State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights

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Abstract. The issue of state immunity in the case of human rights violations has been controversial in the last decade, partly due to the absence of international judicial pronouncements. The bringing of the three cases previously litigated in the United Kingdom and Ireland before the European Court of Human Rights was supposed to reduce this uncertainty. However, decisions of the Court seem to have failed to meet these expectations. The Court has failed to properly examine whether the sources of international law support the scope of state immunity as portrayed in the decisions. Furthermore, the decision on *Al-Adsani* is deficient in that it fails to respect the difference between sovereign and non-sovereign acts, and the effects of peremptory norms with regard to state immunity.

1. Introduction: The Background of the Cases

On 21 November 2001, the European Court of Human Rights delivered three judgments concerning the allegations of violation of Article 6 of the 1950 European Convention on Human Rights which guarantees the right to access to a court. The plaintiffs in each of the cases have alleged that the granting of immunity by the defendant states to foreign states sued in their courts constituted violation of their right under Article 6. The Court dismissed these allegations in all of the three cases. In doing so, the Court developed a certain line of argument relevant for the status of the principles governing state immunity from the perspective of national and international law. The judgments also raise some thoughts about the possible impact of the principles underlying the European Convention and those underlying state immunity upon each other. This article aims to examine these issues and offer some conclusions as to whether the Court's reasoning and conclusions are in line with the state of general international law as well as the law of the European Convention.

In *Al-Adsani*, the Court was asked to declare that the failure of the British authorities to provide adequate judicial remedies for a UK national

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allegedly tortured in Kuwait by the authorities of that country involved violations of Article 3 (freedom from torture) and Article 6 of the European Convention. Al-Adsani was a trained pilot who went to Kuwait in 1991 after Iraqi occupation to assist the resistance movement. During that period, he accidentally came into possession of sexual videotapes involving an influential Sheikh related to the Emir of Kuwait. This circumstance led to the torture of Al-Adsani by the Sheikh and his factual subordinates. After Al-Adsani arrived in the United Kingdom, he sued the State of Kuwait in the English courts. He was unable to sue the Sheikh personally, since the latter had no recoverable assets in the UK.[1]

In *Fogarty*, the Court was asked to declare that the refusal by the British authorities to provide judicial remedy to the applicant in her employment dispute with the Embassy of the United States of America by reference to the state immunity violated her rights under Article 6 of the Convention. The dispute which became the subject matter of litigation before the European Court related to the refusal by the US Embassy to employ Fogarty in one of the three posts at the Embassy she had allegedly applied for. The United States invoked sovereign immunity with regard to that dispute, which prevented adjudication by English courts. Noteworthy, the applicant had had another dispute with the United States before the English courts concerning alleged facts of sexual harassment against her while she was working at the Embassy. In that earlier dispute, the United States did not invoke immunity. The Industrial Tribunal in England heard the case and eventually a compensation in sum of 12,000 pounds was agreed between the parties.[2]

In *McElhinney*, the applicant requested the Court to rule that the refusal by the Irish courts of a judicial determination of his compensation claim against the British Secretary of State concerning the shooting incident at the border between Ireland and the United Kingdom violated his rights under Article 6. The applicant complained that a British soldier had shot six times at his car while crossing the border from Ireland to the UK, for which he sued the British Secretary of State in Ireland, claiming that some of the shots were fired in Ireland. The British Secretary of State invoked immunity but stated that the applicant was at liberty to sue him in the UK. The High Court and the Supreme Court upheld sovereign immunity and refused to hear the case, after which the matter was brought before the European Court of Human Rights.[3]

In all three cases, the European Court disagreed with the applicants, having found 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 addition, in *Al-Adsani*, the Court found that Article 3 was not applic-

1. Al-Adsani, 34 EHRR 11, at 277–281, paras. 9–19 (2002).
2. Fogarty, 34 EHRR 12, at 305–306, paras. 10–14 (2002).
3. McElhinney, 34 EHRR 13, at 324–328, paras. 7–16 (2002).

able to the failure of a state to provide remedies to a person allegedly tortured in another country, and that the respondent state was justified to grant immunity even if the case involved alleged facts of torture outlawed under peremptory norms of international law.

