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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

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Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

1. Austria

SUPREME COURT FOR CIVIL AND CRIMINAL MATTERS

In re KARL KATARY: DECISION OF 3 MARCH 1977

Initiation by a staff member of the IAEA enjoying diplomatic immunity of proceedings under Austrian law concerning the custody of his minor child — Submission of a counter-application by the child's mother — Appointment by the Court of first instance of a curator as a result of failure of its attempt to serve notice of its decision to the child's father — Article 32 of the Vienna Convention on Diplomatic Relations[1]

The case concerned a minor child who, after the dissolution of his parents' marriage on 7 December 1970 had remained with his mother with the initial consent of his father.

The father, a senior staff member of the International Atomic Energy Agency, was the first to institute custody proceedings in 1973 by his application for transfer of the child to him for custody and upbringing and in fact explicitly stated that he was voluntarily submitting to Austrian jurisdiction. He subsequently withdrew his application and, in response to the mother's counter-application for assignment of the child to her for custody and upbringing, asserted his immunity as a senior staff member of IAEA and stated that only that agency could validly waive such immunity. The court of first instance however held that Austrian jurisdiction was established since a declaration of voluntary submission to Austrian law was irrevocable. On the merits the court decided that the child was assigned to his legitimate mother for custody and upbringing. The court attempted to serve notice of its decision through the diplomatic channel. It was however informed by the Federal Ministry of Justice that IAEA had rejected service of the decision with the remark that such service would be a violation of the rights of the father and that execution of an Austrian judicial proceeding so as to be applicable to the father would require a waiver of immunity expressly stated by the Director-General of IAEA. The notice from the Ministry was accompanied by a letter from IAEA stating that the child's father held diplomatic rank with the Agency and enjoyed diplomatic immunity. Having thus failed in its attempt to serve notice of its decision, the court of first instance appointed an attorney as curator in accordance with article 119, paragraph 2 of the Austrian Code of Civil Procedure.

The curator appealed the decision of the court of first instance. The court of appeal remarked that according to article 32, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, only the sending State could waive immunity from jurisdiction. It nonetheless approved the result of the decision of the court of first instance, taking into consideration the fact that the application of the mother constituted a counter-application to be treated in the same way as a counter-claim in respect of which a diplomat, under article 32, paragraph 3 of the Vienna Convention, could not claim immunity from jurisdiction.

The curator then appealed before the Supreme Court the decision of the court of appeal, claiming that his appointment as curator was null and void.

[1] United Nations, *Treaty Series*, vol. 500, p. 95.

The Supreme Court considered as clearly established that the legitimate father was entitled to immunity within the scope of articles 31 and 32 of the Vienna Convention on Diplomatic Relations. It recalled that according to article XV, section 39 (*c*) of the Agreement between Austria and IAEA regarding the Headquarters of this agency,[2] those staff members of IAEA having the professional grade of P-5 and above "shall be accorded the same privileges and immunities, exemptions and facilities as the [Austrian] Government accords to members, having comparable rank, of the staff of chiefs of diplomatic missions accredited to the Republic of Austria". The Supreme Court upheld the conclusion of the court of appeal that the voluntary submission of the father to Austrian jurisdiction was not legally relevant because, according to article 32, paragraphs 1 and 2 of the Vienna Convention, the diplomat himself could not waive his immunity; it moreover concurred with the opinion of the court of appeal that the present case was one covered by article 32, paragraph 3 of the Vienna Convention, under which the initiation of judicial proceedings by a diplomat — an action which was not dependent on the consent of the sending State under any provision of the Convention — had an unalterable consequence: the diplomat who himself initiated judicial proceedings lost the right to invoke immunity in respect of a counter-claim directly connected with the principal claim. He thus ran the risk that the opposing party through a counter-claim might take action against him before the same jurisdiction. It was true that the mother's counter-application was not filed precisely with a counter-claim and that the father's own application had been withdrawn in the meantime. According to article 31, however, the diplomat had immunity in general from civil and administrative jurisdiction and article 32, paragraph 3, referred in general to the initiation of proceedings by the diplomat: it was therefore irrelevant whether a claim under national law was raised in the course of judicial or non-judicial proceedings.

