# STATE AND DIPLOMATIC IMMUNITY AND EMPLOYMENT RIGHTS: EUROPEAN LAW TO THE RESCUE?

RICHARD GARNETT*

**Abstract** The issues of State and diplomatic immunity in cases involving persons employed by foreign States in embassies or consulates or engaged directly by diplomats remain controversial. The focus of this article is on recent developments in European law, in particular under the European Convention on Human Rights, the Brussels I Regulation and the Charter of the European Union, the effect of which has been to enhance the rights of employees of foreign States. Analysis is also made of the United Nations Convention on Jurisdictional Immunities of States and their Property and the current domestic practice of States with the aim of identifying the present international law standard on State immunity and embassy and consular employment. Employees of diplomats, however, remain inadequately protected and this article considers possible strategies for improving their position.

**Keywords**: diplomatic immunity, employment, European law, labour, State immunity.

## I. INTRODUCTION

The issues of State and diplomatic immunity in employment cases continue to cause controversy, particularly in the case of persons employed by foreign States in embassies and consulates and those engaged directly by diplomats and consular officials. In the case of persons employed at embassies and consulates, there are a range of different workers including translators, secretaries, drivers, clerks, technical support staff, librarians and chefs. Significantly, many of these roles, having limited contact with sensitive government material or policies of the State employer, are filled by nationals and residents of the forum State, that is, the country in which the embassy or consulate is located. By contrast, diplomatic or senior policy positions in the mission are almost always held by nationals of the sending State.

In the case of employees performing largely routine or subordinate tasks in embassies or consulates, the nature of the work performed may be indistinguishable from that performed in the private sector. In principle, therefore, it seems logical and appropriate that such persons be treated in

* Professor of Law, The University of Melbourne; Consultant, Herbert Smith Freehills, r.garnett@unimelb.edu.au.

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the same manner as non-government employees in terms of their rights of redress against their employer, for example, for a severance entitlement or compensation arising from a wrongful dismissal. Hence, there should be few situations where the foreign State may resist such claims on the ground of State immunity. A similar position should also apply to claims brought by persons employed directly by diplomats or consular officials either to perform duties in the mission or domestic tasks in the officer's residence such as cooking, cleaning or child minding. Again, where the nature of such work closely resembles that performed for non-government employers, the employee should enjoy equivalent rights. It follows that any plea by the diplomat or consular officer of diplomatic or consular immunity should rarely be accepted.

The basic proposition is that in an increasingly mobile and interconnected world employees should be able to move from workplace to workplace without having their rights substantially curtailed by their choice of employer. It is true that States are not identical to private companies or non-governmental organizations and on occasion perform uniquely sovereign functions that must be shielded from foreign legal process and review. Yet such an argument should not be taken so far as to bar legitimate claims for redress by low-level employees. Some commentators have advocated a test for State immunity in employment claims which focuses predominantly on the role and functions of the employee[1] and it is significant that in a number of recent decisions of European supranational and domestic courts as well as other national tribunals there is now a clear trend in this direction. If such a development continues, then an appropriate balance between the right of a foreign State to protection of its sovereign affairs and the right of an employee to adequate and non-discriminatory redress will arguably have been achieved.

Before examining this issue in detail, some preliminary comments regarding the doctrines of State and diplomatic immunity are necessary. State immunity is a principle of public international law whereby a government may not be sued before another country's courts without its consent. Since the 1970s customary international law has recognized the concept of restrictive immunity where a foreign State may be sued in respect of transactions of a commercial or private law character but not matters concerning the State's sovereign or governmental activities. Yet, in the specific context of employment at embassies and consulates, the position has historically been more complex and varied with some States (such as the United Kingdom) adopting a policy of absolute immunity while others favouring a restrictive view, allowing an employee to sue in certain cases. Among the countries supporting restrictive

[1] See eg R Garnett, 'The Precarious Position of Embassy and Consular Employees in the United Kingdom' (2005) 54 ICLQ 705 and I Pingel, 'Immunité de Juridiction et Contrat de Travail: du Nouveau' (2003) Journal du Droit International 1115.

immunity, a diversity of approaches has also been apparent. Some States have focused on the role and functions of the employee, with persons in menial, non-policy positions entitled to sue, while other jurisdictions have placed emphasis on the type of claim brought by the employee, with economic suits, such as for unpaid wages, admissible but not proceedings challenging a wrongful dismissal, especially where orders for reinstatement to a position are sought. Still other States have given weight to the nationality and residence of the employee, with persons holding the nationality and/or residence of the forum State having a greater entitlement to redress. A combination of the above approaches has also been apparent in some court decisions and national legislation on State immunity, as well also in treaty provisions such as Article 11 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (the UN Convention). Article 11 is considered in detail below.

Hence, the general position in terms of State practice regarding the rights of employees in diplomatic and consular missions has, until recently, been diverse and inconsistent with some countries being very generous in allowing adjudication of claims while others being much less accommodating. An employee in Europe, therefore, would enjoy substantially different rights and legal outcomes depending on the country in which he or she happened to be employed, since in almost all cases actions are brought in the courts of the State of employment. Yet the past ten years have witnessed dramatic changes in the European legal landscape with respect to embassy and consular employment. Instruments such as the European Convention on Human Rights (ECHR), the Council Regulation on Jurisdiction and Judgments in Civil and Commercial Matters (the Brussels I Regulation) and regulations and directives from European Union (EU) law have been increasingly relied upon to limit the operation of State immunity. In addition, as will be argued below, State practice, both in European countries and elsewhere, is now converging around the idea that State immunity should only be imposed where the employee is engaged in duties that implicate the foreign State's sovereignty. Employees in routine and generic roles, by contrast, should be entitled to seek redress. There is little evidence so far, however, of a parallel trend in the area of diplomatic immunity but this may also be about to change. The remainder of this article will examine these recent developments and assess the extent to which European law principles are 'coming to the rescue' of foreign State employees.

## II. EUROPEAN LAW INFLUENCE: THE ECHR

The ECHR applies in all 47 countries which are member States of the Council of Europe.[2] The key provision under the ECHR of relevance to State immunity and

[2] <http://hub.coe.int/>.

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employment disputes is Article 6(1) which provides that everyone is entitled to a public hearing by a tribunal in the determination of its civil rights. This article has been interpreted to include a right of access to a Member State's courts.[3]

### A. *The* Fogarty *Decision*

The first case before the European Court of Human Rights (ECtHR) to consider the interrelationship of national law rules of State immunity and Article 6 in the employment context was *Fogarty v The United Kingdom*.[4] *Fogarty* concerned an Irish national who was employed as an administrative assistant at the United States Embassy in London in the Foreign Broadcasting Information Service. She was dismissed from her post and subsequently obtained compensation for sex discrimination in the UK courts. The United States waived its immunity in this litigation. Fogarty then applied for a further position at the Embassy for which she was rejected, a decision that she again challenged in the UK courts on the ground of sex discrimination. On this occasion, however, the United States claimed immunity under section 16 of the State Immunity Act 1978 (UK) (SIA).

Section 4(1) of the SIA provides that 'a state is not immune in respect of proceedings relating to a contract of employment between the state and an individual where the contract was made in the UK or the work is to be wholly or partly performed' there. Section 16, however, excludes from the scope of section 4 claims concerning the employment of members of a mission as defined in the 1961 Vienna Convention on Diplomatic Relations (VCDR) and the 1964 Vienna Convention on Consular Relations (VCCR). Under Article 1 of these instruments, a member of a mission includes not only diplomatic or consular officers but also low-level administrative and technical personnel. As noted above, section 16 fails to take account of the different types of employment within an embassy or consulate, in particular that many positions have limited connection to the sovereign activities of the State. According to the UK SIA, therefore, a cook is as equally disentitled to sue his or her employer as is an adviser to the ambassador, even though both obviously have different levels of responsibility and contact with sensitive government material. In effect, therefore, a version of absolute immunity exists in respect of consular and embassy employment in the UK.[5]

Returning to the *Fogarty* case, the claimant employee brought an action in the ECtHR against the United Kingdom, alleging that the grant of immunity under section 16 of the SIA violated the right of the employee to access a court to obtain redress under Article 6. The ECtHR rejected the argument, finding that where a State's grant of immunity to a foreign State was consistent with the

[3] *Golder v UK* (1975) 57 ILR 200.
[4] (2002) 34 EHRR 12.
[5] See Garnett (n 1) 707 quoted in *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 para 47.

principles of public international law, there is no violation of Article 6. In determining whether section 16 complied with international law, the court acknowledged that there was a general trend towards limiting immunity in employment-related disputes. National practice was, however, much more divided where the action involved employment at *diplomatic or consular missions*: while some States, such as the UK, granted immunity in respect of all employee claims, others granted it only in respect of acts by senior staff. It was therefore not possible to conclude that the UK position was so clearly aberrant to be in breach of international law.[6]

Secondly, the court noted that questions relating to the recruitment of staff to missions may by their very nature involve sensitive and confidential issues relating to the diplomatic or organizational policy of a foreign State. The court found that there was no evidence of any international trend towards 'relaxation of the rule of state immunity' in the context of recruitment to foreign missions.[7]

Two main threads therefore underlay the ECtHR's decision in *Fogarty:* first, that in 2001 it was impossible to identify a general customary international law rule of State immunity in respect of consular and diplomatic employment cases but second, in cases where orders for recruitment or reinstatement were sought, customary law clearly required the imposition of State immunity. Since cases in which recruitment or reinstatement have been sought have arisen very rarely in national court practice, this second finding of the court was uncontroversial. Reinstatement claims, in particular, are likely to have been few in number given the natural reluctance of an employee to return to a place of employment which has been the subject of a dispute.

The potentially far more significant finding in *Fogarty* for future cases was the conclusion that, apart from claims of recruitment or reinstatement, no general customary international law position existed in respect of embassy and consular employment disputes. Such an outcome would have potentially grave consequences for employees since it would allow a State to impose absolute immunity in respect of all disputes, consistently with Article 6 of the ECHR. There could therefore be no scope for ECtHR review of any employment case, regardless of the worker's duties or the particular claim filed before the national court. An employee's capacity for redress therefore would depend entirely on the country of employment and the forum in which litigation was brought. It seemed, therefore, after *Fogarty* that the various national laws on State immunity and diplomatic and consular employment would remain unaffected with little scope for control or influence at the supranational European law level.

[6] *Fogarty v The United Kingdom* para 37; see also the Concurring Judgment of Judges Caflisch, Costa and Vajic.

[7] ibid, para 38.

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### B. The United Nations Convention on Jurisdictional Immunities of States and their Property

A significant development, however, occurred three years after *Fogarty* when the UN Convention was adopted by the UNGA. Article 5 of the Convention provides the presumptive rule that a State enjoys immunity from the jurisdiction of the courts of another State subject to the provisions of the present Convention. Article 11 is the relevant provision for contracts of employment but is slightly ambiguous on the status of embassy and consular employment disputes. While Article 11(1) provides for a general exception to immunity 'in a proceeding which relates to a contract of employment' for work performed in the territory of the forum, State immunity is then restored in a range of situations in paragraph (2). For example, immunity applies where the employee is a diplomatic agent or consular officer (subparagraphs (2)(b)(i) and (ii)),[8] where 'the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual' (subparagraph (2)(c)) or where the employee is a national of the employer State at the time when the proceeding is instituted, unless the person is a permanent resident of the forum State (subparagraph (2)(e)). The above exceptions are largely uncontroversial since few, if any, nation States would admit such claims in their current practice.

The more contentious exceptions are contained in subparagraphs (a) and (d). According to (a) immunity will apply if the employee has been 'recruited to perform particular functions in the exercise of governmental authority'. Article 11(2)(d) provides that immunity will apply where 'the subject 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'.

At first glance both such provisions have the potential to exclude a wide range of employee claims. Subparagraph (a) was derived from an earlier provision (also Article 11(2)(a)) in the 1991 International Law Commission Draft Articles on State Immunity (ILC Draft Articles) which imposed immunity where 'the employee has been recruited to perform functions closely related to the exercise of governmental authority'. Such provision was interpreted to exclude suit by all persons 'entrusted with functions related to state security

[8] The reference in subpara (2)(b)(iv) to immunity being conferred in an action brought by 'any other person enjoying diplomatic immunity' is best understood as not embracing a mission's administrative or technical staff even though under the 1961 Vienna Convention on Diplomatic Relations, such persons may be entitled to claim diplomatic immunity. Any other interpretation would fatally undermine the Convention's intended policy of restrictive immunity for embassy and consular employment expressed in art 11. See J Foakes and R O'Keefe, 'Article 11' in R O'Keefe and C Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (OUP 2013) 201–2 cited in *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 para 38.

or basic interests of the State'.[9] Apart from persons in senior, policy-oriented roles, 'private secretaries, code clerks, interpreters and translators' were barred from suing. Such a result would be closer to that applicable in States such as the UK that have imposed absolute immunity in respect of mission employment disputes. Indeed, the intention to exclude all administrative and technical staff at missions from their right to sue their foreign State employer is also made clear from comments by the Special Rapporteur of the ILC where he said that subparagraph (2)(a) was aimed at 'exclud[ing] administrative and technical staff of a diplomatic mission from the application of [the general exception to immunity in] paragraph 1'.[10]

Yet in 1999 the ILC Working Group, now under the chairmanship of Gerard Hafner, recommended an important change to Article 11(2)(a) of the ILC Draft Articles, with the aim of further restricting the scope of immunity. Henceforth, immunity would only apply where 'the employee has been recruited to perform particular functions *in the* exercise of governmental authority'.[11] Hafner, who was also Chairman of the UN Working Group which drafted the final version of the Convention, clearly intended that a more limited range of staff was to be embraced by the provision than under the original version. Notably, he refused to amend the provision in response to suggestions by other ILC members[12] that 'administrative and technical staff' should be specifically referred to in Article 11(2)(a) and denied rights to sue. Hafner stated that there is 'no reason why administrative staff, for whom the practice of the courts was still not established, should be included in one particular category'.[13] In his view, therefore, it would be wrong presumptively to impose a blanket immunity in respect of claims by all administrative employees; the better approach is to apply the principle in subparagraph (2)(a) to determine if, on the facts of a given case, each employee was performing acts in the exercise of governmental authority and so decide immunity on an individual basis. In that way, regard could be had to the specific functions and roles carried out by the employee.