Each of the three judgments is accompanied by statements of dissenting views of certain judges who critically disagree with the Court in assessing the state of the applicable law. In addition, *Al-Adsani* has been adopted by nine votes against eight, which is perhaps caused by specific and increased involvement of the public order considerations in that case. Existence of dissenting views – which cannot be satisfactorily dealt with here because of the limit of space – perhaps indicates that the Court's approach towards the impact of state immunity upon the operation and effect of human rights norms cannot be taken as an ultimate and absolute truth and be free of all criticism.

2. The Court's Rationale for Upholding State Immunity

The Court explained its attitude concerning the impact of state immunity on the provisions of the European Convention by reference to the doctrine of the margin of appreciation. In all three cases, the Court provided a similar explanation. In particular, it noted that

> 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.[4]

It must be emphasised that in all three cases the Court's examination of the legitimacy of aim of the conduct in question so briefly is rather exceptional in the light of the Court's long-standing practice. The Court considered that just one sentence was sufficient for resolving the matter whether a margin of appreciation in case of Article 6 was correctly used by the respondent state and whether the aim pursued was legitimate.

As a concrete basis of the exercise of the margin of appreciation, the Court referred to the alleged requirements under general international law which allow a state party to the Convention to restrict guarantees provided thereunder and require that the Court exercise appropriate self-restraint with regard to such situations. The Court in all three cases emphasised that the respondent governments restricted the Convention guarantees of the applicants by reference to generally recognised principles of public international law on state immunity, and concluded that

4. Al-Adsani, *supra* note 1, at 289, para. 54.

> measures taken by a High Contracting Party which reflect generally recognised rules of public international law cannot in principle be regarded as imposing a disproportionate restriction of the right of access to court as embodied in article 6§1.[5]

But the scope of this rule, as contended by the respondents and admittedly shared by the Court, is portrayed differently in each of those cases. As we shall see below, *Fogarty* and *McElhinney* attempt to properly distinguish between sovereign and non-sovereign acts in sense of state immunity. *Al-Adsani*, on the other hand, does not appear to recognise such distinction and seems to adhere to a more or less blanket understanding of state immunity.

In addition, the Court emphasised the role of general international law in the process of deciding the cases at hand, and stated that while the Court must be mindful of the Convention's special character as a human rights treaty, "it must also take relevant rules of international law into account," and interpret the Convention in harmony with other rules of international law.[6] But, as we shall see, in all three cases the Court simply assumed existence of general rules on state immunity and made no serious effort to clarify in which ways these principles had acquired their "generally recognised" character under international law; in other words, it did not duly examine appropriate sources of the law. At least, the texts of judgments do not contain evidence that it did so. This makes it necessary to ask whether the Court's assumption is duly supported under general international law and make some clarifications concerning the sources of the law arguably applicable to these issues, as well as state practice arguably evidencing those sources.

3. State Immunity Under General International Law

State immunity is frequently assumed to be a norm or principle imposed upon states under international law. At the same time, if so understood, this principle relates to the behaviour of a state within its domestic legal system, since it requires that a state's courts shall refrain from adjudication of a case if it involves an act of a foreign state which attracts immunity under international law. Consequently, the lion's share of practice on state immunity stems from the practice of national courts, which may be deciding their cases from a perspective not always totally overlapping with the perspective in which state immunity is perceived under international law.

The questions of correctness of the Court's approach with regard to the scope of state immunity in each of the three cases point to the rele-

5. Al-Adsani, *supra* note 1, at 289, para. 56; Fogarty, *supra* note 2, at 314, para. 36; McElhinney, *supra* note 3, at 333, para. 37.
6. *Id.*

vance of two different perspectives crucial for understanding the scope of state immunity under national and international law. One issue is whether the Court used correct methods to prove existence and applicability of certain international legal rules on state immunity; in particular, whether it correctly identified these norms as flowing from certain sources of international law. Another issue to be clarified is whether the substance of the Court's argument and ultimate conclusions reached correctly mirror the state of general international law and its impact on the law of the European Convention on Human Rights.

