. Rather, it appears that the Court's approach in *Al-Adsani* consists not in interpretation, but merely in non-application of Article 6 to the cases where it would otherwise apply. The Court's reasoning comes closer to dealing with questions relating to the application of Article 6 than to its interpretation,¹⁰⁵ which casts doubt upon its use of interpretive methods.

Article 6, as it stands, guarantees access to a court for 'everyone'. But, despite the absence of a clear limiting provision in the Convention, the Court nevertheless held that states may limit the exercise of the rights guaranteed under Article 6 by granting immunity to foreign states:

Sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. 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.¹⁰⁶

This approach is based on the false premise of absolute immunity embodied in the maxim *par in parem non habet imperium*, and precludes any flexibility in its application, while the functional approach permits the exercise of jurisdiction between equals depending on the nature of the act involved. The Court ignored that the functional approach distinguishes between sovereign and non-sovereign acts, and thereby avoided the task of determining whether torture can be regarded as an act *jure imperi* — an assumption difficult to maintain. Unlike national courts, the European Court had to determine whether torture is a sovereign act attracting immunity in international law as such, regardless of what domestic statutes say on the subject.¹⁰⁷ In international law, domestic laws are merely facts whose legality must be assessed in the context of international rules.¹⁰⁸ Even *Al-Adsani* recognizes this principle, since the Court in reality judged on the compatibility of the State Immunity Act of 1978 with the Convention.¹⁰⁹

The Court assumes that sovereign immunity may constitute an exception to Article 6 by virtue of its existence. But a norm cannot always provide a satisfactory legal solution in a specific situation merely because it exists and would be, *prima facie*, applicable to the situation. All rules of international law exist and operate in the context of their interaction with other rules; their scope and applicability may depend on how those other rules affect or qualify their scope and applicability. This latter question depends, in turn, on whether those other rules possess the capacity to affect

¹⁰⁵ Interpretation is the process of establishing the legal character of consensus achieved by the parties. In contrast, application is the process of determining the consequences of such interpretation in a concrete case. Interpretation of a treaty is independent from its application; however, any application of a treaty presupposes a preceding conscious or subconscious interpretation thereof. G. Schwarzenberger, *International Law and Order* (1971), 116.

¹⁰⁶ *Al-Adsani*, 34 EHRR 11(2002), 289, para. 54.

¹⁰⁷ As Lord Steyn suggested in *Pinochet*, 4 All ER (1998) 945, municipal laws cannot be decisive in determining whether an act may fall within the functions of a state.

¹⁰⁸ *Certain German Interests in Polish Upper Silesia*, PCIJ Series A, No 7, at 19.

¹⁰⁹ *Al-Adsani*, 34 EHRR 11(2002), 292–293, paras 66 *et seq.*

or qualify the scope and applicability of the rule, for example by virtue of being *lex posterior*, *lex specialis* or *lex superior* in relation to that norm.

As a matter of fact, the 'rules' on sovereign immunity emerged when there was still no general human right to a fair trial in international law that imposed on states an obligation to provide the right to individuals irrespective of their nationality. But this right, as embodied in Article 6, is currently a substantive right in international law, and imposes a substantive obligation on states which is at least potentially in conflict with their 'obligations' related to sovereign immunity. According to Lord Millett, Article 6 of the European Convention requires states to maintain a fair judicial process, but it does not require them to exercise 'adjudicative powers they do not possess'.¹¹⁰ According to Lord Cooke, however, denial of immunity in certain cases may be dictated by considerations based on an 'ever-growing recognition of human rights: in particular the access to an impartial court for the determination of one's civil rights and obligations,' unless an act complained of properly falls within the sovereign powers of a state.¹¹¹

Furthermore, the hierarchy within human rights law necessarily influences the scope and applicability of the right to a fair trial in specific situations, such as those involving allegations of torture. It is undeniably part of the object and purpose of the European Convention that certain rights, denoted as non-derogable in the Convention's language, should enjoy a higher degree of protection. In this regard, it is questionable whether a limitation on a 'derogable' right, such as Article 6, even if proportionate or legitimate as such, still carries force when it results in an excuse for a states compliance with the requirements imposed on them by a non-derogable provision.

While the Court was interpreting the provisions in question by reference to 'relevant rules' in the sense of 31§3(c) of the Vienna Convention, it could hardly ignore the special status of the prohibition of torture in general international law. The Court acknowledged that torture is absolutely prohibited, and national and international jurisprudence recognizes the *jus cogens* character of that prohibition.¹¹² In particular, the Court noted the observation of the ICTY that this prohibition, as part of *jus cogens*, takes precedence over general customary law, the character of which the European Court attributed to the rule on state immunity.