The issue arose again after the Draft Articles were referred by the ILC to the UN General Assembly Sixth Committee Working Group, with Hafner noting that 'some delegations considered that the formulation of subparagraph (a) as proposed by the Chairman was too limited and that other categories of employees should be specified … (such as) administrative and technical staff'.[14] Once more, however, the provision was not altered and in his later commentary on the Convention, Hafner confirmed that subparagraph (2)(a) was not intended to include all embassy and consular employees. Writing in 2010 he noted that while the original version as drafted by the ILC 'was potentially much wider' in its coverage of mission employees, the final

[9] (1991) II(2) YBILC 13, 42–43.
[10] ibid 34.
[11] Foakes and O'Keefe (n 8) 190, emphasis added.
[12] Gaja, Simmer and Economides.
[13] (1999) I YBILC para 33.
[14] (A/C.6/55/L.12 10 November 2000).

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Convention provision does not embrace all administrative, technical or service staff without exception. Whether such employees in fact fall under (2)(a) will be 'subject to their functions performed in the mission' with those 'performing auxiliary functions' excluded.[15]

It will therefore arguably be staff occupying positions implementing foreign and defence policies of the State, having contact with sensitive government material or performing roles with no private sector equivalent that will likely be found to perform 'functions in the exercise of governmental authority'. A person responsible for issuing passports and visas,[16] advising the government and representing it at diplomatic conferences[17] or providing intelligence-related services[18] would probably fall within this category. By contrast a chauffeur, responsible for driving members of the mission, an accountant,[19] or a marketing and product promotions agent[20] are all arguably performing too generic and routine roles to be included. Service staff, such as cooks, cleaners, butlers or other persons responsible for 'maintain[ing] the physical fabric'[21] of the mission, would also be excluded. If this limited view of the provision is correct,[22] then a substantial step has been taken to narrow the operation of State immunity in mission employment cases.

The other potentially contentious subparagraph in the UN Convention is Article 11(2)(d) which confers a discretion on senior officers in the defendant employer State to characterize any claim for wrongful dismissal or termination as one that 'interferes with (its) security interests' and in doing so, reinstate immunity. It is not known why such a provision was included since it was not present in the ILC Draft Articles.[23] Unfortunately the subparagraph does have the potential to restore State immunity in many disputes where it otherwise would not have applied, since wrongful dismissal is a common complaint. 'Security interests' here refers to matters of national security as well as to security of diplomatic missions and consular posts.[24] There is very little guidance on this provision although Hafner in his 2010 commentary

[15] G Hafner, 'United Nations Convention on Jurisdictional Immunities of States and Their Property' in *Max Planck Encyclopaedia of Public and International Law* (OUP 2010) paras 26–27.

[16] *Sanchez-Ramirez v The Consulate General of Mexico* 2013 US Dist Lexis 109888 (ND Cal) (aff'd 9th Cir CA May 18 2015).

[17] *Hijazi v Permanent Mission of Saudi Arabia to the United Nations* 403 Fed Appx 631 (2nd Cir 2010).

[18] *Eringer v Principality of Monaco* 533 Fed Appx 703 (9th Cir 2013).

[19] *El-Hadad v United Arab Emirates* 496 F 3d 658 (DC Cir 2007).

[20] *Holden v Canadian Consulate* 92 F 3d 918 (9th Cir 1996).

[21] *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426, 436.

[22] See, for supporting views, Foakes and O'Keefe (n 8) 198–200; U Köhler, 'Contracts of Employment under the UN Convention on Jurisdictional Immunities of States and Their Property' (2004) 9 Austrian Review of International and European Law 191, 207; and H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 448–9 although note that these last mentioned authors also suggest that art 11(2), when read as a whole, 'largely reinstates the absolute [immunity] doctrine'; 437, 443.

[23] Foakes and O'Keefe, ibid 193.

[24] See the Understanding with respect to art 11 in Annex to the Convention.

suggests that it was intended to be sparingly used with the risk of 'misuse' being limited by the requirement that 'the existence of such security interests … be determined by a superior state organ'.[25] It remains to be seen whether Hafner's confidence in its limited use is justified. States with absolute views of State immunity in employment cases could be tempted to rely on their wide discretion under the provision to obstruct employees' claims and there would be little, if any, scope for claimants to obtain judicial review of such decisions.[26] Fortunately, in a recent Indian decision,[27] the court was careful not to find immunity under this provision where there had been no determination by the relevant foreign government authority that the proposed action for wrongful dismissal would interfere with the State's security interests.[28]

### C. *The* Cudak *and* Sabeh El Leil *Decisions*

#### 1. Cudak *and customary international law*

Six years after the UN Convention was adopted, the ECtHR re-entered the debate, in spectacular fashion, with its groundbreaking decision in *Cudak v Lithuania*.[29] The employee Cudak worked in the Polish Embassy in Lithuania in the position of secretary and switchboard operator. The contract of employment specified that her duties consisted of the following: operating the switchboard, fax machine and photocopier of the Embassy, recording international telephone conversations, typing texts and providing information in Lithuanian, Polish and Russian and helping to organize small receptions and parties. Cudak first brought a complaint before the Lithuanian Equal Opportunities Ombudsman, alleging sexual harassment by one of the diplomatic staff of the Embassy, a claim that was upheld. Shortly afterward the claimant was dismissed from her post whereupon she brought a civil claim for compensation for wrongful dismissal before the Lithuanian courts. She did not seek reinstatement to her former position. The Polish Government pleaded State immunity, which was upheld by the Lithuanian Supreme Court. Cudak then brought an action before the ECtHR alleging that the finding of State immunity by the Lithuanian court had deprived her of the right of access to a court in breach of Article 6 of the ECHR.

The ECtHR began its judgment by noting that consistent with its earlier decision in *Fogarty*, the right of access to a court was not absolute but could be subject to limitations imposed by a Member State, provided that such limitations do not impair 'the very essence of the right'.[30] Again it was said that a limitation on the right of access to a court will not be acceptable if it

[25] Hafner (n 15) para 27. [26] Foakes and O'Keefe (n 8) 205; Garnett (n 1) 717.
[27] *Shyam Lal v Union of India* [2010] INDLHC 4446 (16 September 2010) (High Court of Delhi). [28] ibid, para 11. [29] (2010) 51 EHRR 15.
[30] Para 55.

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does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Further, measures taken by a Member State 'which reference generally recognized principles of public international law on state immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court'.[31]

So far, the ECtHR in *Cudak* has faithfully replicated its analysis in *Fogarty.* Applying the above principles to the facts, the court also found, similar to *Fogarty*, that the application of State immunity by the Lithuanian courts pursued a legitimate aim. The key question, however, was whether the restriction on the right of access to a court was proportionate to the aim pursued. On this issue the court first made an important statement. It stated that: 'the Court found, already in the *Fogarty* judgment, that there 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'.[32]

Such an observation is, however, a rather incomplete précis of the *Fogarty* case. While the court in *Fogarty* did make the above statement, it also said that there was no clear customary international law position with respect to claims by diplomatic and consular employees *other than for* recruitment or reinstatement.[33] Indeed, it was this very conclusion that formed part of the reason for the decision in *Fogarty:* the employee there could not claim that the rule of absolute immunity provided in section 16 of the SIA was in breach of Article 6 of the ECHR because there was no existing international law standard that was violated by the UK provision. The failure to mention this aspect of the decision in *Fogarty* by the court in *Cudak* may have been inadvertent or intentional. Perhaps the ECtHR wished to depart from its position that there was no current customary international law rule regarding claims for compensation by embassy employees and that the trend it had identified in *Fogarty* 'towards limiting state immunity in respect of employment related disputes' now applied to claims by mission employees as well (other than where recruitment or reinstatement was sought). The Court in *Cudak* therefore seems to be suggesting that *Fogarty* is no longer authority on mission employment generally but only on the narrow question of recruitment and reinstatement—where it remains clear that State immunity applies.

Such a conclusion is supported by the next section of the court's judgment in *Cudak* where it noted that, since the *Fogarty* case was decided, the UN Convention had been adopted by the UN General Assembly. The UN Convention, as noted above, was substantially based on the 1991 ILC Draft Articles, and included Article 11 which deals with contracts of employment. In a highly significant passage the court said:

[31] ibid, para 57.
[32] ibid, para 63.
[33] See *Fogarty v The United Kingdom* para 37.

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> The report appended to the 1991 Draft Articles stated that the rules formulated in article 11 appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of states …. [t]his must also hold true for the 2004 United Nations Convention. Furthermore, it is a well-established principle of international law that, even if a state has not ratified a treaty, it may be bound by one of its provisions in so far as the provision reflects customary international law, either 'codifying' it or forming a new customary rule.[34]

The court here is suggesting that Article 11 of the UN Convention either represents customary international law through codification of a pre-Convention rule contained in Article 11 of the 1991 ILC Draft Articles or as a 'crystallization' of an emerging rule of custom that occurred upon the adoption of the UN Convention by the UNGA in 2004. Consequently, the UN Convention applied to Lithuania as matter of customary international law even though it had not ratified the instrument. This conclusion was said to be strengthened by the fact that Lithuania had not objected to Article 11 of the ILC Draft Articles nor voted against the adoption of the UN Convention.[35]

Once Article 11 of the UN Convention was found applicable to the litigation, the ECtHR then applied the provision to the facts. The ECtHR found that none of the exceptions in Article 11, which would have conferred immunity on Poland as the employer State, applied to the *Cudak* situation. Specifically, the employee was not a diplomatic agent or consular officer (subparagraph (2)(b)(i)), a national of the employer State at the time the proceedings were commenced (subparagraph (2)(e)) nor was she seeking reinstatement to her former position (subparagraph (2)(c)). Most importantly, the employee 'did not perform any particular functions closely related to the exercise of governmental authority' (subparagraph (2)(a)).[36] In support of this last conclusion, the court reiterated that Cudak was employed as a switchboard operator at the embassy with her main duties being recording international conversations, typing, sending and receiving faxes, photocopying documents, providing information and assisting with the organization of certain events. According to the court, 'neither the Lithuanian Supreme Court nor the Lithuanian Government have shown how these duties could objectively have been related to the sovereign interests of the Polish Government'.[37]

Such an analysis suggests that the burden of proof in establishing whether an employee is performing 'functions … in the exercise of governmental authority' lies upon the employer State (or the Member State in an Article 6 case before the ECtHR). The court also seems to suggest that where an employee's duties appear to be routine or low-level in nature with no obvious connection with government security or policy-related material then a presumption arises that the employee is not exercising governmental authority. It will be then for the employer State to rebut that presumption by producing contrary evidence.

[34] *Cudak v Lithuania* para 66. [35] ibid. [36] *Cudak v Lithuania* para 69.
[37] ibid, para 70

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Such a conclusion is significant because it would make the question of immunity under Article 11(2)(a) depend on the function and status of the employee. This view accords with the opinion of Hafner above regarding the scope of the provision.

In examining the decision in *Cudak*, it must be acknowledged that the ECtHR's approach to the issue of formation of customary international law in the area of embassy employment is 'questionable'.[38] No detailed assessment of State practice was undertaken by the Court, which based its conclusion that Article 11 of the UN Convention represented customary law entirely on the ILC Draft Articles, the commentary to the Articles and the UN Convention itself. Yet the standards required for recognizing a new rule of customary international law are onerous: State practice must reflect a 'uniform and constant usage' in terms of the rule[39] and be accompanied by a sense of legal obligation (*opinio juris*). Since the ECtHR conducted no independent examination of the relevant State practice, it is not at all clear that the test of 'uniform and constant usage' was satisfied in the case of Article 11.

While the Court may say that it used the ILC Draft Articles as a *substitute* for independent consideration of State practice, such an approach is problematic for a number of reasons. First, the ILC Commentary itself was very cautious on the issue of whether Article 11 represented custom, saying only that the article 'appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of states'. Such an observation seems to fall rather short of stating that there is a rule supported by uniform and consistent usage by States. Secondly, the other problem raised by the Court's reliance upon Article 11 of the ILC Draft Articles in support of a codified or crystallized rule of custom in Article 11 of the UN Convention is that the two texts are not the same.[40] While Article 11(2)(a) of the Draft Articles speaks of an employee being 'recruited to perform functions closely related to the exercise of governmental authority', Article 11(2)(a) of the UN Convention refers to an employee being 'recruited to perform particular functions in the exercise of governmental authority'. As discussed above, the wording in the UN Convention represented a conscious and deliberate narrowing of the scope of immunity from the ILC provision. While the ILC provision was intended to prevent all administrative and technical staff of a mission from suing their employer, the UN Convention provision did not impose such a blanket rule. As discussed above, the aim of the UN Convention provision was that a

[38] This was the description given by the English Court of Appeal in *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 para 30. Commentators have been similarly critical see, for example, D Bederman, 'Sabeh El Leil v France' (2012) 106 AJIL 125, 129–31; A Sanger, 'The State Immunity Act and the Right of Access to a Court' (2014) 73 CLJ 1, 2; Fox and Webb (n 22) 417; and also the comments of Advocate General Mengozzi in *Mahamdia v Algeria* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=123085&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1758574> paras 23–24, 26.