In order to understand whether general international law supports the conception of state immunity in the way understood by the Court, one must examine the status of the relevant principles in the context of different sources – particularly treaty and custom – which may either represent or be evidence of general international law.

3.1. Conventional law

As a matter of conventional law, in all three cases the European Court referred to the European Convention on State Immunity[7] – the only treaty which may have possessed certain relevance here, due to the absence of a universal treaty on the subject – and the Court assumed that it reflected the general international law on the subject.[8] Such a line of reasoning appears doubtful if it is borne in mind that that Convention is in force for eight states only and is thus hardly qualified for being considered as an instrument expressing the state of general international law[9] or even a common European attitude with regard to state immunity.

The whole structure of the Basle Convention casts some doubt on a possible assumption that this Convention may serve as evidence of general (or customary) international law binding states even in the absence of the Convention. Substantive provisions of the Basle Convention (Articles 1–14) are framed not in a way recognising existence of state immunity in certain cases or obliging (or even empowering) states to grant immunity to other states in such cases, but merely in a way proscribing grant of immunity to the extent of their applicability. Article 15 of the Convention states that, subject to the provisions embodied in the previous articles, a state party may claim immunity in the courts of another state party. In other words, the plain text of the Basle Convention does not prejudice the status and scope of the principles governing state immunity which may

7. 1972 European Convention on State Immunity, ETS No. 074 (Basle, 16. V. 1972).
8. Al-Adsani, *supra* note 1, at 280, 289–290, paras. 22, 57–58, with regard to personal injury; Fogarty, *supra* note 2, at 308, para. 18, with regard to employment at diplomatic missions; McElhinney, *supra* note 3, at 328, paras. 18–19, with regard to action by armed forces.
9. *Cf.* I Congreso (HL), I AC 260–261 (1983), where Lord Wilberforce refused to consider the Basle Convention as evidence of general international law, requiring that 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."

possibly exist in general international law outside the Convention. It is simply not the purpose of the Basle Convention to determine to what extent states may invoke their immunity in cases not covered by that Convention.

This is further confirmed by the preamble of the Basle Convention, which expresses the desire of state parties "to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State," and thus seems to assume that such general rules are absent outside that Convention, *i.e.*, in general international law. For if one declares that his intention is to "establish" rules and not amend, codify or replace existing ones, one may assume that he considers that such rules do not exist.

It is also questionable whether and to what extent the Basle Convention was invocable in any of the three cases before the European Court. *Al-Adsani* and *Fogarty* have involved the assertion in British courts of state immunity by Kuwait and the United States respectively, neither of which are party to the Basle Convention and thus the United Kingdom was not bound to observe its provisions towards those states. In *McElhinney*, Ireland was not a party to the Basle Convention and the United Kingdom, while invoking immunity in Irish courts, could not have referred to that Convention. Now, if a convention does not embody a specific rule applicable to a specific dispute, it would be absurd to consider that it is an evidence of customary law status of the same rule.

This latter circumstance is particularly relevant in the context of *Al-Adsani*, where the European Court found that

> the 1978 Act [of the United Kingdom on State Immunity], applied by the English courts so as to afford immunity to Kuwait, complies with the relevant provisions of the 1972 Basle [European] Convention [on State Immunity], which […] preserves it in respect of civil proceedings for damages for personal injury unless the injury was caused in the territory of the forum State.[10]

Here, the Court ought to have examined whether the finding that the British legislation as applied by the British courts is compatible with the Basle Convention, is in itself a sufficient indication that the same is compatible with Article 6 of the European Convention. Article 19 of the latter Convention requires from the Court to ensure observance by parties of their engagement under the European Convention, which involves the duty to assess the underlying juridical facts in the light of the Convention provisions as such. Compliance with the instrument not in force as between the United Kingdom and Kuwait could hardly justify the limitation by the United Kingdom of the guarantees afforded by Article 6 of the European Convention to persons within its jurisdiction.