The appellant further claimed that the minor himself enjoyed diplomatic immunity. The Supreme Court however held that since the child had been living since 1970 with his mother, he could not be regarded as forming part of the household of the diplomat within the meaning of article 37, paragraph 1, of the Vienna Convention. The child could therefore not be considered immune from Austrian civil jurisdiction. The possible immunity of the minor's stepfather, who was the mother's second husband and a senior staff member of UNIDO, did likewise not extend, in the Court's view, to the child who, although he belonged to the household of the UNIDO staff member, was not a member of that staff member's family within the meaning of article 37, paragraph 1, of the Vienna Convention.[3]

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2. Switzerland

ADMINISTRATIVE TRIBUNAL OF THE REPUBLIC AND CANTON OF GENEVA

X. *v.* DEPARTMENT OF JUSTICE AND POLICE: JUDGEMENT OF 15 JUNE 1977

Administrative decision suspending the driving licence of a WHO official enjoying immunity from criminal, civil and administrative jurisdiction — The immunity applies

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[2] *Ibid.*, vol. 339, p. 110.

[3] The Court recalled in this connexion that a proposal that the rights of the diplomat should also be accorded to his wife's children, which had been submitted by Sri Lanka (then Ceylon) in the Vienna Conference on Diplomatic Intercourse and Immunities, had to be withdrawn for lack of support (See *Official Records of the United Nations, Conference on Diplomatic Intercourse and Immunities,* vol. II (documents A/CONF.20/C.1/L.91 and A/CONF.20/L.2, para. 28), United Nations publication, Sales No. 62.X.1).

to acts performed by the official in the exercise of his functions, i.e. at any time except during his annual leave, unless there are reasons of public policy to the contrary — Application of the concept of public policy in the case of road traffic regulations — Question how and when immunity must be invoked — Rescission of the contested decision

Following a traffic accident in which he was involved, the appellant, a WHO official at the P-5 level, had his driving licence suspended for a period of three months by order of the Department of Justice and Police. He requested the Administrative Tribunal to rescind the order, *inter alia,* on the ground of the immunity to which he had been entitled at the time of the accident as an international civil servant, class P-5. In reply to an inquiry from the Administrative Tribunal concerning its practice, the Federal Political Department stated that a diplomat's driving licence could be revoked if he was no longer complying with the conditions on which the licence had been issued.

The Tribunal sought to determine whether, at the relevant time, the appellant had enjoyed diplomatic immunity and whether the Department of Justice and Police had been entitled to suspend his driving licence. It noted that, as the holder of an official identity card certifying that he was an international civil servant, class P-5, he enjoyed immunity from criminal, civil and administrative jurisdiction for acts performed in the exercise of his functions, i.e. at all times except during his annual vacation (cf. Max Sørensen, *Manual of Public International Law* (New York, 1968), p. 462). He could therefore assert the principle of the personal inviolability of diplomatic agents — a privilege which, in the case of international civil servants, was granted in the interests of their functions and not for their personal benefit — unless, the Tribunal emphasized, there were reasons of public policy (*ordre public*) to the contrary.

