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UNITED NATIONS JURIDICAL YEARBOOK

2003

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

Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

Italy

THE SUPREME COURT OF CASSATION

Civil Cassation, Combined Civil Divisions,*
23 January 2004, No. 1237

Food and Agriculture Organization of the United Nations (FAO)—Question of immunity from jurisdiction of the organization—Headquarters Agreement (Agreement between the Government of the Italian Republic and the Food and Agriculture Organization of the United Nations regarding the Headquarters of the Food and Agriculture Organization of the United Nations)—Convention on the Privileges and Immunities of Specialized Agencies, 1947

The Supreme Court of Cassation, Combined Civil Divisions, pronounced the following decision:

In the appeal brought by:

Giuliana Carretti, who elects domicile at 11 Viale dell'Università, Rome, at the law firm of attorney Francesco Fabbri, who is representing her and defending her interests by virtue of a power of attorney appearing in the margin of the appeal—Appellant

Versus

The Food and Agriculture Organization of the United Nations (FAO), in the person of its legal representative *pro tempore*, domiciled at 12 Via dei Portoghesi, Rome, at the Office of the State Attorney General, which is representing and defending it as stipulated by law—Respondent

Against decision No. 1613 of the Court of Appeal of Rome, deposited on 20 September 2001;

Having heard the Rapporteur's summary of the case given in public hearing on 6 November 2003 by Dr. Erminio Ravagnani, Counsellor;

Having heard Attorney Francesco Fabbri;

Having heard the public prosecutor's office in the person of Dr. Antonio Martone, Deputy General Prosecutor, who argued for the rejection of the appeal.

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* Dr. Vittorio Carbone, Acting First President; Dr. Giovanni Olla, Division President; Dr. Erminio Ravagnani, Rapporteur and Counsellor; and Counsellors Dr. Enrico Altieri, Dr. Michele Varrone, Dr. Ugo Vitrone, Dr. Roberto Michaele Triola and Dr. Giuseppe Marziale.

The facts

Ms. Giuliana Carretti brought an action before the Rome Labour Tribunal, petitioning, as her principal plea, that the termination of her employment, of which she was notified on 21 April 1993, by the Food and Agriculture Organization of the United Nations (FAO) should be reversed and that FAO should be ordered to pay her the remuneration due her and to pay the related contributions into the United Nations pension fund. She petitioned, as a subordinate plea, that FAO should be ordered to pay certain sums on various scores as well as compensation for material loss and moral damage.

The Rome Tribunal declared that Italian judges lacked jurisdiction.

Ms. Carretti filed an appeal, which was contested by the opposing party.

The Court of Appeal rejected the appeal, on the following grounds:

> Considering that the principal object of the dispute is the petition that the termination of employment should be held to be unlawful, with a consequent petition for compensation for damages and the payment of the omitted contributions, while the subordinate object is the petition for payment, on various scores, of certain sums of money and compensation of injury, including moral damage, Italian judges must be held to be without jurisdiction, since a decision on the dispute, even though it would extend to claims of a material nature, would nonetheless presuppose an evaluation of the conduct of the employer and would thus bear upon the public law structure or the realization of the aims of the international organization. However, the employment relationship of FAO staff members is governed by an extensive and autonomous set of regulations covering a wide variety of matters, including disputes concerning administrative decisions, for which jurisdiction is accorded to the Administrative Tribunal of the International Labour Organization (ILO). Moreover, the question of constitutional lawfulness raised by Ms. Carretti is clearly unfounded, since, under the Convention on Privileges and Immunities of Specialized Agencies of 21 November 1947 (Act No. 1740 of 24 July 1951), a FAO staff member is effectively guaranteed the right to bring an action against FAO for the protection of his or her rights before that Tribunal, and a possible interference in the rights of citizens constituting a violation of constitutional guarantees does not arise. Nor do the unsuccessful outcome of the proceedings brought before that tribunal, the alleged non-recognition of the proceedings by Ms. Carretti, which is belied by the facts as alleged and verified, or the shortness of the time limits for bringing an action appear to be relevant.

Against that decision Ms. Carretti filed an appeal for review of that decision, arguing that there were ample, clear grounds for overturning it.

FAO submitted a counter-appeal.

The law

The Appellant, alleging violation and misapplication of article 382 of the Code of Civil Procedure and other legal rules relating to the jurisdiction of Italian judges with reference to the international instruments rendered enforceable by Act No. 1740 of 24 July 1951 and Act No. 11 of 9 January 1951, and articles 3, 11 and 24 of the Constitution with reference to the legal rules relating to the ILO Tribunal, and further alleging defects in the statement of grounds, contends that the jurisdiction of Italian judges should have been upheld at least with respect to the subordinate pleas, inasmuch as they concerned claims

of an exclusively material nature. She contends, in fact, that her action is limited to the claim for purely material remuneration or relief, upon a finding of unlawful conduct on the part of her employer, without, however, putting forward a "request for the reversal of a prejudicial act of an alleged administrative nature". Moreover, she argues that excluding the jurisdiction of Italian judges would allow the non-appealable decisions of the ILO Tribunal to have an inadmissible effect on the rights claimed by Ms. Carretti under articles 36 and 38 of the Constitution, while the provision for the lapse of the action before that Tribunal and the Convention rendered enforceable by Act No. 1740 of 24 July 1951, as well as the Headquarters Agreement rendered enforceable by Act No. 11 of 9 January 1951, as interpreted by the Court of Appeal, should have led to the conclusion that the question of lawfulness raised in relation to the above-mentioned articles of the Constitution was not manifestly unfounded.

