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"THE IMPLICATIONS OF THE EUROPEAN CONVENTION ON THE DEVELOPMENT OF PUBLIC INTERNATIONAL LAW"

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THE IMPLICATIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS FOR THE DEVELOPMENT OF PUBLIC INTERNATIONAL LAW

By Theodor Meron°

1. Introduction

As the first international convention on human rights, and one with the most advanced mechanisms of judicial resolution of individual and interstate complaints, it is natural that the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [1] and the unparalleled, in both quantity and quality, case law generated by the Commission (no longer in existence since the entry into effect of Protocol 11) and the Court, should have an important impact on the development of public international law, an impact reaching beyond the field of human rights and the geographical parameters of the Council of Europe. Nevertheless, because of the doctrine emphasising the specificity of international human rights (virtual elimination of reciprocity, contraction of domestic jurisdiction, and operation of the law not between theoretically equal sovereign entities, but between governments - subject to duties - and individuals benefiting from rights, all that mostly within the nation State), the significance for general public international law of the normative system developed in Strasbourg cannot be taken for granted. It merits discussion and comment.

This report will be limited to the ECHR. Accordingly, it will not address the impact on public international law of other European conventions. The ECHR has had a profound influence on the decisions of the Court of Justice of the European Communities, the Maastricht Treaty, the inclusion of human rights clauses in the economic and development agreements with States not members of the European Union and the recognition of the constitutional traditions common to the member States as general principles of community law and thus as fundamental rights enforceable before the Court of Justice.[2] The ECHR has had a major impact on the development by the European Communities and the OSCE of what Professor Charles Leben called the "triad of human rights/democracy/rule of law."[3] Beyond Europe, the ECHR has also had a major influence on other regional human rights systems, especially the jurisprudence of the American Court of Human Rights, as well as on the universal human rights system.

2. Character of Human Rights Treaties

Strasbourg institutions have articulated the theory of the objective character of the ECHR, emphasising its normativity and the departure from the reciprocity underlying the law of treaties in general. Thus, in the case of *Austria v. Italy*, the European Commission of Human Rights stated:

> the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, EUR. T.S. No. 5, 213 UNTS 221.

[2] See for example, Wachauf v. Germany, Court of Justice of the European Communities, Case 5/88, [1989] ECR 2609.

[3] Charles Leben, *Is there a European Approach to Human Rights?, in* THE EU AND HUMAN RIGHTS 69, 93 (Philip Alston ed. 1999).

> Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.[4]

In *France et al. v. Turkey,*[5] the Commission held that:

> the general principle of reciprocity in international law and the rule in Article 21, para. 1 of the Vienna Convention on the Law of Treaties, concerning bilateral obligations under a multilateral treaties do not apply to the obligations under the European Convention, which are "essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" (Austria v. Italy, Yearbook 4, 116, at page 140).[6]

In the *Loizidou* case, the Court emphasised the "special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms"[7] and the need not to "diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)."[8]

Although these characterisations were designed for the ECHR only, they may, in the long run influence the interpretation and application of other normative and multilateral treaties which implicate common values rather than just the interests of the individual State parties. Possible candidates for such a development include treaties concerning the environment and arms control. The jurisprudence of the European Court of Human Rights may thus contribute to filling the void left by the Vienna Convention on the Law of Treaties;[9] which hardly dealt with the special problems raised by multilateral normative treaties. This Strasbourg jurisprudence will continue to drive the movement of international law from its State-centered focus to an orientation towards individuals.

3. Reservations

Much has been written about the Strasbourg jurisprudence on reservations to the ECHR. Both because of the ample literature and the continuing work on this subject in the framework of the Committee of Legal Advisers (CAHDI), my discussion will be brief. This jurisprudence draws on the special character of the Convention and turns essentially on the application of Article 57 (former Article 64) and only secondarily on the more general criterion of compatibility with the object and purpose of the Convention derived from the Vienna Convention on the Law of Treaties. As Pierre-Henri Imbert noted, there is no equivalent at the universal level to the Strasbourg institutions, and Article 57 enabled the Court (except with regard to the reservations by Turkey), to avoid addressing the incompatibility criteria of

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[4] Decision of the Commission as to Admissibility of Application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy, 4 YB. EUR. CONV. H.R. 116, 140 (1961).

[5] France, Norway, Denmark, Sweden, Netherlands v. Turkey, European Commission of Human Rights, Appl. No. 9940-9944/82 (joined), Decision on admissibility of 6 December 1983, 35 EUR. COMM'N DEC. & REP. 143 (1984).

[6] *Id.*, at 169, para. 39.

[7] Case of Loizidou v. Turkey (Preliminary Objections), European Court of Human Rights, Judgment of 23 March 1995, 310 EUR. CT. H.R. REP. (SER. A), para. 70 (1995).

[8] *Id.*, para. 75.

[9] Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, UN Doc. A/CONF.39/27 and Corr.1 (1969), 1155 UNTS 331, *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

the Vienna Convention.[10] Imbert acknowledged the fact that the Strasbourg jurisprudence had more of an impact on the work of the Human Rights Committee established under the International Covenant on Civil and Political Rights[11] (CCPR) than on the practice of States belonging to the Council of Europe. This jurisprudence emphasises the requirement of specificity,[12] which Åkemark regards as a reflection of a regional customary law,[13] the exclusion of reservations which may render the Convention ineffective and the severability of inadmissible reservations. Inadmissible reservations would thus be excluded, while maintaining the validity of the reserving State's consent to the Convention (see, in particular, the *Belilos* and *Loizidou* cases[14]).

