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INTERNATIONAL DECISIONS

EDITED BY DAVID J. BEDERMAN

International Criminal Court—Appeals Chamber—Rome Statute—Article 17—complementarity—Article 19—challenges to jurisdiction or admissibility of a case—Kenya

SITUATION IN THE REPUBLIC OF KENYA. No. ICC-01/09-02/11-274. Judgment on Kenya's Appeal of Decision Denying Admissibility. At <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf>. International Criminal Court, August 30, 2011.

On August 30, 2011, the Appeals Chamber of the International Criminal Court (ICC), by a 4-1 majority, rejected¹ Kenya's admissibility challenges under Article 19(2)(b) of the Rome Statute of the International Criminal Court² in cases involving six Kenyans who allegedly perpetrated crimes against humanity during the post-election violence that erupted in December 2007. The judgment marks the first time that a state party has challenged the Court's assertion of jurisdiction over its nationals, arguing that its own authorities are investigating the offenses and should therefore be given time and latitude to do so before interference by the Hague-based tribunal.

The ICC's formal involvement in Kenya began on March 31, 2010, when the pretrial chamber authorized the prosecutor to commence an investigation into the situation, and ruled that potential cases would be admissible because the government was not investigating or prosecuting the leaders bearing the greatest responsibility for the violence.³ A year later, at the prosecution's request, the same judges issued summonses to six individuals associated with the current Kenyan coalition government, the so-called Ocampo Six; namely, Uhuru Muigai Kenyatta (deputy prime minister and minister of finance), Francis Kirimi Muthaura (head of the public service and secretary to the cabinet), Mohammed Hussein Ali (chief executive and head of the national postal corporation and former chief of police), William Samoei Ruto

¹ Situation in the Republic of Kenya, No. ICC-01/09-02/11-274, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Aug. 30, 2011), at <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf>; see also *id.*, Dissenting Opinion of Judge Anita Ušacka (Sept. 20, 2011), at <http://www.icc-cpi.int/iccdocs/doc/doc1234872.pdf>. The ICC documents cited herein are available at the Court's website, <http://www.icc-cpi.int/>.

² Rome Statute of the International Criminal Court, Art. 19(2)(b), July 17, 1998, 2187 UNTS 3 [hereinafter Rome Statute] (providing that "[c]hallenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: . . . [a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted").

³ Situation in the Republic of Kenya, No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010) [hereinafter Article 15 Decision]. For a discussion of the significance of the decision, which contains a seminal statement regarding the scope of crimes against humanity at the ICC, see Charles Chernor Jalloh, Case Report: Situation in the Republic of Kenya, *in* 105 AJIL 540 (2011).

(minister of higher education, science, and technology), Henry Kiprono Kosgey (member of parliament), and Joshua Arap Sang (head of operations of a private, ethnically driven radio station, Kass FM, allegedly affiliated with one of the two political camps).⁴

Three weeks later, Kenya requested that the pretrial chamber determine that the cases involving its nationals were inadmissible before the Court. The application, which some of the suspects supported but was opposed by the ICC prosecutor, as well as victims of the post-election violence, was denied unanimously on May 30, 2011.⁵ Within a week, Kenya filed its appeal (para. 12), arguing that the pretrial chamber should be reversed because the decision was based on serious legal, factual, and procedural errors. For reasons of space, this case note examines only the alleged legal errors, which shaped the outcome.

The government's appeal turned on the appropriate legal test under Article 17(1)(a) of the Rome Statute. Under that provision, which enshrines the foundational complementarity principle giving states primary responsibility to address the offenses within ICC jurisdiction, the Court "shall determine that a case is inadmissible where: (a) [t]he *case* is being *investigated* or prosecuted by a State *which has jurisdiction over it*, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."⁶

According to Kenya, the pretrial chamber had misconstrued the phrase "the case is being investigated" in Article 17(1)(a) and neglected its submissions that the "same person/same conduct" test is erroneous (paras. 26, 29). That test, which the pretrial decision assumed the government had misunderstood, would require that a criminal investigation at the national level encompass both the *conduct* and the *person* that constitute the subject of the ICC case before the matter would be rendered inadmissible before the Court (para. 28). Instead, Kenya claimed, the better test was whether the national proceedings "cover the *same conduct* in respect of persons *at the same level in the hierarchy* being investigated by the ICC" (para. 27).⁷ In any event, the complementarity principle gives states a presumption in favor of national investigations and prosecutions. Thus, Kenya reasoned that the application of Article 17 necessarily entails a degree of flexibility for states to exercise their discretion in deciding whom to prosecute (para. 29).