The appeal is unfounded.

The Combined Civil Divisions have already had occasion to hold that disputes brought against FAO concerning employment relationships in Italy involving Italian citizens employed by the organization are outside the jurisdiction of Italian judges (see decision Cass. SU No. 5942 of 18 May 1992); that the waiver of jurisdiction applies to any judgement that would entail rulings bearing upon the public law structure or the realization of the aims of the international organization (Cass. SU No. 1150 of 7 November 2000); and that the waiver extends to any petition that a termination of employment should be found unlawful with consequent claims for reinstatement and compensation for damage (Cass. SU No. 531 of 3 August 2000; No. 331 of 12 June 1999; No. 120 of 12 March 1999; No. 12771 of 28 November 1991).

No valid reasons are apparent, and none were presented, for departing from that jurisprudence. Moreover, the Appellant herself, while offering extensive arguments in support of her contentions, stresses the material aspect of the dispute, presenting it, inaccurately, as her only point at issue, thus seeming to support the position expressed in the jurisprudence whereby Italian judges do not have jurisdiction with respect to a petition for a termination of employment to be declared unlawful, with the consequent claims for reinstatement and compensation, whereas they do have jurisdiction with respect to a claim for payment of disputed amounts of remuneration, since such a claim has to do with purely material aspects of the relationship and does not require a ruling on the public law powers of the international organization (Cass. SU No. 120 of 12 March 1999). Clearly, that is not the case here, in view of the content of the principal plea.

As the Court held in its judgement No. 5942 of 1992 and reiterates here, the immunity of FAO from the jurisdiction of Italian judges, that is, judges of the Host Country, is based on article VIII, section 16, of the Agreement between the Government of the Italian Republic and the Food and Agriculture Organization of the United Nations regarding the Headquarters of the Food and Agriculture Organizations of the United Nations (known as the "Headquarters Agreement") signed at Washington on 31 October 1950 and rendered enforceable in Italy by Act No. 11 of 9 January 1951, which provides that "FAO and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process. . .".

The treaty origin of the legal text means that attention can be directed not only to the literal wording of the provision itself but also to the spontaneous conduct of the parties in applying it, here in particular the exchange of notes between FAO and the Permanent

Diplomatic Representation of Italy to FAO concerning "the modes of settlement of disputes adopted by the Organization as provided in Article IX, Section 31 *(a)*, of the Convention on the Privileges and Immunities of Specialized Agencies" approved by the General Assembly of the United Nations on 21 November 1947 and rendered enforceable in Italy by Act No. 1740 of 24 July 1951. In giving effect to the obligation under article IX, section 31 *(a)*, of the Convention, FAO declared, and Italy recognized, that none of the institutional purposes of FAO could be achieved if the organization were not to have its own staff, in employment relationships governed by its own staff regulations. With respect to the settlement of disputes arising out of such employment relationships the organization accepted the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILO), with seat in Geneva, to hear complaints of staff members concerning their terms of appointment. Therefore, staff members may, after having exhausted the internal appeal procedure, lodge complaints with the said independent Tribunal.

Interpretation of the Headquarters Agreement on the basis of a literal reading and an evaluation of the subsequent conduct of the parties, and also in the light of the effect given by the organization to the obligation provided for in article IX, section 31 *(a)*, of the Convention on Privileges and Immunities of Specialized Agencies, which was rendered enforceable in Italy by Act No. 1740 of 1951, leads to the conclusion that the organization enjoys immunity from the jurisdiction of Italian judges not only in disputes over its property but also in disputes concerning employment relationships with its staff, whereas the courts of the Italian Republic have jurisdiction, as provided in applicable laws, over acts done and transactions taking place in the headquarters seat in respect of relationships to which FAO is not a party, since the principle of extraterritoriality does not mean that legal acts done within the confines of the headquarters seat cannot be considered to have been done within the territory of the Italian Republic or can be considered to be outside the jurisdiction of Italian judges.

Such an interpretation, finally, leads to the conclusion that the regulations that govern the employment relationship of FAO staff in an exhaustive and autonomous manner, including the regulations governing administrative disputes, which establish the jurisdiction of the ILO Administrative Tribunal, can in no way be considered constitutionally unlawful in relation to articles 3, 11 and 24 of the Constitution. In fact, FAO has set up a jurisdictional system that not only centres around judges—the ILO Administrative Tribunal—clearly endowed with the "third party" impartiality called for by international law, but is also exempt from the procedural limitations that undermine the subjective positions recognized in substantive law and, moreover, is devoid of the tendency to place unreasonable obstacles before the complainant with respect to the protection of the right claimed. That the judges are outside our legal system is not relevant, because limitations on sovereignty are provided for in the Italian Constitution (article 11) and are therefore lawful, even if their effects interfere with the rights of citizens, provided that—as is the case here, in which the time limits for bringing an action are comparable to those validly imposed by domestic law—the interference does not result in a violation of constitutional guarantees. In the present case, therefore, Italian judges must be held to lack jurisdiction.

The costs are to be borne by the losing party and paid as indicated in the dispositive part of the decision.

On these grounds the Court rejects the appeal, declares that Italian judges lack jurisdiction and orders the Appellant to pay the judicial costs of €3,100.00 (three thousand

one hundred euros), of which €3,000.00 (three thousand euros) correspond to fees, in addition to costs debited in advance.

