

*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

1994

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

Chapter VIII. Decisions of national tribunals



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## Chapter VII

### DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

[No decision or advisory opinion from international tribunals on questions relating to the United Nations and related intergovernmental organizations to be reported for 1994.]

## Chapter VIII

### DECISIONS OF NATIONAL TRIBUNALS

#### 1. Argentina

##### *Judgements of the Supreme Court*

##### *January*

PEDRO DANIEL WEINBERG

*Jurisdiction and competence:* National competence. Original jurisdiction of the Supreme Court. General remarks.

The original jurisdiction of the Supreme Court arises from the Argentine Constitution and may not be broadened, restricted or modified by legal norms.

*Jurisdiction and competence:* National competence. Original jurisdiction of the Supreme Court. General remarks.

The Supreme Court has no original jurisdiction in the criminal proceedings instituted against an Argentine citizen who performs technical duties in an international organization — the Inter-American Center for Research and Documentation on Vocational Training, a subsidiary organ of the International Labour Organization — on the basis of an accusation unrelated to his specific duties, since he is not a diplomatic agent in the strict sense, does not represent the Organization and does enjoy full immunity. The existence and scope, where applicable, of the immunities from which the accused might benefit, in accordance with his status and the relevant legal norms, will have to be determined by the competent judge.

##### *Opinion of the Public Prosecutor of the Supreme Court*

##### *Supreme Court:*

The alternate federal judge for the federal court of Río cuarto declared that that tribunal was not competent to hear the case brought against Pedro Daniel Weinberg for a violation of article 213 *bis* of the Penal Code and Act 20.840 owing to the fact

that the accused is an “expert” in the Inter-American Center for Research and Documentation on Vocational Training, a subsidiary organ of the International Labour Organization, which status, in the opinion of the aforesaid magistrate, is subject to the provision of articles 100 and 101 of the Argentine Constitution, which establish the original jurisdiction of the Supreme Court. For this reason, he referred the case to the Supreme Court.

You have consistently upheld the principle according to which such competence must be construed strictly, and may not be broadened, restricted or modified by legal norms (cf., *inter alia*, Judgements 270:78, 271:145, 280:176 and 203, and 284:20).

On the basis of this premise, it should be pointed out that the aforesaid main provisions apply only to ambassadors, public ministers and foreign consuls and that, consequently, officials of international organizations cannot be included in these expressly stated categories, as has been done in the case under consideration, without running the risk of contradicting the aforementioned principle of jurisprudence.

With regard to this matter, the Supreme Court stated in Judgement 250:775 that the granting of diplomatic privileges by legislative means does not give rise to its original jurisdiction.

In the case under consideration, the function of the accused is not of a recognized diplomatic nature in the strict sense, as is made clear by the report of the Ministry of Foreign Affairs, which is contained in the file; in accordance with the consistent practice of the Court, the Ministry is the appropriate authority for establishing diplomatic status for purposes of the Court’s jurisdiction (Judgements 238:313, 250:775, etc.).

The difference between the two statuses becomes clear if one bears in mind that officials of international organizations, such as the International Labour Organization, are governed by a convention of their own (Convention on the Privileges and Immunities of the Specialized Agencies, adopted by the United Nations General Assembly in its resolution 179 (II) of 21 November 1947). In this connection, one should, owing to its importance, draw attention to the regime governing immunities which appears to be more limited in scope than the regime established for diplomats in the strict sense, since it is stressed that such immunities are accorded “so far as is necessary for the effective exercise of their functions”, as long as they exercise such functions not for their personal benefit but in the interests of the Organization, which, in addition shall have “the right and the duty to waive the immunity of any expert in any case where in its opinion and the immunity would impede the course of justice” (convention on the Privileges and Immunities of the Specialized Agencies; annex I, approved on 1 April 1974).

