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Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. Canada

FEDERAL COURT

UNITED NATIONS AND FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS *v.* ATLANTIC SEAWAYS CORPORATION AND UNIMARINE S.A.: DECISION OF 25 MARCH 1979

Jurisdictional clause in a bill of lading providing for the exclusive applicability of Canadian law and the determination of disputes in Canada by the Federal Court of Canada — Question whether the jurisdiction in pursuance of the Federal Court in respect of a cargo claim extends to a cause of action arising outside Canada

The case concerned a claim for the expense of replacing a cargo of wheat which had been shipped for carriage from a port in the United States to a port in the Yemen Arab Republic and had been found upon arrival "affected by infestation and sprouting to the point of germination". The Trial Division had dismissed the action for damages on the ground that the Court was without jurisdiction to entertain the claim.

On appeal, the Federal Court noted that all the parties were located outside Canada and that the contract of carriage was alleged to have been made in the United States. It however observed that the bill of lading stipulated that the contract evidenced by the bill of lading be governed by Canadian law and that the disputes be determined in the Federal Court of Canada to the exclusion of any other courts.

The Court allowed the appeal on the following grounds:

> "The jurisdiction of the Court *ratione materiae* in an action *in personam* in respect of a claim for damage to cargo extends to a cause of action arising outside Canada. The terms of the *Federal Court Act* which confer jurisdiction *in personam* in respect of cargo claims contain no qualification, express or implied, based on the place where the cause of action arises. Significantly, this fact is quite unlike cases of jurisdiction *in personam* in *collision*. Once it is determined that a particular claim is one which falls within one of the categories of jurisdiction specified in section 22 (2) of the *Federal Court Act* the claim must be deemed to be one recognized by Canadian maritime law and one to which that law applies, in so far as the requirement in *Quebec North Shore Paper* and *McNamara Construction* cases is concerned. There is no other workable approach to the admiralty jurisdiction of the Court. To make jurisdiction depend upon the law that will govern by operation of the conflict of laws would create completely unpredictable and hazardous jurisdictional dichotomies."

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2. Israel

DISTRICT COURT OF HAIFA

THE GOVERNMENT OF ISRAEL AGAINST PAPA COLI BEN DISTA SAAR:
JUDGEMENT OF 10 MAY 1979

Question of the jurisdiction of an Israeli court regarding a member of a national contingent within UNIFIL, accused of smuggling explosives into Israeli territory — Claim of immunity from territorial jurisdiction — Question whether the accused could be considered as a member of a foreign military force present in Israel with the consent and permission of the State — Extent of the immunity of jurisdiction of members of such forces in the absence of a specific agreement on the matter between the host State and the country of the military forces origin — Question whether the accused could be considered as enjoying immunity from jurisdiction as a member of a United Nations force

The defendant was an under-officer in the Senegalese battalion within the framework of the United Nations Interim Force in Lebanon (UNIFIL). He was accused of having planned and implemented the transfer of explosives into the territory of the State of Israel for the purpose of delivering them to a representative of the Palestine Liberation Organization in that territory.

The defense attorney claimed immunity and produced as grounds for his claim two letters signed by the Chief Coordinator of United Nations Forces in the Middle East in which it was stated that Israel's refusal to hand over the accused to UNIFIL was contradiction with the "widely and consistently accepted principle of exemption from foreign criminal jurisdiction of military members of United Nations peace-keeping missions".

The Court noted that according to a note of the Legal Adviser to the Israeli Foreign Ministry Israel was not a party "to any international agreement whatsoever which grants immunity to UN soldiers who are not UN officials serving in UN forces in this area, including UNIFIL forces", and that the accused did not "belong to the category of persons enjoying diplomatic immunity in Israel".

With respect to the claim that since the defendant was a soldier in the Senegalese army stationed with permission in Israeli territory, he preserved the right of immunity against local jurisdiction, the Court stated the following:

> "This claim is based on an age-old rule set by Judge Marshall in the United States in the case of the ship 'The Exchange' at the beginning of the 19th century, and which became accepted over the course of time through court decisions in various enlightened nations. This rule states that 'a sovereign relinquishes part of his right of territorial jurisdiction when he permits a foreign ruler's military battalions to pass through the territory under his control' (this and other quotes to follow are taken from Archibald King's article which appeared on the *American Journal of International Law*, vol. 36, 1942). The background from the writing of this article, as the learned writer indicates, was that American military forces were stationed all over the world during World War II. At that time it was a common phenomenon that soldiers from one country would be within the territory of other countries and the question of crimes committed on the friendly nation's sovereign territory would arise. And since a ship is also part of a military division the incident of 'The Exchange' was brought up, whereby the ship was captured by Napoleon's armies in 1811, as proof of the judgement prevailing over military divisions stopping over on foreign territory, from which the author draws the conclusion that 'any military division, whether on land or sea, which enters the territory of another nation (with permission) enjoys extraterritorial status'.
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> "The example of the case of extraterritoriality was not accepted by the King's Council of England when in 1939, the matter of *Chung Chi Cheung* v. *the King* was brought before it. But the presiding Judge Atkin accepted the rule set down by 'The Exchange' incident regarding immunity for foreign military forces stopping off on or passing through foreign territory. Likewise did the learned defense attorney bring to our attention a Canadian legal ruling of 1943

regarding the immunity of American soldiers who were staying on Canadian soil, in which two of the five presiding judges expressed opinions approximating those which the defense attorney is asking us to adopt.

"This claim on the part of the accused's attorney is rejected for various reasons. The first reason, directing itself to the matter at hand, is that the defendant is not part of a military force present on the soil of the State of Israel with the consent and permission of the State. The defendant's military division is encamped on Lebanese territory just as all UNIFIL divisions are stationed on Lebanese territory and not on Israeli territory. In addition, the stationing of these divisions on Lebanese territory was not implemented at the request of the State of Israel, but rather at the request of the Lebanese Government as can be learned from UN Security Council resolution number 425 of March 19th, 1978, by which the Security Council resolved 'in light of the Lebanese Government's request to establish the UNIFIL forces in Southern Lebanon for the purposes of ensuring the pullback of Israeli forces, restoring international peace and security and assisting the Lebanese Government in ensuring the restoration of its effective authority over the area'....

"Even if there was relevance to the law which the defense attorney brings out, the defendant was not within the framework of a soldier serving in a military battalion present on the territory of the State of Israel by her (the State's) invitation or permission, being that the defendant's division, as stated, is stationed on Lebanese territory by right of a Security Council resolution passed upon request of the Government of Lebanon.

"Regarding the defendant's visits into Israeli territory for the purpose of tending to the supply needs of the battalion to which he belongs — although we suppose that these visits were carried out with permission, they may not be construed as a visit of a 'foreign military division' made as per the invitation or consent of the host country. These visits fall more into the category of personal visits, regarding which we must conclude that the State of Israel agreed that the supply needs of the defendant's division would come from Israeli territory. And as Judge Marshall stated in the above-mentioned article by King, on page 541, there is no supposition regarding the entrance of foreign troops into the soil of a friendly country but rather must be expressly stated.

"In addition to this, the rule set down in the matter of 'The Exchange' was never universally in effect, but rather subject to specific legislation or the agreement among various nations, for the purpose of granting immunity to members of military divisions stationed on foreign soil. In this way was an agreement reached between England and France regarding the authority of military courts to try English soldiers who were stationed on French soil during the First World War. Similar agreements were reached between France and Serbia, France and Italy, France and Portugal and France and Siam during World War I. When American troops landed on French soil in 1917, there was necessity of exchanging letters between the American Secretary of State for Foreign Affairs and the French Ambassador in Washington D.C. in order to grant judicial authority to American military courts over American soldiers in France.

"And regarding American troops stationed in English soil during World War I, after long drawn out negotiations between England and the United States over judicial authority, the British Government issued a defense regulation which granted *limited* judicial authority to American military courts, even though she never implemented her judicial authority in regard to American soldiers stationed on her soil.

"Also after the outbreak of World War II, the United States never attained from the British Government full immunity which is referred to in the case of 'The Exchange', regarding her soldiers stationed on English territory, and this is despite the fact that at the outset of the war it was England who was the party most highly interested in having American soldiers stationed on soil under her jurisdiction.

"When there was necessity to station American military divisions on Australian territory, the Australian Government issued a regulation by whose right American military courts would bear authority regarding disciplinary and internal administrative matters, while reserving for

herself the judicial authority to bring American military personnel to trial. At a later stage, in 1942, a law was passed which stated that, in the event of the arrest of an American military person in Australia who had broken Australian law, notification would be given to the American military authorities and, if requested, the individual would be transferred to them for trial by American military law.

"It will not come as a shock that, when the scholarly J. G. Starke sums up the legal situation in 1977 in his book, *An Introduction to International Law*, he begins the paragraph which discusses our case as follows:

'armed forces admitted on foreign territory enjoy a limited, but not an absolute immunity from the territorial jurisdiction.'