[39] *Asylum Case* ICJ Rep 1950, 266, 277.

[40] *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 para 29.

court would decide, on an individual basis, whether the employee was in fact exercising the governmental authority of the State in terms of the role and functions performed. It would only be in such circumstances that his or her claim would be barred by immunity. The ECtHR should not therefore have relied upon Article 11(2)(a) of the ILC Draft Articles in support of its conclusion that Article 11(2)(a) of the UN Convention represented customary international law as they are different texts.

Next, the very limited number of ratifications of the UN Convention (16) and the fact that the Convention still requires another 14 ratifications or accessions before it will come into force[41] is a further point against concluding that its provisions represent custom. While the UN Convention may arguably be seen as an 'authoritative pronouncement'[42] on the customary law of State immunity, the ECtHR should still have made reference to the Convention's current status and membership.

Commentary has also been critical of the ECtHR in placing weight on the fact that Lithuania had not opposed the text in Article 11 during the adoption of the ILC Draft Articles and the UN Convention. As already noted, this statement is objectionable on the ground that the ECtHR should not have conflated the ILC and UN versions of Article 11, which are different. Putting that matter to one side, however, the criticism of the ECtHR on this point is arguably less justified. The Court was not saying here, as has possibly been suggested,[43] that Lithuania was only bound by Article 11(2)(a) because it failed to object to the provision at the time the Convention was adopted. Instead, the ECtHR was more likely stating that if Article 11 *did* represent customary international law then Lithuania could only *not* be bound by the provision if the State could show that it had been a 'persistent objector' from the time of the rule's formation. Such an argument is one of the few defences available to a State that seeks to exempt itself from a customary rule. So, rather than the Court finding that a State who is not a party to a Convention may nevertheless be bound by its terms through acquiescence—a truly radical proposition—the better view is that Lithuania's conduct was only relevant to the Court in determining whether it had been a persistent objector. Of course, if the ECtHR was wrong in its conclusion that Article 11 of the UN Convention represents customary law then the fact that Lithuania did not object to the Convention at the time of its adoption has no significance since a treaty not forming part of customary law cannot bind a non-party.

The crucial question that remains, however, is, even if the ECtHR's reasoning on the formation of customary international law in *Cudak* was flawed, could its *conclusion* that Article 11(2)(a) embodied a rule of custom nevertheless be

[41] ibid.

[42] I Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights: The Method' (2013) 12 Law and Practice of International Tribunals 243, 248.

[43] *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33 para 29.

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supported by an independent examination of State practice? The English Court of Appeal in *Benkharbouche v Embassy of the Republic of Sudan*[44] recently took an analogous approach in the context of service staff of a diplomatic mission suing for compensation for unfair dismissal. While the Court of Appeal rejected the approach of the ECtHR in *Cudak* to the formation of customary international law it nevertheless found, after its own assessment of State practice, that the customary law of immunity would not bar suits by service employees. This case is discussed in detail at section IID below. In *Cudak* the employee in question was a secretary and switchboard operator and so a member of the administrative and technical workforce, not the service staff, of the mission. The English Court of Appeal's conclusion, therefore, on the status of service staff cannot be applied to employees in the position of Cudak. What the decision in *Benkharbouche* does, however, show, which is of relevance to administrative and technical staff, is that the imposition of State immunity in respect of *all* mission employees is not consistent with customary international law.

The specific question that must therefore be addressed is whether there is a customary rule of State immunity that would bar a suit for compensation by a member of the administrative and technical staff not performing acts in the exercise of governmental authority. It will be argued that while there is no uniformity of national State practice on this issue, a clear and strong trend in favour of refusing immunity exists in cases where the employee is engaged in routine, low-level roles with limited contact with government policy. It is suggested that this position had been reached by 2010, at the time the *Cudak* case was decided by the ECtHR, as the historical diversity in State practice had converged in favour of the approach identified above. Moreover, in the five years since the *Cudak* decision, there has been still further State practice consistent with this view. Consequently, while the reasoning of the ECtHR in *Cudak* is dubious, its conclusion that Article 11(2)(a) of the UN Convention represents customary international law is correct. The following survey of recent State practice on the topic of mission employment supports this contention.

### 2. *State practice on administrative and technical staff*

The first category of States to examine is those European countries that are a party to the 1972 European Convention on State Immunity (the ECSI). The ECSI has been ratified and adopted into domestic law by Austria, Switzerland, the Netherlands, Belgium, Germany, Luxembourg and Cyprus. The key provision is Article 5, which creates a presumption of non-immunity where the contract is to be performed in the forum State. Immunity is, however, restored where the employee is a national of the foreign State at the time of the

[44] [2015] EWCA Civ 33.

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proceedings or was not a national or permanent resident of the forum at the time of entering into the employment contract. Since foreign States rarely admit non-nationals into their diplomatic or consular corps, it may be that the requirement (to avoid immunity) that the employee not be a national of the foreign State has the practical effect of allowing routine or low-level workers at embassies or consulates to be able to sue their employer.

The jurisprudence of almost all of the above ECSI States confirms that a restrictive approach to immunity has been taken in the area of mission employment disputes based on an approach that focuses on the role and duties of the employee and his or her proximity to the sovereign activities of the State. Switzerland, for example, has long taken the view that the question of immunity in an embassy or consulate employment action depends upon whether the conclusion of the contract by the foreign State was a sovereign or private act. In resolving this issue, focus is placed on the status and position of the individual employee, with subordinate employees, particularly those with strong territorial ties to the forum State through nationality or residence entitled to sue but not persons in senior, decision-making positions. So, pleas of immunity were rejected in the case of actions brought by a radio telegrapher/clerk,[45] telephone operator,[46] translator/interpreter[47] and driver.[48] Such an approach is entirely consistent with the *Cudak* interpretation of Article 11(2)(a) of the UN Convention, a result that will now be reinforced, given that Switzerland ratified the instrument in April 2010.

A similar approach has been taken in Austria where embassy employees who hold Austrian nationality and are employed in low-level positions, such as a driver,[49] an interpreter[50] and a photographer[51] have been allowed to sue. Indeed, in one case, the Austrian Supreme Court even permitted a French national employed as head of the visa section at the French Consulate to bring proceedings, a result that appears questionable in light of Article 11(2)(a) of the UN Convention, as such a person may be expected to exercise governmental authority. Yet this last outcome would not affect Austria's compliance with Article 6 of the ECHR since the court is *denying* immunity more widely than required by customary international law. Consistency with Article 11(2)(a) is likely to increase in future cases since Austria became a party to the Convention in September 2006.

[45] *S v India* (1984) 82 ILR 13 (Swiss Federal Tribunal).

[46] *Landano v United States* [1988] Jahrbuch des Schweizerischen Arbeitsrechts 424.

[47] *R v Iraq* 13 December 1994 (Swiss Federal Tribunal) cited in Council of Europe and G Hafner *et al.* (eds), *State Practice Regarding State Immunities* (Martinus Nijhoff 2006) 192.

[48] *Driver X v Kuwait* [2003] Jahrbuch des Schweizerischen Arbeitsrechts 468 (Labour Court of Geneva)

[49] *British Embassy Driver Case* (1978) 65 ILR 20 (Superior Provincial Court of Vienna).

[50] (1991) 2 Journal du Droit International 441.

[51] *RW v Embassy of X* (Supreme Court of Austria) 21 November 1990, cited in Council of Europe and Hafner *et al.* (n 47) 179.

Belgium also has consistently adopted a restrictive approach to immunity in mission employment cases, based on whether the employment was 'an act of ordinary affairs rather than an exercise of public power'.[52] Applying such a test, a chauffeur,[53] language teacher[54] and a telephone operator/secretary[55] all employed at foreign embassies were entitled to sue their foreign State employer. Such outcomes are entirely consistent with a test based on whether the employee was exercising governmental authority.

The Netherlands, by contrast, earlier favoured a policy of absolute immunity with respect to embassy employment cases but from at least 1985, it has accepted that an employee with no civil service or diplomatic status is able to sue.[56] The two exceptions, where immunity applies, are where the employee is a national of the employer State and is not a permanent resident of the Netherlands[57] or the action poses a threat to State security.[58] Employees appointed to the administrative or technical staff of a mission performing generic, routine roles such as secretarial or chauffeur positions are often locally recruited from nationals of the forum State,[59] as compared to diplomatic personnel who are almost always nationals of the foreign State. Hence, in practice, the Dutch approach is broadly consistent with a test based on the functions of the employee since it will be claims by senior staff that will be more likely barred by immunity.

In France a similar position has been adopted in recent cases where the Cour de Cassation has allowed claims to proceed against foreign States by a number of low-level embassy workers such as a nurse/secretary,[60] an assistant in the media section[61] and a caretaker,[62] for the reason that they had not been charged with 'any special responsibility for the performance of the public service of the Embassy'.[63] The focus on the role and duties of the employee is therefore again apparent. This trend is likely to continue since France became a party to the Convention in August 2011.

The position in Germany has been less clear but is steadily moving toward an analysis based on the role and functions of the employee. While early decisions on mission employment favoured absolute immunity,[64] from the mid-1990s it appears that a shift towards restrictive immunity may have occurred. In *X v*

[52] *Rousseau v Republic of Upper Volta* (1983) 82 ILR 118 (Brussels Labour Tribunal).
[53] ibid.
[54] *Queiros Magalhaes Abrantes v Republic of Portugal* (1992) 27 Revue Belge de Droit International 698 (Brussels Labour Court).
[55] *Sawas v Saudi Arabia* ILDC 1146 (BE 2007) (Brussels Labour Court).
[56] *MK v Turkey* (1984) 94 ILR 350 (Sub District Court of The Hague).
[57] *X v Morocco* ILDC 548 (NL 2007) (Netherlands Court of Appeal).
[58] Compare *Van Hulst v United States of America* [1990] NYIL 379 (Supreme Court of The Netherlands).
[59] Australian Law Reform Commission, *Report No. 24* (1984) para 100.
[60] *Barrandon v USA* 116 ILR 622 (1998).
[61] *Coco v Argentina* 113 ILR 491 (1996).
[62] *Saignie v Embassy of Japan* 113 ILR 492 (1997).
[63] ibid 493.
[64] *Conrades v United Kingdom* 65 ILR 205 (Hanover Labour Court).

*Argentine Republic*[65] a person employed to issue passports and visas was barred from suing her employer for wrongful termination of her contract because she was performing 'consular functions' and hence exercising the sovereign authority of the foreign State. Such an outcome can be seen as consistent with Article 11(2)(a) of the UN Convention, which, for a finding of immunity, requires an employee to perform 'functions in the exercise of governmental authority'. According to that argument, while some employees such as cleaners and chefs will rarely if ever be found to exercise governmental authority, other persons, even enjoying a relatively low level of responsibility, could be barred if their work has uniquely governmental features. In another German case[66] the finding of immunity was even clearer, since the claimant was there employed as a financial assistant responsible for analysis and budgetary preparation, and so was in a senior, policy-oriented role.

A restrictive immunity approach also exists in other European countries that are not party to the ECSI. Spain, for example, has allowed suits to be brought by employees at diplomatic and consular missions. In two decisions the Spanish Supreme Court upheld the claims of a Spanish national employed as a driver[67] and a national of a third State employed as a secretary,[68] both at foreign embassies. In both cases the court declared that entry into a contract of employment by a foreign State was a private, not a sovereign act, and so immunity did not apply. Such an approach is consistent with an analysis based on whether the employee was exercising the governmental authority of the foreign State, an outcome which will be reinforced by Spain's accession to the UN Convention in September 2011.

Portugal is a State that maintained a policy of absolute immunity in mission employment cases for many years before abandoning it in 2002. In *X v State of Israel*[69] the Portuguese Supreme Court allowed a housekeeper at an embassy to sue for damages for termination of her employment contract, with the primary factor being that the employee's position and duties did not implicate the sovereignty of the foreign State. Similarly, in two later decisions, a secretary 'hired to exercise administrative functions'[70] and a driver[71] both employed at embassies were held entitled to sue for compensation for wrongful dismissal but not reinstatement. All three decisions are clearly consistent with Article

[65] 114 ILR 502 (Federal Labour Court 3 July 1996).

[66] *Muller v United States Of America* 114 1LR 512 (Regional Labour Court of Hesse 11 May 1998).

[67] *EBM v Equatorial Guinea* (10 February 1986) extracted in A Chueca Sancho and J Diez-Hochleitner, 'La Admision de La Tesis Restrictiva de Las Inmunidades del Estado Extranjero en La Reciente Practica Espanola' (1988) 40 Revista Espanola de Derecho Internacional 7, 10.

[68] *Abbott v Republic of South Africa* (1 December 1986) extracted in ibid, 12.

[69] 127 ILR 310 (13 November 2002).

[70] *AA v Austrian Embassy* ILDC 826 (PT 2007) (Supreme Court of Portugal).

[71] *A v Islamic Republic of Pakistan* (2004) (Court of Appeal of Portugal) cited in Council of Europe and Hafner *et al.* (n 47) 190.