Moreover, in my opinion, the fact that the accused is an Argentine citizen is of paramount importance in the case under consideration. This is, in fact, a long-standing principle, formulated by Carlos Calvo (see his *Treatise on International Law*, Paris, 1868, pp. 236-237), which states that, when a national of a country represents a foreign country in his own country, he shall be subject to the local laws in connection with acts that are unrelated to his position. It therefore seems to me that it follows logically from this principle that the tribunal for trying Pedro Daniel Weinberg for alleged crimes committed prior to his appointment to the position he holds in an international organization, insofar as it is not clear that he had been accredited by Argentina to carry out duties relating to his position, cannot be the special court established by the aforementioned constitutional provisions.

In the light of the foregoing, it is my opinion that the present case does not fall within your original jurisdiction.

15 January 1980

HÉCTOR J. BAUSSET

MARCELO EDUARDO BOMBAU

*Jurisdiction and competence:* Federal competence. Original jurisdiction of the Supreme Court. Diplomatic and consular agents.

The original jurisdiction of the Court includes ambassadors, public ministers and foreign consuls (art. 101 of the Argentine Constitution). Since this limitation may not be extended by legislation, the diplomatic privileges that might be enjoyed by officials of an international body (cf. Art. V, sect. 18, subpara. (a), of the Convention on the Privileges and Immunities of the United Nations), cannot alter such jurisdiction.

*Jurisdiction and competence:* Federal competence. Original jurisdiction of the Supreme Court. General remarks.

The privilege that article II, section 2, of the Convention on the Privileges and Immunities of the United Nations accords to United Nations property does not give rise to the original jurisdiction of the Supreme Court. This is the case because, if foreign states are not exempt from the provisions of article 101 of the Argentine Constitution, an international organization established by those States cannot be in a better position or enjoy greater privileges.

*Jurisdiction and competence:* Federal competence. Original jurisdiction of the Supreme Court. General remarks.

Whether the vehicle that was allegedly involved in the municipal infraction belonged to an individual, the United Nations High Commissioner for Refugees or an official of his Office, or to the United Nations, the Court is not authorized to hear the case, which will have to be referred to the competent body in order to determine whether and, if so, to what extent that international body or its officials enjoy immunities and privileges.

## 2. Germany

*Press release issued by the Federal Constitutional Court No. 29/94*

In the proceedings on the dispute over the deployment of German forces, the Federal Constitutional Court (Second Panel) has ruled that the Federal Republic of Germany is at liberty to assign German armed forces in operations mounted by the North Atlantic treaty Organization (NATO) and Western European Union (WEU) to

implement resolutions of the Security Council of the United Nations. The same applies to the assignment of German contingents to peacekeeping forces of the United Nations. However, the Basic Law requires the Federal Government to obtain — in principle the prior — explicit approval of the German Bundestag. The ruling was sought by the Social Democratic Party (SDP) and the Free Democratic Party (FDP) groups in the Bundestag.

According to article 24(2) of the Basic Law, the Federation may become a party to a system of collective security and in so doing consent to limitations upon its sovereign powers. The Federal Constitutional Court also sees in this power conferred by the Basic Law the constitutional foundation for an assumption of responsibilities that are typically associated with membership of such a system of collective security. Hence German servicemen may be deployed within the scope of United Nations peacekeeping missions even if the latter are authorized to use force. The objections submitted by the applicants on constitutional grounds to the participation of German forces in the UNOSOM II mission in Somalia, in the NATO/WEU naval operation in the Adriatic to monitor a United Nations embargo on the Federative Republic of Yugoslavia and in the AWACS monitoring of the ban on flights in the airspace over Bosnia and Herzegovina, likewise imposed by the United Nations, are therefore rejected. German servicemen may also be integrated into NATO formations which are deployed within the framework of United Nations operations. This, according to the Court, is covered by parliament's approval of Germany's accession to NATO and the Charter of the United Nations.

The Court also finds, however, after thoroughly analyzing the provisions of the Basic Law relating to the status of the armed forces in the constitutional system, that the Federal Government is required to obtain the Bundestag's explicit approval for each deployment of German armed forces. Such approval must in principle be obtained prior to their deployment. The Bundestag must decide on the deployment of armed forces with a simple majority. Once parliament has given its approval, the decision on the modalities of deployment and on necessary coordination within and with the governing bodies of international organizations, falls within the government's sphere of competence. The nature and extent of Parliament's involvement is for Parliament itself to decide within the scope of these constitutional constraints.