The prosecutor and the victims disputed Kenya's appeal. They argued that the pretrial chamber had considered all relevant arguments and correctly articulated and applied the test for admissibility (paras. 31, 32). The government's preferred test applied only to the broader situation stage, not the specific case. In the prosecution's view, Article 17 regulates which should take precedence where the ICC and the concerned state concurrently exercise jurisdiction over the same case. According to this view, Kenya's faulty logic also forecloses the possibility for each side to pursue different suspects simultaneously for crimes related to the same

⁴ See Situation in the Republic of Kenya, No. ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang (Mar. 8, 2011); No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali (Mar. 8, 2011).

⁵ Situation in the Republic of Kenya, No. ICC-01/09-01/11-101, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

⁶ Rome Statute, *supra* note 2, Art. 17(1)(a) (emphasis added).

⁷ Quoting Situation in the Republic of Kenya, Nos. ICC-01/09-01/11 & ICC-01/09-02/11, Application on Behalf of the Government of Kenya Pursuant to Article 19 of the ICC Statute, para. 32 (Mar. 31, 2011) (emphasis added) (characterizing the test as that used in the pretrial chamber's Article 15 Decision, *supra* note 3).

events (para. 31). Moreover, the prosecutor claimed, the same-person, same-conduct test is rooted in the text and legislative history of the Rome Statute (*id.*).

The Appeals Chamber would seize this first opportunity to rule on the “same person” element of the same-person, same-conduct test (para. 34).⁸ The majority clarified that although Article 17 stipulates how to resolve conflicts of jurisdiction between the ICC and its states parties, and ostensibly gives states the first bite of the jurisdictional pie, whether the case is being investigated does not just entail an inquiry into whether a state is undertaking some abstract investigation. Rather, the crucial issue is whether the “*same case*” is being concurrently investigated by both the Court and the concerned national jurisdiction (para. 36).

In addition, because complementarity is assessed at other stages of ICC proceedings, not only during admissibility challenges, the meaning of the phrase “case is being investigated” in paragraph 1(a) should be understood as applied in each of its specific contexts (para. 38). For instance, when the prosecutor is deciding whether to initiate investigations into situations (which also demands an Article 17 analysis), the parameters of the likely cases will be relatively vague because the prosecutorial inquiries will be in their early stages (*id.*). Whereas, for admissibility challenges under Article 19, which relate to concrete cases for which arrest warrants or summonses will have been issued, the determinative elements of the *case* will be specific to both the individual and the impugned conduct (para. 39). Consequently, for a judicial determination of inadmissibility under Article 17(1)(a) at this stage, “the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court” (*id.*).

Applying this test to Kenya’s admissibility challenge, which purported to oust ICC jurisdiction over the six suspects for the conduct alleged in their respective summonses, implies that the cases would be deemed inadmissible at the Court only if the government could show that it was investigating those same persons for substantially the same conduct by, for example, interviewing witnesses, collecting evidence, or undertaking forensic analyses (para. 40). Mere preparation to investigate suspects other than those under ICC scrutiny is insufficient to give rise to inadmissibility. Indeed, where investigations are planned rather than under way, it would be wrong to assert that the same case is being investigated by both the Court and the state since there would be no jurisdictional conflict that would then need to be resolved (*id.*).

Where, as in this appeal, the prosecution has identified specific suspects, the inquiry cannot simply be whether third, unnamed suspects at the same level of hierarchy within Kenya are being pursued for the alleged commission of ICC offenses. Rather, the determinative issue is whether the same suspects are under investigation in both the Court and the national jurisdiction for substantially the same conduct (paras. 40, 41).