All this makes one doubt whether it was justified for the European Court to assume that the Basle Convention could impact upon the extent of the

10. Al-Adsani, *supra* note 1, at 289–290, para. 57.

margin of appreciation states may enjoy under the provisions of the European Convention on Human Rights. If an instrument fails to establish a set of obligations between states involved in, or related to, the litigation before the European Court, it can hardly provide the basis for limitation by states of the substantive rights enjoyable by individuals under the European Convention.

3.2. Customary law

It must now be examined whether the European Court's assumption of existence of "generally recognised" legal principles on state immunity is supported under customary international law. At a first glance, one may hardly fail to notice the multiplicity of national legislative instruments and judicial decisions which grant immunity to foreign states for one type of act or another. But while judicial practice stems predominantly from national courts, each of which operates on the specific basis of substantive and procedural law provided for by their respective national legislations, it is the diverse substantive and jurisdictional background of national legal systems which could provide practically the only evidence for the status of state immunity under international law. Indeed, some authors refer to the lack of uniformity of practice and question the existence of a general rule on state immunity.[11]

Also in practice, it has been emphasised that national legislation and judicial practice may not be taken as evidence of uniform legal principles on state immunity under international law. For instance, in *I Congreso*, Lord Wilberforce refused to consider the 1978 State Immunity Act of the United Kingdom as evidence of international law, since "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 international law – the latter being in a state of uncertainty – without affording evidence what that law is.[12]

Apparently in the same spirit, Lord Denning refused to admit existence of any uniform rules on state immunity under international law.[13]

The litigation in British and Irish courts directly underlying the cases

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11. D.P. O'Connell, International Law 846 (1970). Lack of uniformity and consistency of practice is also emphasised *in* R. Higgins, Problems and Process 81 (1994), and H. Lauterpacht (Ed.), Oppenheim's International Law, Vol. 1, 8th Ed., 274 (1955).
12. I Congreso (HL), *supra* note 9, at 260.
13. Lord Denning, Trendtex Trading *v.* Bank of Nigeria, 1 QB 552–553 (1977). *See also* Lord Wilberforce noting that the law on state immunity is in state of development and many of its aspects are uncertain, I Congreso (HL), *supra* note 9, at 260.

here under consideration supports the above-mentioned long-standing approach.[14] It would suffice to indicate that, when the case of *Al-Adsani* was considered by the British courts, the reasoning of Mantell J, Stuart-Smith LJ and Ward LJ had not shown the slightest indication that, under international law, Kuwait would be entitled to immunity for the acts of torture. Their reasoning rather implies that the regime governing immunity may be different under international law and under British legislation. It has been acknowledged that an act of torture could hardly attract immunity under international law, but the "comprehensive code" embodied in the British 1978 State Immunity Act would not have allowed a solution dictated by international law to be implemented in English domestic law.[15] Similarly, the Irish Supreme Court in *McElhinney* remarked that "statutes are evidence of domestic law in the individual States and not evidence of international law generally."[16] The entire process of litigation in *Al-Adsani* and *McElhinney* before the British and Irish courts is therefore in accordance with the attitude Lord Wilberforce and Lord Denning took with regard to domestic statutes on State immunity as possible evidence of international law. It must also be noted that the decisions of the courts of the United States of America involving the questions of state immunity support a similar approach.[17] All these circumstances went somehow unnoticed by the European Court, and it is still unclear from which sources this Court has inferred existence of "generally recognised" rules on state immunity which allegedly justified its restriction of guarantees under Article 6 of the Convention which benefit persons under the jurisdiction of state parties.

But, while domestic legislative instruments and judicial decisions cannot offer a uniform guidance on the subject, there can also be an alternative perspective which may influence correctness of the European Court's approach. While being unable to infer rules of general international law on the subject, the European Court still had an alternative option for determining in which cases the respondent states might have legitimately granted immunity to foreign states in the cases at hand. It may be said that this alternative perspective, while not strictly required under customary law, is tolerated under it. This is due partly to the fact that under general

