Caso de McElhinney contra Irlanda, de 21/11/2001 [ENG]

No violation of Art. 6-1

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF McELHINNEY v. IRELAND

(Application no. 31253/96)

JUDGMENT

STRASBOURG

21 November 2001

This judgment may be subject to editorial revision.

In the case of McElhinney v. Ireland,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. Wildhaber, *President*,

Mrs E. Palm,

Mr C.L. Rozakis,

Mr L. Ferrari Bravo,

Mr Gaukur Jörundsson,

Mr L. Caflisch,

Mr L. Loucaides,

Mr I. Cabral Barreto,

Mr K. Jungwiert,

Sir Nicolas Bratza,

Mr B. Zupancic,

Mrs N. Vajic,

Mr M. Pellonpää,

Mrs M. Tsatsa-Nikolovska,

Mr E. Levits,

Mr A. Kovler,

Mr N. Kearns, ad hoc *judge*,

and also of Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 9 February 2000, 4 July 2001 and 10 October 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 31253/96) against Ireland and the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr John McElhinney ("the applicant"), on 16 April 1996.

2. The applicant was represented by Mr P. Brennan, a solicitor practising in Dublin. The Irish Government ("the Government") were represented by their successive Agents, Mr R. Siev and Dr. A. Connelly.

3. The applicant alleged, in particular, that he was refused access to a court contrary to Article 6 of the Convention. A claim under Article 14 of the Convention which was declared admissible was not pursued.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Mr J. Hedigan, the judge elected in respect of Ireland, withdrew from the examination of the application (Rule 28). The Government accordingly appointed Mr N. Kearns to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). On 31 August 1999 a Chamber of that Section, composed of the following judges: Mr J.-P. Costa, Sir Nicolas Bratza, Mr L. Loucaides, M. P. Kuris, Mr W. Fuhrmann, Mr K. Jungwiert and Mr K. Traja, and also of Mrs S. Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. By a decision of 9 February 2000, following a hearing on admissibility and merits (Rule 54 § 4), the Grand Chamber declared the application partly admissible in so far as Ireland was concerned and inadmissible in so far as the United Kingdom was concerned.

There appeared before the Court:

(a) *for the Government of Ireland*

Mr R. Siev, *Agent*,

Mr P. Gallagher,

Mr D. R. Phelan, *Counsel*,

Mr R. Barrett, *Advisers*;

(b) *for the Government of the United Kingdom*

Ms S. McCrory, Foreign and Commonwealth Office, *Agent*,

Mr D. Lloyd Jones, QC,

Mr D. Anderson, QC, *Counsel*,

Mr O. Paulin, Crown Solicitor's Office,

Ms J. Foakes, Foreign and Commonwealth Office, *Advisers*;

(b) *for the applicant*

Mr M. Forde,

Mr C. Bradley, *Counsel*,

Ms A. O'Sullivan, *Solicitor*,

Mr S. Groarke, *Adviser*.

The Court heard addresses by Mr Gallagher, Mr Lloyd Jones, Mr Forde and Mr Bradley.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant is a police officer (*garda*). At 11 p.m. on 4 March 1991, when off-duty, the applicant and two passengers, in a private car (described in subsequent police reports as a "jeep") towing a van on a trailer, crossed from Northern Ireland into Ireland at a United Kingdom permanent vehicle checkpoint in County Derry. Precisely what occurred that night is disputed between the parties. It is not, however disputed that the applicant accidentally drove his car into the checkpoint barrier. The check-point was manned by armed British soldiers, one of whom, a corporal in the British Royal Military Police, approached the applicant after the accident. The Government contend that he asked the applicant to stop and was ignored. The applicant alleges that he did stop and that the soldier then waved him on. In any event, it would appear that the soldier moved towards the car and was hit by the vehicle being towed. He was thrown forward on to the tow-bar and dragged for a short distance until he managed to pull himself up into a standing position on the tow-bar. The applicant maintains that he was unaware of the soldier's position and continued driving into Ireland. According to the report completed by the Irish Police in April 1991 following their investigation into the incident (see paragraph 9 below), the soldier fired six shots, one of which entered the car's exhaust pipe, another of which went through the back windscreen and exited through the roof. The Government claim that some, at least, of these shots were fired in Northern Ireland. According to the applicant he heard the shots and, fearing a terrorist attack, continued driving until he reached a police station, where he considered he would be safe. He stopped the car about two miles from the border, in the village of Muff, in County Donegal, Ireland. According to the police report, at this stage the soldier, described by witnesses as in a

state of “blind panic”, ordered the applicant and the two passengers to get out of the car and stand against the wall with their hands in the air. The applicant alleges that he turned to face the soldier, intending to explain that he was a police officer and that there was no cause for alarm. Again, according to the applicant, the soldier then aimed his gun at him and pulled the trigger twice, although the shots did not fire because the gun jammed.