However, the Court considered that:

the present case concerns not, as in the *Furundzija* and *Pinochet* decisions, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. 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

¹¹⁰ *Holland v. Lampen-Wolfe*, 3 All ER (2000), 847–848.

¹¹¹ *Ibid.*, 838.

¹¹² *Furundzija*, Judgment of 10 December 1998, case no. IT-95–17/I-T, para. 155; *Delalic*, Judgment of 16 November 1998, case no. IT-96–2-T, para. 466; *Kunarac*, Judgment of 22 February 2001, case no. IT-96–23-T, para. 454.

suit in the courts of another State where acts of torture are alleged.¹¹³

This statement of the Court results in a contradiction; for if it is assumed that a *jus cogens* rule as such prevails over an inconsistent norm of general, or customary, international law, it is rather curious to require the existence of an additional norm — supported in a convention or judicial practice — which would enable a given peremptory norm to take its effect in a specific case.¹¹⁴

A similar contradiction results from the Court's reasoning that, in civil proceedings, the state immunity rule prevails in relation to *jus cogens*, while in criminal proceedings the same rule would not prevail. The Joint Dissenting Opinion of six judges rightly denies that 'the standards applicable in civil cases differ from those applying in criminal matters when a conflict arises between the peremptory norm of international law on the prohibition of torture and the rules on State immunity'.¹¹⁵ The Court hardly examined the issue of the hierarchy of norms, and thus focused on *jus cogens* without respecting its most peculiar characteristic — the capacity to prevail over other norms. Paragraphs 57–65 of the Judgment, dealing with the relevance of *jus cogens*, lack any focus on the hierarchy of norms, and discuss merely its evidentiary rather than its normative aspect.

In order to justify its approach, the Court referred to the claim of the Working Group of the International Law Commission on State immunity that in most cases before national courts involving *jus cogens* the plea of sovereign immunity had succeeded.¹¹⁶ But this has resulted in a misinterpretation. Although the Working Group acknowledged that in most cases the plea of immunity had succeeded, nothing in its Report suggests that international law would uphold state immunity with regard to civil proceedings related to torture. Rather, the Working Group concluded that recent developments with regard to the impact of *jus cogens* on immunity, even if not at that stage mirrored by the draft Articles on state immunity, are so significant that their importance in the law of state immunity should not be ignored.¹¹⁷

The Court failed properly to assess the impact of domestic judicial decisions, by ignoring the fact that national courts reach their decisions to uphold immunity pleas on the basis of national legislation and not international law. They often concede that they have the jurisdiction to sanction civil cases regarding remedies against torture committed abroad as a breach of *jus cogens* — as warranted by international law as such.¹¹⁸ But they acknowledge that a national legislator, while requiring the grant of

¹¹³ *Al-Adsani*, 34 EHRR 11 (2002), 291, para. 61. Judge Zupancic's Opinion is inspired by the same point, *ibid.*, 23–24.

¹¹⁴ As the Joint Dissenting Opinion, 34 EHRR 11 (2002) 298, para. 1, submits, 'the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal 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 and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.'

¹¹⁵ Joint Dissenting Opinion, *Al-Adsani*, 34 EHRR 11(2002), at 297–298 (introductory paragraph).

¹¹⁶ *Al-Adsani*, 34 EHRR 11(2002), at 291, para. 62.

¹¹⁷ Annex to the Report of the Working Group on State Immunity, A/CN.4/L.576, 56–58.

¹¹⁸ *Supra* notes 82–84 and the accompanying text.

immunity to foreign States, has not admitted an exception in the case of *jus cogens*, and they accord priority to state immunity as required by their domestic law.¹¹⁹ These holdings hardly provide evidence that international law as such upholds sovereign immunity in civil proceedings involving the violation of *jus cogens*. When Al-Adsani's case was considered by the English courts, they acknowledged that torture could rarely attract immunity in international law, but the 'comprehensive code' embodied in the 1978 UK State Immunity Act did not permit a solution dictated by international law to be implemented in English domestic law.¹²⁰ This process affirms entirely the attitude of Lord Wilberforce with regard to domestic state immunity statutes as evidence of international law.¹²¹

If it is accepted that torture is prohibited by a peremptory norm, the reasons advanced by the Court would hardly suffice to allow contracting states not to grant a judicial remedy to the victims of torture. *Jus cogens* prevails over conflicting rules of international law, whether general or particular. The prohibition of torture therefore prevails over State immunity because of the normative characteristics of that prohibition, not because the 'rules' on State immunity should or do actually allow this. If the Court decided to interpret Article 6 by reference to 'relevant rules' in the sense of Article 31§3(c) of the Vienna Convention, it would have had to accord due importance to the higher hierarchical status of certain norms of general international law which prevail over other general norms.