After referring to Philippe Cahier, who considered that "diplomatic privileges and immunities are subject to limitations in the interest of the public safety of the receiving State"[4] (which includes traffic safety), and to George Perrenoud, who conceded the possibility of suspending the driving licence of a diplomatic agent "whose manner of driving is a danger to public safety",[5] the Tribunal noted that the Federal Political Department had also spelt out the kind of infringement of road traffic safety for which a driving licence could be suspended when it had specified that such action might be taken if any circumstance which would have precluded the issue of a licence arose in the person of the diplomatic agent, or if he was physically unfit "to drive a motor vehicle", was addicted to drink or constantly violated traffic regulations. In such cases, suspension of the driving licence did not infringe the general principles of public international law laid down in the Vienna Convention on Diplomatic Relations.[6] The situation was entirely different where the suspension of the driving licence was the result of an infraction of traffic regulations; however serious the infringement of road safety might be, the Department was not entitled to order the suspension of the licence, since such a decision would be in contravention of the immunity from administrative jurisdiction enjoyed by diplomatic agents with respect to their functions, and in violation of the provisions of the Vienna Convention.

On the question before which authority, and at what stage, a diplomatic agent or international civil servant should plead immunity from legal process, the Tribunal recalled Philippe Cahier's statement that:

> "There are no set rules in diplomatic law concerning the manner in which immunity from legal process should be asserted before a court. When an action is

[4] P. Cahier, *Le Droit diplomatique contemporain* (Geneva and Paris, 1962), pp. 223 and 247.
[5] G. Perrenoud, *Le régime des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales en Suisse* (Lausanne, 1949), pp. 151–152.
[6] United Nations, *Treaty Series,* vol. 500, p. 95.

brought against a diplomat, he may enter an appearance, represented by counsel, and request termination of the action on the ground of his diplomatic status".[7]

Similarly, the Tribunal noted that:

"The diplomat may, with the same end in view, arrange for a request to be submitted to the receiving State by the mission to which he belongs. Under the Vienna Convention system, the latter procedure should in fact be the rule, since diplomatic agents may waive their immunity from legal process only with the consent of the authorities to which they are subordinate (cf. articles 21 and 22 of the Agreement between the Swiss Federal Council and the World Health Organization concerning the legal status of WHO in Switzerland[8])".

In the present case, the appellant had not waived his immunity; even if he had, the Administrative Tribunal itself would have raised the issue of lack of competence *ratione personae,* since in matters of public law competence was strictly a legal question allowing of no derogation. Moreover, the nature and the purpose of immunity from legal process were such that the person enjoying it was not bound to observe any particular time-limit. The Tribunal referred in that connexion to Georges Perrenoud, who stated that "the issue of lack of competence by reason of immunity, which is a matter of public policy, may be raised at any stage so long as judgement has not been rendered".[9] Since the contested decision had been in the form of a unilateral administrative act taken without the person concerned really having had an opportunity to be heard, it could be impugned by means of an appeal to the Tribunal, and the appellant was then in a position somewhat similar to that of the defendant in a criminal case or the respondent in a civil case. While observing that some commentators also held that "enjoying immunity from jurisdiction meant simply enjoying the right to be the object of judicial proceedings . . . the immunity in question had never meant the inability to appear as plaintiff before the same courts",[10] the Tribunal nevertheless queried firstly, whether the question of immunity should not in principle be raised by means of a request to the receiving State from the diplomatic mission concerned, and, secondly, whether the administrative authority should not defer action until a diplomatic *démarche* had been made to the mission in question.

The Tribunal noted that the Department of Justice and Police had based its order on an isolated violation of a traffic regulation and that it had not been shown that the appellant was generally unfit to drive; it therefore ruled that he remained covered by

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[7] P. Cahier, *op. cit.,* p. 264.

[8] United Nations, *Treaty Series,* vol. 26, p. 331. The articles in question read as follows:

"Article 21

"OBJECT OF THE IMMUNITIES

"1. The immunities provided for in the present agreement in respect of officials of the World Health Organization are not designed for the personal benefit of those officials but solely to ensure the free functioning of the World Health Organization and the complete independence of its agents in all circumstances.

"WAIVING OF THE IMMUNITIES

"2. The Director-General of the World Health Organization has the right and duty to waive the immunity of any official in any case in which he considers that such immunity would impede the course of justice and could be waived without prejudice to the interests of the World Health Organization.