A violation of article 59(2) of the Basic Law could not be found because the Panel's votes were equally divided. The applicants had argued that the deployment of NATO forces under the auspices of the United Nations constituted a substantive change in the NATO Treaty and that any such change required the approval of Parliament under article 59(2) of the Basic Law. Four members of the Panel, whose opinion carries the decision, take the view that the members of NATO, by taking the contentious measures, had clearly not done so with the intention of already extending the NATO Treaty to include further tasks. In the opinion of the other four members of the Panel, the Federal Government was involved in a progressive extension of the NATO Treaty in a manner which threatened to undermine the participatory rights of the Bundestag. They held that this constituted a direct threat to those rights.

With this decision the Federal Constitutional Court has recognized the long-disputed admissibility of the deployment of German forces under a United Nations mandate but at the same time made their deployment in each individual case subject to the approval of the German Bundestag.

Justices Böckenförde and Kruis explained in a dissenting opinion that the application of the FDP parliamentary group ought to have been declared inadmissible and rejected.

(Decision of the Second Panel, 12 July 1994 -2 BvE 3/92, 2 BvE 5/93, 2 be 7/93 and 2 be 8/93 - ) Karlsruhe, 12 July 1994.

### 3. United States of America

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*Memorandum and order*

*92 Civ. 2021 (wk)*

MAURIZIO DE LUCA (PLAINTIFF) AGAINST THE UNITED NATIONS ORGANIZATION, JAVIER PEREZ DE CUELLAR, LUIS MARIA GOMEZ, ARMANDO DUQUE, KOFI ANNAN, ABDOU CISS, OLEG BUGAEV, SUSAN R. MILLS, FREDERICK GAZZOLI (DEFENDANTS)

WHITMAN KNAPP, SENIOR DISTRICT JUDGE

Plaintiff moves for default judgment against the United Nations and eight United Nations officials and employees under federal rule of civil procedure 55(b)(2). On 30 March 1993, plaintiff filed a complaint *pro se* alleging breach of contract, forgery, negligence and the violation of federal civil rights and employee medical benefits law. When plaintiff served process upon defendants during April, May and June 1993, the United Nations Legal Counsel wrote the court explaining that the organization and the individual defendants, with respect to acts performed by them in their official capacity, are immune from all legal process under international and United States law. None of the defendants have answered the complaint. Presently, the United Nations, on behalf of itself and the eight individual defendants, moves to dismiss the complaint for lack of subject-matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process and on the basis of immunity. The United States appeared at oral argument on the motions on 10 September 1993 and has submitted a statement of interest in support of defendants' motion to dismiss.

For reasons that follow, we deny plaintiff's motion for default and, on the basis of immunity, grant defendants' motion to dismiss the complaint.

#### BACKGROUND

Plaintiff, a United States citizen, was employed by the United Nations as a security officer from June 1977 until 31 December 1988, the effective date of his resignation. Pursuant to regulations set forth by its General Assembly, the United



Nations withholds the estimated federal and local taxes of staff members whose national Governments require them to pay such taxes based on their United Nations salaries. It then reimburses the employees, enabling them to pay their taxes directly to their national Governments. Between 1977 and 1987, the United Nations withheld plaintiff's estimated federal, state and local income taxes and then reimbursed him in the form of cheques made payable to himself and the Internal Revenue Service (IRS). However, for the tax year 1988, the United Nations withheld plaintiff's estimated taxes but never reimbursed him. The United Nations claims that it did so because plaintiff failed to provide it with certified copies of his 1988 tax return. Plaintiff alleges that the United Nations reported to IRS that it had reimbursed his withheld taxes for 1988. This information, plaintiff contends, led IRS to audit him for those tax years between 1990 and 1992. Moreover, because the United Nations had never reimbursed him in 1988, plaintiff was personally required to pay \$6,801.36 in federal, state and local tax for that year.