The Court did not judge that the principle of sovereign immunity forms part of *jus cogens*,¹²² and despite some suggestions to the contrary,¹²³ this is indeed the case: it may be waived, renounced, derogated from in a treaty or breached by way of reciprocity or reprisal, even with regard to acts *jure imperi*. It is unclear how the European Court could construe a provision of the Convention (enforcement of which is its primary task) in the light of the requirements of that rule. For any conventional rule is presumed to operate in full unless this is clearly precluded by circumstances, such as the hierarchical superiority of another norm. It is hardly arguable that the European Convention provides an excuse for states to preclude victims of a breach of *jus cogens* from obtaining adequate remedies — a conclusion totally alien to the Convention's object and purpose. Such conclusion follows however from the whole text and spirit of *Al-Adsani*.

While referring to 'relevant rules' of international law as an applicable method of interpretation, the Court failed to observe how international law strikes a balance between Al-Adsani's interest to obtain compensation for torture and the interest of Kuwait not to be impeached before the English courts. It is evident that the international community considers the former interest more important, since it

¹¹⁹ See, for example, *Siderman de Blake v. Argentina*, 103 ILR 455; *Princz v. Federal Republic of Germany*, 33 ILM 1483 (1994); *Smith et al. v. Libyan Arab Jamahiriya*, 36 ILM 100 (1997).

¹²⁰ *Al-Adsani* (High Court), 103 ILR (1996), at 427–431; *Al-Adsani* (Court of Appeal), 107 ILR (1997), at 538–547.

¹²¹ *Supra* note 96.

¹²² Cf. Joint Dissenting Opinion, 34 EHRR 11(2002), at 298, para. 2.

¹²³ Jennings, *supra* note 89, at 684–685.

protects it, unlike the latter, through a peremptory norm which can override a conflicting norm. Had Kuwait failed to obtain immunity in the English courts — and if it was assumed that such refusal by the English courts constituted an international wrong — it would be the only international person thus injured. But Al-Adsani's failure to obtain remedies for torture has injured the interests of the international community as a whole.

B Object and Purpose of the Convention

The European Court did not examine whether its interpretation of Article 6 was justified in the light of the object and purpose of the Convention. As the Court's standing jurisprudence dictates, the Convention is intended to guarantee rights which are not theoretical or illusory but practical and effective.¹²⁴ This means that the Court has to 'look beyond appearances and formalities, and to focus on the realities of the position of the individual.'¹²⁵ The realities of the position of Al-Adsani, as compared to the position of those involved in other cases before the European Court where the plea of immunity succeeded, are telling regarding the question whether the Court's approach duly respected the Convention's object and purpose.

It is true that the right of access to a court is not absolute, neither in general international law nor under Article 6 of the Convention, and may be subject to limitations. As *Golder* suggests, the right may be regulated by a state with a view to meeting certain needs of society; for example, it may be limited in a way as not to benefit minors and persons of unsound mind. But such regulation must never prejudice the substance of the right itself, nor conflict with other rights enshrined in the Convention.¹²⁶ For example, mental illness may justify limitations on the exercise of the right of access to a court, but 'it cannot warrant the total absence of that right as embodied in Article 6§1' for the person concerned.¹²⁷

In determining the scope of Article 6, the European Court referred to the doctrine of the margin of appreciation, and held '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'.¹²⁸ The Court considered that just one sentence was sufficient to resolve the question whether the margin of appreciation was correctly used and whether the pursued aim was legitimate.

Applicability of the doctrine of the margin of appreciation depends on the degree of discretion allowed to the state, which varies according to the context.¹²⁹ The context is above all provided for by the relevant provisions of the Convention. Articles 8 to 11 of the Convention contain limitation clauses which allow states to restrict the rights

¹²⁴ *Artico*, 60 ILR (1981), at 182; *Soering*, 98 ILR (1994), at 301.

¹²⁵ van Dijk and van Hoof, *supra* note 6, at 74.

¹²⁶ *Golder*, 57 ILR 219.

¹²⁷ *Winterwerp*, 58 ILR (1980), at 681–682.

¹²⁸ *Al-Adsani*, 34 EHRR 11(2002) 289, paras 53–54.