The European jurisprudence has had a critically important impact on the universal system of human rights as manifested by General Comment No. 24 of the Human Rights Committee and on the jurisprudence of the Inter-American Court of Human Rights. Although provisions similar to Article 57 (former Article 64) can be found in many Council of Europe treaties, I note the conclusion of Åkermark that that jurisprudence does not appear to have been supported by the majority of the members of the Council of Europe,[15] at any rate outside of the ECHR (the decisions of the Court are of course binding on the State parties before the Court). Moreover, two members of the Council of Europe, France and the United Kingdom, have strongly dissented from General Comment No. 24,[16] especially questioning the competence of the Committee to decide on invalidity and separability.[17]

Outside the Council of Europe, the United States has questioned the legal foundation of the Committee's approach.[18] The Pellet reports and the recent work of the International Law Commission (ILC) demonstrate strong resistance to the Strasbourg jurisprudence and to General Comment No. 24 as a paradigm for the law of treaties in general. They reflect a preference for the maintenance of the reservations system established by the Vienna Convention on the Law of Treaties. Time will tell whether the Strasbourg jurisprudence on reservations will have an impact, and how much of an impact, on other normative multilateral conventions. Although so far that impact outside human rights treaties has been insignificant, in the long run the assertive stand taken by the Strasbourg institutions may prove useful in tempering the *laissez-faire* of the Vienna Convention's system.

4. Interpretation of Treaties

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[10] CAHDI, Group of Specialists on Reservations to International Treaties, 2nd meeting, Paris, Sept. 1998, Statement by Pierre-Henri Imbert.

[11] International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A, 19 December 1966, *in force* 23 March 1976, 21 UN GAOR (Suppl. No. 16), at 53, UN Doc. A/6316 (1967).

[12] Åkermark, *Reservations: Breaking New Ground in the Council of Europe*, 24 EUR. L. REV. 499, 503 (1999).

[13] Åkermark, *Reservations Clauses in Treaties Concluded within the Council of Europe*, 48 I.C.L.Q. 479, 493 (1999).

[14] Belilos Case (Switzerland), European Court of Human Rights, Judgment of 29 April 1988, 132 EUR. CT. H.R. REP. (SER. A) (1988). Case of Loizidou v. Turkey, *supra* note 7.

[15] Åkermark, *supra* note 12, 504-507.

[16] Committee on Human Rights, General Comment No. 24(52), adopted on 2 November 1994, Report of the Human Rights Committee, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex V.

[17] Report of the Human Rights Committee, Vol. I, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex VI, (1995) (UK); 51 UN GAOR (Supp. No. 40), UN Doc. A/51/40, Annex VI (1996) (France).

[18] Report of the Human Rights Committee, Vol. I, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex VI, (1995).

Sir Ian Sinclair observed that human rights bodies, in particular the European institutions, have put emphasis on the "object and purpose" of human rights treaties to such an extent that they sometimes overrode the "ordinary meaning" of the text or ignored such evidence of the parties' intention as found in the *travaux préparatoires*.[19] Sinclair gave as an example the *Golder* case, where the Court read into Article 6 of the ECHR not only the procedural safeguards in legal proceedings, but also a right of access to courts.[20] This approach of the Court to the interpretation of the Convention has been criticised by Judge Fitzmaurice:

> But what I find it impossible to accept is the implied suggestion that because the Convention has a constitutional aspect, the ordinary rules of treaty interpretation can be ignored or brushed aside in the interests of promoting objects or purposes not originally intended by the parties. Such a view moreover overlooks the patent fact that, even in the case of constitutions proper, and even allowing for certain permissible interpretational differences of treatment between treaties and constitutions as indicated in paragraph 32 of the dissenting part of my opinion in the Golder case, there are rules of interpretation applicable to constitutions, and these rules have in large measure a character closely analogous to those of treaty interpretation [...].[21]

In contrast, Jonathan Charney noted that "to the extent that these Courts may have adopted a teleological approach, it seems to be more consistent with the role of the treaty's purpose as intended in the Vienna Convention. It has rarely, if ever, been used to sacrifice the text in order to carry out judicially created purposes."[22]

Bruno Simma pointed out that another principle of interpretation has been developed by the European Court of Human Rights, *i.e.*, that the ECHR must be interpreted in "in the light of present day conditions."[23]

The need to interpret treaties in light of human rights concerns, as developed by the European Court of Human Rights, has influenced the jurisprudence of the European Court of Justice on fundamental rights as a part of the general principles of law. Those fundamental rights are derived from the national constitutions of member States and from treaties to which they are parties. In the *Nold* case,[24] the European Court of Justice, after referring to the "constitutional traditions common to the Member States," noted that "[i]nternational treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of

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[19] Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES 133 (2nd ed., 1984).

[20] Golder Case (United Kingdom), European Court of Human Rights, Judgment of 21 February 1975, 18 EUR. CT. H.R. REP. (SER. A) (1975).

[21] National Union of Belgian Police Case (Belgium), European Court of Human Rights, Judgment of 27 October 1975, 19 EUR. CT. H.R. REP. (SER. A), Dissenting Opinion of J. Fitzmaurice, para. 9 (1975); *See also* dissenting opinion in Golder Case, *supra* note 20.