Plaintiff contends that the actions of the United Nations constituted breach of his employment contract, prima facie tort, injurious falsehood and employment discrimination prohibited by Title VII, 42 U.S.C.A. 2000e et seq. (1981 & Suppl. 1991). He alleges that in 1987, in retaliation for pressure exerted by the United States on the United Nations to reduce its personnel during the mid-1980s, United Nations Secretary-General Javier Perez de Cuellar initiated an unprecedented tax audit of United States nationals employed by the Organization, including himself. Plaintiff claims that United States nationals were singled out in the audit, as the United Nations never audited the nationals of four other countries which, like the United States, require that United Nations employees pay national taxes.

After plaintiff left the United Nations on 20 April 1989, its Finance Division issued a "final pay statement" which indicated that plaintiff had received \$850.72 in retroactive pay and compensatory time which he alleges he never received. Plaintiff further alleges that this final pay statement contained his forged signature and was issued with the intent of defrauding him of his remaining salary and compensatory time.

Finally, plaintiff claims that the United Nations denied him continuation of his medical benefits after his resignation in violation of 29 U.S.C.A. 1161 (Supp. 1993), which requires certain employers to allow former employees to elect continued coverage under the employer's group health insurance plan.

#### DISCUSSION

Plaintiff contends that he is entitled to default judgment against defendants because they failed to answer his complaint, which alleges damages in the amount of \$1,408,504.76. The United Nations argues that plaintiff's complaint must be dismissed under Fed.R.Civ.Pro. 12(b) because both itself and the individual defendants, who are alleged to have been acting in the course of their employment, are cloaked with immunity under international and federal law. On a motion to dismiss, a district court must construe the complaint in favor of the pleader (see *Scheuer v. Rhodes* (1974) 416 U.S. 232, 236) and must accept as true its factual allegations (see *LaBounty v. Adler* (2d Cir. 1991) 933 F.2d 121, 123). We separately discuss plaintiff's claims against the United Nations and those against the individual defendants.

(A) THE UNITED NATIONS

Under the Convention on the Privileges and Immunities of the United Nations (“United Nations Convention”), 13 February 1946, 21 U.S.T. 1418, 1422, T.I.A.S. 6900, acceded to by the United States in 1970, the United Nations and “its property and assets” enjoy immunity from “every form of legal process except insofar as in any particular case it has expressly waived its immunity”. United Nations Convention, art. II, sec. 2; see also *Boimah v. United Nations General Assembly* (E.D.N.Y. 1987) 664 F.Supp. 69, 71.<sup>1</sup> A district court may dismiss a complaint based on a defendant’s established immunity. Properly invoked immunity shields a defendant “not only from the consequences of litigation’s results, but also from the burden of defending themselves”. *Davis B. Passman* (1979) 442 U.S. 228, 235 n.11, quoting *Dombrowski v. Eastland* (1967) 387 U.S. 82, 85. Plaintiff has not alleged that the United Nations has expressly waived its immunity in this instance and no evidence presented in this case so suggests. Finding the United Nations to be immune from plaintiff’s claims, we dismiss them.

(B) INDIVIDUAL DEFENDANTS

Of the eight current or former United Nations officials and employees named as individual defendants, two currently serve as Assistant Secretaries-General: Luis Maria Gomez and Kofi Annan. The United Nations Convention confers upon such officers “the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law”. United Nations Convention art. V, sec. 19. In the United States, article 31 of the Vienna Convention on Diplomatic Relations (Vienna Convention), 18 April 1961, 22 U.S.T. 3227, T.I.A.S. 7502 (entered into force for the United States 1 December 1972), governs the privileges and immunities of diplomatic envoys and provides, in pertinent part:

“1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

“(a) A real action relating to private immovable property...

“(b) An action relating to succession in which the diplomatic agent is involved ...