8. The Irish police had been notified of the incident at the border and soon arrived at Muff. The applicant was arrested on suspicion of driving having consumed excess alcohol. He refused to comply with police requests to provide blood and urine samples.

9. As mentioned above, the Irish Police carried out an inquiry into the incident in the course of which 71 witnesses were interviewed. In his report the investigating officer concluded that the applicant had shown “a regrettable degree of recklessness” in leaving the scene of the accident at the check-point. The report continued:

“This was a most serious incident and one which could have resulted in the serious injury or death of one or more persons. First of all the soldier was at great risk, had he fallen off the draw-bar. The three occupants of the jeep may well have been shot by [the soldier] or his colleagues at the check-point. The safety of the bystanders at Muff was also put in jeopardy resulting from the presence of the armed and terrified soldier. This matter has been vigorously and thoroughly investigated and the only conceivable reason that I can find that would prompt Garda McElhinney to deliberately leave the scene of the accident would be because he was intoxicated ...”.

The applicant was subsequently prosecuted and convicted in Ireland for his refusal to provide blood and urine samples. No disciplinary proceedings were taken against him, but he was transferred to another area.

10. The applicant alleges that he feared for his life and suffered severe post-traumatic shock as a result of the above incident. On 29 June 1993 he lodged an action in the Irish High Court against the individual soldier and the British Secretary of State for Northern Ireland. He claimed damages, including exemplary and punitive damages, in respect of his allegation that the soldier had wrongfully assaulted him by pointing a loaded gun at him and pulling the trigger.

11. On 5 November 1993 the United Kingdom Government’s solicitors wrote to the applicant’s solicitors as follows:

“... The Secretary of State for Northern Ireland bears no responsibility for the actions of the first defendant who is a soldier in the British Armed Forces under the authority of the Secretary of State for Defence in the United Kingdom and accordingly the Secretary of State for Northern Ireland is not a proper defendant to these proceedings.

Even if the Secretary of State was the proper defendant, both it and [the soldier] contend that they are exempt from the jurisdiction of the Irish courts on the basis of the doctrine of sovereign immunity.

If your client considers that he does have a valid claim there is nothing to prevent him from pursuing it in Northern Ireland against the proper body. ..."

The applicant's solicitors replied in a letter dated 3 December 1993:

"... We have also sought advice on the issue of foreign sovereign immunity raised by you and have been advised that, in these circumstances, no such immunity would apply. That being so, our client prefers to seek his redress in the courts of this jurisdiction where the incident in question occurred. ..."

12. On 13 January 1994 the applicant applied for permission to substitute for the second defendant the United Kingdom Secretary of State for Defence. On 21 January 1994 the Secretary of State for Northern Ireland, claiming sovereign immunity, applied for the summons to be set aside.

13. On 15 April 1994 a High Court judge granted the Secretary of State's request, on the ground that the applicant was not entitled to bring an action in the Irish courts against a member of a foreign sovereign government.

14. The applicant appealed, arguing, first, that the doctrine of sovereign immunity did not apply to claims for damages for personal injury caused by torts taking place within the forum State's jurisdiction. Secondly, he submitted that the principle of reciprocity should apply to prevent the Irish court granting immunity to the United Kingdom in circumstances in which British courts, applying the State Immunity Act 1978, would not grant immunity to Ireland. Thirdly, he put forward the argument that, even if the doctrine of state immunity applied, it should yield in his case since he alleged an infringement of the constitutionally protected right to bodily integrity.

15. The Supreme Court gave judgment on 15 December 1995, rejecting the applicant's appeal. The applicant had relied on the Supreme Court's judgment in *Government of Canada v. the Employment Appeals Tribunal* (1992) 2 IR 484, but the court held that that judgment was authority only for the proposition that the doctrine of immunity did not apply in respect of commercial or trading activities carried out by a foreign government. The facts alleged by the applicant did not relate to any commercial activity, and it was not established that, as a principle of public international law, immunity no longer applied in respect of personal injuries caused by the tortious act of a foreign State's servant or agent acting within the sphere of sovereign activity ("*de jure imperii*"). In his judgment, Chief Justice Hamilton, with whom Justices O'Flaherty and Blayney agreed, observed:

"There can be no doubt but that the first defendant [the soldier] in carrying out his duties at the said checkpoint was acting within the sphere of governmental or sovereign activity and the acts complained of must be regarded as '*jure imperii*' even though alleged to have been committed within this jurisdiction.