So decided in Rome on 6 November 2003.

Deposited with the Clerk of the Court's Office on 23 January 2004.

Canada

High Court

Province of Quebec, District of Montreal,* 20 November 2003,
No. 500–05–061028–005 and No. 500–05–063492–019

Analysis of the scope and goal of immunity of an international organization and its staff—Question of whether the International Civil Aviation Staff Association enjoys immunity from jurisdiction accorded to the International Civil Aviation Association (ICAO)—Immunity from jurisdiction of senior officials of ICAO—Question of waiver of immunity by ICAO by not providing adequate provision of appropriate modes of settlement of disputes arising out of contracts or other disputes under article 33 of the Headquarters Agreement—The Vienna Convention on Diplomatic Relations, 1961—The Convention on the Privileges and Immunities of the United Nations, 1946—Headquarters Agreement between the Government of Canada and ICAO—The concepts of absolute immunity and functional immunity

Gérald René Trempe, Applicant, Against the ICAO Staff Association and Wayne Dixon, Respondents, and, the Attorney-General of Canada, Intervener

Gérald René Trempe, Applicant, Against Dirk Jan Goossen, the ICAO Council and Jesus Ocampo, Respondents, and the Attorney-General of Canada, Intervener

Judgement

1. In the present case the Applicant has filed two actions for damages for non-renewal of his employment contract with the International Civil Aviation Association (ICAO) in December 1992.

2. In the first (500–05–061028–005), dated 1 November 2000, the Applicant requested that the ICAO Staff Association and its President, Wayne Dixon, pay him $300,000 in monetary, moral and punitive damages. He claimed that the Association and its President had not adequately represented him in his dealings with ICAO. His pleas read as follows:

To RECEIVE the present application;

To REJECT any attempt by the Respondents to have the case declared inadmissible;

To ORDER the co-Respondent STA to pay the Applicant the sum of $120,000 in monetary damage, plus interest at the official rate and the additional compensation provided for under the law as from the issuance of the writ;

To ORDER the co-Respondents jointly and severally to pay him $120,000 in moral injury, plus interest at the official rate and the additional compensation provided for under the law as from the issuance of the writ;

* The Honourable Claude Tellier, j.c.s., Presiding.

To ORDER the co-Respondents jointly and severally to pay the Applicant the sum of $60,000 in punitive damages, plus interest at the official rate and the additional compensation provided for under the law as from the date of the judgement;

To RESERVE all remedies for the applicant against any natural or artificial person who might be included or added to the present action or who might be prosecuted separately;

To ORDER that part of the judgement be enforced notwithstanding any appeal;

PLUS costs.

3. In the second (005–05–063492–019) dated 1 March 2001, the Applicant requested the sum of $14,000,000 in monetary, moral and punitive damages. He claimed that the Respondents—the ICAO Council, Dirk Jan Goossen and Jesus Ocampo—had told him that the reason he was not being renewed was that his post had been abolished whereas, in fact, he was actually being dismissed. His amended pleas read as follows:

To RECIEVE the present application;

To REJECT any request by the Respondents to have the case declared inadmissible;

To CONDUCT a judicial review of the constitutionality and compatibility of articles 19 (3), 20 *(a)*, 21 (1) and 24 of the Headquarters Agreement with the Constitution and the Canadian Charter of Rights and Freedoms;

To DECLARE the provisions of articles 19 (3), 20 *(a)*, 21 (1) and 24 of the Headquarters Agreement wholly or partly inoperative;

To RULE that the right to justice takes precedence over rules regarding the immunity of ICAO;

To ORDER the Respondents jointly and severally to pay the Applicant the sum of $1,000,000 in present and future monetary damages, subject to review, plus interest at the official rate and the additional compensation provided for under the law as from the issuance of the writ;

To ORDER the Respondents jointly and severally to pay the Applicant the sum of $12,000,000 in non-monetary damages, of which $3,000,000 in general damages and $5,000,000 in additional damages, plus interest at the official rate and the additional compensation provided for under the law as from the issuance of the writ;

To ORDER the Respondents jointly and severally to pay the Applicant the sum of $1,000,000 in punitive damages, plus interest at the official rate and the additional compensation provided for under the law as from the date of the judgement;

To ORDER that part of the judgement be enforced notwithstanding any appeal;

PLUS costs.

(emphasis added by the Court)

4. Just when the case was up for a default judgement, the Attorney-General of Canada, acting at the request of ICAO, intervened in the two cases requesting that the cases be ruled inadmissible on the grounds that ICAO and its staff have been accorded immunity under national and international law. In short, the Attorney-General filed a request that the Court declare that it did not have jurisdiction.

5. The two requests were considered simultaneously and the present judgement will cover both requests.

6. Before going on to discuss the arguments raised by each party, the Court believes it is appropriate to go over the relevant points raised in the written proceedings. It should be noted that, when considering a request regarding inadmissibility, the Court does not hear any witnesses, for it must take the facts cited in the written proceedings as having been proved.

7. When considering a request that a case be judged inadmissible, the issue before the Court is as follows: Assuming that the Applicant can prove all the facts cited in the introductory pleadings, is he entitled to a judgement based on the pleadings? Conversely, it is often said that one must ask oneself whether the submission is doomed to fail.

8. Consequently it seems necessary to recall the principal facts outlined in the written pleadings before trying to apply to these facts the rules of law invoked.