[22] Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 COLLECTED COURSES 101, 188 (1998); *also* Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AJIL 1, 18-20 (1985).

[23] Simma, *International Human Rights and General International Law*, IV(2) COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 155, 185 (1993), citing the Court in the Tyrer Case (United Kingdom), European Court of Human Rights, Judgment of 25 April 1978, 26 EUR. CT. H.R. REP. (SER. A), at 15-16 (1978).

[24] Nold, Kohlen-und Baustoffgroßhandlung v. Commission of the European Communities, Court of Justice of the European Communities, Case 4/73, [1974] ECR 491, 507, para. 13.

Community Law."[25] The Court then took note of the ECHR and, in particular of the First Additional Protocol which protects the right of property.[26]

5. State Sovereignty, Consent to the ECHR and Admission to International Organizations

Although it is not uncommon for international organisations to insist that various commitments be made by the applicant States as a condition for admission to membership, the Council of Europe has gone further. Before the Parliamentary Assembly (PA) recommends that the Committee of Ministers (CM) invite an applicant State to become a member of the Council, the PA must satisfy itself that such applicant State has met the conditions of Article 3 of the Statute of the Council, accepts the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and is willing to collaborate sincerely and effectively in the realisation of the aims of the Council. In essence, accession to the Council presupposes that an applicant State has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and human rights. The PA further requires that an applicant State accepts and ratifies the ECHR and a number of additional protocols. All this amounts to a robust and innovative use of admission to international organisations as a tool to compel States to comply with the Strasbourg system of human rights and to ratify several human rights treaties. It establishes a model that may be followed by other organisations.[27]

6. Due Process Standards

The jurisprudence of the ICTY and of the Rwanda tribunal is replete with references to the jurisprudence of the ECHR with regard to judicial guarantees and due process protections and procedures. Here, Strasbourg Institutions have already had a tangible impact on international humanitarian law, on international criminal law and on the rules of procedure and evidence of these tribunals.

7. Protection of Environment

The relationship between human rights and environmental protection has been envisaged in different perspectives. One is to recognise a human right to a satisfactory, decent, or healthy environment. A second approach is to consider the quality of the environment as intertwined with existing human rights, such as the right to life, to health or to an adequate standard of living.[28] A third is to elaborate a set of "environmental rights" applied specifically in an environmental law context. These are essentially procedural rights, such as a right to participation in decision-making, a right to information and a right of access

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[25] *Id.*

[26] First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, in force 18 May 1954, EUR. T.S. No. 9.

[27] *See* Meron & Sloan, *Democracy, Rule of Law and Admission to the Council of Europe*, 26 ISRAEL Y.B. HUMAN RIGHTS 137 (1997).

[28] Merrills, *Environmental Protection and Human Rights: Conceptual Aspects*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 25, 39-40 (Alan E. Boyle and Michael R. Anderson eds, 1996); Cançado Trindade, *The Contribution of International Human Rights to Environmental Protection, with Special Reference to Global Environmental Change*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 244, 271 *ff* (Edith Brown-Weiss ed., 1992).

to remedies.[29] The Strasbourg institutions have focused primarily on the second and the third of these perspectives.

None of the universal or regional human rights texts concerned with the protection of human rights currently in force - the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights, the American Convention on Human Rights (ACHR), the ECHR and the European Social Charter, and the African Charter on Human Rights and People's Rights - provide for a generic individual "right to environment."[30] The Strasbourg institutions have, however, showed the way towards the development of environmental protection and the right to a healthy environment through such existing rights as the right to life, right to the respect of one's private life, right to health and right to property, and also with regard to remedies and to the right to information. I shall give some examples of the pertinent decisions which are likely to have a broad influence on the international law of environment.

The Strasbourg institutions have thus considered that the protection of the right to life involves positive obligations. In *L.C.B. v. United Kingdom*, the applicant, who suffered from leukemia since childhood, complained of the failure of the State to warn and advise her parents of the risks entailed by the alleged exposure of her father to radiation at Christmas Island at the time of the United Kingdom's nuclear tests. The Court considered that:

> [...] the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. [...] It has not been suggested that the respondent State intentionally sought to deprive the applicant of her life. The Court's task is, therefore, to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.[31]

However, the Court did not find it established that:

> given the information available to the State at the relevant time [...] concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act of its own motion to notify her parents of these matters or take any special action in relation to her.[32]

In *Balmer-Schafroth and others v. Switzerland*, the applicants alleged violations of Article 6 (right to a tribunal) and Article 13 (right to a remedy for violations of the Convention) for not being allowed to challenge a decision of the Swiss Federal Council to permit the extension of the operating licence of a nuclear power station. The Court considered that the right on which the applicants relied on was "the right to have their physical integrity adequately protected from the risks entailed by the use of nuclear energy," a right recognised in Swiss law. However, it held that Article 6 was not applicable since the applicants had not establish[ed] a

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[29] Kiss, *Le droit à la conservation de l'environnement*, 2(12) REVUE UNIVERSELLE DES DROITS DE L'HOMME 445, 447-448 (1990).

[30] International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution 2200, 19 December 1966, 21 UN GAOR (Supp. No 16), at 49, UN Doc. A/6316 (1967); International Covenant on Civil and Political Rights, *supra* note 11; European Social Charter, Turin, 18 October 1961, EUR. T.S. No. 35, 529 UNTS 89; American Convention on Human Rights, San Jose, 22 November 1969, *reprinted in* 9 ILM 673 (1970); African Charter on Human Rights and People's Rights, Banjul, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 ILM 58 (1982).