It is submitted on behalf of the plaintiff that, as the acts complained of were tortious and caused personal injuries to him, the principle of foreign sovereign immunity should not apply to such acts and that it was a near-universally recognised principle of international law that claims for personal injuries allegedly inflicted in the forum state by or

on behalf of a foreign government constitute an exception to the sovereign immunity principle.

In support of such submission, counsel for the plaintiff referred in particular to the United Kingdom State Immunity Act 1978; the Canadian State Immunity Act 1982; the Australian Foreign Sovereign Immunities Act 1985 and the European Convention on State Immunity 1972. ...

The plaintiff relies on these statutes as indicative of a recognised principle of public international law. ...

Distinction must be drawn between the provisions of legislation in a number of states and the provisions of public international law, and the principles set forth in individual state legislation cannot be regarded as establishing principles of public international law.

The provisions of statutes cannot be used as evidence of what international law is: statutes are evidence of the domestic law in the individual states and not evidence of international law generally.

Article 11 of the European Convention on State Immunity provides that:-

'A Contracting Party cannot claim immunity from the jurisdiction of a court of another contracting party in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.'

I do not have to decide, in the circumstances of this case, whether the terms of the Convention are part of the domestic law of this State because even if it were, the plaintiff's claim herein would fail by virtue of the terms of Article 31 of the said Convention, which provides that:-

'Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting Party in respect of anything done or omitted to be done by, or in relation to its armed forces when on the territory of another Contracting State.'

The terms of Article 31 recognise that, as a matter of international law, immunities and privileges in respect of anything done or omitted to be done by or in relation to armed forces, when on the territory of another Contracting State, exist. ...

Despite the Herculean efforts of the plaintiff's legal advisers in making available to the court copies of all relevant decisions, articles and draft Conventions, and the cogent arguments of counsel, I am not satisfied that it is a principle of public international law that the immunity granted to sovereign states should be restricted by making them liable in respect of tortious acts, committed on their behalf by their servant or agent, causing personal injuries to the person affected by such act or omission, when such act or omission is committed *jure imperii* and I would dismiss the appeal on this point ..."

16. The applicant did not pursue his action against the individual soldier who had allegedly assaulted him.

II. RELEVANT legal materials

A. Sovereign immunity in Irish law

17. In his judgment in the *Government of Canada* case (cited in paragraph 15 above), Justice Hederman described the position of sovereign immunity in Irish law as follows:

"The doctrine of sovereign immunity is one of the generally recognised principles of international law, which, by Article 29, s.3 of the Constitution, Ireland has accepted as its rule of conduct in its relations with other states .... [T]he Oireachtas [the National Parliament] has never sought to qualify or modify this position ...".

B. The Basle Convention

18. The 1972 European Convention on State Immunity ("the Basle Convention"), entered into force on 11 June 1976 after its ratification by three States. It has now been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and signed by one other State (Portugal), but has not been signed or ratified by Ireland. It provides in Article 11:

"A Contracting Party cannot claim immunity from the jurisdiction of a court of another Contracting Party in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred. "

Article 31 of the same Convention provides:

"Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting Party in respect of anything done or omitted to be done by or in relation to its armed forces on the territory of another Contracting State."

C. The International Law Commission's draft Article 12

19. The International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property, submitted to the General Assembly of the United Nations ((1991), II(2) YBILC 13), provides at Article 12 that:

"... a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

In its commentary on that passage, the ILC noted that the "physical injury ... appears to be confined to insurable risks. The areas of damage envisaged in Article 12 are mainly concerned with accidental death or physical injuries to persons ... involved in traffic accidents ... Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained that, by applying the doctrine of sovereign immunity, the Irish courts had denied him the right to a judicial determination of his compensation claim. He invoked Article 6 § 1 of the Convention, which provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. Applicability of Article 6 § 1 of the Convention

1. The submissions of the parties

21. The Government argued that Article 6 § 1 of the Convention did not apply to the proceedings in question. Under Irish law there was no "right" to sue in respect of torts allegedly committed by the armed forces of another sovereign power. The Irish courts had no discretion in this respect. In this instance sovereign immunity was functionally restricted and concerned an aspect of sovereign power, a fundamental act *jure imperii*. It followed that the sovereign immunity doctrine affected the substantive content of the right claimed and was not merely a procedural bar.

