approach fails to water the complementarity tree or to nurture the anti-impunity work of national jurisdictions upon which the Rome Statute was predicated. The proposed alternative of suspensions of the ICC investigations and transfer of the cases to Kenya, perhaps on condition that the prosecutor monitor the cases and report back to the pretrial chamber every six months, would have better respected those goals while maintaining safeguards against the risk of allowing impunity to prevail for the heinous crimes against humanity committed in Kenya.

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European Convention on Human Rights—access to justice and fair hearings—foreign sovereign immunity in proceedings involving employment disputes—UN Convention on Jurisdictional Immunities of States and Their Property—customary international law

SABEH EL LEIL v. FRANCE. Application No. 34869/05. *At* http://www.echr.coe.int. European Court of Human Rights (Grand Chamber), June 29, 2011.

In the second of two applications on the subject decided by the Grand Chamber of the European Court of Human Rights within the last two years,[1] the Court was called upon in *Sabeh el Leil* to establish appropriate limits to the doctrine of foreign state immunity in employment disputes.[2] In both cases, individuals who were employed at a foreign state's embassy (in *Sabeh el Leil*, that of Kuwait) were fired and sought relief under the domestic procedures of the host state (France). In both instances, the domestic courts of the host state had denied redress on the basis of foreign sovereign immunity, and the aggrieved individual brought an application under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and particularly Article 6, paragraph 1, guaranteeing "a fair . . . hearing . . . by [a] . . . tribunal."[3] The Grand Chamber unanimously concluded in *Sabeh el Leil* that Article 6(1) had been violated, inasmuch as French domestic courts had not properly applied the international law of state immunity, as reflected in the textual provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property,[4] and the relevant aspects of customary international law.

Applicant Farouk Sabeh el Leil, a French national (para. 1), was an accountant at the Kuwaiti Embassy in Paris pursuant to a contract of indefinite duration (dated August 25, 1980) with the state of Kuwait. In April 1985, he was promoted to head accountant and his job description included supervision of his staff's work and "the management of administrative tasks" (para. 7). In a December 1999 communication, twenty employees of the embassy acknowledged that Sabeh el Leil had "assumed the role of staff representative" and had "resolved all disputes between the staff and the diplomatic mission" over his years as head accountant (para. 8). In

[1] The earlier case was Cudak v. Lithuania, App. No. 15869/02 (Eur. Ct. H.R. Mar. 23, 2010). Decisions of the Court are available online at http://www.echr.coe.int/.

[2] Sabeh el Leil v. France, App. No. 34869/05 (Eur. Ct. H.R. June 29, 2011).

[3] Nov. 4, 1950, ETS No. 5, 213 UNTS 222.

[4] United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex (Dec. 2, 2004) [hereinafter UN Immunities Convention].

March 2000, the applicant's contract was terminated, ostensibly as part of a wider "restructuring of all the Embassy's departments" (para. 10).

Sabeh el Leil brought his termination to the attention of the Paris Employment Tribunal. In a decision of November 2000, the tribunal rejected Kuwait's assertion of jurisdictional immunity because the applicant's employment at the embassy was "an expressly private-law activity" (para. 12), and the tribunal granted Sabeh el Leil an award equivalent to €82,224.60. Dissatisfied with the amount of the award, Sabeh el Leil appealed to the Paris Court of Appeal, which set aside the Employment Tribunal's judgment. The Court of Appeal held that the applicant, "in view of his level of responsibility and the nature of his duties as a whole, did not perform mere acts of management but enjoyed a certain autonomy which meant that he carried out his activities in the interest of the public diplomatic service" (para. 15). The Paris Court of Appeal thus held that Sabeh el Leil's claims against Kuwait were inadmissible by "virtue of the principle of jurisdictional immunity of foreign States" (*id.*). The applicant then initiated an appeal in the French Court of Cassation, which, in March 2005, denied review (para. 17). In September 2005, proceedings were brought by Sabeh el Leil against France under the European Convention on Human Rights (para. 1), which culminated in the Grand Chamber's June 2011 ruling.