14. It must be noted that there was no domestic litigation concerning the claims in Fogarty which were subsequently submitted to the European Court, since the applicant has been advised that because of invocation of immunity by the United States she had no remedy in the law of the United Kingdom. *See supra* note 2.
15. Al-Adsani, High Court, 103 ILR 420, at 427–431; Al-Adsani, Court of Appeal, 107 ILR 536, at 538–547.
16. McElhinney, Irish Supreme Court, Decision of 15 December 1995, 104 ILR 691, at 701.
17. *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). In the literature, it has also been explained that the obstacle in the way of the argument supporting exception to state immunity in cases of torture is not the rationale of this argument, but "its implementation [is] firmly against the grain of the text of domestic legislation." W. Adams, *In Search of Defence of the Transnational Human Rights Paradigm: May Jus Cogens Norms be Invoked to Create Implied Exceptions in Domestic Immunity Statutes?*, *in* S. Craig (Ed.), Torture as Tort 247, at 271 (2001).

international law state immunity may be understood as based on comity[18] and not hard law, and partly to the difference between sovereign and non-sovereign acts which are decisive in understanding which acts may attract immunity and which may not. Under this approach, which has become dominant in the first half of the last century, the nature of the act complained of is decisive of whether a state may be subjected to the jurisdiction of the courts of another state.[19] As Lord Wilberforce explained, It must be demonstrated 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."[20] The answer is known only in specific cases where a court examines the nature of a specific act and concludes whether this act is an emanation of sovereign powers of a state. It remains to be seen whether the European Court respected this principle in the three cases at hand.

In *Fogarty*, the respondent state submitted that the upholding of immunity by English courts was justified "because questions of employment of members of diplomatic missions fall within the core of sovereign power."[21] The Court noted that the applicant brought before the Court not the issue of her contractual rights as a current embassy employee, but the issue of alleged discrimination in the recruitment process. The Court emphasised that

> questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, *inter alia*, to the diplomatic and organisational policy of a foreign State.[22]

Judges Costa, Caflisch and Vajic arrived at a similar conclusion in their Concurring Opinion and suggested that

> while immunity is complete when it comes to selecting diplomatic and consular personnel, this may not longer be the case, in certain situations, once the individual concerned has been hired.[23]

These observations of the Court and individual judges may serve as a basis for at least two conclusions related to understanding the scope of state immunity. The Court has provided a careful explanation why the act in question may attract immunity as a sovereign act: because it relates to the diplomatic and organisational policy. The whole reasoning here reflects the link of the concept of state immunity to the core of sovereign function of a state which embassies abroad are supposed to serve. In addition, the

18. *Cf.* I. Brownlie, Principles of Public International Law 325–327 (1998).
19. *See* Higgins, *supra* note 11, at 78 *et seq.*; O'Connell, *supra* note 11, at 844 *et seq.*
20. I Congreso (HL), *supra* note 9, at 252 and 262.
21. Fogarty, *supra* note 2, at 310–312, paras. 22 and 30.
22. *Id.*, at 314, para. 38.
23. Concurring Opinion of Judges Costa, Caflisch and Vajic, *Id.*, at 316, para. 3.

Court's reasoning leaves the way open for assuming that had the applicant brought the issue of her contractual rights before the Court, the latter might have applied different criteria and reached a different conclusion.

In *McElhinney*, the Irish Supreme Court based its reasoning on the fact that the action performed by the British soldier was an act *de jure imperi*.[24] Before the European Court, Ireland also contended that the granting of immunity to the United Kingdom was justified by the *de jure imperi* nature of the acts complained of before the Irish courts;[25] the European Court accepted this view.[26] *McElhinney* is thus based on the understanding that the action by the British soldier was an act performed in the exercise of state sovereignty and consequently attracted immunity.