22. The applicant submitted that Article 6 § 1 applied to the proceedings in question. Under Irish law he had a "right" to be compensated. The sovereign immunity exception was a procedural bar creating an exception from local jurisdiction only and not from legal responsibility.

2. The Court's assessment

23. The Court recalls its established case-law to the effect that Article 6 § 1 does not itself guarantee any particular content for "civil rights and obligations" in the substantive

law of the Contracting States. It extends only to *contestations* (disputes) over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law (see *Z. and Others v. the United Kingdom*, [GC], no. 29392/95, § 87, ECHR 2001, and the authorities cited therein).

24. Whether a person has an actionable domestic claim may depend not only on the substantive content, properly speaking, of the relevant civil right as defined under national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court. In the latter kind of case Article 6 § 1 may be applicable. Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6 § 1 a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims must be capable of being submitted to a judge for adjudication - if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, § 65).

25. The proceedings which the applicant intended to pursue were for damages for assault, trespass to the person, negligence and breach of duty. Such an action is well known to Irish law. The Court does not accept the Government's plea that because of the operation of State immunity the applicant did not have a substantive right under domestic law. It notes that an action against a State is not barred *in limine*: if the defendant State chooses to waive immunity, the action will proceed to a hearing and judgment. The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.

26. In these circumstances, the Court is satisfied that there existed a serious and genuine dispute over civil rights. It follows that Article 6 § 1 was applicable to the proceedings in question.

B. Compliance with Article 6 § 1

1. The submissions of the parties

27. According to the Government, the Convention should be interpreted in the light of public international law. The case-law of the Irish courts confirmed that, while exceptions to the doctrine of State immunity might be accepted in respect of commercial acts by foreign states ("a*cta jure gestionis*"), immunity was retained, as required by public international law, in respect of governmental acts ("*acta jure imperii*"). This interpretation of international law, upholding immunity for *acta jure imperii*, had been followed by the courts of a number of other European countries in recent years, for example Austria (*Hunting Rights Contamination Claim*, (1991) 86 International Law Reports 564, 569), France (*Societé iranienne de gaz, Cour de Cassation*, 2 May 1990), Germany (*Iranian Embassy Case*, *Bundesverfassungsgericht,* 30 April 1963), Italy (*Ministry of Foreign Affairs v. Federici and Japanese State,* (1984) 65 International Law Reports 268, 278), Spain (*Abbot v. Republic of South Africa*, Constitutional Court, 1 July 1992) and Switzerland (*S. v. Socialist Republic of Romania,* (1990) 82 International Law Reports 45, 48). The fact that only a limited number of countries had ratified or acceded to the Basle

Convention (see paragraph 18 above) could be taken as an indication that many States were not willing to countenance all the exceptions to the doctrine of State immunity set out therein.

28. The limitation on the applicant's right of access to court had a legitimate objective, namely compliance with generally recognised principles of international law and the promotion of harmonious relations, mutual respect and understanding between nations. The Government stressed in this connection the context in which sovereign immunity had been applied in the present case: the United Kingdom had exercised sovereign powers designed to safeguard its interests within its territory by operating a security checkpoint on its border with the Republic of Ireland in order to curb paramilitary activities. Ireland was entitled to a margin of appreciation, especially since its courts had applied sovereign immunity very carefully following two full and detailed hearings.

29. The Government further submitted that the applicant had an alternative means of recourse. In their view, he should have instituted proceedings in Northern Ireland, where shots had been fired at him, instead of in the Republic of Ireland, where, in his submission, there had been only an attempt to shoot. The courts in Northern Ireland were easily accessible to the applicant, the relevant law was substantially identical to that in Ireland and the United Kingdom was a High Contracting Party to the Convention.

30. In the applicant's view, the immunity asserted by the United Kingdom Government no longer existed in public international law. By 1995 most countries had changed their sovereign immunity rules to permit actions for personal injuries inflicted in the forum State. For example, the legislation of the United Kingdom (State Immunity Act 1978), United States (the Foreign Sovereign Immunities Act 1978), Canada (the State Immunity Act 1982) and Australia (the Foreign Sovereign Immunities Act 1985) did not generally grant foreign States immunity in respect of death or personal injury caused or occurring on the territory of the forum State. This new position was reflected in Article 12 of the International Law Commission's Draft Articles on the Jurisdictional Immunities of States and their Property (A/CN.4/L.457/24.5.91) and in Article 11 of the Basle Convention. Article 31 of that treaty applied only when foreign armed forces were stationed on another State's territory with its consent, whereas the soldier who assaulted the applicant had not had permission to enter Ireland.