"The scope of such immunity is dependent, according to Starke, upon the circumstances under which those military forces were permitted to tarry upon the soil of another sovereign State, especially upon the existence of or lack of specifically expressed agreements between the host country and the country of the military forces' origin in which there are arrangements regarding the conditions of entry of military forces into the foreign country's territory. The author's opinion is that where there are no such existing agreements, it is incumbent upon the host country to accept the accepted rules of international law (by virtue of her hosting foreign troops) — rules which have their source in the case of 'The Exchange'. From here, the learned author's opinion is that immunity is granted specifically and expressly by the host country, and that conditions of such immunity are determined in an agreement between the host country and the country of the military forces' origin; and that when a nation agrees to host a foreign army on her territory without the formation of an agreement setting down the terms of such immunity for the visiting army's soldiers, it is possible that the terms accepted by international law will be applicable. These terms grant exclusive authority to military officers regarding crimes committed in the area where the military division is stationed, or in disciplinary matters, and likewise in regard to crimes committed outside this area when the soldiers are actually performing their duties. The author goes on to state, on page 293:

'On the other hand, if the members of the force commit offences outside their area and while engaged in non-military duties, for example, recreation or pleasure, the territorial State may claim that they are subject to local law.'

"Let it also be recalled that in the Canadian Supreme Court, in confronting the problem before us, one of the Judges who espoused the acceptance of the law of immunity (Judge Tachereau) stated as follows (in D.L.R. of 1943):

"This immunity as I have said, applies to all forces, whether on duty or on leave, but not to members of the forces who may enter Canada as tourists or casual visitors.

'Moreover, the powers of arrest, search, entry or custody which may be exercised by Canadian authorities with respect to offences committed or believed to have been committed, are not interfered with.'

"It is superfluous to state that in the case before us, the defendant was not in the framework of his job during the time he allegedly perpetrated the transfer of explosives for the PLO; and that his entrance into Israel was an entrance with permission as is granted to every tourist or visitor.

"Finally let us introduce the words of Oppenheim in his book on international law, 8th printing, edited by Lauterpacht, 1967, pp. 848-49:

'However, the view which has the support of the bulk of practice is that in principle, members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State or otherwise.'

"Our summary in regard to this point, consequently, is as follows: the rule claimed by the attorney for the defense is not applicable in regard to the matter before us due to the fact that the defendant was not a soldier in a military division stationed within the territory of the State of

Israel with the State's permission. This rule is not of universal relevance in international law — the customs of a country conceding judicial authority over crimes committed on her soil are dependent upon agreements between the host country and the visiting army's country of origin. Such that the defense attorney's claim is rejected."

With regard to the claim that the defendant had the right of immunity due to his being part of a United Nations force and would not, as a United Nations soldier, be sentenced by a court of the country in which he was stationed, in accordance with the rules of international law which had found expression in international pacts and in customary international law, the Court stated the following:

"Regarding this issue of conventional international law, the defense attorney relied upon the UN Charter and upon diplomatic correspondence exchange, which was the basis for stationing UN troops in various parts of the world such as Cyprus, the Congo, and in 1975 in Egypt after the separation of forces agreement between Israel and Egypt ...."

"The learned defense attorney also brought us quotes from Bowett's book, *United Nations Forces*, of 1964, from which it may be learned that if the old theory of extraterritoriality no longer holds, a new theory of functionality has taken its place. According to this theory, the justification for granting immunity and other rights to UN forces lies in the necessity to facilitate their effective functioning as a UN military force. The author goes on to say that these rights and immunity are not granted for the personal enjoyment of individuals but rather for the good of the organization; and there is nothing which grants UN forces freedom to escape the authority of local law.

"According to this opinion, which is espoused by the defense attorney, UN forces such as these do not fall into the category of a 'friendly army' but rather they must maintain neutrality, which they can do only if they are free of all pressure on the part of the country in which they are stationed.

"Since the State of Israel derives benefit from these troops being stationed in Southern Lebanon, he goes on to say, Israel must take an interest in preserving the independence of these forces.

"We wonder if, indeed, it may be pleaded in the name of an individual, accused of such crimes as those the defendant is accused of, that they are based on the preservation of neutrality which can serve as a basis for claiming immunity under any circumstances. But the law is not with the defense attorney, and not because of the grounds we raised here as a matter of incident, but rather because the relinquishment of the right to try falls into the framework of an act of kindness which the sovereign State may choose to perform in advance according to an agreement; or, *post facto*, after the commission of a crime he would be doing so of his own free will and not in accordance with practiced international law.