9. According to the Applicant's amended pleas, in his second submission, we learn that he worked for ICAO from 27 June 1990 until 30 December 1992.

10. When he was appointed, a written contract was drawn up dated 3 July 1990 (it was produced as document P-1). The provisions of the contract included the following:

- The appointment was for the period from 27 June 1990 to 12 October 1990;
- The first assignment was "Distribution clerk";
- Calculation of vacation and sick days;
- The appointment could be cancelled on one month's notice or payment of one month's salary;
- The provisions of the ICAO Service Code applicable to permanent staff members were not applicable to that short-term contract.

The contract was subsequently extended for 1991 and 1992.

11. Document P-2 shows that Respondent Goossens, who at the time was deputy director of personnel, recommended to the Secretary General that the conditions of service of temporary staff should be amended so that the latter could be covered by all the provisions of the ICAO Service Code. The recommendation was apparently adopted on 11 December 1990.

12. In a service note dated 25 January 1991, Respondent Goossen informed the staff of the Secretary General's decision and the employment contracts of non-permanent staff were amended accordingly (see P-4).

13. On 6 November 1992, the ICAO Secretary General informed the Applicant that his one-year contract dated 30 December 1991 would expire on 30 December 1992 and that the Organization would not offer him a further appointment (see P-5).

14. The Applicant alleges in paragraph 17 of his amended pleas that, after receiving the notice of 6 November 1992, he met with Respondent Goossen on 13 November 1992, and was told that his contract was not being renewed because the number of staff had to be reduced and the post was being abolished.

15. In paragraph 19, the Applicant alleges that he went to ICAO on 5 January 1993 and found that someone was sitting in his office and that a vacancy notice had been issued in the post.

16. He tried to contact the Secretary General but the latter was on vacation until 20 January 1993. On that day he finally spoke to the Secretary General to explain the

situation to him and inform him that he planned to file an appeal in accordance with the Service Code for he believed that the reason his contract had not been renewed was not because his post had been abolished but because he had, in fact, been dismissed.

17. This allegation was corroborated by the letter dated 27 January 1993 from the Secretary General to the Applicant (see P-6):

> This is in response to your letter of 20 January 1993 in which you appeal to me to review the decision taken and conveyed to you on 6 November 1992.
>
> The very nature of a temporary appointment is that it does not carry any expectancy of renewal and expires automatically without further notice.
>
> At the time, C/PER spoke with you on 13 November 1992, it was intended to keep the post vacant. However, later on it was decided to fill the post again and a temporary Distribution Clerk was recruited because the supervisors did not express an interest to rehire you.
>
> Although the terms of your temporary appointment dated 30 December 1991 (see paragraph 9 of the letter of temporary appointment of 3 July 1990) exclude the Staff Regulations and Rules concerning the appeals procedure, *I would have been prepared to consider a request from you to allow you to do so if such a request had been submitted to me within the prescribed time limit laid down in Staff Rule* 111.1, paragraph 5, i.e. *within one month of the time you received notification of the decision in writing on 6 November 1992. Since you did not meet this deadline, I am not prepared to consider your request.*
>
> (emphasis added by the Court)

18. The Applicant replied to the Secretary General on 9 February 1993 (see P-7) stating the following:

> I am grateful to you to have let me know your decision relating to the appeal under Staff Regulations and Rules.
>
> I would like to draw your attention on the point that the misrepresentation of the facts by C/PER concerning the non-requirement of my post for 1993, as reported in my letter of 20 January 1993, explains why I did not appeal to you in due time.
>
> I do not want to be considered as a victim neither as a fautive employee. But it has to be mentioned that the opportunity to justify myself about the unfair supervisor's report has never been given to me.
>
> It implies, for the one hand, that my legitimate employee's right to defend myself against the arbitrary has been denied and on the other hand, my application for a future post vacancy may not be favorably considered.
>
> For these reasons, I request you to authorize me to address directly to the United Nations Administrative Tribunal.

19. In that letter, he requested permission to appeal directly to the United Nations Administrative Tribunal (UNAT). The Secretary General asked Respondent Goossen to comment on the request. Goossen sent the Secretary General a lengthy report recommending that no appeal be filed with UNAT because, he claimed, there were no exceptional circumstances (see P-8).

20. On 18 February 1993, the Secretary General rejected the Applicant's request for permission to appeal directly to UNAT.

21. On 27 April 1994, the appeals board submitted a recommendation to the Secretary General urging him to waive the time limits in that case so as to enable the Applicant to proceed with his appeal (see P-11). The Secretary General did not accept the recommendation and again rejected the Applicant's request (see P-12).

22. It appears from P-12 that on 19 August 1994, the Applicant submitted an appeal directly to UNAT requesting that it order:

"(1) The rescinding of the Secretary General decision [not to renew his appointment beyond 31 December 1992];

(2) [His] reinstatement as a staff member of the International Civil Aviation Organization;

(3) Payment of [his] salary and allowances with interest covering the period from 1st January 1993 up to the end of this litigation during which time [he has] been compelled to remain unemployed;

(4) Payment to UN Joint Staff Pension Fund by ICAO on [his] behalf of the appropriate contributions with interest covering the period 1st January 1993 till the end of this litigation;

(5) Exemplary damages for moral and material injury resulting from misuse of administrative practices and the time limits setting as a trap and a means to catch [him] out, in the range of $65,000 to $95,000;

(6) Appropriate compensation to cover the cost of filing this appeal, in the range of $1,000 to $1,500.