Ultimately, because the pretrial chamber had applied the correct test reflecting the specific stage of the ICC proceedings, the Appeals Chamber held that no legal (para. 46), factual (paras. 69, 83), or procedural errors vitiated the pretrial chamber’s decision denying Kenya’s admissibility challenge (paras. 99, 112, 122–23). This was particularly so, considering that it is the state contesting the admissibility of a case that bears the burden of demonstrating, by providing

⁸ Pre-trial Chamber I formulated this test in Situation in the Democratic Republic of the Congo, No. ICC-01/04-01/06-8-Corr., Decision on the Prosecutor’s Application for a Warrant of Arrest, Annex I, paras. 31, 37 (Feb. 10, 2006).

specific evidence with sufficient probative value, that it is investigating the case—a burden that Kenya had simply failed to discharge (para. 61).

In a strong dissent, released three weeks after the majority's judgment,⁹ Judge Anita Ušacka would have reversed the pretrial chamber's decision because it contained material errors relating to substance and procedure (diss. op., para. 1). Essentially, in her view, the pretrial chamber had abused its discretion by failing to adapt the admissibility proceedings to fit the Kenya situation (*id.*, para. 24), refusing to account sufficiently for the country's important arguments rooted in complementarity in this first such challenge by an ICC state party, applying an unduly high burden in its definitions of "investigation" and a "case" (*id.*, para. 25), and hastening the disposition of the admissibility challenge only to gloss over weighty legal/factual issues and trampling on Kenya's sovereign right initially to investigate and prosecute the cases (*id.*, paras. 28–30).

* * * *

Two fundamentally different conceptions of complementarity contend with one another within the Appeals Chamber's ruling. The first is the government's view of complementarity, endorsed by Judge Ušacka, which is that national jurisdictions should win by default without strong evidence rebutting the presumption in favor of their right to prosecute first. The government and the dissent correctly observed that the ICC was intended to complement the work of national jurisdictions when states exercise their primary duty to investigate and prosecute international crimes—a matter that, not coincidentally, also goes to the heart of state sovereignty. The competing view is the Court's application of complementarity: that the primary goal of the Rome Statute is to end impunity, and that whatever division of labor accomplishes that end will, or rather should, win out.

Both of these understandings find some historical grounding in the Rome Statute and unsurprisingly, therefore, were invoked by each of the opposing camps. The conception of Kenya and Judge Ušacka is reflected in the preamble, Article 1, and Article 17,¹⁰ as well as the drafting history of those provisions before and during the Rome negotiations of June and July 1998, where the preservation of national sovereignty was a primary goal. It is a perspective that is also grounded in most of the relevant literature.

The majority's interpretation rests on a broader, more interventionist, and perhaps unrealistic vision of the ICC. In this view, the crimes over which the Court has jurisdiction are international in nature and since the ICC was created to help end the culture of impunity for them, the application of complementarity should not become too restrictive. Otherwise, the international penal court will lose its limited leverage over national jurisdictions and become unable to fulfill this broader noble mission. This conception, too, is supported by the preamble to the Rome Statute, so that each interpretation is granted some textual grounding.¹¹

While it seems apparent that the majority and dissenting opinions fall within the boundaries of complementarity, it also seems apparent that neither position remains entirely consistent

⁹ The judicial composition is interesting. The majority included two African judges: Daniel Nsereko of Kenya's neighbor Uganda, who presided; and Akua Kuenyehia of Ghana. The other majority judges were Sang-Hyun Song of the Republic of Korea and Erkki Kourula of Finland. The lone dissenter was Anita Ušacka of Latvia.

¹⁰ The preamble to the Rome Statute, *supra* note 2, and Article 1 emphasize that the ICC "shall be complementary to national criminal jurisdictions." For Article 17(1)(a), see text at note 6 *supra*.

¹¹ *Id.*, pmbi.

with other core substantive principles. Kenya's view of admissibility broadens the complementarity test to give the appearance that the six cases at issue belong within the realm of the inadmissible. In doing so, however, it oversimplifies the matter and boils the entire inquiry down to whether or not the national jurisdiction asserts a claim over the case and gives some promise to proceed with investigations or prosecutions. The idea that an ICC state party enjoys the first right to prosecute rests on solid ground in the Rome Statute. But the suggestion that, in the context of an admissibility challenge, mere promises to proceed with the investigation of an amorphous group of unidentified suspects that may or may not include those currently before the Court swings the pendulum too far in the opposite direction. It also masks serious concerns about the genuineness of the East African nation's investigations and the complex national political dynamics anticipated when presidential elections are held in 2012; in particular, the difficulties that will face any independent national prosecutor seeking to proceed with charges against, for example, Deputy Prime Minister Kenyatta, who is widely deemed a front-runner for head of state and is supported by the current Kikuyu-led establishment in Nairobi under President Mwai Kibaki.