After rejecting France's preliminary objection that the application was inadmissible for failure to exhaust domestic remedies (paras. 28–34), the Grand Chamber turned to the substance of Sabeh el Leil's assertion that he had been denied a fair hearing under European Convention Article 6(1), and its public international law implications. The Court found that the European Convention's right to a fair hearing was certainly applicable in Sabeh el Leil's case (paras. 36–41), and so the critical question for the Court's consideration was whether France had complied with this provision. The Grand Chamber reiterated that Article 6(1)'s "right of access" was to be interpreted consistently with "any relevant rules of international law applicable in the relations between the parties," as stipulated under Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (para. 48).[5] One of the "inherent" limitations that international law imposed on access to justice, the Grand Chamber held, are "those limitations generally accepted by the community of nations as part of the rule of State immunity" (para. 49). But it was up to the Court, as it had been in previous decisions,[6] to apply "the rule[s] of State immunity from jurisdiction" and "ascertain whether the circumstances of the case justified such [a] restriction" (para. 51) on the right of access to courts guaranteed by Convention Article 6(1).

Essential to the Grand Chamber's determination whether French courts had adequately justified their application of foreign state immunity in denying access to Sabeh el Leil was the proper reading of the 2004 UN Immunities Convention. The relevant portions of Article 11 of that instrument, Contracts of Employment, provide:

> 1. 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 a contract of employment between the State and an individual

[5] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331, 8 ILM 679 (1969) [hereinafter Vienna Convention].

[6] *See, e.g.*, Fogarty v. United Kingdom, 2001-XI Eur. Ct. H.R. 157; Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79; Marius Emberland, Case Report: Fogarty v. United Kingdom, Al-Adsani v. United Kingdom, *in* 96 AJIL 699 (2002); *see also Cudak*, App. No. 15869/02.

for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

(b) the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

. . . or

(iv) any other person enjoying diplomatic immunity;

. . .

(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum . . . .

In the *travaux préparatoires* of the 2004 Immunities Convention, the UN International Law Commission (ILC) understood Article 11(2) as allowing proceedings in the forum state for "compensation or damages for 'wrongful dismissal'" arising from employment contracts and as precluding foreign sovereign immunity in such circumstances (para. 21).

Likewise, in reviewing the case law of the French Court of Cassation, the Grand Chamber concluded that French courts typically would reject jurisdictional immunity in instances where an aggrieved employee was not "exercis[ing] . . . the foreign State's sovereignty, as opposed to an act of administration" (para. 24). Under these precedents, the dismissals of a caretaker, a nurse/medical secretary, and a senior clerk in a consulate, all of them embassy employees who otherwise "had no particular responsibility in the exercise of the public diplomatic service," were not subject to foreign sovereign immunity and the matters could proceed in French courts (para. 25). The Court of Cassation went further and ruled that when a foreign state had decided to close a consulate, resulting in the termination of some employees, "French courts retain[ed] the power to verify the reality of the closure and to rule on the consequences of any redundancy caused thereby" (*id.*).[7]

In light of these rules of state immunity, and their previous application by French tribunals, it remained for the Grand Chamber to reconcile any decision in *Sabeh el Leil* with its 2010 ruling in *Cudak v. Lithuania*. In *Cudak*, a Lithuanian national and switchboard operator/receptionist at the Polish Embassy in Vilnius had brought a complaint in the Lithuanian courts for wrongful termination and the Grand Chamber had held that the matter had been improperly dismissed on the basis of foreign sovereign immunity. There had thus been a violation of Article 6(1). The Grand Chamber elaborated and held that Cudak's duties at the embassy had in no way implicated the "sovereign interests" of Poland. Nor had Cudak's activities involved any Polish security interests, and any suggestion to the contrary was belied by the finding of

[7] *See* Cour de cassation soc., Mar. 31, 2009, Bull. civ. V, No. 92 (Fr.).

the Lithuanian Equal Opportunities Ombudsman that Cudak had been dismissed from her position when she complained of sexual harassment by another embassy employee.[8]

The Grand Chamber in *Sabeh el Leil* concluded that none of the exceptions to Article 11 of the 2004 Immunities Convention was applicable. Sabeh el Leil was neither a Kuwaiti national (within the meaning of Article 11(2)(e)), nor a member of Kuwait's diplomatic or consular staff (under Article 11(2)(b)) (para. 60). Even more pertinently, Sabeh el Leil's duties and functions at the Kuwaiti Embassy were such as not to implicate "the exercise of governmental authority" (under Article 11(2)(a)) (para. 61). Likewise, in the absence of any recorded assertion by Kuwait (through its head of state, head of government, or minister of foreign affairs), Sabeh el Leil's proceeding did not pose any "risk of interference with the security interests" of Kuwait (under Article 11(2)(d)) (*id.*).[9] As for the Paris Court of Appeal's unsupported finding that Sabeh el Leil had acquired "additional responsibilities" at the embassy (para. 15)—including financial services for the Kuwait Boundary Demarcation Commission and the Council of Arab Ambassadors in Paris, and (presumably) his service as a staff representative on an informal basis—the Grand Chamber found that such an assertion could not amount to converting the applicant's position from an administrative basis to one involving the sovereign interests of Kuwait (paras. 62–64).