31. In any event, public international law had to be reconciled with human rights guarantees. The limitation did not pursue a legitimate aim, since the applicant's case did not concern paramilitaries and there was no evidence that the relations between the United Kingdom and Ireland would have deteriorated significantly if the Irish court had rejected the sovereign immunity plea. Moreover, the limitation could not be proportionate if the United Kingdom did not consider it necessary to grant immunity to foreign governments in similar situations.

32. The applicant submitted that he had no alternative remedy. It was likely that the individual soldier would also have been covered by the doctrine of State immunity, and there was no rule in Ireland allowing for the compensation of persons whose claims had been rejected because of sovereign immunity. As regards the possibility of suing in Northern Ireland, the applicant pointed out that he wanted to sue for damages in connection with an incident involving being allegedly assaulted by a British soldier on the

territory of the Republic of Ireland. As a result, the appropriate forum for his action was that of the *locus delicti*, the Republic of Ireland.

2. The Court's assessment

33. In the Golder case the Court held that the procedural guarantees laid down in Article 6 concerning fairness, publicity and promptness would be meaningless in the absence of any protection for the pre-condition for the enjoyment of those guarantees, namely, access to court. It established this as an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36).

34. The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany,* [GC], no. 26083/94,§ 59, ECHR 1999-I).

35. The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection 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.

36. The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, *mutatis mutandis,* the Loizidou v. Turkey judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 43). 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.

37. It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be

regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.

38. The Court observes that, on the material before it (see paragraphs 27 and 30 above), there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. Further, it appears from the materials referred to above (see paragraph 19) that the trend may primarily refer to "insurable" personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security. Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards. The Court agrees with the Supreme Court in the present case (see paragraph 15 above) that it is not possible, given the present state of the development of international law, to conclude that Irish law conflicts with its general principles.

39. The Court moreover notes that in the circumstances of the present case it would have been open to the applicant to bring an action in Northern Ireland against the United Kingdom Secretary of State for Defence. The Court recalls in this respect that it held inadmissible for non-exhaustion of domestic remedies the applicant's complaint that it was not open to him to pursue an action against the United Kingdom in Northern Ireland (see the decision on admissibility in the present case of 9 February 2000). The Court also notes that in the initial correspondence between the applicant's advisers and the United Kingdom's representatives in the (Irish) domestic proceedings, the Government's lawyers stated that there was no bar to an action in Northern Ireland, and the applicant's solicitors replied that they preferred to bring the action in Ireland. They did not refer to any procedural or other bar bringing an action in Northern Ireland (see paragraph 11 above).

40. In these circumstances, the decisions of the Irish courts upholding the United Kingdom's claim to immunity cannot be said to have exceeded the margin of appreciation allowed to States in limiting an individual's right to access to court.

It follows that there has been no violation of Article 6 § 1 in this case.

FOR THESE REASONS, THE COURT

Holds by twelve votes to five that there has been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 November 2001.

Luzius Wildhaber

President

Paul Mahoney

Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

(a) dissenting opinion of Mr Rozakis;

(b) dissenting opinion of Mr Caflisch, Mr Cabral Barreto and Mrs Vajic;

(c) dissenting opinion of Mr Loucaides.

L. W.

P.J. M.

DISSENTING OPINION OF JUDGE ROZAKIS

I greatly regret that I am unable to subscribe to the Court's decision that there has been no violation in the present case in respect of the applicant's right of access to a court, as provided for by Article 6 § 1 of the Convention. The reasons for my dissent are the following:

1. The main issue under consideration in the case is proportionality. The majority's decision is founded on the conclusion that the restriction imposed upon the applicant's right to have access to the Irish courts was proportionate to the aim pursued. It is difficult for me to accept such a conclusion based on the premise that (a) in matters of State immunity there is simply a trend towards limiting this right in respect of personal injury actions in respect of acts occurring within the jurisdiction of the State in which the proceedings are brought, and that (b) the applicant, being on the other side of the balancing spectrum, had alternative means to protect effectively his rights under the Convention.