But no similar submission has been made, or could reasonably have been made, in *Al-Adsani*. Having referred to the maxim *par in parem non habet imperium*, the European Court has not bothered to enquire about the nature of the acts of torture and their relationship to the sovereign powers of a state; whether torture may constitute an act *de jure imperi*. *Al-Adsani* is thus based on a blanket understanding of state immunity and suggests that whenever an act of a state is involved in litigation, immunity may, or even must, be granted to a foreign state. In addition, *Al-Adsani* has been unique among three cases in that the Court there faced the plea that the act of torture, as a breach of *jus cogens*, may not attract state immunity because it may never fall within the scope of sovereign powers or functions of a state. Although the Court took note of the peremptory nature of the prohibition of torture, it still considered that immunity was still due in case of civil claims, even if the case involved *jus cogens*.[27] It is submitted that such approach is a misperception of the hierarchy of norms in international law, for if *jus cogens* exists and operates, it must be able to override operation of a conflicting principle irrespective of whether one deals with a civil or criminal case. This point has been discussed in and supported by the Joint Dissenting Opinion, which convincingly highlights the major problems and drawbacks in the reasoning of the majority of the Court.[28] Indeed, the distinction between sovereign and non-sovereign acts, to be drawn on a case-specific basis, offers a viable alternative to overcome challenges posed by peremptory norms to the regime

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24. McElhinney, *supra* note 16, at 702–203.
25. McElhinney, *supra* note 3, at 330–331, paras. 22 and 27–28.
26. *Id.*, at 334, para. 38.
27. Al-Adsani, *supra* note 1, at 291, para. 61.
28. 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.

    Id., Joint Dissenting Opinion of Judges Rozakis and Caflish joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, at 298, para. 1.

of state immunity without coming into conflict with peremptory norms themselves.

Lastly, the issue of balancing conflicting circumstances should be addressed. Three cases at hand involved different contexts in this regard. In *Fogarty*, the Court faced a specific claim relating to non-recruitment and a situation where the applicant had already received a decent compensation for the alleged violation of her employment rights in the past.[29] In *McElhinney*, the Court took into account the existence of a possible alternative forum for the applicant: he could bring an action in Northern Ireland and he merely chose to do so in Ireland.[30] But in *Al-Adsani*, the Court tolerated that state immunity resulted in an absolute bar of consideration of the applicant's claims in the British courts without providing the applicant with any compensation or alternative remedy; in addition, the United Kingdom had refused to assist Al-Adsani in obtaining compensation from Kuwait through diplomatic protection.[31]

4. CONCLUSION

The three decisions discussed in the present article are relevant in understanding the normative and functional background of the principles underlying state immunity under national and international law. As far as the normative aspect is concerned, in all three cases it is unclear which rules and sources of international law the European Court applied in order to reach the conclusions it reached on the subject. The Court merely seems to have assumed existence of certain "rules" on state immunity, but did not prove their existence through clear evidence.

Functional considerations have been treated differently in the cases at hand. As far as *Fogarty* and *McElhinney* are concerned, certain doubts may arise as to the correctness of the reasoning underlying the Court's approach. But, on the other hand, it must be acknowledged that the Court arrived at this approach through due examination of the nature of the acts complained of and justified this approach by demonstrating the close link of those actions to the sovereign functions of the respondent cases. In addition, the Court made sufficient effort to examine all underlying circumstances and find a balance between conflicting values and interests, *inter alia* by taking into account the applicants' own behaviour which might have influenced the scope of state immunity in these cases. *Al-Adsani* is, however, radically different from the balanced approach adhered to in the above two cases. Here, the Court seems to have adhered to the blanket understanding of state immunity. *Al-Adsani* does not mirror the need to justify state immunity by examining the nature of acts and their

29. *See supra* note 2 and the accompanying text.
30. McElhinney, *supra* note 3, at 334, para. 39.
31. Al-Adsani, *supra* note 1, at 280 and 288, paras. 19 and 51.

link to the core of a state's sovereign powers and functions. It embodies a blanket approach to state immunity and fails in all ways to find a proper balance between conflicting values and interests, including the complete misperception of the hierarchy of norms. Not only does the Court seem to have overlooked that the regime of state immunity cannot remain unaffected by considerations of international public order, but it has also ignored the fact that the regime of state immunity as one of the most dynamic, flexible and ever-changing regimes under international law itself allows to be interpreted and applied in a way as not to hamper effective operation of international public order. Consequently, in the three judgments delivered on the same day, the European Court failed to elaborate its coherent understanding of the rationale and scope of state immunity which seems to be an approach very close to the application of double standards in the field of human rights.