The last point to be dispensed with by the Grand Chamber in *Sabeh el Leil* was also confronted in *Cudak*: neither France nor Lithuania had, by the time of the Court's decision,[10] completed the formalities of ratification of the 2004 UN Immunities Convention (paras. 22, 57). Indeed, even as of the date of this writing, the Immunities Convention had not entered into force, lacking the thirty necessary ratifications, approvals, accessions, or acceptances. The Court nonetheless held that the rules contained in Article 11 of the Immunities Convention were binding on France as customary international law (paras. 54, 57). Considering that France had done nothing to oppose the Convention after signing it on January 17, 2007, and that the ratification procedure was still pending before the French Assembly, the Grand Chamber applied Article 11 to France in the same way as it had to Lithuania in *Cudak*.[11]

The Grand Chamber unanimously found a violation of Article 6(1) of the European Convention's "fair hearing" protection, inasmuch as French courts had misapplied "the applicable provisions of [the] international law" of state immunity (paras. 67–68). The Court awarded Sabeh el Leil €60,000 in damages and €16,678 in costs (paras. 72, 75).

* * * *

Among the most notable aspects of the Grand Chamber's rulings in *Sabeh el Leil* and *Cudak* was the affirmation that the international law of state immunity was decisive in interpreting the reach of the guarantee of a fair hearing in employment disputes involving the termination of personnel at official establishments within the member countries of the Council of Europe.

[8] *Cudak*, paras. 70–72.

[9] *See* UN Immunities Convention, *supra* note 4, annex, Understanding with Respect to Article 11 ("The reference in article 11, paragraph 2(d), to the 'security interests' of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.").

[10] France approved the 2004 UN Immunities Convention on August 12, 2011. *See* United Nations, Multilateral Treaties Deposited with the Secretary-General, *at* http://treaties.un.org/ [hereinafter Multilateral Treaties]. Lithuania has taken no action at all with respect to the Convention. *See id.*

[11] *Cudak*, paras. 66–67 (citing North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 41, para. 71 (Feb. 20)).

While this conclusion was couched as part of the principle of proportionality in construing the European Convention's protections (para. 47), the *Sabeh el Leil* Court reiterated that using public international law as the rule of decision in such cases was part and parcel of the "Convention's special character as a human rights treaty . . . tak[ing] . . . into account . . . those [rules] relating to the grant of State immunity" (para. 48).[12] The Court found itself attempting to balance what may be two contradictory objectives here. The first is to "promote comity and good relations between States through the respect of another State's sovereignty" and the proper application of rules of sovereign immunity (para. 52). The other is to ensure that parties to the European Convention cannot, "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 categories of persons" (para. 50).

While the Grand Chamber arguably achieved the correct result in *Sabeh el Leil* and *Cudak* (rejecting assertions of foreign sovereign immunity and awarding damages for violation of European Convention Article 6(1)),[13] the manner in which it reached its conclusions under the international law of state immunity was profoundly flawed. There are major defects in the Court's jurisprudence on foreign sovereign immunity in employment disputes.

These defects stem from the assumptions that the 2004 Immunities Convention is in force and that the provisions of Article 11 are binding on the relevant parties in *Sabeh el Leil* and *Cudak*.[14] Some commentators have observed that Article 11 is inordinately complex and difficult to apply in practice.[15] This provision sets forth a default rule that states cannot normally invoke sovereign immunity in proceedings relating to employment contracts.[16] The balance of Article 11 sets forth exceptions to this rule, which, the Grand Chamber emphasized in its *Sabeh el Leil* decision, were "exhaustively enumerated" (para. 60) and were to "be strictly interpreted" (para. 66). The key exceptions to Article 11(1), for the purposes of the Court's review of compliance with the international law of state immunity, were that (1) the applicant is a national of the employer state (Art. 11(2)(e)); (2) the dispute concerns the recruitment or reinstatement of the applicant (Art. 11(2)(c), (d)); (3) the employee exercises "governmental authority" (Art. 11(2)(a)); (4) the resolution of the employment dispute in the forum state will "interfere with the [national] security interests of" the employer state (Art. 11(2)(d) & Understanding re Art. 11); and (5) the employee has diplomatic or consular status (Art. 11(2)(b)). If any of these conditions arises, the employer can legitimately assert state immunity. While the Grand Chamber's approach in reviewing a domestic court's decision for compliance with the international law of state immunity appears sensible, nothing in the text of Article 11 necessarily suggests that this list of exceptions is exhaustive or is to be construed narrowly.[17] Therefore, one of the crucial textual assumptions made by the Court may be spurious.