11(2)(a) of the UN Convention, a trend that is likely to continue given that Portugal ratified the instrument in September 2006.

Poland and the Czech Republic are also States that previously adhered to absolute immunity in mission employment but now follow a restrictive approach, based on whether the employment involved 'acts of public authority' of the foreign State.[72] Such an approach again appears to accord with the 'exercise of governmental authority' test in Article 11(2)(a) of the UN Convention. The Czech Republic became a party to the Convention in March 2015.

Italy is a jurisdiction that has spawned a large number of cases on embassy and consular employment and has moved from a position of absolute immunity to an approach that is highly generous to employees. In the most recent statement from the Italian Court of Cassation,[73] it has been declared that State immunity must be denied in *either* of two cases. The first is where the employee has performed 'auxiliary duties' not connected to the sovereign functions of the State and the second is where the claimant has only requested pecuniary remedies, such as a salary or pension entitlement, regardless of the type or level of functions performed. Where, however, the court is required to investigate the reasons for an unfair dismissal, particularly in the context of a claim for reinstatement, immunity may be granted.[74] The first limb of the Italian approach is clearly in line with the principle in Article 11(2)(a) of the UN Convention although the second limb, in denying immunity even where an employee is engaged in sovereign activities, possibly exceeds the provision's scope.[75] Nevertheless, the key point to note here is that an Italian court will not *grant* immunity in claims for compensation by low-level employees engaged in routine duties and to that extent its approach is consistent with the above suggested customary international law rule. Closer alignment with Article 11(2)(a) of the UN Convention is likely to increase in future decisions since Italy became a party to the UN Convention in May 2013.

Finland is a State with possibly conflicting authority on the point with a 1992 Supreme Court case suggesting a restrictive approach to immunity based on whether the employee's duties were closely related to the exercise of

[72] See *Maciej K v Embassy of a Foreign State* (Supreme Court of Poland 2000) cited in Council of Europe and Hafner *et al.* (n 47) 189 and *State Immunity in Labour Law Matters Case* (Supreme Court of Czech Republic) (2008) 142 ILR 206.

[73] *Brazil v De Vianna Dos Campos Riscado* ILDC 2037 (IT 2012); see also *Vespignani v Bianchi* (Court of Cassation 22 July 2004) extracted in (2005) 15 Italian Yearbook of International Law 317–18.

[74] *Brazil v De Vianna Dos Campos Riscado* ILDC 2037 (IT 2012); *British Consulate in Milan v Papa* (Court of Cassation 27 May 1999).

[75] A Atteritano, 'Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years' (2009) 19 Italian Yearbook of International Law 31, 44; R Pavoni, 'La Jurisprudence Italienne Sur l'Immunité Des Etats Dans Les Différends En Matière De Travail: Tendances Récents A La Lumière De La Convention Des Nations Unies' (2007) 53 Annuaire Français de Droit International 211.

governmental authority[76] but a 2000 lower court decision upholding immunity in the case of suit by a chauffeur.[77] However, Finland became a party to the UN Convention in April 2014, following its Scandinavian neighbours, Norway (March 2006) and Sweden (December 2009) and so it may be assumed that the courts of all three countries will now adopt a position in relation to mission employment cases consistent with Article 11 of the Convention.

The two principal common law jurisdictions in Europe, the United Kingdom and Ireland, have traditionally taken the view that absolute immunity should be applied in all mission employment disputes. In the case of the UK, this position no longer applies after the Court of Appeal decision in *Benkharbouche v Embassy of the Republic of Sudan*[78] discussed below. In Ireland the position also may be about to change with the authority of the 1992 Supreme Court decision in *Government of Canada v The Employment Appeals Tribunal and Burke*[79] being recently questioned. In *Burke* a chauffeur was barred from suing on the basis that all employment at missions was considered sovereign, yet interestingly, in a recent decision,[80] the Irish Employment Appeals Tribunal allowed a cleaner at an embassy to sue for wrongful dismissal on the basis that her work did not involve 'the exercise of public powers'. Such a view is much closer to the principle expressed in Article 11(2)(a) of the UN Convention and may suggest that a move to a restrictive approach to immunity based on the status and duties of the employee will develop in future cases.

Outside of Europe, in the principal countries with judicial practice in the area of mission employment, there is also strong evidence of a focus on the role and functions of the employee in State immunity determinations concerning embassies. In the United States, section 1605(a)(2) of the Foreign Sovereign Immunities Act 1976 provides that State immunity is not available where the foreign State engages in 'commercial activity' as opposed to conduct which is public or governmental in nature. The legislative history to the provision states that the employment of 'diplomatic, civil service or military personnel' would be public or governmental in nature but not the employment of US citizens or third-country nationals in the US. Further, the 'engagement of laborers, clerical staff or public relations or marketing agents' is also considered by the history as commercial activity. The reference to 'diplomatic and civil service personnel' on the one hand and 'laborers and clerical staff' on the other suggests a distinction in application of the

[76] *Hanna Heusala v Republic of Turkey* cited in Council of Europe and Hafner *et al.* (n 47) 181.
[77] *Ricardo v Republic of Venezuela* (District Court of Helsinki) cited in ibid 182.
[78] [2015] EWCA Civ 33.
[79] [1992] IR 484; this case was followed in *Geraghty v Embassy of Mexico* [1998] ELR 310 (secretary) (Irish Employment Appeals Tribunal) and *Italian Embassy v Damery* (administrative assistant) (Irish Labour Court 14 December 2004).
[80] *Asha Abdullahi Asam v Embassy of the Republic of Kenya* (UD2163/2011) <http://www.labourlawnetwork.eu/national_labour_law_latest_country_reports/national_court_rulings/court_decisions/prm/64/v__detail/id__3317/category__17/index.html>.

immunity rule based on the status and position of the employee. The idea is that the more senior or policy-oriented the position of the employee, the more likely immunity will be found since such employees are closer to the sovereign core and security interests of the foreign State. Hence, while all staff holding diplomatic rank at embassies and consulates would be unable to sue their employer in a US court, mission employees engaged in duties indistinguishable from work customarily performed in the private sector are much less likely to have their actions barred by immunity.

This focus in the legislative history on the status and duties of the employee is supported by US jurisprudence. In *Holden v Canadian Consulate*,[81] a commercial officer within the trade and investment section of a Canadian consulate was held entitled to bring claims for sex and age discrimination and breach of an employment contract against her foreign State employer. The Court in *Holden* stated that immunity would apply if the employee either came within the category of civil servant or formed part of the consulate's diplomatic personnel. The employee was found not to be a civil servant, as she was not entitled to tenure and received no benefits or civil service protection from the foreign State employer. Nor was she a diplomat; although the employee was on the staff of the consulate, she was engaged in promotion and marketing activities, and was not privy to governmental policy deliberation or policymaking. Further, the plaintiff did not speak for the Canadian government. Nor as a US citizen was she allowed inside the consulate unless in the company of a Canadian foreign service officer. Similarly, in *El-Hadad v United Arab Emirates*,[82] an Egyptian national employed as an accountant in the UAE Embassy was able to sue his employer on the basis that he was not a civil servant, had no role in the creation of government policy, and to the extent he carried out such policy, his duties were 'ministerial not discretionary'. In essence, the employee was engaged in standard accounting work. Likewise and most recently, a claim for discrimination by an employee responsible for supervising the French Embassy's internship placement program and coordinating the Embassy's partnership with the French Cultural Exchange was allowed to proceed in a US court. The claimant's duties were found to be only of a clerical and administrative nature and, significantly, she was not involved in governmental decision-making.[83] In contrast, immunity was upheld in the case of an adviser to the Saudi Arabian Mission to the United Nations,[84] where the employee's role involved attendance at diplomatic meetings, conducting research, writing memoranda and speaking on behalf of the mission and also in the case of a person

[81] 92 F 3d 918 (9th Cir 1996).

[82] 496 F 3d 658 (DC Cir 2007).

[83] *Ashraf-Hassan v Embassy of France in the US* 40 F Supp 3d 94, 102–103 (DDC 2014) (aff'd DC Cir CA 1 May 2015).

[84] *Hijazi v Permanent Mission of Saudi Arabia to the United Nations* 403 Fed Appx 631 (2d Cir 2010).

responsible for issuing passports and visas.[85] A clear delineation between mission employees engaged in sovereign activities and those in routine roles is therefore apparent in the US practice.[86]

In Australia, an analogous division between types of employees based on proximity to the sovereign core of the State has been created. Section 12(1) of the Foreign States Immunities Act 1985 creates a general presumption of non-immunity in the case of employment contracts where the contract is made in Australia or to be performed there. Section 12(3), however, reimposes immunity where the employee is a national of the foreign State employer and not a resident of Australia. The practical effect of this provision is to exclude almost all actions by members of the civil service of the foreign State, since the laws of most countries require civil servants to hold the nationality of the State which they represent. Section 12(5) of the Act provides that immunity also applies where the employee is (a) a member of the diplomatic staff of a mission as defined in Article 1(d) of the Vienna Convention on Diplomatic Relations 1961, or (b) a 'consular officer' as defined in the Vienna Convention on Consular Relations 1963. Under section 12(6), immunity is further recognized where (a) the employee is a 'member of the administrative and technical staff of a mission' as defined in Article 1(f) of the Vienna Convention on Diplomatic Relations 1961, or (b) a 'consular employee' as defined in Article 1(e) of the Vienna Convention on Consular Relations 1963, unless the member or employee was a permanent resident of Australia at the time the contract was made.

In Australia, therefore, State immunity will not normally apply in the case of locally recruited administrative or technical staff to a mission. Since most local staff are engaged in routine, non-policy-oriented roles in the mission, the effect of the Australian legislation is to base immunity on the status and duties of the employee. Accordingly, a gardener at the Kuwait Embassy,[87] a secretary/typist at the Indian Consulate[88] and a driver/receptionist at the Libyan Embassy,[89] were permitted to sue for damages for wrongful dismissal, as they were all Australian permanent residents at the time of entering their employment contracts.

The position in Canada, while not uniform, also reveals some support for the view that the grant of immunity in mission employment cases should depend upon the status and duties of the employee. Canada is similar to the United States in not having an employment-specific exception to immunity but

[85] *Sanchez-Ramirez v The Consulate General of Mexico* 2013 US Dist Lexis 109888 (ND Cal) (aff'd 9th Cir CA May 18 2015).

[86] Note that a similar approach may possibly be adopted in Israel where it is provided that an employee may sue his or her foreign state employer 'where the cause of action is a commercial transaction': Foreign States Immunity Law 2008 section 4(c).

[87] *Robinson v Kuwait Liaison Office* (1997) 145 ALR 68.

[88] *Thomas and Consulate General of India* [2002] NSWIR Comm 24.

[89] *Hussein v Libya* 2006 AIRC 486; see also *Kassis v Republic of Lebanon* [2014] FCCA 155.

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allowing actions against foreign States to proceed where the claim 'relates to commercial activity' of the State.[90] Consistent with the above argument, a consul general[91] and a senior civil servant at an embassy[92] were barred by immunity from suing for compensation for unfair dismissal but a claim by an assistant consular for immigration[93] was allowed to proceed. Relevantly, the court in the last mentioned decision noted that 'the employee did not participate in the creation of government policy or its administration. She carried out directions [and] … was not privy to political deliberations. She could not speak for the government in its decision-making … . [H]er role was an administrative and client service driven role.'[94] In fairness though, it must be acknowledged that in Canada there have been actions by lower-level administrative employees at missions that have been partly[95] or entirely[96] barred by immunity.

There is also recent jurisprudence in Asian countries that supports an immunity analysis based on the role and functions of the employee. In *British High Commission v Jansen*[97] the Supreme Court of Sri Lanka held that a security assistant to the British High Commission whose role was not only to provide security but also to maintain the inviolability of the Embassy premises was not permitted to sue his employer for unfair dismissal. According to the court, 'the maintenance of security in the mission could not be classified as merely auxiliary but … integral to the core sphere of sovereign activity. The contract of employment was not effected in the capacity of a private citizen and the functions of the [employee] were enlisted in the interest of the public service of the UK Government.' Such an approach shows a clear regard for the role and activities of the employee in the decision to grant immunity. Similarly, an Indian court allowed a driver at an embassy to sue his employer on the basis that he was not performing acts in the exercise of governmental authority.[98]

It is interesting to note that there is also evidence of a similar approach having been adopted in Africa. In *Bah v Libyan Embassy*[99] and *Dube v American Embassy*[100] the Botswana Labour Court allowed two embassy employees to sue for compensation for unfair dismissal, with the Court holding that an action arising out of breach of an employment contract or the Botswana Employment Act involved a private law transaction and was therefore

[90] State Immunity Act 1985 (Can) section 5.
[91] *Butcher v Saint Lucia* (1998) 79 ACWS (3d) 815 (Ont CA).
[92] *Morocco c El-Ansari* 2010 QCCA 2256.
[93] *Roy v South Africa* 2013 ONSC 4633.
[94] ibid, para 61.
[95] In *Greco v Holy See* [2000] OJ No 5293 (QL) (Ont Sup Ct) a claim for moneys owed under an employment contract was admitted but not one for unfair dismissal.
[96] *Bentley v Consulate General of Barbados* 2010 HRTO 2258 (Ont Human Rights Tribunal).
[97] SC Appeal No 99/2012, 10 July 2014, at <http://www.supremecourt.lk/images/documents/sc_appeal_99_2012.pdf>.
[98] *Shyam Lal v Union of India* [2010] INDLHC 4446 (High Court of Delhi).
[99] 2006 1 BLR 22; 142 ILR 167.
[100] 2010 2 BLR 98.