[31] Case of L.C.B. v. United Kingdom, European Court of Human Rights, Judgment of 9 June 1998, III REPORTS JUDG. & DEC., para. 36 (1998).

[32] *Id.*, para. 41.

direct link between the operating conditions of the power station [...] and their right to protection of their physical integrity, as they [had] failed to show that the operation of the [...] power station exposed them personally to a danger that was not only serious but also specific and above all, imminent. [33]

In the *Guerra and others v. Italy* case, the applicants complained that the failure of the authorities to inform the public about the hazards and the procedure to be followed in the event of a major accident infringed their right to freedom of information. The Court found that the State had not fulfilled its obligation to secure the applicants' right to respect for their private and family life, by not providing essential information that would have enabled the applicants to assess the risks they and their families might run.[34]

Other cases concerned the environmental implications of respect of private life, home and property under the Convention.

In *S. v. France*, the applicant alleged that the erection of a nuclear power station at less than three hundred meters from her house had transformed the rural surroundings into an industrial environment with several negative consequences: alteration of the natural site, noise pollution, industrial light during the night, a microclimate modification and loss of value of the property.[35] Although the application was found inadmissible, the Commission noted, on the applicability of Article 8, that noise nuisances of a considerable level could not only affect the physical well-being of an individual, but also prevent him from enjoying the amenities of his home. It further noted that the State had the duty not only to refrain from direct interferences but also the duty to prevent interferences by individuals.[36]

In the *López Ostra* case, the Commission and the Court found a breach of the Convention as a consequence of environmental harm. The applicant had filed an application asserting that she had been unable to obtain relief under Spanish law for the noxious emissions of a water purification and waste treatment station constructed near her home. She claimed that the passive attitude of Spanish authorities with regard to the smells, noise and polluting fumes caused by the plant constituted a violation of Articles 3 and 8 of the Convention. Both the Commission and the Court found a breach of Article 8, but not of Article 3.[37] The Court, putting the question in the framework of environmental protection, stated:

> Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however seriously endangering their health.[38]

In this case, the interference was not directly attributable to public authorities, but the Court pointed out that the case could be approached either from the perspective of an omission, the tolerance of the operation of the station, or from the perspective of a positive interference, since the land on which the station was erected on was public property and a State subsidy was provided for the construction. The Court seems to have favoured the

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[33] Case of Balmer-Schafroth and others v. Switzerland, European Court of Human Rights, Judgment of 26 August 1997, IV REPORTS JUDG. & DEC., para. 40 (1997).

[34] Case of Guerra and others v. Italy, European Court of Human Rights, Judgment of 19 February 1998, I REPORTS JUDG. & DEC., paras. 60-62 (1998).

[35] S. v. France, European Commission of Human Rights, Appl. No. 13728/88, Decision of 17 May 1990, *reprinted in* 3 REVUE UNIVERSELLE DES DROITS DE L'HOMME 236 (1991) (in French).

[36] *Id.*, at 237.

[37] Case of López Ostra v. Spain, European Court of Human Rights, Judgment of 9 December 1994, 313C EUR. CT. H.R. REP. (SER. A), para. 31 (1994) (the text of the Commission's opinion is annexed to the judgment).

[38] *Id.*, para. 51.

positive duty approach, *i.e.*, establishing whether the authorities took the measures necessary for protecting the applicant's rights. It found that after the initial relocation of the inhabitants of the neighbourhood, the municipality had failed to take such measures. But the main criticisms levelled by the Court against the behaviour of the public authorities were positive acts, *inter alia*, resisting the decisions of lower tribunals ordering the closing down of the station. Cases such as *López Ostra* involve a delicate assessment of the fair balance to be struck between the economic well-being of the community and individual interests.

As regards the right of property, the European Commission has taken the view that there will be a breach of Article 1 of Protocol I where pollution and other environmental degradation result in a substantial fall in the value of the property, which is not subsequently compensated.[39]

The Strasbourg institutions have also recognised a right of access to environmental information held by public authorities. The right to environmental information may be associated with the right to life, freedom of expression, and to the right of respect for one's private life. It has been invoked before the Strasbourg organs under all these headings. In *Guerra and others v. Italy*, the applicants lived in a town near a chemical factory. They alleged that the lack of measures to reduce pollution levels and accident hazards arising out of the factory's operation infringed their right to respect for their lives and physical integrity (Article 2); and that the failure of the authorities to inform the public about the hazards and the procedure to be followed in the event of a major accident infringed their right to freedom of information (Article 10). The Court rejected the Commission's findings that freedom of information could entail a duty to collect and disseminate environmental information. Recalling its earlier jurisprudence, it reiterated that freedom of information "basically prohibits a government from restricting a person receiving information that others wish or may be willing to impart to him," and it "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."[40] The Court then proceeded to examine the complaints under Articles 2 and 8. Under Article 8, the Court held that, by not providing essential information that would have enabled the applicants to assess the risks they might run, "the respondent State [had] not fulfil[led] its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention."[41]

Similarly, the Court held in the *McGinley and Egan* case, which concerned the supply of information on radiation levels following the British nuclear tests on Christmas Island, that:

> Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.[42]

From the *McGinley and Egan* and the *Guerra* cases, it has been inferred that the Court has recognized a right to environmental information on the basis of Articles 2 or 8 of the Convention. A State has the duty to provide or disseminate information it holds when this information is likely to contribute to the protection of guaranteed rights. The Court may have been influenced by parallel developments in general international environmental law,

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[39] Weber, *Environmental Information and the European Convention on Human Rights*, 12(5) H.R.L.J. 177, 181 (1991).