[or]

(i) Payment of the amount equivalent to three years net base salary;

(ii) Exemplary damages for moral and material injury resulting from misuse of administrative practices and the time limits setting as a trap and a means to catch [him] out, in the range of $65,000 to $95,000;

(iii) Appropriate compensation to cover the cost of filing this appeal, in the range of $1,000 to $1,500."

23. After considering the evidence and making several comments, the Tribunal stated on page 7 of its decision, dated 7 November 1995:

IV. The Applicant requests the Tribunal to rescind the Secretary General's decision not to waive the time-limit. In the opinion of the Tribunal, the Secretary General enjoys discretionary power to determine whether "exceptional circumstances" exist that would justify a waiver of the time-limit laid down in staff rule 111.1.7. In earlier rulings, the Tribunal has held (Judgement No. 527, Han (1992)) that only a decision by the Secretary General tainted by errors of law or fact, arbitrariness or discrimination would prompt the Tribunal to censure the decision; moreover, it would be for the Applicant to show that the decision was tainted by one of those defects. That has not happened in this case.

V. *If the Chief of the Personnel Branch—and this has not been confirmed—gave inaccurate information to the Applicant, that was wrong. Nevertheless, in the circumstances, the Secretary General was within his rights in concluding that there was no justification for waiving the time-limit.*

(emphasis added by the Court)

24. The first application—the pleas of which are cited above—was filed on 1 November 2000. This application was directed against the ICAO Staff Association and Wayne Dixon who was president of the Association at the time the Applicant's employment terminated.

25. The Attorney-General was authorized to intervene in that first case by a judgement of 23 March 2001.

26. On 21 June 2001, the Attorney-General, acting at the request of the Association, filed a request that the case be declared inadmissible, citing the immunity of the Association and of its president Wayne Dixon. In short, the Attorney-General filed a request that the Court declare itself to have no jurisdiction to hear the case.

27. The second application was filed on 1 March 2001. Initially the respondents cited were:

- Dirk Jan Goossen;
- the ICAO Council and
- Jesus Ocampo

28. On 28 June 2001, this Court issued a judgement authorizing the Attorney-General to intervene in that second case.

29. On 12 July 2001, the Attorney-General filed a request that the case be declared inadmissible, citing the same grounds as those cited in the first case.

30. In short, the Attorney-General in her request, cited the fact that ICAO is an international organization and, as such, enjoys privileges and immunities both under Canadian law and under international law that remove it from the jurisdiction of this Court. The same would apply to the officials cited as respondents. The Court will come back to these issues.

31. Following that intervention and the filing of the request that the case be declared inadmissible, the Applicant amended his original application. The new one is dated 15 September 2003.

32. In it, he made the following changes:

(a) It is no longer the ICAO Council that is cited as Respondent but the International Civil Aviation Organization;

(b) Jesus Ocampo is no longer cited as a Respondent;

(c) There are new paragraphs containing additional information and arguments but they do not provide any major new facts to the debate;

(d) As regards the claims, the clarifications do not provide any facts to change the current judicial debate.

33. Following is a summary in chronological order of the facts and proceedings that the Court considers relevant to the discussion of the requests submitted by the Attorney-General.

34. In this connection, the Court wishes to recall the procedural context of the present hearing:

- There are two preliminary requests which have been combined for the hearing;
- At this stage in the proceedings, only the issues raised by the Attorney-General can be discussed and decided;

– On no account can the Court consider—still less decide on—the merits of the cases filed by the Applicant;

– In his presentation and pleadings the Applicant raises the issue of constitutionality of certain provisions of the Headquarters Agreement with the Canadian Charter of Rights and Freedoms. That issue will be considered once the Court has dealt with the issue of immunity raised by the Attorney-General.

Issues in dispute

35. Before listing the issues in dispute the Court wishes to make one thing clear. The issue before it is simply the request by the Attorney-General of Canada that the Court reject the Applicant's cases on the grounds of inadmissibility.

36. The Attorney-General points out that ICAO and its staff have immunity and therefore do not come within the jurisdiction of Canadian courts.

37. The Court will start by considering and taking a decision on the issue of immunity; it will therefore have to refrain from considering any other issue, including the merits of the proceedings instituted by the Applicant. It will then turn to the constitutional issue raised by the Applicant. Here again it declares that it has no jurisdiction to engage in judicial review of decisions taken by the Secretary General or by UNAT.

38. Having said that, the Court will now discuss the issues raised.

39. It will start by considering the concept of immunity. The latter is a legal concept that is recognized under both national legislation and international law.

40. There are numerous examples of immunity under national legislation: immunity is granted, *inter alia*, to members of parliament, to judges, to Crown prosecutors and to members of disciplinary committees of professional bodies referred to in the Professions Code.

41. No one in any of the positions listed above can be prosecuted for actions taken in the performance of their duties.

42. The same concepts can be found at the international level, but the context and content are different.

43. Under Canadian law, the issue of immunity is governed by the Act respecting the privileges and immunities of foreign missions and international organizations (the Act), which was adopted on 5 December 1991 (L.C.C. c. F-29.4). It supersedes earlier legislation.

44. This Act governs all Canada's external relations. Article 3 covers both diplomatic missions and consular posts and article 5 lists the rules applicable to Canada's relations with international organizations.