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justiciable. No immunity applied as the claimants were not challenging a governmental act.

Overall then, this survey of recent State practice on State immunity and mission employment shows that in many jurisdictions a restrictive approach has now been adopted that typically focuses on whether the employee's role and functions involve the exercise of government authority or public power. While total uniformity of approach has not been achieved, it is strongly arguable that, looking at the practice as a whole, the role and functions of the employee view is the most widely accepted. This analysis is also desirable as it strikes an appropriate balance between, on the one hand protecting foreign States' legitimate security interests from possibly intrusive claims by senior staff, while on the other ensuring that employees performing routine and generic tasks receive appropriate redress. Importantly, therefore, the practice considered as a whole supports the conclusion reached by the ECtHR in *Cudak* that Article 11(2)(a) of the UN Convention represents customary law on the issue of suits for compensation by administrative and technical staff at missions. As noted above, however, the Court should have conducted its own examination of current State practice rather than simply relying on the outdated ILC Draft Articles.

Another issue addressed by the court in *Cudak* was the interpretation of Article 11(2)(d) of the UN Convention. Concern was expressed above as to the possible unjust application of this provision, given the potentially wide discretion accorded to senior governmental officials of the employer State to declare that a dismissal or termination of employment affects the State's security interests. Interestingly, in *Cudak* the ECtHR appeared cognizant of this problem, noting that the mere allegation 'that [the employee] could have had access to certain documents or could have been privy to confidential conversations in the course of her duties is not sufficient' to show a threat to Poland's security interests.[101] Further, the court said, the fact that the employee's claim for unfair dismissal was based on acts of sexual harassment also 'can hardly be regarded as undermining such interests'.[102]

It is interesting that the court chose to examine Article 11(2)(d) because there was no evidence that the Polish government relied on this provision before the Lithuanian court and so, strictly speaking, it was not relevant. Yet by considering such provision the ECtHR may have wanted to emphasize that a foreign State's decision to declare a proceeding a threat to its security interests will not be beyond judicial review. Instead, the court will retain the power objectively to assess whether the harm to the State's interests is real. The court also suggests that in the case of an employee with subordinate or routine office-type duties, the security of the State's mission is unlikely to be compromised, particularly where as in *Cudak* the claim was for compensation for sexual harassment.

[101] *Cudak v Lithuania* para 72.

[102] ibid.

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The court again is to be applauded for this approach: the clear policy of restrictive immunity enshrined in Article 11 would have been seriously undermined if foreign States could simply reimpose immunity 'through the back door' by stating in every case of termination or dismissal that its security interests would be affected by allowing the litigation to proceed. An independent, objective judicial assessment of such 'threats' will help to prevent abuses of this right by foreign States, even if such a procedure is not strictly authorized by the text of subparagraph (2)(d).

### 3. *Sabeh el Leil* and *Wallishauser*

A little more than a year after the *Cudak* decision the ECtHR was confronted with another embassy employment case in *Sabeh el Leil v France*.[103] The claimant, a French national, had been employed as an accountant in the Kuwaiti Embassy in France and promoted to head accountant in 1985. In 2000 his contract was terminated as part of a cost reduction exercise. The employee sued the Kuwait government in the French courts seeking compensation for wrongful dismissal but the action was dismissed on the ground of State immunity. The employee then brought an application against France before the ECtHR, alleging that the application of immunity by its courts had denied the claimant his right of access to a court in breach of Article 6(1) of the ECHR.

The court essentially reprised its approach and decision in *Cudak*, noting once more that the key question was whether the application of State immunity was consistent with the principles of customary international law enshrined in Article 11 of the UN Convention. Again, the court noted, such principles could apply to a State that had not ratified the Convention provided that the State had not opposed the instrument. For the reasons mentioned above, such assertion can only be correct if the Convention itself represents customary international law and the reference to the State's failure to object refers to its not being a persistent objector to the customary norm. In the case of France, its position as a 'non-persistent objector' was clearer than that of Lithuania in *Cudak* since France had signed the UN Convention in 2007 and the ratification process was pending before the French Parliament at the time *Sabeh el Leil* was decided. Moreover, when French domestic law of State immunity and embassy employment disputes was considered, it was clear that immunity was not applied where the employee had no 'special responsibility in the exercise of the public diplomatic service'.[104] Application of this principle had led to a rejection of immunity by French courts in mission employment cases involving subordinate staff. The ECtHR could not understand why the French courts did not reach the same result on the facts of *Sabeh el Leil* and the present author agrees.

[103] [2011] ECHR 1055.

[104] ibid, paras 25, 59.

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Specifically, the court felt that Article 11(2)(a) of the UN Convention, which imposes immunity where an employee performs acts 'in the exercise of governmental authority', to be 'clearly irrelevant'[105] to the present case since Sabeh el Leil's work involved no such duties. The claimant was employed as an accountant and while he was also an unofficial staff representative who may have assumed 'additional responsibilities', the French court failed to demonstrate how his role was 'linked to the sovereign interests of the state of Kuwait'. In the absence of evidence that the employee's work implicated the foreign State's sovereignty, the immunity finding could not be supported.

For good measure, the ECtHR also referred to Article 11(2)(d) of the Convention, finding that again, similar to *Cudak*, this subparagraph could not have been raised on the facts of *Sabeh el Leil* as no (objective) risk or threat to the employer State's security in allowing the current claim to proceed was shown.

The *Sabeh el Leil* decision therefore continues the welcome trend from *Cudak* of excluding employees in non-policy, non-security roles from the scope of State immunity. If anything *Sabeh el Leil* was a clearer case given that the French courts (particularly the Cour de Cassation) had long and consistently taken the view that immunity should only apply where an employee was engaged in the sovereign activities of the foreign State. The ECtHR was therefore surely correct to wonder why the French courts granted immunity in this case: here was an employee whose tasks were virtually identical to those of a person working in the private sector and so rightfully, he should have been allowed to sue for wrongful dismissal.

Further evidence in support of this view comes from the 2012 decision of the ECtHR in *Wallishauser v Austria*[106] where the court acknowledged that a foreign State employer could not, consistently with the UN Convention, have validly relied upon immunity in an action for salary payments brought by a photographer at the US Embassy in Vienna.[107] Again, this conclusion was based on the fact that such an employee was not performing duties in the exercise of governmental authority.

The ECtHR in *Cudak* and *Sabeh el Leil* has therefore developed a test based on the nature and level of the duties and functions of the employee which, as has been suggested, now embodies the customary international law standard in mission employment cases. Such an approach is desirable when it is remembered that the majority of cases to date have involved employees with little connection to the policy apparatus of the foreign State but who were simply performing roles that could have taken place for any employer. Hopefully some of the previous cases where such employees were barred by State immunity from obtaining redress will not be repeated.

Hence, *Cudak, Sabeh El Leil* and *Wallishauser* all show clearly that even in countries that adopt a restrictive approach to immunity, there will be scope for

[105] ibid, para 61. [106] (App 156/04) 17 July 2012. [107] ibid, paras 62, 71.

employees to challenge decisions on Article 6 grounds where the grant of immunity in the particular case does not comply with Article 11 of the UN Convention. For the purposes of this article, the *Cudak/Sabeh el Leil* line of authority on the ECHR may therefore be described as the first example of European law intrusion in the field of State immunity and embassy employment.[108] Nevertheless, as discussed above, since the clear majority of European countries now follow an approach that is consistent with the standard articulated by the ECtHR in the above cases, the need to challenge national court decisions on Article 6 grounds will hopefully arise rarely.

### *D. The* Benkharbouche *Decision*

The issue of compliance of national laws on immunity with Article 6 of the ECHR recently arose in the decision of the English Court of Appeal in *Benkharbouche v Embassy of The Republic of Sudan*.[109] In this case the Court affirmed an earlier judgment of the Employment Appeal Tribunal,[110] although on different grounds. The *Benkharbouche* case involved two appeals, one by B, who was a Moroccan national and employed at the Sudanese Embassy in London and the other by J, also a Moroccan national and a member of the domestic staff of the Libyan Embassy in London. B's action was for wrongful dismissal, unpaid wages, holiday pay and breach of the European Union Working Time Directive[111] while J sued for wrongful dismissal and arrears of pay, holiday pay and for breaches of the Working Time and Race Discrimination[112] Directives. At the time J entered into her employment contract, she was neither a UK national nor habitually resident in that country. Both Sudan and Libya pleaded State immunity, based on sections 4 and 16 of the SIA. In the case of both B and J the first instance Employment Tribunal upheld immunity based on section 16(1)(a) which provides that 'members of a mission' have no right to sue. Additionally in the case of J, immunity was found under section 4(2)(b) which provides that an employee who was neither a UK national nor permanent resident at the time of entering the contract is barred from bringing proceedings. On appeal to the EAT, B and J both argued that the effect of section 16(1)(a) was to deny their right to access a court in breach of Article 6 of the ECHR, with J making the same allegation in respect of section 4(2)(b). Both claimants then argued that assuming a breach of Article 6 was established, the UK court must, pursuant to section 3 of the Human Rights Act 1998 (UK) (HRA),

[108] These decisions have also been supported on the basis that, by favouring the 'private' rights of employees over the 'public' domain of their employment, the ECtHR has furthered the aims of employment law: see L Rodgers, 'Immunity and the Public/Private Boundary in EU Employment Law' (2015) 6 ELLJ 48.

[109] [2015] EWCA Civ 33. [110] [2013] UKEAT 0401_ 12_ 0410. [111] (2003/88/EC). [112] (2000/43/EC).

interpret the legislation to the fullest extent possible so as to comply with Article 6.

The EAT noted that the effect of the decisions in *Cudak* and *Sabeh el Leil* was to make the validity of a domestic court's finding of immunity under Article 11 (2)(a) of the UN Convention depend upon 'whether the proposed claim involved any public aspect of the employee's work'.[113] In the case of B and J, there was no evidence that adjudication of their disputes would engage any public governmental function of the foreign States. Hence, to the extent that a court would apply section 16(1) to impose immunity in such circumstances, it was inconsistent with Article 6 of the ECHR.[114]

The position with respect to section 4(2)(b) of the SIA was less clear. In the case of J this provision was relied upon to impose immunity because she was not a national or habitual resident of the UK at the time of entry into her employment contract. The complication here, however, was that in the original 1991 ILC Draft Articles on State immunity such a restriction in national law would have been permissible but by the time the UN Convention was adopted, no such ground of immunity existed. Rather, the UN Convention would only grant immunity where the employee held the nationality of the employer State *at the time the proceeding was instituted* (Article 11(2)(e)). Yet, according to the ECtHR's direction in *Cudak* and *Sabeh el Leil*, the provisions of the UN Convention represent customary international law and so form the sole basis for assessing national law compliance with Article 6 of the ECHR. Hence, on this view, section 4(2)(b) is inconsistent. The UK EAT agreed with this outcome, although with 'much greater hesitation' given that the Draft Articles of 1991 would have recognized immunity in such circumstances.

The decision of the EAT was upheld by the English Court of Appeal but its reasoning differed in a number of key respects. First, the Court of Appeal accepted the approach of the ECtHR in *Fogarty* and *Cudak* that a Contracting State to the ECHR would not be in breach of Article 6 of the ECHR where it gave effect to a rule of international law requiring the grant of State immunity. In such a case 'the grant of immunity would be held to be a proportionate means of achieving a legitimate aim'.[115] Secondly, the Court of Appeal rejected the view in *Cudak* and *Sabeh el Leil* that Article 11 of the UN Convention represented customary international law in respect of *all* embassy employment disputes. The diversity of State practice, the court said, made it difficult to determine 'whether [immunity] covered disputes relating to the employment of staff at all levels'.[116] Also, the adoption of the UN Convention in 2004, its subsequent ratification by only 16 States and the fact

[113] *Benkharbouche v Embassy of The Republic of Sudan* [2013] UKEAT 0401_ 12_ 0410 para 33.
[114] ibid, para 34. [115] [2015] EWCA Civ 33 para 16. [116] ibid, para 24.

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that it was not yet in force were all further factors pointing against the view that Article 11 embodied custom.[117]

So, the English Court of Appeal did not consider itself bound by the ECtHR's decisions in *Cudak, Sabeh el Leil* and *Wallishauser* on the status of Article 11 in customary international law. Yet, despite this conclusion, the Court of Appeal also rejected the principle in *Fogarty*, that is, that it is impossible to identify *any* customary international law principles in respect of embassy employment disputes. The Court of Appeal thought therefore that it was still necessary, for the purposes of resolving the dispute in *Benkharbouche*, to consider whether sections 16(1)(a) and 4(2)(b) of the SIA were 'required by international law' or at least within the margin of appreciation accorded to states … under international law'.[118] Of course, had the *Fogarty* approach been adopted by the Court of Appeal, the second of the above questions would have been answered in the affirmative, given the non-existence of any customary law rules under that view. So, even if section 16, for example, created a form of absolute immunity in all mission employment cases, the absence of any customary rule on the topic would mean that such a provision could never be outside 'the margin of appreciation' accorded to States.