On the other hand, the majority's reasoning endorses an extremely narrow reading of the nature, scope, and purpose of Article 17. Admittedly, in its first decision to deal frontally with this issue, the Appeals Chamber has amended the same-person, same-conduct test to the "same-person, *substantially* same-conduct" test. The qualified test seems designed to maintain the national investigative spotlight on the same suspect as the one before the Court but appears to require only a rough equivalence in pursuing the impugned conduct. This approach makes sense, although it is difficult to imagine that a national prosecutor would choose to charge a suspect with harder-to-prove international crimes, such as crimes against humanity, if the same conduct could be more easily characterized as ordinary murder for the purpose of securing a conviction under domestic law. Be that as it may, the revised test still leaves ample room for outright judicial rejections of any legitimate national attempt to prosecute the ICC crimes that occur within a state's territory on the basis that it does not address substantially the same conduct.

By essentially retaining the strict same-person, same-conduct test, which on its face granted no margin of appreciation for states to make different investigative or charging decisions from those of the ICC prosecutor, the Appeals Chamber places stringent demands on states. From a proaccountability point of view, this high threshold may perhaps be apt at this adolescent stage of the Court's life. Nevertheless, in the long term it could undermine reasonable national efforts to prosecute by going against the logic of the burden-sharing goals of complementarity. Worse, it may also hinder the growth of effective national jurisdictions willing and able to prosecute the crimes, especially in Africa, which is so far the only scene of the Hague tribunal's investigations and prosecutions and where Kenya has a relatively more functional criminal justice system than most of the other countries. This consideration foreshadows a fundamental question for the future: is a single test for complementarity necessary, or appropriate, for application to all 119 current ICC states parties, or should there be a common, but differentiated, standard to reflect the specific circumstances and legal tradition(s) of each state?

In this context, one might ask whether Kenya's admissibility challenge could have been addressed in a way that would better reflect both the letter and the spirit of complementarity contained in Article 17, as Judge Ušacka suggested (*diss. op.*, para. 28). A more nuanced majority approach to inadmissibility could have attempted to find a middle ground between these

two extreme views to preserve both the primacy of national jurisdictions and the Court's ability to evaluate, influence, and shape domestic criminal proceedings. Such an approach would focus not just on the immediate cases, but also on the long term. On this view, the Appeals Chamber could have done more to support Kenya in its stated efforts to undertake criminal justice reforms that would enable it to address the crimes under its domestic legal system and thus possibly to establish a dialogue between the state and the ICC. Further, instead of a static approach to complementarity, a dynamic relationship would be sought that admits of changed circumstances where inadmissible cases could become admissible and vice versa (*id.*, para. 20). The Rome Statute bolsters this suggestion by unambiguously encouraging national proceedings through close cooperation between the prosecution and the state before an investigation escalates to the point where a formal admissibility challenge is required. Basically, the overall thrust of the scheme is international encouragement of and deference to genuine national efforts to prosecute.

As a corollary, one might consider whether similar levels of cooperation could be fostered between the ICC prosecutor and national authorities *after* both sides have taken *some or substantial steps* toward investigation of the alleged offenses. Of course, in the Kenya situation, the question of genuine willingness to investigate will remain relevant despite the majority's insistence that the issue whether the country is actually investigating is separate from the assessment of the genuineness of its investigation (para. 40). In fact, a close reading of the pretrial as well as the appeals decisions reveals that this concern tainted the government's entire admissibility challenge because the suspects are closely aligned with the powers that be in Nairobi. Still, as a consequence of applying the strict same-person, substantially same-conduct test, the majority of the judges could simply deem as insufficient or irrelevant Kenya's early attempts to investigate the post-election violence through, for example, the independent Kenya National Commission on Human Rights and the Commission of Inquiry into the Post Election Violence. But a look at the summonses and what is known of the case against the suspects confirms that the prosecutor relied substantially on evidence gathered during national investigations by those two Kenyan institutions long before the ICC got involved.¹²