¹²⁹ Harris, O'Boyle and Warbrick, *supra* note 19, at 14.

enshrined in those Articles for reasons of national security, territorial integrity, public safety, protection of health or morals, reputation or rights of others, impartiality of judiciary. None of these Articles permits the limitation of a Convention right by reference to the need of a state to comply with considerations of comity or even with other international obligations that are invoked, not least because, due to its object and purpose, the Convention is not an instrument which can be subordinated to other international obligations.¹³⁰ It is not justified to subject Article 6, whose terms do not permit a margin of appreciation and limitation by reference to a legitimate aim, to a limitation which is expressly ruled out under Articles 8 to 11.

In practice the European Court has permitted some restrictions on Article 6 by reference to state immunity. In *Beer and Regan* and *Waite and Kennedy*, the Court held that the European Space Agency (ESA) was entitled to immunity before German courts and that the limitation of the rights of the applicants under Article 6 was thus legitimate.¹³¹ It would suffice to say that, right or wrong, these cases are radically at variance with *Al-Adsani*, at least in these essential points:

1. In *Beer and Regan* and *Waite and Kennedy*, there was a specific provision on the immunity of ESA that was embodied in an international agreement. In *Al-Adsani*, the Court assumed the existence in international law of the absolute immunity of States without bothering to enquire into state practice and *opinio juris*.
2. In *Beer and Regan* and *Waite and Kennedy*, the impact of the immunity on the scope of rights guaranteed under Article 6 was substantially different, because alternative remedies were available to the applicants, such as resorting to the ESA Appeals Board. In *Al-Adsani*, the Court accepted that state immunity might result in an absolute bar to consideration of the applicant's claims in the English courts without providing him with any alternative remedy.
3. In *Beer and Regan* and *Waite and Kennedy*, there was no prejudice to other rights guaranteed by the Convention, since only Article 6 was at stake. In *Al-Adsani*, the applicant's situation involved allegations of torture, and by upholding state immunity the Court tolerated the fact that he would not get any remedy for the alleged torture.

Therefore, the Court's attitude in *Al-Adsani* is hardly justified under the doctrine of the margin of appreciation. The applicant's right has been nullified rather than subjected to restrictions or managed in the context of legitimacy or proportionality. Judge Loucaides has rightly remarked that:

Any form of blanket immunity, whether based on international law or national law, which is applied by a court in order to block completely the judicial determination of a civil right without balancing the competing interests, namely those connected with the particular immunity and those relating to the nature of the specific claim which is the subject matter of the relevant proceedings, is a disproportionate limitation on Article 6§1 of the Convention and for that reason it amounts to a violation of that Article.¹³²

¹³⁰ *Supra* Section 2.

¹³¹ *Beer and Regan*, 28934/95 (18 February 1999); *Waite and Kennedy*, 28934/95 (18 February 1999).

¹³² Dissenting Opinion, *Al-Adsani*, 34 EHRR 11(2002), 301.

Attention should also be paid to the failure of the United Kingdom to give Al-Adsani an alternative means of protection such as diplomatic protection against Kuwait.¹³³ Although a state is not obliged in international law to provide diplomatic protection to its citizens, in this specific case it could have amounted to an alternative means of legal protection possibly capable of justifying the deprivation of Al-Adsani's rights under Article 6. If the United Kingdom had successfully presented Kuwait with a claim to compensate Al-Adsani for torture as required under international law, the arguments related to comity and good relations between states as a basis of not impeaching a state in a foreign court might still have carried some weight. But the result of what happened was that Al-Adsani was left without any remedy. Moreover, the United Kingdom argued before the European Court that the proper means of obtaining remedies for Al-Adsani would have been a diplomatic representation or an inter-State claim,¹³⁴ despite the fact that it had itself earlier refused to afford these safeguards to him.

Another concern related to the Court's treatment of the Convention's object and purpose arises from the fact that the Convention imposes objective obligations on states for the benefit of individual human beings.¹³⁵ State immunity, for its part, protects the interests of individual states. The Court has not explained how a provision of the Convention, such as Article 6, may inherently or implicitly be qualified with an exception which in the course of a possible conflict between values and interests strikes a balance with the object and purpose of the European Convention.