[40] Case of Guerra and others v. Italy, *supra* note 34, para. 53.

[41] *Id.*, para. 60.

[42] Case of McGinley and Egan v. United Kingdom, European Court of Human Rights, Judgment of 9 June 1998, III REPORTS JUDG. & DEC., para. 101 (1998).

especially some European texts providing for a right of access to certain environmental information held by public authorities.[43]

8. State Responsibility: *Erga Omnes* Obligations

The ECHR provides that "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."[44] Standing to submit claims against any other party to the convention is not dependent on any special interest or nexus with the victim. The Convention thus anticipated the principle of *erga omnes* obligations stated by the International Court of Justice in the *Barcelona Traction* case.[45] Of course, while the ECHR recognises the principle of obligations *erga omnes contractantes*, the *Barcelona Traction* case contemplated such obligations under general international law.[46]

The ECHR may also have influenced treaties other than human rights treaties. In the environmental field, the Bern Convention thus provides that:

> Any dispute between Contracting Parties concerning the interpretation or application of this Convention which has not been settled on the basis of the provisions of the preceding paragraph or by negotiation between the parties concerned shall, unless the said parties agree otherwise, be submitted, at the request of one of them, to arbitration [...].[47]

Most obligations under the Convention concern national measures for the conservation of wild flora, wild fauna and natural habitats. A State party would probably not be required to have suffered a specific injury to challenge another Party's performance.

9. State Responsibility: Diplomatic Protection

Human rights approaches to remedies against violating States and to the responsibility of the State to ensure the human rights of all persons subject to its jurisdiction, and especially Article 33 (former Article 46) of the ECHR, are having an obvious impact on the traditional law of diplomatic protection. It is a part of the trend to present as human rights issues claims which in the past would have been presented as diplomatic protection of citizens abroad.

This development may well be illustrated by the recent application presented by Denmark against Turkey for alleged violations of the ECHR "on behalf" of a Danish national. Denmark's application includes both elements of diplomatic protection - infringements by a foreign State of the rights of one of its nationals - and elements more characteristic of human rights regimes - violations of the Convention by a State in regard of its own nationals. Denmark thus requested the Court of Human Rights to examine both the treatment of its citizen and whether the interrogation techniques applied to him were used in Turkey as a

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[43] Maljean-Dubois, *La Convention européenne des droits de l'homme et le droit à l'information en matière d'environnement. A propos de l'arrêt rendu par la CEDH le 19 février 1998 en l'affaire Anna Maria Guerra et 39 autres c. Italie*, 4 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 995, 1011-1012 (1998).

[44] Article 33 (former Article 46).

[45] Barcelona Traction, Light, and Power Company (Second Application) (Belgium v. Spain), International Court of Justice, Judgment of 5 February 1970, [1970] ICJ REP. 3, at 33.

[46] Theodor Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 190-196 (1989).

[47] Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, EUR. T.S. No. 104, Article 18.

widespread practice.[48] Thus, rather than continue the classical competition between a minimum or national treatment standard, the Danish application does not only challenge the treatment of an alien, but also the treatment by the foreign State of its own nationals.

Even with regard to claims submitted by individuals against a State party to the Convention, an element of diplomatic protection is, however, preserved in Article 36(1) which allows a party, one of whose nationals is an applicant in proceedings against another party, to submit written comments and to take part in hearings.

10. Responsibility and Territoriality

The ECHR and its jurisprudence have had an effect on the territorial scope of responsibility of States under international law. The protection provided by the CCPR, the ECHR and the ACHR extends to persons "within the territory of a State or subject to its jurisdiction" (CCPR), to persons "within the jurisdiction of" of a State (ECHR) or to persons "subject to the jurisdiction" of the State (ACHR).[49] In the *Soering* case, the European Court stated that:

> Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. [...][50]

Nevertheless, the Court held that the decision to extradite a fugitive may engage the responsibility of a contracting State under the Convention where there exist substantial grounds for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The Court added that:

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. [...] Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. [...] In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"[...].[51]

Thus, Article 1 is pertinent to the application of extradition agreements concluded by the parties to the ECHR. Another aspect of the interpretation and application of Article 1 of the Convention, and one which has influenced the work of the Human Rights Committee, has been to construe the word "jurisdiction" as extending to areas outside of a State's national

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[48] Denmark v. Turkey (Preliminary Objections), European Court of Human Rights (First Section), Appl. No. 34382/97, Decision as to admissibility of 8 June 1999. (The decision is available at <http://www.echr.coe.int/hudoc/>).

[49] *See* Meron, *Extraterritoriality of Human Rights Treaties*, 89 AJIL 78 (1995).

[50] Soering Case (United Kingdom), European Court of Human Rights, Judgment of 26 June 1989, 161 EUR. CT. H.R. REP. (SER. A), para. 86 (1989).