2. With regard to the extent of the obligation of a State to respect a plea of sovereign immunity in personal injury actions occurring within its jurisdiction, I generally subscribe to the opinions of my learned colleagues Caflisch, Cabral Barreto, Vajic and Loucaides expressed in their own dissent. I deviate, to a certain degree, from them in that I believe that, in the period under consideration (1994-95), the status of international law, as aptly described by the dissenters, was such that it allowed a State to invoke sovereign immunity in order to bar access to a court without flagrantly violating general international law. Yet, the fact that the law on sovereign immunity was - and still is - at a stage of transition, and that the clear preference of the international community was - and is - to limit it in specific States' actions, has a weighty impact on the proportionality test under the Convention. In other words, I can accept that the invocation of sovereign immunity by Ireland in 1994-95 served a legitimate interest, but when we come to the balancing

exercise of weighing the various interests involved, the plea of sovereign immunity loses much of its weight in view of the developments of international law and the current status of the law on sovereign immunity.

3. Against this background, namely a rather weak invocation of a State's interest, lies the right of the applicant to have access to a court to sue the United Kingdom for damages on account of an assault which had occurred in the territory of Ireland. The elements supporting him in the weighing exercise seem to me more important than the justification put forward by Ireland. Firstly, the applicant is an Irish citizen, a matter which usually creates a jurisdictional bond between a person and his State and, in

international law, a *prima facie* obligation on the State to protect him. Secondly, the assault against the applicant occurred within Irish territory, a matter which further reinforces the jurisdictional bond. Thirdly, the applicant invoked a number of practical difficulties (see p. 9 of the admissibility decision of 9 February 2000) with regard to the alternative possibility of bringing proceedings in the United Kingdom, which do not seem to me to be altogether irrelevant or negligible.

4. The above-mentioned elements seriously weaken the Court's argument that the applicant had reasonable alternative means to protect effectively his right under the Convention. In any event, I seriously dispute an unqualified transposition of a principle that the Court applied in a specific category of case (e.g. *Waite and Kennedy v. Germany*) - namely the circumscribed scope of Article 6 in circumstances where a State party to the Convention has relinquished parts of its jurisdiction to an international organisation - to all cases involving a jurisdictional plurality. The *Waite and Kennedy* precedent referred to specific circumstances concerning persons working within an international organisation and labour disputes for which internal proceedings existed and were known to the applicants when they decided to become employees of the organisation. There is no relationship whatsoever between that case and the present one, where the subject matter of the dispute was damages for assault, and where the applicant did not have any link with the United Kingdom jurisdiction - other than the incidental link of the national origin of the defendant - or any kind of allegiance and loyalty to that foreign jurisdiction.

Under these circumstances I consider that the applicant was unduly deprived of his right of access to a court and that the deprivation was disproportionate and impaired the very essence of this right.

DISSENTING OPINION OF JUDGES CAFLISCH, CABRAL BARRETO AND VAJIC

To our regret, we are unable to concur with either the Court's decision or its reasoning. We think that, in the instant case, the Republic of Ireland has violated the right of access to courts enshrined in Article 6 § 1 of the Convention. The violation consisted in the acceptance, by the Irish courts, of the plea of immunity raised by the United Kingdom. Our conclusion is based on the following reasoning.

The principle of State immunity has long ceased to be a blanket rule exempting States from the jurisdiction of courts of law. This is true, in particular, in the context of international relations, i.e. regarding the position of foreign States before local courts. While the evolution leading to a more sophisticated set of rules is too long and complex to be retraced here, it may be said that the edifice of absolute immunity of jurisdiction (and even of execution) began to crumble, in the first quarter of the 20th century, with the advent of State trading: Why should States, when engaging in commercial activities like

individuals, be treated more favourably than the latter and, thus, enjoy a competitive advantage? By the same token, why should a foreign country locally hiring employees who will not engage directly in diplomatic or consular activities on behalf of that country be exempted from the operation of local law? And why should a State be so exempted when appearing, like a private person, in the guise of an heir or legatee, or as the owner of industrial or intellectual property? Why, finally – and this is the issue arising in the present case –, should a State not be accountable, before the courts of another State, for injury and damage inflicted by its agents on individuals or their property on the territory of that other State, just as it would be if the tort had been caused, not by an agent of that other State, but by an individual?

The above exceptions to absolute immunity have gradually come to be recognised by national legislators and courts, initially in continental Western Europe and, much later, in common law countries. For obvious reasons, they have been slower to emerge in the former socialist bloc, long dominated by State trading and the absence of competition.

The exceptions in question have also found their way into the international law on State immunity, especially the torts exception. That this is so is shown, for example, by the State Immunity Act 1978 of the United Kingdom – the very State which claimed sovereign immunity in the instant case –, Section 5 of which provides that a foreign State is

"not immune as respects proceedings in respect of *(a)* death or personal injury; or *(b)* damage to or loss of tangible property, caused by an act or omission in the United Kingdom".