“(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”

Assistant Secretaries-General Annan and Gomez are immune from plaintiff’s claims under the United Nations and Vienna Conventions as none of the exceptions listed in article 31 of the Vienna Convention apply here. The instant case is neither a real action relating to private immovable property nor a succession action. Moreover, it involves neither a commercial nor a professional activity exercised by either of these defendants outside their official functions. Rather, plaintiff has alleged that Gomez failed to reimburse him for taxes the United Nations withheld and that Annan denied him the right to elect continued coverage under the Organization’s group health plan.

One of the remaining six defendants is a former United Nations Secretary-General — Javier Perez de Cuellar — and another is a former Assistant Secretary-General — Abdou Ciss. Persons formerly serving the United Nations in such capacity are protected by the same immunity afforded former diplomatic agents under the Vienna Convention, immunity “with respect to acts performed by such persons in the exercise of [their] functions as member[s] of the mission . . .” Vienna Convention Art. 39(2). Because plaintiff’s claims against Perez de Cuellar and Ciss are based solely on their official activities at the United Nations, these defendants are immune from the current action. Plaintiff’s claims against the former Secretary-General are based on the following: (a) his alleged supervision of the United Nations Finance Division, which failed to reimburse plaintiff for his 1988 taxes and which plaintiff claims, issued a forged and fraudulent pay statement; (b) his alleged supervision of the United Nations Office of Human Resources Management, which plaintiff claims denied his extended medical coverage; (c) his alleged supervision of the United Nations Office of Human Resources Management, which plaintiff asserts failed to respond to complaints he filed about the taxes, the pay statement and his medical coverage, and (d) his creation of the 1987 tax audit that plaintiff claims was intended to retaliate against the United States. Similarly, plaintiff’s complaint alleges that Ciss, who ran the United Nations Office of Human Resources Management, failed to investigate plaintiff’s complaints regarding the aforementioned misconduct.

The remaining four defendants are current or former United Nations officers: Armando Duque, former Director of Personnel of the United Nations Office of Human Resources Management; Susan R. Mills, Deputy Controller; Frederick Gazzoli, Acting Chief of the Internal Audit Section of the United Nations Development Programme; and Oleg Bugaev, Director of the Internal Audit. Under § 1(b) of the International Organization Immunities Act (IOIA), 22 U.S.C.A. §§ 288 et seq. (1990 & Suppl. 1993), United Nations officers and employees are immune from suit and legal process “relating to acts performed by them in their official capacity and falling within their functions as officers or employees, except insofar as such immunity may be waived by the [United Nations]”. IOIA, 22 U.S.C.A. § 228d(b).<sup>2</sup> Here, plaintiff has not alleged that the United Nations has waived the immunity of these four defendants.

We find these four defendants immune from plaintiff’s claims under IOIA because those claims relate only to acts performed by them “in their official capacity”. The complaint alleges that Duque failed to investigate plaintiff’s complaints; that Mills never reimbursed plaintiff for his 1988 taxes and produced a false and forged pay statement; and that Gazzoli and Bugaev, for auditing purposes, obtained documents regarding plaintiff’s taxes from New York State officials. Notwithstanding how improper any of these actions may have been, they represent precisely the type of official activity which 7(b) of IOIA was intended to immunize. See e.g., *Tuck v. Pan Am, Health Org. et al.* (D.C. Cir. 1981) 668 F.2d 547, 550, fn. 7 (Director of Pan American Health Organization (PAHO) immune under IOIA § 7(b) from plaintiff’s breach of contract and race discrimination claims to the extent that “the acts alleged in the complaint relate to [his] functions as PAHO Director”); *Boimah v. United Nations General Assembly* (E.D.N.Y. 1987) 664 F.Supp. 69, 71 (individual officers of the United Nations General Assembly would have been immune from plaintiff’s employment discrimination action under § 7(b) had plaintiff chosen to sue them individually).