"Article 22

"PREVENTION OF ABUSES

"The World Health Organization shall co-operate at all times with the Swiss authorities to facilitate the proper administration of justice, secure the observance of police regulations and prevent any abuse in connexion with the privileges, immunities and facilities provided for in this agreement."

[9] G. Perrenoud, *op. cit.,* pp. 44–45. The Tribunal also referred to Jean-Flavien Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des Cours de l'Académie de droit international de La Haye,* 1953 — III (Leyden, 1955), t. 84, pp. 317 *et seq.*

[10] *Yearbook of the International Law Commission,* 1957, vol. I, pp. 113–115 (particularly para. 12), mentioned by P. Cahier, *op. cit.,* p. 272.

diplomatic immunity, which precluded any coercive action against him by the Genevan authorities. However, in view of the fact that there might have been some justification for the administrative authority's believing that he was not covered by immunity — for instance, because his functions in WHO and the extent of his immunity had not been immediately apparent — the Tribunal, referring in particular to André Grisel, who had written that "in administrative law, voidability is the rule and voidness the exception",[11] found that the contested order should be rescinded rather than declared void. It noted, however, that a decision would have to be declared void if there had been a clear failure to respect immunity from legal process, as would be the case where, for instance, the decision related to an ambassador or a minister or a head of mission, or to the Director-General of an international organization and his immediate assistants.[12]

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3. United States of America

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(*a*) DUPREE ASSOCIATES, INC. *v.* THE ORGANIZATION OF AMERICAN STATES AND THE GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES: ORDER OF 31 MAY 1977

Case brought against an international organization coming under the International Organizations Immunities Act — Motion to dismiss presented by the defendants on the basis of their alleged immunity from suit — Extent of the immunity from suit enjoyed by foreign sovereigns — Question whether the restrictive concept of immunity developed in relation to foreign sovereigns extends to international organizations within the meaning of the International Organizations Immunities Act

The plaintiff sought damages in the amount of 1 000 000 dollars from the defendants for breach of contract. The defendants had moved dismissal of the case on the ground that they were immune from suit.

The Court recalled that under the International Organizations Immunities Act (22 U.S.C. Sec. 288 *et seq.*)[13] enacted in 1945:

> "(*b*) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract"

It further recalled that the Act defined the term "international organization" and gave the President the authority to designate the organizations entitled to enjoy such immunity as follows:

> "For the purposes of this title, the term 'international organization' means a public international organization in which the United States participates pursuant

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[11] André Grisel, *Droit administratif suisse* (Neuchâtel, 1970), pp. 201 and 204. The Tribunal also referred to Fritz Fleiner, *Institutionen des deutschen Verwaltungsrecht*, 8th ed., 2nd reprint (Aalen, 1963), p. 206, and Hans Rudolf Schwarzenbach, *Grundriss des allgemeinen Verwaltungsrechts*, 6th ed. (Berne, 1975), p. 111.

[12] Cf. André Grisel, *op. cit.*, pp. 202–203, and Max Imboden and René A. Rhinow, *Schweizerische Verwaltungsrechtsprechung*, vol. 1 (Basel and Stuttgart, 1976), p. 239.

[13] United Nations Legislative Series, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (ST/LEG/SER.B/10 – Sales No. 60.V.2), p. 128.

to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in said sections."

The Court noted that the Organization of American States had been designated in 1954 through Executive Order No. 10533, 3 C.F.R. 194 (1954-1958 Compilation) as

"a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act".

Thus, the Court noted, it was quite clear that the defendants in the case were immune from some suits: the question was whether the immunity conferred upon them extended to the present suit.

The defendants argued that the United States Congress in passing the International Organizations Immunities Act in 1945 intended that the concept of immunity then in effect should apply to designated international organizations. That concept, as expressed by the State Department,[14] was that foreign sovereigns were entitled to absolute immunity.