Against this backdrop, one solution could have been for the Court to suspend or defer the prosecutor's investigation to give Kenya an opportunity to conduct its own prosecution of the suspects while the ICC prosecutor would closely monitor the ongoing investigation to ensure that it remained devoted to the same "case." Article 18(2) of the Rome Statute provides the framework for such a deferral, even if the "within one month" time limitation makes the provision not entirely applicable to this stage of the Kenya situation.¹³ Such a halfway solution

¹² See Kenyan National Dialogue and Reconciliation, Annotated Agenda and Timetable at A)2 (Feb. 1, 2008), at http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf; see also Commission of Inquiry into the Post Election Violence, Report (Oct. 15, 2008), at <http://www.dialoguekenya.org/docs/PEVReport1.pdf>.

¹³ Rome Statute, *supra* note 2, Art. 18(2) (providing: "Within one month of receipt of that notice [from the prosecutor indicating intent to begin an investigation], a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation."). On the other hand, Article 19(10) of the Rome Statute gives the prosecutor the right to request a review of a decision holding a case inadmissible before

would have numerous advantages over the Court's outright dismissal of the admissibility application and would have assuaged the government's and dissent's rightful concern about the future of the complementarity bargain struck at Rome.

First, without being exhaustive, suspension or deferral would continue to foster the development of national solutions to combat international crimes, a core purpose of the ICC reflected in both its preamble and its substantive provisions.

Second, much like the way that the International Criminal Tribunals for the Former Yugoslavia and Rwanda now transfer high-value suspects to national jurisdictions and monitor their cases in the domestic courts (with the option to claw them back in case of irregularities), it would maintain ICC leverage over national criminal proceedings and eliminate, or at least minimize, the possibility of shielding suspects by the state concerned (in this case, Kenya). Interestingly, here, the government voluntarily offered to provide periodic investigative reports to the chamber and simultaneously requested the transfer of material evidence in the prosecutor's possession for use in its domestic investigations. That request was also denied. The flimsy justification was offered that the Kenyan authorities were neither investigating nor trying the suspects' conduct constituting a crime within the jurisdiction of the Court or a serious crime under domestic law—a position that the government's evidence and the dissenting opinion contradict (*diss. op.*, paras. 8, 26, 28).¹⁴

Third, suspension or deferral of the ICC investigation would uphold the broader purpose of the Court to challenge impunity and ensure the prosecution of international crimes without overreaching and placing itself on a collision course with states whose cooperation will ultimately be crucial for its success in holding any trials of suspects—if, indeed, the formal charges against the Ocampo Six are later confirmed.

Fourth, it would not commit the ICC to any specific interpretation of Article 17 that could negatively affect the way it handles future admissibility dilemmas.

Finally, suspension or deferral would more adequately address Kenya's "let's take a big picture" approach to complementarity argument whose merits the pretrial and majority appeals judges regrettably declined to engage in a substantive way. Again, a perusal of the drafting history of the Rome Statute and the related discussion of complementarity by Judge Ušacka (*diss. op.*, paras. 19–20) shows that the ICC system was always conceptualized as a secondary, backup mechanism to that of its member states rather than as a system that, as the majority itself conceded (para. 36), would replace or supplant the heavy lifting that was envisaged for states in the struggle to ensure justice for victims of serious international crimes.

This is just one solution that the Appeals Chamber could have used instead of summarily dismissing Kenya's claim. It is not necessarily the best solution that could have been found, but its core advantage is rooted in the *raison d'être* of complementarity. As it is, the majority's

the ICC if new facts arise to negate the basis upon which it was predicated. Thus, a case previously found inadmissible could be rendered admissible because of changed circumstances, thereby giving states further incentives to ensure good-faith investigations and prosecutions.

¹⁴ Situation in the Republic of Kenya, No. ICC-01/09-63, Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, paras. 33–34 (June 29, 2011); *id.*, No. ICC-01/09-78, Decision on the Admissibility of the "Appeal of the Government of Kenya Against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence,'" para. 21 (Aug. 10, 2011) (holding, as inadmissible, Kenya's appeal of the decision denying the request for cooperation).

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

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

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

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

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

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

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

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

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