[51] *Id.*, para. 87. The same principles were applied in cases of expulsion, Case of Cruz Varas and Others v. Sweden, Judgment of 20 March 1991, 201 EUR. CT. H.R. REP. (SER. A) (1991); Case of Vilvarajah and Others v. the United Kingdom, Judgment of 30 October 1991, 215 EUR. CT. H.R. REP. (SER. A) (1991); Case of Chahal v. the United Kingdom, Judgment of 15 November 1996, V REPORTS JUDG. & DEC. (1998).

territory where that State's authorities exercise power over people there present. [52] This has implications for international humanitarian law as well.

Thus, the Commission declared admissible a petition filed by Cyprus against Turkey, alleging murders of civilians, repeated rapes, forcible eviction, looting, robbery, unlawful seizure, arbitrary detention, torture and other inhuman treatment, forced labour, destruction of property, forced expatriation and separation of families in the context of occupation.[53] In another case, the Commission reiterated that:

> [...] the authorised agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.[54]

Françoise Hampson thus commented that "[i]t is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation which engages the possible responsibility of the State and not the place where the action takes place."[55]

In another case also related to the attribution of responsibility for acts committed in the northern part of Cyprus, the Commission held that:

> Authorised agents of a State, including armed forces, not only remain under its jurisdiction when abroad but also bring any other persons 'within the jurisdiction' of that State to the extent that they exercise authority over such persons.[56]

It then distinguished between acts imputable to Turkey and those imputable to the Northern Cyprus authorities by reference to a criterion of "actual control." In that same context, the Court held that:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through subordinate local administration.[57]

11. State Responsibility for Non-Governmental Acts and Imputability (*Drittwirkung*)

Human rights have had an impact on imputability, on the responsibility of a State for unauthorised acts of its officials and even for acts committed by non-governmental agencies

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[52] Meron, *supra* note 49, 79-81 (1995).

[53] Cyprus v. Turkey, European Commission on Human Rights, Appl. No. 6780/74 and 6950/75, Report of 10 July 1976, 2 EUR. COMM'N DEC. & REP. 1254 E.H.R.R. 482 (1975).

[54] W. v. Ireland, European Commission on Human Rights, Appl. No. 9360/81, Decision on admissibility of 28 February 1983, 32 EUR. COMM'N DEC. & REP. 211, 215 (1983); *also* Cyprus v. Turkey, *id.*, 136.

[55] Hampson, *Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts*, 31 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 119, 122 (1992).

[56] Chrysostomos and Papachrysostomou v. Turkey, European Commission on Human Rights, Appl. No. 15299/89 and 15300/89, Report of 8 July 1993, 86 EUR. COMM'N DEC. & REP. 4, at paras. 96 and 170. The Council of Ministers agreed with the report of the Commission: Resolution DH (95) 245 of 19 October 1995.

[57] Loizidou v. Turkey, *supra* note 7, para. 62.

or individuals in the country. This may be important for the law of State responsibility also in matters not involving human rights, but environmental and other subjects, including matters in the economic area and compliance with international sanctions. Normally, States are responsible only for conduct attributable to them, that is mainly the conduct of State apparatus.[58] This is reflected in Article 10 of the ILC draft articles on State responsibility (part one).[59] While the American Court of Human Rights has resorted to such state responsibility terms as due process and imputability, the European Court of Human Rights has emphasized the positive duty of governments to ensure compliance with their obligations under the Convention even as between non-governmental actors.

Although contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another (e.g. deprivation of life and liberty or the perpetration of acts of egregious discrimination) cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness. This is true of some other rights and obligations under international law. In our era, many activities are carried out by non-State entities. Making them comply with applicable rules of international law may be essential. The ICJ acknowledged this reality when, in a different context, it deplored "[t]he frequency with which at the present time the principles of international law . . . are set at naught by individuals or groups of individuals ..."[60] Because the purpose of human rights law is to protect human dignity, and because some essential human rights are often breached by private persons, the obligation of States to observe and ensure respect for human rights and to prevent violations cannot be confined to restrictions upon governmental powers but must extend to the prevention of some private "interferences" with human rights.[61] States should prevent violations by non-governmental actors. The standard of care required would depend on the character and the importance of the norm protected. When prevention fails, States should resort to criminal proceedings against the perpetrator of human rights violations and should ensure that their internal law provides the victim with effective civil remedies against the responsible private actor.

Human rights obligations stated in international humanitarian and human rights instruments increasingly extend to private individuals and to private action. In some areas of international law, such as that governing labour rights and conditions of work, the relevant international labour conventions routinely regulate relations between private employees and employers. The prohibitions of slavery and genocide apply, of course, also to private persons and groups. So does the prohibition of hostage-taking.

Together with the Human Rights Committee and the Inter-American human rights institutions, the ECHR's Article 1 and Strasbourg institutions have helped to establish the duty of States to ensure compliance by private persons with some of the Covenant's norms, or, at a minimum, to adopt measures "against private interference with enjoyment of the rights..."[62] That Article provides that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

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[58] *See generally* Theodor Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 155-171 (1989).

[59] [1975] 2 YB INT'L L. COMM'N 60, UN Doc. A/CN.4/Ser.A/1975/Add.1 (1976).

[60] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), International Court of Justice, Judgement of 24 May 1980, 1980 ICJ REP. 4, 42.

[61] Forde, *Non-Governmental Interferences with Human Rights*, 56 BRIT. YB. INT'L L. 253 (1985). Note particularly the discussion of the practice of the European Commission of Human Rights and the European Court of Human Rights with respect to non-governmental interference with human rights. *Id.*, at 271-8. *See* Andrew Clapham, HUMAN RIGHTS IN THE PRIVATE SPHERE 178-244 (1993).