Thus, in interpreting Article 6, the Court ignored the relevance of the object and purpose of the European Convention. Indeed, as one authoritative voice has put it,

the widespread and remarkable acceptance by States of standards prescribed both in regional and universal conventions on human rights, coupled with the compulsory procedures for their implementation, compellingly evidences the reduction in the importance of the residue of so-called acts *jure imperi* in respect of which State immunity on the national plane exists.¹³⁶

This statement, made more than a decade ago, is reflective of trends both in general international law and the law of human rights, and indicates that the increase in hierarchical importance of human rights norms should not be frustrated by claims of state immunity in situations where the effective operation of those human rights norms is at stake. It further reflects the progressive role that the supervisory organs have to play in this process. But unfortunately, in *Al-Adsani*, the European Court chose to swim against the tide.

¹³³ *Al-Adsani*, 34 EHRR 11(2002), 280, 288, paras 19, 51.

¹³⁴ *Ibid.*, 288, para. 50.

¹³⁵ *Supra* section 2.

¹³⁶ E. Lauterpacht, *Aspects of the Administration of International Justice* (1991) 56. See also Garnett, 'Should Foreign State Immunity be Abolished?', 20 *AYIL* (1999) 190, suggesting that as 'the demand for individual human rights protection grows, the immunity of foreign States has become an anachronism'.

7 Concluding Remarks

The general impression flowing from *Bankovic* and *Al-Adsani* is that the European Court feels free to pick and choose between different methods of interpretation as if there were no order or hierarchy between these methods. For example, while relying heavily on 'relevant rules' of international law under Article 31§3(c) of the Vienna Convention in interpreting Articles 1 and 6, the Court did not even mention this interpretive method with regard to Article 3. While focusing on the notions relevant for the Convention's object and purpose in examining the scope of Article 1, the Court failed to do so with respect to Articles 3 and 6. In addition, the specific interpretive methods were misapplied. Above all, the Court has practically failed in the two cases to accord due importance to the nature of the European Convention as an instrument of public order establishing obligations of an objective nature, which go beyond the reciprocal commitments of individual contracting states. Furthermore, the Court also neglected the question of how certain provisions of the Convention are mirrored in general international law. Finally, the Court's line of reasoning in both cases lacked the requisite degree of coherence when dealing with the previous jurisprudence of the Convention organs.

All this cannot fail to raise serious concerns, above all for those whom the Convention has been designed to protect and to safeguard. This is more significant in the context of the accession of new states to the European Convention. In a way hardly compatible with the Convention's purposes, the European Court has sent a message to all those who benefit from Convention rights that the degree of protection they enjoy is not as high as was previously assumed. Although dealing with an instrument of public order, the Court has paradoxically reached its decisions in the spirit of the *Magna Carta*, since both decisions are alike in suggesting that the European Convention restricts the contracting states only when dealing with certain persons and not others; that the idea of human rights might have evolved since then seems to matter little in *Bankovic* and *Al-Adsani*. Both decisions are in line with a more general phenomenon, which Professor Allott has described in relation to the idea of international human rights:

the installation of human rights in the international constitution after 1945 has been paradoxical. The idea of human rights quickly became perverted by the self-misconceiving of international society. Human rights were quickly appropriated by governments, embodied in treaties, made part of the stuff of primitive international relations, swept up into the maw of an international bureaucracy. The reality of the idea of human rights has been degraded. From being a source of ultimate anxiety for usurping holders of public social power, they were turned into bureaucratic small-change. Human rights, a reservoir of unlimited power in all the self-creating of society, became a plaything of governments and lawyers. The game of human rights has been played in international statal organizations by diplomats and bureaucrats, and their appointees, in the setting and ethos of traditional international relations.¹³⁷

But the objective and public order nature of the obligations embodied in the European Convention — the fact that the Convention protects individuals as such and

¹³⁷ P. Allott, *Eunomia* (2001), at 287–288.

not the interests of states, whether parties to it or not — offers an alternative. This could result in a more effective protection of human dignity through human rights, where the latter are considered as absolute values, not primarily dependent on certain technicalities — either substantive or procedural — through which states could escape their full application. But *Bankovic* and *Al-Adsani* embody a different approach, and indeed treat the Convention's human rights as 'a plaything of governments' and their lawyers. They have received a message from the Court that they may appear in Strasbourg and persuade the Court to fail in its application of the Convention to their conduct by reference to factors and circumstances totally alien to the Convention's object and purpose. The European Court has reassured governments that they can successfully do that, and count on the fact that their own legal interests will be accorded a predominant legal significance in the process of interpreting an instrument which supposedly protects an individual as such. The overall approach in the two cases is radically at variance with the ideas and principles underlying human rights in general and the European Convention in particular, and serves as a typical situation to justify the claim that 'If the idea of human rights reassures governments it is worse than nothing'.¹³⁸

¹³⁸ *Ibid.*, 288.