Plaintiff contends that none of the individual defendants are immune because in participating in the alleged misconduct each violated either federal and state law or the Organization's own internal regulations. However, the case law applying § 7(b) rejects the notion that a defendant's immunity under IOIA can be defeated by allegations of illegal conduct. See, e.g., *Tuck; Boimah*. Plaintiff would have us rely on *People v. Coumatos*, (Gen. Sess. N.Y. Co. 1961) 224 N.Y.S.2d 504, *later opinion*, (Gen. Sess. N.Y. Co. 1962) 224 N.Y. S. 2d 504, *later opinion* (Gen. Sess. N.Y. Co. 1962) 224 N.Y.S.2d 507, *aff'd mem.* (1<sup>st</sup> Dep't 1964) 247 N.Y.S.2d 1000, in which the trial court held that defendant, a United Nations inventory clerk indicted on 44 counts of grand larceny, had no diplomatic immunity preventing it from exercising its jurisdiction over the case. The trial court noted that the defendant failed to claim that his alleged crimes, which involved thefts against his co-workers, were either "directly or remotely related to the functions of his United Nations employment". 224 N.Y.S.2d at 510. *Coumatos* is clearly inapposite as plaintiff's claims challenge actions which defendants have taken in implementing United Nations employment and financial policy.

Similarly unavailing is plaintiff's assertion that defendants acted in bad faith or with improper motive. That assertion has no bearing on our determination as to whether or not they are immune from the present action under IOIA. See, e.g., *Donald v. Orfila* (D.C. Cir. 1986) 788F.2d 36. In *Orfila*, the District of Columbia Circuit found defendant, Secretary-General of the Organization of American States (OAS), immune under IOIA § 7(b) from plaintiff's action for breach of contract and intentional infliction of emotional distress, notwithstanding plaintiff's claim that the Secretary had acted in bad faith. The court refused to characterize plaintiff's termination from employment at OAS as an "individual" rather than "official" act of the defendant based on the asserted impropriety of defendant's motive, reasoning that if it were to determine defendant's immunity in such a manner, "the 22U.S.C. § 228d(b) immunity shield, which Congress intended to afford solid protection, would indeed be evanescent." *Idem*, at p. 37.

Although plaintiff has leveled some rather serious charges against both the United Nations and the individual defendants, we must bear in mind the policy underlying the immunity from employee actions which international and federal law provides international organizations and their officers, as stated by the District of Columbia Circuit:

"[T]he purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide." *Mendaro v. World Bank* (D.C. Cir. 1983) 717 F.2d 610, 615-16.

#### CONCLUSION

Find that the United Nations and the eight individual defendants are immune from this action under international and federal law, we deny plaintiff's motion for default judgement and grant defendants' motion to dismiss the complaint in its entirety with prejudice.

SO ORDERED.

New York, New York

10 January 1994

Whitman Knapp, Senior United States District Judge

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#### NOTES

<sup>1</sup>The International Organizations Immunities Act (IOIA), 22 U.S.C.A. §§ 288 et seq. (1990 & Suppl. 1993), enacted in 1945, cloaks the United Nations with similar immunity. Under IOIA, designated international organizations receive the same immunity as that "enjoyed by foreign Governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract". 22 U.S.C.A. §§ 288a(b). The United Nations was so designated by executive order in 1946. See Ex. Ord. No. 9698, 11 F.R. 1809 (19 February 1946). The immunity of foreign Governments is now governed by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. 1602 et seq. (Supp. 1993). FSIA confers on foreign Governments general jurisdictional immunity subject to several exceptions. 28 U.S.C.A. § 1604. We need not consider the application of these exceptions to the instant case, for the United Nations Convention, which contains no such exceptions, provides sufficient ground for finding the United Nations immune from plaintiff's claims.

<sup>2</sup>The United Nations Convention similarly confers upon certain categories of United Nations officials — those designated by the Secretary General — "immun[ity] from legal process in respect of words spoken or written and all acts performed by them in their official capacity." United Nations Convention, art. V., sec. 18(a). We need not determine which individual defendants fall within such designated categories as the officer immunity provision of IOIA, § 7(b), applies to all of them. Part Four