[62] Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 77-78 (Louis Henkin

In the *Young, James and Webster Case (Closed Shop Case)* (1981)[63] the Court, applying Articles 1 and 11 (which guarantee the rights of peaceful assembly and freedom of association, including the right to form and to join trade unions), found that Article 11 had been violated . It stated that:

> [a]lthough the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.[64]

In the *National Union of Belgian Police Case*,[65] the Commission interpreted Article 11 by taking into account UN human rights instruments and ILO Conventions Nos. 87 and 98. It concluded that the latter Conventions reflect widely accepted labour law standards which are elaborated and clarified by the competent organs of the ILO. As they are a body of special rules binding also on European States, they should not be ignored in the interpretation of Article 11, particularly if the European Convention is to keep pace with the rules of international labour law and if its concepts are to remain in harmony with the concepts used in international labour law and practice.[66]

On this broad international law basis, the Commission concluded that freedom of association stated in Article 11 "may be legitimately extended to cover State responsibility in the sphere of labour management relations".[67]

The Commission followed the same approach in *Swedish Engine Drivers' Union* Case.[68] Taking into account once more UN human rights instruments and the ILO's Conventions, the Commission rejected the assertion that Article 11 provided protection only against governmental interference. On the contrary, the Article was "designed to protect unions against all kinds of interference, including interference by employers".[69] Invoking the principle of effectiveness in treaty interpretation, the Commission concluded:

> If it is the role of the Convention and the function of its interpretation to make the protection of individuals effective, the interpretation of Article 11 should be such as to provide, in conformity with international labour law, some protection against "private" interference.[70]

The Court addressed the duty of States to conform to the Convention by adopting legislative measures governing certain relations between private individuals. In the case of *X and Y v.*

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ed. 1981); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 31-32 (1982); Sperduti, *Responsibility of States for Activities of Private Law Persons*, *in* [Instalment] 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 373, 375 (R. Bernhardt ed. 1987).

[63] European Court of Human Rights, Judgment of 13 August 1981, 44 EUR. CT. H.R. REP. (SER. A) (1981); 62 INT'L L REP. 359 (1982).

[64] Id., para. 4962 INT'L L. REP. 376-7 (1982).

[65] Appl. No. 4464/70, 17 EUR. CT. H.R. (SER. B) (1976).

[66] *Id*., at 51. See also *id*., at 49-51.

[67] *Id.,* at 52.

[68] Appl. No. 5614/72, 18 EUR. CT. HR (SER. B), at 42-46 (1977).

[69] *Id.,* at 45.

[70] *Id.,* at 46.

The Netherlands,[71] the applicant claimed that the right of both his daughter and himself to respect for their private life, guaranteed by Article 8 of the European Convention, had been infringed and that Article 8 required that parents must be able to have recourse to remedies in the event of their children being the victims of sexual abuse. Finding that Article 8 had in fact been breached, the Court stated:

> The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. [...] These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[72]

In Osman v. United Kingdom,[73] the European Court of Human Rights considered the alleged failure of public authorities to prevent an individual from deliberately killing the applicant's husband. While finding no violation of Article 2 (right to life), the Court established a standard for positive state obligations, similar, in results if not in legal technique used, to the jurisprudence of the Inter-American Court of Human Rights and the Human Rights Committee:

> The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[74]

To be sure, the applicability of some human rights instruments to private actors does not imply that the conduct of private persons when not carried out in fact on behalf of a state (Article 8 of ILC Draft Articles on State responsibility (part one)) in breach of some instruments is attributable to the State. Rather, the breach is generated by the fact that the

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[71] European Court of Human Rights, Judgment of 26 March 1985, 91 EUR. CT. H.R. REP. (SER. A) (1985).

[72] *Id.*, at 11.

[73] Osman v. United Kingdom, App. No. 00023452/94, III REPORTS JUDG. & DEC. (1998). (Judgment of Oct. 28 1998, European Court of Human Rights). (The decision is available at <http://www.echr.coe.int/hudoc/>)

[74] *Id.* at paras. 115, 116 (citations omitted).

State itself violates its obligation under international law by tolerating the occurrence of the prohibited acts.[75]

Thus in the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights suggested that acts of public authority which are imputable to the State do not exhaust all the circumstances in which a State is obligated to prevent, investigate, and punish human rights violations, nor the cases in which the state itself might be responsible for violations.[76] A breach of human rights which is initially not imputable to a State, having been committed by either a private or by an unidentified person, can generate State responsibility not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it according to the requirements of the American Convention on Human Rights. The critical question, therefore, is whether the State has demonstrated lack of due diligence by allowing the act to take place either with its support or acquiescence or by not taking measures designed to prevent the act or to punish those responsible.

To be sure, the fact that a particular human right may not impose obligations on a private person or a private group does not mean that the acts contemplated are lawful. In practice, such acts often constitute breaches of the national law of the State concerned.

The extension of some human rights such as the prohibition of egregious discrimination on grounds of race or sex to encompass private action is impelled by significant community values. This expansion inevitably generates tension with other human rights, such as the freedom of association and the right to privacy, and requires a careful balancing of these values. The alternative, limiting the reach of human rights to public life, would diminish their effectiveness and is thus clearly unacceptable.

The Strasbourg jurisprudence has, however, implications going beyond human rights. In the present world, there is a need to control various types of conduct which does not directly involve the State and its apparatus. Strasbourg jurisprudence provides the tools for addressing this need.