45. One significant feature of this Act is that, instead of having all the applicable rules listed in the Act itself, appended to it are three schedules which contain the full text of three international treaties which are thereby incorporated into Canadian law. They are the following:

(a) The Vienna Convention on Diplomatic Relations of 18 April 1961 (Schedule I);

(b) The Vienna Convention on Consular Relations adopted on 24 April 1963 (Schedule II);

(c) The Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946 (Schedule III).

46. This method of incorporating international instruments into domestic law has important consequences. As a general rule, it is not within the competence of national courts to interpret and implement international treaties and conventions. That is not, however, the case when the full text of a treaty is incorporated into the body of national legislation. That is what we have done with all the articles of the Vienna Convention which are referred to in article 3 of the Act.

47. The Court will now look at the provisions of article 5 of the Act, which refer to the Convention on the Privileges and Immunities of the United Nations, contained in Schedule III of the Act:

> 5. (1) The Governor in Council may, by order, provide that:
>
> *(a)* an international organization shall have the *legal capacities* of a *body corporate*;
>
> *(b)* an *international organization shall*, to the extent specified in the order, *have the privileges and immunities set out in Articles II and III of the Convention on the Privileges and Immunities of the United Nations, set out in Schedule III*;
>
> *(c)* representatives of a foreign State that is a member of or participates in an international organization shall, to the extent specified in the order, have the privileges and immunities set out in Article IV of the Convention on the Privileges and Immunities of the United Nations;
>
> *(d)* representatives of a foreign State that is a member of an international organization headquartered in Canada, and members of their families forming part of their households, shall, to the extent specified in the order, have privileges and immunities comparable to the privileges and immunities accorded to diplomatic representatives, and members of their families forming part of their households, in Canada under the Vienna Convention on Diplomatic Relations;
>
> (. . .)
>
> *(f)* such *senior officials of an international organization* as may be designated by the Governor in Council, and, in the case of an international organization headquartered in Canada, members of their families forming part of their households, *shall, to the extent specified in the order, have privileges and immunities comparable to the privileges and immunities accorded to diplomatic agents,* and members of their families forming part of their households, *under the Vienna Convention on Diplomatic Relations*;
>
> *(g)* such other officials of an international organization as may be designated by the Governor in Council shall, to the extent specified in the order, have the privileges and immunities set out in section 18 of article V of the Convention on the Privileges and Immunities of the United Nations;
>
> (emphasis added by the Court)

48. In light of the references to article 5 of the Act and to articles II, III and IV of the Convention on the Privileges and Immunities of the United Nations, the Court will look at the following provisions of the articles of the Convention:

> Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in

so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Section 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(. . .)

Section 11. *Representatives of Members to the principal and subsidiary organs of the United Nations* and to conferences convened by the United Nations, *shall*, while exercising their functions and during their journey to and from the place of meeting, *enjoy the following privileges and immunities*:

(a) immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, *immunity from legal process of every kind*;

(b) inviolability for all papers and documents

(. . .)

Section 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, *complete freedom of speech and independence in the discharge of their duties, the immunity from legal process* in respect of words spoken or written and *all acts done by them in discharging their duties* shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members;

(. . .)

Section 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but *in order to safeguard the independent exercise of their functions in connection with the United Nations*. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

(emphasis added by the Court)

49. Finally, the Court will cite articles 29 and 31 of the Vienna Convention on Diplomatic Relations, reproduced in Annex l:

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 31

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 situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

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

2. A diplomatic agent *is not obliged to give evidence as a witness*.

3. *No measures of execution may be taken in respect of a diplomatic agent* except in the cases coming under subparagraphs *(a)*, *(b)* and *(c)* of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

(emphasis added by the Court)

50. For the purpose of interpreting these provisions, the Court deems it useful to cite the preamble to the Vienna Convention which reads as follows:

VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The States Parties to the present Convention,

Recalling that *peoples of all nations* from ancient times *have recognized the status of diplomatic agents*,

Having in mind the purposes and principles of the Charter of the United Nations concerning *the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations*,

Believing that an *international convention* on *diplomatic* intercourse, *privileges and immunities would contribute to the development of friendly relations among nations*, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but *to ensure the efficient performance of the functions of diplomatic missions as representing States*,

Affirming that *the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention*,

(emphasis added by the Court)

51. The above texts contain the legislative provisions adopted by Parliament and are therefore part of Canadian legislation. This Act enables the Government to adopt decrees to update *recognition of the international organizations* and *accord them the applicable immunities and privileges*. This was done in the case of ICAO by signing a Headquarters Agreement, the most recent of which was dated 4 and 9 October 1990.

52. In article 2 of this Agreement the Government of Canada *recognizes* ICAO as an *international organization possessing juridical personality* and the capacity to contract, to acquire and dispose of property and to institute legal proceedings.

53. Pursuant to article 3 and following articles of the Agreement, ICAO is accorded *immunity for its property and assets, its premises and archives and exemption from taxes*.

54. Article 17 and the subsequent articles deal with the immunities accorded to ICAO staff members. In that connection, the Court will cite the following articles:

Article 17

PURPOSE OF PRIVILEGES AND IMMUNITIES

(1) *Privileges and immunities are accorded to Permanent Representatives, Representatives, administrative staff*, service staff and private servants of members of the mission, not for the personal benefit of the individuals themselves, *but in order to safeguard the independent exercise of their functions* in connection with the Organization. Consequently, a Member State not only has the right, but is under a duty to waive the immunity of such persons in any case where, in the opinion of the Member State, the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded. (. . .)