The Court consequently felt that some attempt at an assessment of the customary international law position had to be made, at least in respect of the employees in *Benkharbouche*, who both fell within the category of service staff. The Court accordingly conducted its own examination of both State practice and international instruments on the issue of State immunity in service employee disputes. Significantly, the court found no evidence in the State practice or instruments of a rule of international law that required immunity to be granted in respect of claims of compensation by service staff at embassies. The position may well be different, the Court said, where the claim is for the recruitment, renewal of employment or reinstatement of an individual (such as in *Fogarty*) or where the proceedings would interfere with the security interests of the State. Neither consideration was present in the immediate cases.[119] Secondly, the Court said, and this was the crucial finding, 'the preponderance of state practice' supports the view that imposing absolute immunity in the case of all claims by service staff 'can no longer be regarded as within the range of tenable views of what is required by international law'.[120] The view of Garnett above, that the application of immunity to all embassy and consulate employment disputes is 'likely inconsistent with … international law'[121] was referred to with approval.[122] Consequently, the Court found, section 16(1)(a) of the SIA did not comply

[117] For the reasons mentioned above, however, it is contended that while the reasoning of the ECtHR in *Cudak* on the formation of customary international law of State immunity is dubious, its conclusion that art 11(2)(a) of the UN Convention represented custom is, with respect, correct.
[118] ibid, para 30. [119] ibid, para 46. [120] ibid, para 46; see also para 53.
[121] Garnett (n 1) 707. [122] ibid, para 47.

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with the customary international law standard and so was in breach of Article 6 of the ECHR.

The Court of Appeal's approach to section 4(2)(b) of the SIA also slightly differed from that taken by the EAT. Once again the Court made its own assessment of the customary international law position with respect to the application of immunity under this provision and found that that there was no 'widely recognised acceptance that public international law requires the grant of immunity on such a basis'.[123] For this reason alone there was found to be a breach of Article 6. Further, the Court of Appeal also held that section 4(2)(b), by imposing immunity where the employee was not a national or habitual resident of the UK at the time of entry into her employment contract, also breached Article 14 of the ECHR as it involved impermissible discrimination against foreign nationals living in the UK.

So, on the basis that Article 6 was breached by application of sections 16(1)(a) and 4(2)(b) of the SIA in the cases of B and J, the next question for the Court of Appeal was whether these provisions could be interpreted under section 3 of the HRA to make the legislation compliant with the ECHR and so allow the claims to proceed. The Court of Appeal adopted the analysis of the EAT on this issue.[124] The EAT had referred to the decision of the House of Lords in *Ghaidan v Goidin-Mendoza*[125] which discussed the approach to be taken to section 3 applications. Specifically, a court may read words into the legislation so as it make it comply with the ECHR provided that such words are not 'inconsistent with a fundamental feature of the legislative scheme' or with 'its essential principles'.[126] In essence, the court can 'interpret' but not 'amend' the legislation. Applying these principles to the SIA, the EAT in *Benkharbouche* refused to add words to sections 4(2) and 16(1) to render the provisions harmonious with the Convention. Parliament in the SIA has 'set out a clear list in respect of whom a plea of immunity will fail and those in respect of whom it will succeed' as part of its overall policy 'deliberately to limit access to justice in certain cases'.[127] To move a category of case from the 'immunity' group and place it in the 'no-immunity' group would distort the overall balance struck by the legislature. Such an action would be 'legislation' not 'interpretation'.

The Court of Appeal, having agreed with and endorsed this analysis of the EAT, then proceeded to make a declaration that section 16(1)(a) of the SIA infringes Article 6 of the ECHR and section 4(2)(b) of the SIA infringes both Article 6 and 14 of the ECHR in their application to the claims brought by the present claimants.[128] Note, however, that such a declaration of incompatibility under section 4 of the HRA does not affect the operation or validity of the SIA. The declaration acts at most 'as a signal to Parliament that it needs to consider

[123] ibid, para 56. [124] ibid, para 67. [125] [2004] 2 AC 557.
[126] ibid, para 32 (Lord Nicholls), para 63 (Lord Millett), para 121 (Lord Rodger).
[127] [2013] UKEAT 0401_ 12_ 0410 para 41. [128] [2015] EWCA Civ 33 para 68.

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amending that legislation'.[129] Such an outcome is of limited utility to an employee in the position of B or J, however, since he or she would still need to bring a claim before the ECtHR for breach of Article 6 to obtain compensation. Fortunately in the *Benkharbouche* case the employees had a further argument based on non-compliance with EU law which was successful. This aspect of the case is discussed below.

Hence, while in the *Benkharbouche* case the Court of Appeal did not accept the conclusion of the ECtHR in *Cudak* and *Sabeh el Leil* that Article 11 of the UN Convention represents customary international law in respect of all mission employment disputes, it nevertheless reached a result that was consistent with those decisions. Specifically, the Court of Appeal held that the application of absolute immunity by a State to claims for compensation by service staff is in breach of Article 6 of the ECHR. The Court of Appeal's approach therefore also differentiates between levels of staff in terms of the application of immunity, with service employees being permitted to sue because of their lack of proximity to the sovereign activities of the State. Such an analysis is in accord with the ECtHR view that determines immunity questions based on the role and functions of the employee. The main difference between the two approaches is that the English Court of Appeal confined its analysis to service staff whereas the ECtHR suggested that a 'role and functions' test should be applied to all mission employees, in particular, administrative and technical staff. According to the ECtHR, where such employees do not perform functions in the exercise of governmental authority and their claims do not affect State security or interfere with the operations of the mission, they are entitled to sue. Since, as argued above, there is also a clear trend in recent State practice in favour of this view, it is hoped that English courts in later decisions involving administrative or technical staff performing routine or generic duties will adopt this position. Of course, if they do not, their decisions may be liable to challenge before the ECtHR under Article 6.

### *E. Collective Labour Claims*

As a final word on the UN Convention, some comment should be made about collective labour claims. A collective claim typically involves a trade union seeking representation in a workplace and such actions are not referred to in either the text or commentary to the Convention. In a recent Belgian decision,[130] it was suggested that immunity applied to bar such suits on the basis that they were outside the scope of Article 11 and would, in the

[129] ibid, para 72.
[130] Labour Court of Brussels 3 May 2012 cited in B Theeuwes, F Dopagne and E Hay, *Diplomatic Law in Belgium* (Maklu Publishers 2014) 120 para 129.

embassy and consulate context, interfere with the right of a State to organize its missions. Consequently, in that case, immunity was applied to block an application to establish a committee for the protection of non-diplomatic staff at an embassy. The Court considered that the absence of any exception for collective claims in Article 11 of the UN Convention meant that immunity must have been intended to apply in such cases. This analysis appears textually correct given that Article 5 creates a presumption of immunity for a foreign State which is then subject to an exception in Article 11(1) for 'a proceeding which relates to a contract of employment'. Since a collective claim is brought by a labour representation body on behalf of a *group* of employees, it is not a proceeding in respect of a *single* contract of employment and so arguably would fall outside this provision. The absence of any reference to collective claims in the provision suggests that they were probably a deliberate omission.

Some support for the application of State immunity to collective labour actions comes from the decision of the Supreme Court of Canada in *United States v The Public Service Alliance of Canada*.[131] In that case, which has been recently followed by the Ontario Superior Court of Justice on similar facts,[132] a distinction was drawn between a collective claim on behalf of civilian workers at a US military base (that was barred by State immunity) and a suit by an individual employee at the base (that would have been admissible). The distinction is based on the fact that a collective claim would almost always be more disruptive and intrusive upon a foreign State's sovereignty and capacity to organize and administer its workforce than a suit by an individual employee. Immunity should therefore apply in the case of collective claims under the UN Convention, particularly where highly sovereign workplaces such as diplomatic and consular missions are involved. Consequently, an action challenging a 'mass layoff' of employees at the Venezuelan Embassy in Portugal was properly barred by State immunity because it would involve an investigation into the administration and staffing policies of the foreign State in its missions.[133]

[131] (1992) 94 ILR 264.

[132] *Defense Contract Management Agency Americas (Canada) v Public Service Alliance of Canada* 2013 ONSC 2005.

[133] District Court of Portugal 21 September 2005 at www.coe.int/t/dlapil/cahdi/Source/state_immunities/PORTUGAL_Immunities_2013_EN.pdf. For a supportive Italian decision, see *Italian Trade Union for Embassy and Consular Staff v United States* (1981) 65 ILR 338. See also C-583/10 *United States of America v Nolan* [2013] 1 CMLR 32 at para 49 where the European Court of Justice suggested (obiter) that State immunity would apply in the context of an application for collective consultation for redundancy by staff at a foreign military base under Directive 98/59/EC on the approximation of laws of Member States relating to collective redundancies. The position, however, of State-owned corporations engaged in purely commercial activities may be less clear: *State Bank of India v National Labor Relations Board* 808 F 2d 526 (7th Cir 1986).

## III. EUROPEAN LAW INFLUENCE: THE BRUSSELS I REGULATION

The second example of European law influence on embassy employment cases can be seen in the recent decision of the European Court of Justice (ECJ) in *Mahamdia v Algeria.*[134] *Mahamdia* involved a reference from a German court to the ECJ to interpret the Brussels I Regulation.[135] The combined effect of Article 18(2) and 19(1) of the Regulation[136] is that where an employer is domiciled outside the European Union (EU) but has an 'establishment' in the EU, where the employee works, the employee may sue the employer in the courts of the Member State in which the employer's 'establishment' is situated. The claimant in this case, M, worked for the Algerian Government as a driver at its embassy in Berlin. In this role the employee drove guests and colleagues and occasionally the ambassador and also delivered embassy correspondence to entities in Germany and the post office. Upon his employment being terminated, the employee sued the Algerian government for compensation for wrongful dismissal as well as for unpaid overtime in the German courts.

The defendant State argued that the court had no personal jurisdiction over it since the embassy was not an 'establishment' within the terms of Article 18(2) of the Regulation. The ECJ rejected this argument, finding that an embassy may be considered an 'establishment' 'where the functions carried out by the employee do not fall within the exercise of public powers' or 'where the proceedings are not likely to interfere with the security interests of the state'.[137] The ECJ accepted the German court's classification of the employee's activities in the present case as private law in nature and 'ancillary to (the) state's exercise of sovereignty'.[138] Consequently, the German courts had personal jurisdiction in respect of the embassy employee's claim. In support of its conclusion that an embassy could be an 'establishment' the ECJ noted that an embassy was not a monolithically sovereign body but an entity which could in certain circumstances act as a private person, 'acquir(ing) rights and obligations of a civil nature, in particular, as a result of concluding private law contracts'.[139] In determining whether an embassy was acting as a private rather than a sovereign entity in the context of a dispute with an employee, the role and functions of the employee were critical.

While the ECJ did not expressly refer to the ECtHR's decisions in *Cudak* and *Sabeh el Leil* their influence seems unmistakable. It was by no means obvious

[134] C-154/11 19 July 2012; 153 ILR 58.

[135] Council Reg No 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; note that this Regulation has been replaced in respect of proceedings commenced after 10 January 2015 by the Regulation (EU) 1215/2012 of the European Parliament and Council on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The analysis in the text, however, is unaffected.

[136] See, for the 2012 Regulation, arts 20(2) and 21(1)(a).

[137] *Mahamdia v Algeria* paras 56–57. [138] ibid, para 27. [139] ibid, para 49.

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that, in considering whether an embassy was an 'establishment' under Article 18(2) of the Regulation, the court should take a case-specific approach that focuses on the nature of the individual contract with the claimant. The ECJ could have simply chosen a single classification of an embassy for all purposes. Instead the court adopted a flexible analysis which allows a claimant in certain cases to sue a foreign State in an EU Member State instead of being confined to the courts of a possibly unreceptive employer State.[140]

A further important consequence of the ECJ's decision is that it creates a symmetry and consistency with the approach of the ECtHR in in its interpretation of Article 6 of the ECHR. While the language used by the ECJ ('functions within the exercise of public powers') is not identical to the wording of Article 11(2)(a) of the UN Convention ('functions in the exercise of governmental authority') in substance they are the same formulation. In *Mahamdia*, the claimant was an embassy driver with no involvement in the policies or prerogatives of the foreign State; he was therefore not performing functions in the exercise of governmental authority. Hence, if in *Mahamdia*, Algeria had pleaded State immunity and a German court had accepted such a claim, an arguable case for a breach of Article 6 of the ECHR by Germany would have existed, according to the view in *Cudak*. Yet the key point to emphasize is that both the ECtHR and ECJ have accepted that, in assessing embassy employment claims against foreign States, it is appropriate to apply a test that focuses on the role and duties of the employee. In *Benkharbouche v Embassy of the Republic of Sudan*[141] the English Court of Appeal noted that the *Mahamdia* case provides 'support for the view that international law does not require the grant of absolute immunity from all employment claims by employees of diplomatic missions'.

## IV. EUROPEAN LAW INFLUENCE: THE EU CHARTER

The third example of the influence of European law on State immunity and employment appears in the English Court of Appeal decision in *Benkharbouche v Embassy of the Republic of Sudan*,[142] discussed above. The final argument of the claimant employees in that case was that the granting of immunity under sections 16(1) and 4(2)(b) of the UK SIA violated principles of European Union law, specifically, Article 47 of the EU Charter. Article 47 is in substance the same as Article 6 of the ECHR in conferring a right of access to a court.[143]

[140] D Martiny, 'Deutscher Kündigungsschutz für das Personal ausländischer Botschaften?' [2013] Praxis des Internationalen Privat und Verfahrensrechts (IPRax) 536; M Nino, 'State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice' [2014] Rivista di diritto internazionale privato e processuale 819, 845.

[141] [2015] EWCA Civ 33 para 48.

[142] [2015] EWCA Civ 33.

[143] ibid, para 71.