[12] *See also Cudak*, paras. 56–57; Fogarty v. United Kingdom, 2001-XI Eur. Ct. H.R. 157, paras. 35–36.

[13] *But see Cudak*, Concurring Opinion of Judge Malinverni (noting that proper remedy may be reopening of Lithuanian proceedings, instead of awarding damages for a violation of Convention Article 6(1)).

[14] Nowhere in the Grand Chamber's decisions is the status of the Immunities Convention discussed in relation to Kuwait or Poland, the countries against which an employment claim was brought. Neither Kuwait nor Poland has signed the Convention, or taken any other action with respect to that treaty. *See* Multilateral Treaties, *supra* note 10.

[15] *See, e.g.*, HAZEL FOX, THE LAW OF STATE IMMUNITY at x, 242–44, 308–09 (paperback ed. 2004 with new preface, corrections, supplementary bibliography, and updated table of cases) (2002) [hereinafter FOX 2004]; *see also id.* at 548–49 (2d ed. 2008) [hereinafter FOX 2008].

[16] UN Immunities Convention, *supra* note 4, Art. 11(1).

[17] *See* FOX 2004, *supra* note 15, at x n.5 (quoting UK criticism of Article 11).

Even more astonishing is a point barely acknowledged by the Court in *Sabeh el Leil* and *Cudak*: the UN Immunities Convention has not entered into force.[18] The Grand Chamber did understand that inasmuch as (at the time of its decisions) neither France nor Lithuania had completed the ratification process for the Convention, its terms could not be applied directly. Instead, the Court held in *Sabeh el Leil* that Article 11 was binding as customary international law (paras. 54, 57). But the only support that the Grand Chamber could muster for this proposition was the fairly prosaic assertion that "absolute State immunity has, for many years, clearly been eroded" (para. 53),[19] and that states, like France, that had not ratified the Convention were subject to the article provided they "ha[d] not opposed it either" (para. 54). A much stronger ground for the Court to have invoked in *Sabeh el Leil* would have been Article 18 of the 1969 Vienna Convention,[20] inasmuch as France had signed the Immunities Convention. Arguably, French tribunals were under an obligation to follow the provisions of Article 11 of the Immunities Convention until the acceptance formalities were completed (which occurred in August 2011). In these respects, the holding in *Sabeh el Leil* seems sound—but not its reliance on customary international law.

Such cannot be said about the Grand Chamber's ruling in *Cudak*. After all, Lithuania had not even signed the Immunities Convention, so that not even the rationale of Article 18 of the Vienna Convention could save the Court's holding. In persisting with its logic, the Grand Chamber noted that the substance of Article 11 was "consistent with the emerging trend in the legislative and treaty practice of a growing number of States."[21] But the only state practice discussed in *Cudak* was Lithuania's case law.[22] This is hardly the authority the International Court of Justice (ICJ) meant to invoke in its discussion in the *North Sea Continental Shelf Cases* (cited by the *Cudak* Court) as the basis for "forming a new customary rule."[23] According to the Grand Chamber, the mere fact that Lithuania had made no objection to Article 11 in the drafting process before the ILC, and had not opposed the adoption of the Convention[24] (presumably before the General Assembly's Sixth Committee) was enough to make it binding as customary international law.[25]

[18] The Convention (at Article 30) requires thirty ratifications (or the equivalent action) to enter into force. As of October 14, 2011, there were only thirteen parties. *See* Multilateral Treaties, *supra* note 10.

[19] *See also* Cudak v. Lithuania, App. No. 15869/02, para. 63 (Eur. Ct. H.R. Mar. 23, 2010) ("[T]here was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies.") (citing Fogarty v. United Kingdom, 2001-XI Eur. Ct. H.R. 157, paras. 37–38).