Article 19

SENIOR OFFICIALS

(1) *The President of the Council and the Secretary General* of the Organization *shall be accorded*, in respect of themselves and members of their families forming part of their households, *the same privileges and immunities*, subject to corresponding conditions and obligations, *as are enjoyed by diplomatic agents in Canada*.

(2) The *Deputy Secretary General, the Assistant Secretaries General*, and officers of equivalent rank shall be accorded, in respect of themselves and members of their families forming part of their households, *the same privileges and immunities*, subject to corresponding conditions and obligations, *as are enjoyed by diplomatic agents and their families in Canada*.

(3) In addition, *officials belonging to senior categories designated by the Secretary General and accepted* by the Government of Canada *shall be accorded, in respect of themselves* and members of their families forming part of their households, the privileges and immunities, subject to corresponding conditions and obligations, as are grated to diplomatic agents.

Article 20

OTHER OFFICIALS

Except insofar as in any particular case any privilege or immunity is waived by the Secretary General of the Organization, officials who are not covered by article 19 shall:

(a) be immune from legal process in respect of words spoken or written and *all acts performed by them in their official capacity*; (. . .)

Article 21

PURPOSE OF PRIVILEGES AND IMMUNITIES

(1) *Privileges and immunities* under articles 19 and 20 *are accorded to officials in the interests of the Organization* and not for the personal benefit of the individuals themselves. The Secretary General of the Organization shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organization. In the case of the President of the Council and the Secretary General of the Organization, the Council of the Organization shall have the right to waive the immunity.

(2) Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of Canada. They also have a duty not to interfere in the international affairs of Canada.

(emphasis added by the Court)

55. Finally, article 33, which is invoked in particular by the Applicant, reads as follows:

Article 33

OTHER DISPUTES

The Organization shall make adequate provision for *appropriate modes of settlement* of:

(a) Disputes arising out of contracts or other disputes to which the Organization is a party;

(b) Disputes involving any officials of the Organization if their immunity has not been waived in accordance with article 21.

(emphasis added by the Court)

Discussion

56. The various texts cited above call for a general comment. It is clear from these texts that Canada recognizes—as does the international community—the need to encourage Canada's participation in the programmes and activities sponsored by the United Nations and related international organizations and Canada's relations with other States.

57. These international activities must be based on the freedom of thought and of action of States and must be protected from any undue influence or interference by any one State.

58. This goal of freedom and independence of action cannot be achieved without recognizing the concept of immunity, that is to say, that an international organization or State must not be subjected to another State, to its domestic legislation and its courts in the pursuit of its goals. Immunity is the basis of all international and diplomatic activity. Immunity is the sum of the privileges that a State grants to another State or to an international organization to help it achieve its goals. In granting immunity to another State or organization, a State thereby gives up part of its sovereignty.

59. The Vienna Convention does not give a definition of the term immunity as such but uses a variety of terms. For example, the premises of a diplomatic mission are inviolable, and communications and the diplomatic bag are protected. A diplomatic agent is inviolable and cannot be arrested or put in prison; nor can such an agent prosecuted in criminal or even civil jurisdiction, save in certain limited cases.

60. It is clear from these texts that there are two types of immunity—absolute immunity and immunity in respect of functions. The first, as the term would suggest, is absolute, that is to say there are no exceptions; it must be respected and applied no matter what the circumstances. Functional immunity can be described as relative, that is to say, it applies only to the extent that the action in question has been committed by the person in the performance of their duties.

61. The first and easiest issue to be decided concerns the status of ICAO as an international organization according to the Headquarters Agreement. In principle, ICAO enjoys almost absolute immunity and therefore it cannot be prosecuted in any Canadian court for any reason. The only exception would be if an international organization were to be involved in a commercial activity and had not provided for modes of settling disputes in accordance with the provisions of article 33 of the above-mentioned Headquarters Agreement.

62. This conclusion is clearly demonstrated by articles 2 and 3 of the Headquarters Agreement which read as follows:

Article 2

LEGAL PERSONALITY

The Organization shall possess juridical personality. It shall have the legal capacities of a body corporate, including the capacity:

(a) To contract;

(b) To acquire and dispose of immovable and movable property; and

(c) To institute legal proceedings.

Article 3

IMMUNITY OF PROPERTY AND ASSETS

(1) The Organization, its property and its 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 States.

(2) For the purpose of this article, and articles 4 and 6, the word "assets" shall also include funds administered by the Organization in furtherance of its constitutional functions.

63. The first conclusion to be drawn in this case is that ICAO is accorded immunity under the Headquarters Agreement and that this immunity is absolute.

64. The other articles of the Headquarters Agreement merely spell out the various aspects of this immunity.

65. The Court will now turn to the issue of whether the ICAO Staff Association has immunity and is therefore sheltered from civil proceedings in Canadian court.