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The critical difference between the provisions is that, while the ECHR articles cannot be disapplied by a UK domestic court because of the limited operation of the HRA, EU law, by contrast, has 'direct effect' in domestic law. The consequence is that where the employment claims are 'within the scope of EU law'[144] any principles of domestic legislation which conflict with fundamental EU rights cannot be applied in accordance with section 2(1) of the European Communities Act 1972 (UK). In *Benkharbouche*, it will be recalled that mission employees B and J had brought claims for race discrimination and harassment, holiday pay and failure to provide regular breaks in violation of the EU Race Discrimination and Working Time Directives. Such claims fell within the material scope of EU law and because the UK rules of State immunity precluded their capacity to enforce such rights in breach of Article 47 of the Charter, the immunity provisions were disapplied.

The consequences of this decision are likely to be highly significant in embassy employment cases. Henceforth, employees will be encouraged to circumvent State immunity restrictions under domestic law by pleading breaches of EU regulations without the need (in the UK context at least) of having first to comply with the interpretive requirement of section 3 of the HRA.

Moreover, the decision may have even wider implications. In *Benkharbouche* B and J were found to be service staff, whose 'work [did] not relate to the sovereign functions of the mission'[145] and so their claims could not be barred by the customary international law of State immunity as defined by the English Court of Appeal. Consequently, the attempt to impose immunity in that case was found to be a breach of Article 6 of the ECHR. Yet, while the Court of Appeal in *Benkharbouche* seemed to assume that the same test applies to breaches of Article 47 of the EU Charter, it did not clearly state that a breach of customary international law was *also* a requirement to establishing a violation of Article 47. While Article 52(3) of the Charter states that 'the meaning and scope of [Charter] rights shall be the same as those laid down by the [ECHR]', it also provides that 'this provision shall not prevent *Union law providing more extensive protection*'.[146] Possibly an argument could be made that to give full effect and 'extensive protection' to EU rules, international law principles that obstruct their operation, such as State immunity, must give way in all circumstances. While such a result creates a difference in scope between the rights under the ECHR and the Charter, such discrepancy could be justified by the need to implement fully EU law, even where it conflicts with international law.

The issue particularly arises where immunity is imposed by a national court in circumstances that may *not* violate customary international law. Suppose, for example, an embassy employee was responsible for issuing passports and visas or handling media liaison for the employer State. In each of these cases

[144] ibid, para 73. [145] ibid, para 85. [146] Emphasis added.

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it may be more difficult to find that the employee is not engaged in the sovereign functions of the mission with the result that a domestic court's upholding immunity would not be in breach of international law. Yet, why cannot the employee in each case argue that he or she has been denied a right of access to a court under Article 47, assuming a breach of EU laws, simply because immunity has been imposed at all? Arguably such a course is permitted by Article 52(3) of the EU Charter on the basis that EU law may provide 'more extensive protection' for rights than the ECHR.[147]

Of course, if a court were to find that Article 47 was breached whenever State immunity was granted in an embassy employment case, it would render the immunity rules redundant. While the extremity of this conclusion may deter many courts from reaching such a result, concern for enhancing employee rights within the EU may be considered a more compelling factor.

## V. DIPLOMATIC AND CONSULAR IMMUNITY

So it can be seen that European law principles have had a significant impact on State immunity in embassy and consular employment cases. The impact on diplomatic and consular immunity has been less marked so far but the position may change, particularly since, from the point of view of the employee at least, the interference with his or her rights is just as acute.

### *A. Domestic Servants*

Diplomatic and consular immunity have traditionally been regarded as distinct from State immunity as they apply where an individual official in the form of a diplomat or consular officer, as opposed to the State itself, is sued. The aim of diplomatic and consular immunity is to allow the agent to exercise his or her functions without any restraint or coercion on the part of the receiving State.[148] In the employment context, diplomatic and consular immunity has often been invoked where a domestic servant employed by a serving diplomat or consular officer in his or her residence commences proceedings. Three types of claim have generally arisen: where domestic workers have been victims of slavery, involuntary servitude or forced labour, where they have been subject to human trafficking or where their contractual rights as employee have been violated due to non-payment of wages, lack of leave,

[147] See eg R Schutze, *European Constitutional Law* (CUP 2010) 428–9; S Peers and A Ward (eds), *The European Union Charter of Fundamental Rights Politics Law and Policy* (Hart Publishing 2004) 170 who both acknowledge that the effect of art 52(3) may be to confer a higher level of rights protection under the Charter as compared with the ECHR. See also The UK House of Commons European Scrutiny Committee 43rd Report 2013–14 HC 979, 'The Application of the EU Charter of Fundamental Rights in the UK: A State of Confusion' paras 163–164.

[148] *Aldona S v Royaume Uni* (Supreme Court of Poland 1948) cited in *Al-Malki v Reyes* [2013] UKEAT 0403_ 12_0410 para 33 (affirmed *Reyes v Al-Malki* [2015] EWCA Civ 32).

etc.[149] Unlike State immunity cases where most employees are 'locally recruited' residents of the forum State, domestic servant disputes typically involve immigrant workers hired outside the forum.

In response to such claims diplomatic and consular agents have relied upon immunities granted to them under the Vienna Convention on Diplomatic Relations 1961 (VCDR) and the Vienna Convention on Consular Relations 1964 (VCCR). Article 31(1) of the VCDR provides that a 'diplomatic agent shall … enjoy immunity from the (receiving State's) civil and administrative jurisdiction'. Article 31(1)(c) provides that immunity will not be available 'in the case of … an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions'. Such a provision has unfortunately acted as a form of absolute immunity barring all suits by claimants in diplomatic employment cases, because entry into a contract with a domestic servant has never been considered 'professional or commercial activity' by the diplomat. Courts in the United States, United Kingdom and other European countries have all adopted this position.

In *Tabion v Mufti*[150] a United States Circuit Court of Appeals had to consider an action by a Filipino domestic servant against her employer, a Jordanian diplomat. The court upheld the diplomat's plea of immunity under Article 31 (1)(c), holding that the hiring of a domestic servant as household help is an act incidental to the daily life of a diplomat in the receiving state and therefore not 'professional or commercial activity … outside his official functions'.[151] Relying on the US Government's Statement of Interest in the case, commercial activity under the Article was found to 'relate only to trade or business activity engaged in for personal profit'.[152] In subsequent decisions, United States courts have unanimously reaffirmed this view: see *Gonzales Paredes v Vila*,[153] *Sabbithi v Al Saleh*,[154] *Montuya v Chedid*[155] and *Fun v Polger*.[156] In a recent United Kingdom decision, *Reyes v Al-Malki*,[157] the English Court of Appeal also found that 'as a matter of ordinary language, a contract for the provision of services which are incidental to [a diplomat's] family or domestic life is not commercial activity'.[158] According to the Court, such a conclusion was also supported by the context[159] and object and purpose[160] of the provision.

The above position appears to have been taken with little regard to the extremity of the circumstances presented by the employee. While in all of the

[149] F Staiano, 'Domestic Workers' Human Rights Versus Diplomatic Immunity: Developments in International and National Jurisprudence' (2012) 22 Italian Yearbook of International Law 201, 205–6; A Kartusch, *Domestic Workers in Diplomatic Households* (German Institute of Human Rights 2011) 48.

[150] 73 F 3d 535 (4th Cir 1996).

[151] ibid, 537, 538–539.

[152] ibid, 538–539.

[153] 479 F Supp 2d 187 (DDC 2007).

[154] 665 F Supp 2d 122 (DDC 2009).

[155] 779 F Supp 2d 60 (DDC 2011).

[156] 2014 US Dist Lexis 4602 (DNJ).

[157] [2015] EWCA Civ 32.

[158] ibid, para 14.

[159] ibid, para 19.

[160] ibid, para 29.

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above cases the claimant pleaded breaches of contract based on excessive working hours and inadequate wages, in some cases additionally, serious human rights violations were alleged. For example in *Sabbithi*, the defendant was accused of having deprived the plaintiffs of their passports and physically abusing them, in *Montuya* the plaintiff complained of abuse and physical confinement to the defendant's residence and in *Reyes* the plaintiffs had been determined by the UK Government to be victims of human trafficking. Hence, it seems that any case involving an employment relationship between an incumbent diplomat and a domestic servant is excluded from judicial review. European domestic court decisions are consistent with this view.[161] An absolute immunity standard therefore effectively prevails.

On the question of human rights abuses, it is interesting to note that in the *Sabbithi* case the plaintiff employee sought to overcome the finding of diplomatic immunity by arguing that it was overridden by the international law doctrine of *jus cogens*. *Jus cogens* principles are peremptory norms of public international law 'which … prevail over both customary international law and treaties'.[162] The plaintiff argued that human trafficking was such a norm. The court responded first by denying that such activity occurred on the facts and secondly, by again reciting the US Government's Statement of Interest, to the effect that there was no *jus cogens* exception to diplomatic immunity.[163] The question arises once more as to whether the court should have given greater consideration to the issue of serious human rights violations and diplomatic immunity, especially given the paucity of available avenues of redress for employees.

Another observation that can be made of Article 31(1)(c) of the VCDR is that it differs in a key respect with its companion instrument, the VCCR. Article 43 (1) of the VCCR provides that 'consular officers … shall not be amenable to the jurisdiction of the (courts) of the receiving state in respect of acts performed in the exercise of consular functions'. Under this provision, there is no requirement that an employee has to show, in addition to the functional test above, that the consular employer has engaged in 'professional or commercial activity' as exists in Article 31(1)(c) of the VCDR. While such a difference between the texts could be justified on the ground that diplomats, unlike consular officers, have a closer connection by their work to the sovereign affairs of the sending State, arguably this rationale is less

[161] See eg *Mohamed X v Madame Fettouma Z* (CA Montpellier 17 October 2012, 11/01255 Legifrance); *MDDA v The Australian Embassy* (1988) 19 NYIL 438 n 27.

[162] 605 F Supp 2d, 122, 129.

[163] For a similar approach taken by an English court, see *Reyes v Al-Malki* [2015] EWCA Civ 32 para 64, although note that human trafficking was found to have occurred in that case. It is also well accepted that a *jus cogens* norm does not take precedence over the rules of *State* immunity: see *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* ICJ Rep 2012, 99; *Jones v Saudi Arabia* [2007] 1 AC 270.

compelling in the context of a suit by a domestic servant employee performing essentially 'private' duties at his or her residence. If the main objective of both the VCDR and the VCCR is to ensure that diplomatic and consular officers can perform their functions in the receiving State without interference then it is hard to see why a single functional test, such as is provided in Article 43(1) of the VCCR, cannot apply to determine immunity in both cases, at least in the case of suits by domestic servant employees. It is not at all clear why a diplomat requires the additional 'professional or commercial activity' protection to enable him or her to carry out their responsibilities effectively. Indeed, from the point of the view of the claimant domestic servant, the difference between the two formulations only serves to frustrate their legitimate pursuit of redress.

A United States Circuit Court of Appeals decision, *Park v Shin*,[164] shows that domestic servant employees have a much greater chance of overcoming immunity once a purely functional analysis is applied. In *Park* a domestic servant was held entitled to sue her employer, the Deputy Consul General of Korea. The claimant's primary role was cooking, cleaning and taking care of the defendant's children and she also prepared and served food for guests of the consular officer at his home. The key fact for the court was that the claimant was the Shin family's '*personal* domestic servant'[165] with the bulk of her duties and time focused on the care of the consular officer and his family, not official consular functions. The court also noted that the plaintiff's visa was for 'personal employees of consular officers' and that her salary, medical expenses and costs of travel to the US were all paid by the Shins directly.

So, the *Park* case demonstrates clearly that once the 'professional or commercial' activity requirement is removed, the prospects of success for domestic servants improve immeasurably, at least where such persons perform predominantly personal duties for their employer. There therefore seems, at least from the point of view of the employee, a case of discriminatory treatment between employees of diplomatic and consular officials. Surely in the situation where both employees perform the same general tasks within the sphere of personal domestic assistance, it is unreasonable that recovery should depend upon a person's choice of employer.[166]

A German court recently sought to justify the plainly inequitable position for domestic servants of diplomatic staff. In *Pfarr v Anonymous*[167] the court noted that even though an incumbent diplomat cannot be sued, the receiving State could still declare the diplomat *persona non grata* and expel him or her under Article 9 of the VCDR, the employee could still commence

[164] 313 F 3d 1138 (9th Cir 2002).
[165] ibid, 1142 (emphasis in the original).
[166] Compare *Reyes v Al-Malki* [2015] EWCA Civ 32 para 28 where the English Court of Appeal distinguished *Park* on the ground that it involved consular, not diplomatic, immunity but did not address the above argument.
[167] ILDC 1903 (DE 2011) (Higher Regional Court KG).

proceedings against the diplomat in the sending State's courts or finally the employee could wait until the end of the diplomat's posting and sue him or her in the receiving State.

None of these options is, however, useful from the point of view of the aggrieved employee. In the first case, the decision to declare a diplomat *persona non grata* lies with the receiving State not the employee and so is subject to political considerations over which the employee will likely have little control. Also and more fundamentally, such a declaration does not provide compensation for the injured employee. As to the option of pursuing proceedings against the diplomat in the courts of the sending State, that is, the diplomat's State of nationality, such a route is likely to be expensive and onerous for an individual domestic servant and also unlikely to be successful if the courts are not impartial or independent of the executive. The third alternative may encounter problems of expired limitation periods, of locating the former defendant for service of court process (assuming he or she has left the receiving State)[168] and also of finding assets in the receiving State against which any judgment can be executed (or failing that, being able to enforce any judgment in the sending State).