12. International Humanitarian Law: Application of the Principle of Proportionality and Limits to Collateral Damage

One of the most important principles of international humanitarian law is that of proportionality. Strasbourg institutions have applied that principle and have contributed to its development. They have also relied on the principle of proportionality contained in human rights law, and thus further enriched international humanitarian law. The ECHR is one of the rare human rights treaties with provisions on the use of force. Human rights law establishes that the force used must not be more than absolutely necessary.[77] The principal provision on this subject, Article 2(2) of the ECHR, states that a deprivation of life shall not be regarded as inflicted in derogation of that Article when it results from the use of force which is no more than absolutely necessary. This applies to the use of force by both the military and the police. Article 2(2) has influenced also additional normative instruments, as for example, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement

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[75] *See* [1975] 2 YB INT'L L. COMM'N 71. In its commentary on that Article, the ILC explains that "although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned." *Id.*, at 82.

[76] Velásquez Rodríguez Case (Honduras), Inter-American Court of Human Rights, Judgment of 29 July 1988, [1988] INTER-AM.CT.H.R. REP. (SER. C), No. 4, paras. 172-173.

[77] Hampson, *supra* note 55, at 134.

Officials (1990), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Articles 9 and 10).[78]

The European Court of Human Rights addressed the issue of the planning and conduct of an operation carried out by security forces, in a case involving the killing of a civilian during an alleged armed clash between the Turkish army and the PKK in the vicinity of a village. The applicant, a sister of the victim, alleged that the clash had been an operation of retaliation against the village, while the Turkish Government asserted that it was an ambush operation conducted by the security forces and that the victim had not been killed by a bullet fired by the military side. The Court, following the assessment made by the Commission, found that it had not been proven that the applicant had been intentionally killed by the security forces. Nevertheless, emphasising the principles of necessity, proportionality, and the duty to take sufficient precautions, it held Turkey responsible for a violation of Article 2:

> [...] it is to be recalled that the text of this provision [Article 2] [...], read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of the term "absolutely necessary" suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see the above-mentioned McCann and Others judgement, p. 46, §§ 148-150).
>
> Furthermore, under Article 2 of the Convention, read in conjunction with Article 1, the State may be required to take certain measures in order to "secure" an effective enjoyment of the right to life.
>
> In the light of the above considerations, the Court agrees with the Commission that the responsibility of the State is not confined to circumstances when there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.
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> Thus, even though it has not been established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, the Court must consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush.[79]

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[78] United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Sept. 7, 1990.

[79] Case of Ergi v. Turkey, European Court of Human Rights, Judgment of 28 July 1998, IV REPORTS JUDG. & DEC., at para. 79 (1998). *See generally*, Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, INT'L REV. RED CROSS, No. 324, 513, 516, (Sept. 1988).

In the circumstances of the case, the Court found that it could be reasonably inferred that insufficient precautions had been taken to protect the lives of the civilian population.

In a case involving the killing of three IRA members in Gibraltar by members of the British Special Air Service (SAS), the Court has introduced a two-pronged test to determine the compatibility of the use of lethal force with the protection afforded to the right to life:

> [...] in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.[80]

Applying the first test to the facts of the case, the Court concluded that:

> [...] the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life [...]. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.
>
> It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[81]

The Court found that the actions of the soldiers in themselves did not give rise to a violation of the Convention. It then turned to the second test, examining the circumstances of the control and organisation of the operation. Here, the Court found against the government of the United Kingdom:

> [...] having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) of the Convention.[82]

The Court (by 10 votes to 9) thus reversed the conclusion of the Commission, which had held (by 11 votes to 6) that "the planning and execution of the operation by the authorities [did] not disclose any deliberate design or lack of proper care which might render the use of lethal force [...] disproportionate to the aim of defending other persons from unlawful violence."[83]

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[80] Case of McCann and Others v. United Kingdom, European Court of Human Rights, Judgment of 5 January 1995, 324 EUR. CT. H.R. REP. (SER. A), at para. 194 (1995).

[81] *Id.,* at para. 200.

[82] *Id.,* at para. 213.

[83] McCann and Others v. U.K., 21 EUR. HUM. RTS REP. 97, para. 250 (1996).

13. Conclusions

Although it is still early to reach definitive conclusions about the impact of the ECHR on general international law, it is already clear that that impact is significant not only for other regional human rights and universal human rights systems, but also for such different areas as principles of State responsibility, interpretation of treaties, and environmental protection. An area where such an influence has, at least so far, been limited to human rights systems and where it did not extend to general international law is that of reservations to treaties.

The Implications of The European Convention on Human Rights for the Development of Public International Law

Although it is still early to reach definitive conclusions about the impact of the European Convention on Human Rights on general international law, it is already clear that that impact is significant not only for other regional human rights and universal human rights systems, but also for such different areas as principles of State responsibility, interpretation of treaties, and environmental protection. An area where such an influence has, at least so far, been limited to human rights systems and where it did not extend to general international law is that of reservations to treaties.

With this Report specially prepared by Professor Theodor Meron (Charles L. Denison Professor of Law, New York University Law School, Associate Member of the Institute of International Law), discussed at the 19th meeting of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, Berlin, 13-14 March 2000, the CAHDI wishes to contribute in a practical manner to the Celebration of The 50th anniversary of The European Convention on Human Rights (1950-2000).