This provision is echoed in Section 1605(a) (5) of the United States Foreign Sovereign Immunities Act (1976) and in Section 13 of Australia's Foreign States Immunities Act (*International Legal Materials*, Vol. 25, 1986, p. 715). The many countries where State immunity is an issue left to be determined by the courts – these are, paradoxically, the courts of civil law countries – follow the same rule, witness the numerous decisions listed in the International Law Commission's (ILC) commentary relating to Article 12 of its Draft Articles on Jurisdictional Immunities of States and Their Property (Report of the ILC on the Work of its 43rd Session, 29 April-19 July 1991, United Nations General Assembly, 46th Session, Supplement N° 10, p. 11, at pp. 103 n. 163 and 105 n. 165), as well as in the Fifth Report of the Commission's Special Rapporteur (Yearbook of the ILC 1983, Vol. II, Part One, paragraphs 76-99).

The same solution has been retained in treaty law. Article 11 of the European Convention on State Immunity of 16 May 1972 (European Treaties, N° 74) provides:

"A contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

It is true that, as of the time of writing, the 1972 Convention was binding only on eight out of the 43 members of the Council of Europe. This does not, however, prevent some of its provisions – Article 11 for one – from reflecting generally recognised rules, as is shown by the international practice referred to in the present opinion. It is also true that

Article 31 of the same Convention stipulates an exception to the torts exception cited above by stressing that

"[n]othing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State",

but, as is and will become apparent from the practice referred to in the present opinion, this exception is specific to the Convention and has no general validity.

Finally, various attempts at codifying the international law of State immunity should be examined. A first item to be considered under this heading is Article III(e) of a resolution adopted by the Institute of International Law (*Institut de droit international*) on 2 September 1991 and entitled: "Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement" (*Annuaire de l'Institut de droit international*, Vol. 64-II, 1992, p. 390, at p. 393). That provision runs as follows:

"The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State."

Another text pointing in the same direction is the International Law Association's Revised Draft Articles for a Convention on State Immunity of August 1994 (ILA, *Report of its Sixty-Sixth Conference*, Buenos Aires 1994, p. 488). According to Article III(F) of that Draft,

"[w]here the cause of action relates to: 1. Death or personal injury; or 2. Damage to or loss of property, and the act or omission which caused the death, injury or damage either occurred wholly or partly in the forum State or if that act or omission had a direct effect in the forum State",

the foreign State shall not be immune. This extends the exception to State immunity beyond acts or omissions which occurred wholly or partly in the forum State. It also comprises acts or omissions which had a *direct effect* in the forum State, *i.e.* it opens up the exception to so-called transborder tort actions. If in the case of McElhinney it may be argued that if the tort had its origin on the territory of the United Kingdom (Northern Ireland), it nevertheless had a direct effect in the forum State, Ireland, and is therefore covered in every respect by what Article III (F) considers to be the rule of State immunity.

The ILC, a subsidiary organ of the United Nations General Assembly entrusted with the progressive development of international law and its codification, and made up of eminent experts in that field, has, in turn, prepared a set of "Draft Articles on Jurisdictional Immunities of States and Their Property". As is shown by the work of the Commission's Special Rapporteurs, this Draft, which has been mentioned already, largely rests on the prevailing State and international practice. This is true, in particular, of its Article 12, entitled "Personal Injuries and Damage to Property", which prescribes:

"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the

territory or that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

The ILC's commentary on this provision (Report of the ILC…, *op. Cit.*, pp. 102-108) reveals: *(i)* that the exception it makes to the general principle of immunity, while mainly destined to encompass road and other accidents, i.e. insurable risks (judgment, § 19), it "is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination " (*ibid*., p. 103); *(ii)* that that exception only obtains where the forum State is the State on whose territory the act or omission complained of has taken place, because, if access to its courts were denied, the injured person would be without recourse to justice (*ibid.*, p. 103); *(iii)* that the author of the act or omission must have been present in that State's territory at the relevant time, this condition being meant to rule out transboundary injuries which are more properly classified as State-to-State disputes (*ibid.*, p. 104); and *(iv)* that no distinction shall be drawn between the torts resulting from the exercise of the *jus imperii* and those flowing from acts or omissions falling into the category of *jus gestionis* (*ibid.*, p. 105). Finally, it may be said that the Commission's commentary is firmly rooted in practice; its language nowhere suggests that the Commission intended to propose Article 12 as *lex ferenda*, that is, as a development rather than a codification of international law.