On the question of immunity, however, the German court is correct in saying that the position of employees is strengthened after the diplomat's employer has left his or her post. In such a case the relevant provision of the VCDR is Article 39(2) which provides that a former diplomat will only be entitled to claim immunity 'with respect to acts performed … in the exercise of his functions as a member of the mission'. The immunity provided in this provision is therefore a more restrictive one than that existing under Article 31(1)(c) and is in fact the same as that for incumbent consular officials under Article 43(1) of the VCCR.

Not surprisingly then, and consistent with the above decision in *Park v Shin*, United States courts in a series of cases have interpreted Article 39(2) to hold that there is no diplomatic immunity in respect of actions that pertain to (the diplomat's) household or personal life … that may provide at best an indirect rather than a direct benefit to diplomatic functions'.[169] Immunity therefore does not apply for acts that are 'incidental to the exercise of a diplomat's functions as a member of the mission' but only those 'inextricably tied to his or her professional activities' that is, 'official acts'.[170] On the facts of *Swarna v Al-Awadi*, the court found that the diplomat's employment of the plaintiff did not constitute an official act. The claimant was employed solely to meet the diplomat's and his family's personal needs by cooking, cleaning and caring for the defendant's children and only occasionally performed duties at

[168] Kartusch's empirical research suggests that this is a common problem in practice; see (n 149) 55.

[169] *Swarna v Al-Awadi* 622 F 3d 123, 134–135 (2nd Cir 2010); *Baoanan v Baja* 627 F Supp 2d 155 (SDNY 2009).

[170] *Swarna v Al-Awadi* ibid, 135–137.

mission-related functions. The fact that the employee was paid out of the diplomat's private funds and entered the US on a domestic/personal employee visa was further evidence in support of the above conclusion.

The court in *Swarna* also relied on the fact that the defendant allegedly raped the employee in further support of the conclusion that he had not been engaged in official acts since such conduct, by definition, could hardly be authorized. Here, for the first time, a US court is suggesting that the nature of the claim, in particular, where serious human rights abuses are alleged, will be relevant in determining whether diplomatic immunity should be available. By contrast, a UK court recently rejected this approach, declaring that once employment was found to be within the official functions of a diplomat, '[his or her] behaviour toward the domestic servant could not remove it from that category'.[171]

The problem with this reasoning is that it treats all offending conduct by a diplomat alike for the purposes of determining the immunity question. Surely a failure to pay agreed wages should be considered differently to an allegation of human trafficking or slavery, for example. If diplomats were put on notice that they would lose their functional immunity when engaging in heinous conduct, then the law of diplomatic immunity could have a deterrent effect. In another UK decision the court seems more mindful of this point, finding that allegations of discrimination and harassment in the form of sexual abuse cannot 'sensibly be argued … [to be] acts carried out in the functions of the mission'.[172] While it is true that the VCDR makes no express reference to human rights principles on the issue of immunity, it is not a great step to say that where abusive conduct is alleged against a diplomat or consular officer, he or she should not be able to assert that such activity is beyond judicial review because it occurred during the performance of his or her official functions.

Similar reasoning to the *Swarna* case was adopted in the later decision of *Baoanan v Baja*.[173] There, once again a domestic servant was able to sue her employer where the bulk of her duties related to the private needs and domestic affairs of the diplomat and his family. This outcome was not affected by the fact that the diplomat and his family resided in the embassy. The court also followed the view expressed in *Swarna* that where an allegation made against the diplomat included serious human rights abuses, such as human trafficking and slavery, this must be seen as plainly unrelated to the diplomat's functions as a member of the mission.

United Kingdom courts have followed the *Swarna* and *Baoanan* decisions in two recent cases involving domestic servants, concluding that the work carried

[171] *Al-Malki v Reyes* [2013] UKEAT 0403_ 12_0410 para 42, affirmed *Reyes v Al-Malki* [2015] EWCA Civ 32 para 34.

[172] *Abusabib v Taddese* [2012] UKEAT 0424_11_2012 para 35, affirmed [2013] EWCA Civ 1351 para 3.

[173] 627 F Supp 2d 155.

out clearly fell outside the official functions of the diplomat: see *Wokuri v Kassam*[174] and *Abusabib v Taddese.*[175] In *Abusabib* the court also suggested that while a 'domestic worker who performs no task outside the diplomat's home' would rarely, if ever, have a close connection with the functions of the mission, employment of other persons, such as personal assistants, may fall within that category.[176] If this view is correct, then such staff, having contracted directly with diplomatic personnel rather than the foreign State itself, would be in an even worse position than domestic servants in terms of the application of diplomatic immunity.

### B. Other Employees of Diplomats

This outcome can be seen in a number of United States decisions where persons employed to carry out routine and non-governmental responsibilities at embassies and consulates were barred from suit on the basis of diplomatic or consular immunity. In each case[177] the court relied upon Article 5(m) of the VCDR and VCCR, which provides that diplomatic or consular functions includes 'any other functions entrusted to a diplomatic or consular post by the sending state which are not prohibited by the laws and regulations of the receiving state or to which no objection is taken by the receiving state'. The courts found that a diplomatic or consular officer's 'managing and supervising [of mission] employees' is a function of that officer within Article 5(m) and termination of the employment of staff is an act performed in the exercise of that function. Hence, such employees have no right to redress because their employment falls within the diplomatic or consular officer's official functions. Such a result is unjust when it is remembered that such actions would not be barred by State immunity under the UN Convention, had the persons been fortunate enough to have been employed directly by the foreign State or mission instead.

### C. Reform

So, the position of employees of diplomats and consular officers is substantially more precarious than that of persons employed directly by a foreign State. From the point of view of the employee and the tasks which he or she performs it seems inequitable and discriminatory that the scope of immunity from jurisdiction should be substantially different. The question then is whether

[174] [2012] EWHC 105 (Ch).
[175] [2012] UKEAT 0424_11_2012 affirmed [2013] EWCA Civ 1351.
[176] ibid, para 31.
[177] *Ewald v Royal Norwegian Embassy* 2012 US Dist Lexis 8949 (D Minn); *Jimenez v Delgado* 2013 US Dist Lexis 148068 (SD Tex); the same result was reached in *Ford v Clement* 834 F Supp 72 (SDNY 1993) although the plaintiff employee there was a former vice-consul who may have had a more 'policy-oriented' role.

this situation can be changed, perhaps by reference to European law principles, as has occurred in the case of State immunity.

One option, that would benefit domestic servants of diplomats, would be for courts to alter their interpretation of 'professional or commercial activity' in Article 31(1)(c) of the VCDR so as to permit employment claims to be brought. Instead of defining such activity narrowly to refer only to 'trade or business activity engaged in for personal profit', an approach similar to that taken in respect of State immunity could be adopted whereby employment of persons not exercising sovereign authority could be considered 'professional or commercial'. If this approach were accepted,[178] a domestic servant of a diplomat would now be able to sue his or her employer given the clear and well-established view that such employment does not fall within the official functions of the diplomat. Essentially, domestic servants of diplomats would now be placed in the same position as similar employees of consular officers, which would be a positive step.

This change, however, will not help persons employed by diplomats or consular officers who are not domestic servants but perform administrative duties at the mission. For this category the recommendation is that Article 5 (m) of the VCDR and VCCR no longer be interpreted to provide that the employment of such persons is a 'function' of a diplomat or consular officer. Not only is there no express wording in the provision referring to employment of persons but such an approach can be justified by the need to provide an equivalent interpretation of diplomatic and State immunity in employment matters. Once again, an approach that parallels State immunity could be applied whereby employment of persons not exercising sovereign authority are entitled to sue their employer, regardless of whether it is a diplomat or the foreign State itself. Persons employed at embassies or consulates in administrative or technical roles are surely entitled to the same level of protection and rights of redress, regardless of the identity of their employer.

While such a proposal, to amalgamate the law of State and diplomatic immunity in the context of claims by employees, may appear radical, it should be recalled that 50 years ago, at the time the VCDR and VCCR were created, the customary international law of State immunity also would not have allowed any mission employee to sue his or her foreign State employer. Yet, today, as a result of significant developments in State practice, as noted above and recognized by the Court of Appeal in *Benkharbouche* and the UN Convention, the position has changed in favour of greater recognition of employee rights. Specifically, where persons are employed in routine and

[178] An alternative approach would be to amend art 31(1)(c) of the VCDR to render it consistent with art 39(2) of the VCDR and art 43(1) of the VCCR by deleting the 'professional or commercial activity' requirement. The task, however, of achieving agreement among over 150 States to amend a widely accepted international instrument would likely be Herculean.

generic roles and not engaged in sovereign activities of the State, the case for denying immunity is strong. It is true that there are important differences between State and diplomatic immunity with the rationale of the former being to preserve the sovereign equality of States and the latter to protect diplomats from interference by the receiving State with their functions. Yet, it is frankly hard to see why allowing an employee engaged in domestic service duties to sue his or her diplomat employer for compensation would intrude any more on the diplomat's functions or dignity than would occur to the foreign State if it were the employer. Hence, the employee's capacity to vindicate its rights should not depend on the identity of the employer where the employee's role and duties are indistinguishable in each case.[179] Such a view is particularly asserted where the instrument invoked to deny employees redress, the VCDR, is now over 50 years old and arguably does not adequately reflect heightened contemporary concerns regarding the rights of individuals. In essence, an evolution similar to that which has occurred in employee rights and State immunity is advocated for diplomatic immunity as well.

The final strategy that may be considered in protecting employees of diplomats is an appeal to European law principles. The issue was considered in the recent decision of the English Court of Appeal in *Reyes v Al-Malki*.[180] *Reyes* again involved domestic servants employed in the official residence of a diplomat. Claims were brought against the incumbent diplomat for compensation for racial discrimination and harassment, unauthorized deductions from wages and for accrued but untaken holidays. As noted above, the Court first found that their actions would be barred by diplomatic immunity, as the diplomat was not engaged in 'professional or commercial activity' under Article 31(1)(c). The claimants next argued that the imposition of immunity violated their right of access to a court under Article 6 of the ECHR.

Applying the approach of the ECtHR in *Fogarty* and *Cudak*, the Court first had to determine whether the application of diplomatic immunity in this case was a proportionate restriction on the employee's right of access to a court. While the ECtHR in *Cudak* and *Sabeh el Leil* had found that the granting of State immunity in those cases was disproportionate because it was inconsistent with the customary international law standard established in Article 11 of the UN Convention, the context of diplomatic immunity was different. While the international law of State immunity may have undergone significant contraction in the employment field in recent years, no equivalent movement could be detected in the area of diplomatic immunity. Hence, the VCDR 'remains an authoritative statement of international law on diplomatic immunity'.[181] Consequently, applying the test of proportionality in *Fogarty*,

[179] A point also suggested by X Yang, *State Immunity in International Law* (CUP 2012) 192 and Rodgers (n 108) 68, 71. [180] [2015] EWCA Civ 32. [181] ibid.

there could be no breach of Article 6 of the ECHR where the granting of diplomatic immunity by the Contracting State was consistent with the principles of customary international law as stated in the VCDR, which was the case here. Compliance with a State's international law obligations was again conclusive on the issue of proportionality.[182]

The effect of the decision in *Reyes* is that either a judicial reinterpretation or amendment of Article 31(1)(c) of the VCDR will be required to protect the interests of employees of diplomats. The Court of Appeal in that case accepted the premise of *Fogarty, Cudak* and *Sabeh el Leil* that a breach of Article 6 of the ECHR can only be established where the grant of immunity exceeds the customary international law standard. Assuming that the current interpretation of the VCDR represents customary international law, an employee can effectively never challenge a grant of immunity to an incumbent diplomat under the ECHR.

Yet, the interesting and unresolved question mentioned above in relation to the EU Charter should again be considered. If the view is taken that a breach of Article 47 of the EU Charter need not be premised on a violation of customary international law (unlike Article 6 of the ECHR) then the question arises whether an employee of a diplomat could challenge immunity where breaches of EU labour regulations are involved. In the *Benkharbouche* case, discussed above, the English Court of Appeal did not have to consider the question whether Article 47 could apply in the absence of a violation of international law since in that case the grant of State immunity was found to be a breach. Yet, if the effect of Article 52(3) of the EU Charter is to allow for more extensive protection of rights under EU law than under the ECHR, it is hard to see why international law principles such as diplomatic immunity, that prevent employees from vindicating their rights, should not be disapplied under Article 47. While such an argument would not have helped the employee in *Reyes* since no breaches of EU laws were alleged, if such violations were pleaded in a subsequent case, the way would be arguably open for a challenge to diplomatic or consular immunity under Article 47. It will be interesting to see if such an argument is raised in future cases.

## VI. CONCLUSION

The application of the doctrines of State and diplomatic immunity in embassy and consular employment matters remains a highly contentious question. In the European context there has been a clear trend towards enhancing the rights of persons employed by foreign States, principally through the mechanisms of the ECHR, the Brussels I Regulation and the EU Charter and also in recent State practice. A focus on resolving immunity questions by reference to the role and duties of the mission employee is apparent, which is consistent with the

[182] ibid, para 70.

approach taken in many non-European countries. So far, no parallel development has occurred in the case of employees of diplomats. Yet, given the similar situation and predicament of both categories of employees, particularly in terms of the roles and functions performed, it is suggested that their rights to redress should be made equivalent wherever possible. Hopefully this position can be achieved through a revised interpretation of 'professional or commercial activity' of diplomats in the VCDR or an innovative application of the EU Charter.