"In summarizing jurisdictional authority, Bowett concludes (page 437):

'It now seems to be accepted, despite occasional statements to the contrary, that visiting forces generally are subject to the exercise of concurrent criminal jurisdiction not only of the authorities of the forces to which they belong but also of the host State ...

'On the other hand, however, agreements concluded by the United Nations with Egypt, Lebanon, and the Congo provided that the members of the Force are subject to the exclusive criminal jurisdiction of the participating State.'

"We take it from here that this rule regarding immunity for UN forces is none other than part of international conventional law, to differentiate it from international customary law.

"Regarding our case, no agreement between the UN and government of Israel regarding immunity granted to members of the UN forces was brought to our attention. As a matter of fact, from the letter of the Legal Adviser to the Foreign Ministry presented to us and mentioned above, we learn that the State of Israel is not a party to "any agreement whatsoever which grants immunity to UN soldiers who are not UN officials serving in UN forces in this area, including UNIFIL forces." From here we learn that, according to the words of the scholarly author, there is no place for the plea of the defense attorney as being based on conventional international law.

"In regard to customary international law, only if there exists a specific agreement between the UN and the host country would the existence of this law be evidenced.

"In the words of the author, Ian Brownlie, in his book on international law, 1973:

'By analogy with the privileges and immunities accorded to diplomats, the requisite privileges and immunities in respect of the territorial jurisdiction of host states are provided for but in this context on the basis of treaty and not customary law. There is as yet no customary rule supporting international immunities.'

"In addition, the accepted view among the various authors is that members of military divisions serving in the Forces of the UN are not in the category of 'UN officials' and therefore are not eligible for the immunities granted UN officials by various agreements. Every immunity granted them is anchored in an agreement between the UN and the host country, as Bowett states in his book, quoted above, on page 131:

'The members of the Force who are at the same time members of the national contingents serving with UNEF in Egypt are not entitled to the privileges and immunities from jurisdiction contained in the Charter of the United Nations, since, although they are, for the purposes of the Regulations of the Force, "international personnel under the authority of the United Nations and subject to the instructions of the Commander through the chain of command," they are not agents or officials of the Organization.'

"Such that the defendant cannot cast his fate either on customary international law nor on conventional international law during the period of his services in the UNIFIL forces, and his claims based on international law are thus rejected. Even if the courts of the State of Israel were to consider customary international law as part of our country's judicial system, such acceptance would only abide if it were proven that this ruling of international law was passed by the majority of cultured nations of the world; if there 'does not exist a contradiction between the instructions of local law and international law. But where such a contradiction does exist, it is incumbent upon the court to give preference to the instructions of the local legislator and put it into effect'."

The Court then noted that one of the crimes allegedly committed by the defendant was the transgression of paragraph 99 of the 1977 Penal Law, a crime to be found in Section 7 of the law entitled "State Security, Foreign Relations, and Official Secrets" and further observed that under paragraph 5 of the above-mentioned law, Israeli courts were authorized to try persons for crimes committed abroad if such crimes "either harmed, or were intended to harm, the State of Israel, her security", etc. The Court concluded that in his broadening the bounds of the territorial jurisdiction of the Israeli courts to include acts committed abroad when those acts harmed the security of the State, the legislator could not have intended to grant immunity to persons who, even though the seal of the United Nations was upon them, were accused of crimes of this sort. It added that courts in the United States and Canada had taken the same path in their refusal to grant immunity, even though such immunity was as a rule accepted, when the matter under discussion was one of crimes against their security, and referred in this connexion to the case of a United Nations official from the Soviet Union who was accused of acts of subversion against the United States (*US* v. *Coplon*),[1] and to the ruling of a Canadian court in the case of *R.* v. *Rose*, under which

"... where acts committed by the diplomatic corps tend to put the safety of the State to which the corps is accredited in peril, then the immunity fails before that higher interest."

Finally, the Court, referring to the "United Nations Immunities and Privileges Ordinance enacted by the High Commissioner for Palestine on June 14th, 1947,[2] by which the High Commissioner (today the Foreign Minister) was authorized to confer immunities upon the United Nations or United Nations officials noted that the Foreign Minister had never made use of his authority in regard to this Order and that, although the Israeli sovereign State was aware of the

[1] District Court, Southern District, New York, 10 May 1949, 84F. Suppl. 472.

[2] See United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations* (ST/LEG/SER.13/10), p. 68.

necessity in granting immunity to United Nations bodies in certain instances, it chose not to utilize this authority regarding persons in the United Nations forces such as the defendant.

The Court concluded that, not being in accordance with customary or conventional international law, and not in accordance with Israeli law, the plea of immunity claimed in the name of the defendant should be rejected.