[20] Vienna Convention, *supra* note 5, Art. 18 ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . .").

[21] *Cudak*, para. 66 (citing [1991] 2 Y.B. Int'l L. Comm'n, pt. 2, at 44, para. 14, UN Doc. A/CN.4/SER.A/1991 (Part 2) (discussing the 1991 draft articles, a rather truncated version of the text finally adopted in 2004; the 1991 draft Article 11 is reprinted in *Cudak*, para. 28)).

[22] *See id.*, paras. 22–23 (discussing the decisions of the Lithuanian Supreme Court of Dec. 21, 2000, and Apr. 6, 2007).

[23] *Id.*, para. 66.

[24] *Id. But see id.*, Concurring Opinion of Judge Cabral Barreto (noting the "ambiguity" in the Grand Chamber's holding).

[25] Seventeen of the forty-seven members of the Council of Europe are signatories to the UN Immunities Convention. Of the seventeen, only eight have completed the ratification, accession, acceptance, or approval process. *See* Multilateral Treaties, *supra* note 10.

The Grand Chamber's jurisprudence in correlating Article 6(1) violations with the law of state immunity thus reduces to whether the decision under review generally comports with other rulings made by that country. In *Sabeh el Leil*, the Grand Chamber could confidently hold that the Court of Cassation had previously given a rigorous review to foreign state action in terminating embassy and consulate employees (para. 59), even going so far (in its judgment of March 31, 2009) as to review a country's decision to close a mission and to find that the employee had been wrongfully terminated.[26] With such "precedent," it was hardly coherent for French tribunals to rule against an applicant, like Sabeh el Leil, who had been rendered redundant because of alleged "restructuring" on "economic grounds" (para. 10). In short, the French case law was inconsistent, and the French tribunals in *Sabeh el Leil* had failed to "giv[e] relevant and sufficient reasons" for their decisions and to apply international law properly (para. 67).[27]

This means that a European tribunal's compliance with the international law of state immunity will be a self-proving proposition—dependent on the Grand Chamber's assessment of the domestic tribunal's consistency with its earlier precedents. That does not implicate any recognizable analysis under customary international law, as the Grand Chamber purported to conduct, since it relied on the ICJ's famous formulation in the *North Sea Continental Shelf Cases*. Instead, that would practically require a searching review of precedents from a wide cross section of parties to the European Convention and a determination of whether such rulings are supported by *opinio juris*. Such an analysis has not been forthcoming from the Grand Chamber. In the meantime, observers will have to be content with summary proceedings that allow the European Court to stand—rather unsteadily—as an arbiter on questions of foreign state immunity.

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European Convention on Human Rights—extraterritorial application—territorial and personal jurisdiction—effective control—right to life—occupation of Iraq

AL-SKEINI v. UNITED KINGDOM. App. No. 55721/07. 50 ILM 995 (2011), *available at* http://www.echr.coe.int/.

European Court of Human Rights (Grand Chamber), July 7, 2011.

In *Al-Skeini* v. *United Kingdom*, decided on July 7, 2011,[1] the Grand Chamber of the European Court of Human Rights in Strasbourg (the Court) found that the human rights obligations of the United Kingdom applied to its actions in Iraq and that the United Kingdom had

Only eight members have completed the ratification process of the European Convention on State Immunity, May 16, 1972, ETS No. 74, 1495 UNTS 182 (entered into force June 11, 1976). *See* European Convention on State Immunity, *at* http://www.conventions.coe.int/. Article 5 of the European Convention concerns employment disputes, but bears little resemblance in substance to Article 11 of the UN Immunities Convention, and has not been regarded as expressive of customary international law. *See* FOX 2004, *supra* note 15, at 305–07; FOX 2008, *supra* note 15, at 549.

[26] *See* text at note 7 *supra*.

[27] The Grand Chamber clearly rejected the argument that Sabeh el Leil had greater "governmental authority" than the applicant in *Cudak*, by virtue of his functions as an unofficial staff representative (paras. 62–64). But this was a procedural ruling, based on the lack of appropriate "documents or facts" found by the Paris Court of Appeal (para. 64).

[1] Al-Skeini v. United Kingdom, App. No. 55721/07 (Eur. Ct. H.R. July 7, 2011), 50 ILM 995 (2011). Judgments and decisions of the Court are available online at http://www.echr.coe.int/.