Subsequently, the Commission's Draft Articles ran into stormy weather, when they were examined by the General Assembly's Sixth Committee and a working party convened by the latter in 1992 and 1993. Criticisms were levelled at various provisions of the Draft, but not Article 12, which gave rise to little or no discussion.

Finally, as a result of these criticisms, the Draft Articles were sent back for possible "repairs" to the ILC which, in turn, established a working group to deal with the problems inherent in the Draft (see Report of the ILC 1999, Chapter VII). Nowhere in the Working Group's Report of May 1999 is there any discussion of Article 12; nor is the latter mentioned in an appendix to the Report dealing with recent developments in the field of State immunity. This must mean that there were no significant challenges against the approach followed by the ILC.

The foregoing considerations lead to the conclusion that Article 12 reflects the law as it is at present and that it squarely covers the case at hand. However, even if one were not prepared to admit as much, that Article is, at the very least, the expression of a remarkable convergence of tendencies in contemporary international law. This convergence is sufficiently powerful to suggest, at any rate, that at present there is no international *duty*, on the part of States, to grant immunity to other States in matters of torts caused by the latter's agents.

There was, consequently, no conflict between the international law on sovereign immunity and the right of access to domestic courts guaranteed by Article 6 § 1 of the Convention. It follows that the Court, in our view, should have held Article 6 § 1 to apply to the present case. It could then have found that the Republic of Ireland should have allowed the applicant to have access to its courts. By not doing so, it disproportionately restricted the applicant's rights under the Convention.

dissenting opinion of judge loucaides

I am unable to agree with the Court's decision. I agree with the dissenting opinion of Judges Caflisch, Cabral Barreto and Vajic to the effect that, in this case, for the reasons

set out in that opinion, there was no conflict between the international law on sovereign immunity and the right of access to domestic courts guaranteed by Article 6 § 1 of the Convention and therefore no question of refusing access to court on the ground of such immunity could arise in this case. However I would like to add an additional reason for finding a violation of Article 6 § 1 of the Convention in this case.

As in the cases of Al-Adsani and Fogarty (judgments of 21 November 2001), I would like to repeat here that I believe that a blanket immunity 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 proceedings, amounts to a disproportionate restriction on the right of access to court. In this respect I would like to underline the following points.

In present democratic society an absolute immunity from judicial proceedings appears to be an anachronistic doctrine incompatible with the demands of justice and the rule of law.

The international law immunities originated at a time when individual rights were practically non-existent and when States needed greater protection from possible harassment through abusive judicial proceedings. The doctrine of State immunity has in modern times been subjected to an increasing number of restrictions, the trend being to reduce its application in view of developments in the field of human rights which strengthen the position of the individual. Moreover, nowadays judicial institutions, at least in the countries where the Convention is applicable, are bound to secure the safeguards of fairness and impartiality provided therein and protect States accordingly.

In a case like the one before the Court, the *lex specialis* is the European Convention of Human Rights. General principles of international law are not embodied in the Convention except insofar as reference is expressly made to them by the Convention (see, for example, Articles 15, 35 § 1 and 53 of the Convention and Article 1 of Protocol No. 1). Therefore, one should be reluctant to accept restrictions on Convention rights derived from principles of international law such as those establishing immunities which are not even part of the *jus cogens* norms.

It is correct that Article 6 may be subject to inherent limitations, but these limitations should not affect the core of the right. Procedural conditions such as time-limits, the need for leave to appeal etc. do not affect the substance of the right. But completely preventing somebody from having his case determined by a court, without any fault on his part and

regardless of the nature of the case, contravenes, in my opinion, Article 6 § 1 of the Convention.

Finally I would like to place on record my reaction to the fact that the majority in finding no violation of Article 6 § 1 in this case has taken into account "that in the circumstances of the present case it would have been open to the applicant to bring an action against the United Kingdom Secretary of State for Defence in Northern Ireland".

I believe that when a complaint is made for a breach of the Convention, the complaint should be examined by the Court by reference only to the legal system of the respondent State. Any defects or other problems relating to such a system cannot be remedied by reference to the legal system of any other High Contracting Party, whether neighbouring to the respondent State or not. Therefore, the fact that the applicant in this

case had the possibility of a judicial remedy in the United Kingdom in respect of his grievance should be irrelevant to the issue before the Court, which was solely and exclusively whether the applicant had access to the courts in Ireland in respect of the same complaint. I think it is unfair as well as odd to expect the applicant to have recourse to another State as a solution to his problem of lack of access to a court in his own country, against which his complaint was directed.