The Court however noted that since 1952, the State Department had utilized a "restrictive" concept of immunity with respect to foreign sovereigns under which a foreign sovereign is immune with respect to its purely public and governmental acts *(jure imperii)* but is not immune and is subject to process and suit in all actions arising out of its private and commercial acts *(jure gestionis)*. The Court referred in this connexion to *Ocean Transport Co.* v. *Republic of Ivory Coast* (269 F. Supp.703 (E.D.La. 1967)) and to *Renchard* v. *Humphreys and Harding* (381 F. Supp.382 (D.D.C. 1974)).[15]

Examining the question whether the shift in State Department policy with respect to immunity of foreign sovereigns also affected international organizations, the Court referred to *Victory Transport, Inc.* v. *Comisaria General* (336 F. 2d 354 (2nd Cir. 1964)), *cert.denied,* 381 U.S. 934 (1965) in which it had been recognized that the restrictive concept of immunity was the governing principle with respect to immunity for foreign sovereigns and that since international organizations under the International Organizations Immunities Act were extended only that immunity enjoyed by foreign sovereigns, it followed that international organizations were entitled only to restricted immunity. The Court concurred with this reasoning.

Noting that the action was for breach of contract regarding construction of a building, i.e., a commercial activity, and that the State Department had refrained from urging that the defendants be granted immunity therefrom, the Court denied the defendants' motion to dismiss.

(*b*) DUPREE ASSOCIATES, INC. *v.* THE ORGANIZATION OF AMERICAN STATES AND THE GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES: ORDER OF 22 JUNE 1977

Motion for certification and stay pending appeal — Question whether international organizations coming under the International Organizations Immunities Act enjoy absolute immunity from suit — Restrictive immunity is no defence in a suit for breach of contract in relation to a commercial activity

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[14] The responsibility for determining the scope of immunity a foreign sovereign enjoys has been allocated to the State Department. This is done because the judicial branch has recognized that questions of immunity are political in nature, and should be dealt with by the executive branch: *see,* e.g. *Republic of Mexico* v. *Hoffman,* 324 U.S. 30 (1945).

[15] This policy has been codified into the United States Code by the Foreign Sovereigns Immunities Act of 1976 (P.L. 94–583, 90 Stat. 2091 *et seq.*), which was however not controlling as it had not gone into effect until 19 January 1977, well after the events involved in the present case occurred.

Wishing to take an appeal from the Court's order summarized under (*a*) above, the defendants moved for certification and for stay of proceedings pending the outcome of their appeal.

While recognizing that no appellate court had had occasion to face squarely the question whether international organizations are entitled to "absolute" or "restrictive" immunity[16] and while admitting that *Victory Transport, Inc.* v. *Comisaria General* could not validly be invoked in the present case since it involved an agency of the Spanish government, not an international organization, the Court maintained its reasoning as reflected under (*a*) above. It noted that, in the view of the defendants, international organizations were of a breed different from foreign sovereigns and that the differences warranted the application of the absolute immunity principle in all cases involving such organizations. It observed however that the United States Congress had expressly adopted the contrary principle that "International organizations . . . shall enjoy the *same* immunity from suit . . . as is enjoyed by foreign governments" and that had it recognized the distinctions advanced by the defendants and intended to accord absolute immunity to international organizations, it could easily have said so.

The Court reiterated its view that restrictive immunity was no defence in a suit for breach of contract in relation to the construction of a building: such a contract, even though the building was intended to serve as headquarters for the international organization, qualified as a commercial activity. In the light of the above, it denied the defendants' motion for certification and stay pending appeal.

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[16] The Court noted that apparently, the only case in which a court had dismissed a suit against an international organization was *Moulton* v. *Pan American Union* (C.A. No. 20776-63 (D.C. Ct. Gen. Sess.1963)). It expressed doubts as to whether the ground of decision was absolute immunity and suggested that a former employee's suit for benefits would likely be barred under the doctrine of restrictive immunity as well.