66. It would seem that the Association has no legal personality under Canadian law and is but by-product of ICAO. . . From the plentiful documents submitted to the Court it seems that the ICAO Council adopted a Service Code which provides for the regulation of working relations between ICAO and its staff (see P-2). The preamble to that Code reads as follows:

> 1. The ICAO Service Code consists of *Staff Regulations embodying the conditions of service and the basic rights, duties and obligations of members of the Secretariat of ICAO, as approved by the ICAO Council.* The Secretary General, as the Chief Executive Officer, shall enforce these regulations, and shall lay down and enforce such staff rules consistent therewith as he considers necessary.
>
> 2. Toward the realization of the concept of a truly international civil service, the Organization shall cooperate to the fullest extent practicable with other international organizations, particularly the United Nations, and with the International Civil Service Commission, in the establishment of uniform and progressive personnel standards and practices.
>
> (emphasis added by the Court)

67. Article 8 of the Code deals with relations with members of the Association and states that:

> 8.1 It shall be the policy of the Organization *to recognize an association or associations of staff members as a proper and desirable means of representing the interests of the staff*. The Council, in deciding whether to recognize any group as a representative association of staff members, will take into account the following:
>
> 1) whether the group represents a sufficiently substantial number of staff members or a sufficiently distinct category of staff members to justify its recognition as a representative association;
>
> 2) whether its charter or constitution and the statement of its objectives are not in conflict with the interests of the Organization.
>
> 8.2 A recognized association may have direct dealings with the Secretary General, but shall not have the right of presenting its views to the Assembly, the Council or any of their subordinate bodies. Notwithstanding this provision, a recognized association may make application through the Secretary General to present its views to the Finance Committee.
>
> (emphasis added by the Court)

68. It seems that the Code contains the constitution of the Association which was recognized as such by ICAO. The Association is therefore an internal structure and just a by-product of ICAO; it does not have juridical personality as might be the case with a committee entrusted with budgetary, financial or other responsibilities. In other words, it has no juridical personality other than that of ICAO and is entirely dependent on the latter for its existence. Accordingly, the Court concludes that the Association is covered by the privileges and immunities accorded to ICAO and is not subject to the jurisdiction of this Court.

69. The Court will now turn to the issue of Respondent Goossen himself. The Attorney-General produced a certificate (R-7) attesting to the fact that Respondent Goossen was considered a senior official of ICAO and, as such, was covered by immunity in the performance of his duties.

70. The Court has no choice but to conclude that Respondent Goossen is covered by the immunity provided for under the Headquarters Agreement and that, accordingly, he cannot be prosecuted in a civil court in Canada.

71. The Court must conclude the same as regards Respondent Wayne Dixon in respect of whom a certificate (R-4) was produced in the other case.

72. Since these two officials are being prosecuted for actions carried out in the performance of their duties they cannot be prosecuted in this Court.

73. The Court must now turn to another issue. While recognizing the existence of immunities accorded to ICAO and its officials, the Applicant submits that the immunity should be waived in this case because ICAO did not make proper arrangements to ensure the settlement of his claim. He bases this argument on article 33 of the Headquarters Agreement which was cited above.

74. The Court cannot accept this argument for the following reason. In adopting the Service Code, ICAO provided modalities for settling any grievance a staff member might have regarding his conditions of work, including dismissal. Initially, the Code governed the conditions of work of permanent staff members. Then it was decided that the Code applied also to fixed-term employees and the Applicant accepted the authority of the provisions of the Code. So much so that he took advantage of it and submitted a request to the Secretary General for review of his dismissal. The Secretary General replied that he would have been prepared to consider his request, but did not do so because it was not submitted within the required time limit.

75. The Applicant then filed an appeal directly with the United Nations Administrative Tribunal which held a hearing and rejected the appeal. It is true that UNAT wondered whether the Applicant was given the correct information regarding the reason for the non-renewal of his contract, but it felt that the Secretary General had had the opportunity to make a sound decision and therefore refused to intervene in the exercise of that discretion.

76. Were those two decisions—that of the Secretary General and that of UNAT—fair? Can it not be said that, given the circumstances, they were too rigid with respect to the issue of time limits? Was the Applicant denied, as is his claim, the right to a hearing? This issue can be discussed but it is not up to this Court to intervene and to review the decisions. This Court does not have jurisdiction over the matter. It has the authority to monitor and oversee the courts and political bodies of Quebec but it does not have the authority to do so in the case of international organizations.

77. In short, the Applicant says that he was unfairly dismissed by ICAO. He exercised the right which he thought he had, pursuant to the internal regulations of an organization which enjoys immunity under Canadian law, to appeal. He accepted the authority of this means of settlement. The appeal did not have the result he had hoped for. This Court has no authority to consider appeals regarding these issues.

78. Both parties submitted extensive documentation on the matters raised for purposes of consideration of these two requests. The Court looked at it but does not feel there is any need to refer to it *in extenso*. It will merely cite the following.

79. In the case *Miller v. Canada*,[1] Judge Bastarache of the Supreme Court of Canada wrote on page 425:

[1] [2001] Recueils des arrêts de la Cour Suprême du Canada 407.

> The majority judges considered the argument carefully. The Appellant did not institute proceedings against ICAO in the Supreme Court. It is clear from the *Headquarters Agreement, the ICAO staff rules, the Service Code* and the previous judgements that, *had he done so, his case would have been rejected. ICAO has complete immunity from prosecution under the international agreements it has signed with Canada*, thus complaints *must be filed in accordance with the administrative procedures set forth in the Service Code and staff rules*. In fact, Miller did file a claim against ICAO in accordance with the administrative procedures. He waited six years and at the time the appeal was heard he was still waiting for a decision. This action on the other hand has been instituted against third parties who, according to him, are responsible for his health problems.
>
> (emphasis added by the Court)

80. On page 428 the judge continued by saying:

> To begin with, the decision refers to the State Immunity Act, but the latter does not apply in this case. *However, if ICAO had been a party to this action or if there had been an inquiry into ICAO's actions, its use of the building or the way in which it paid or treated its employees, that argument would have been convincing. Clearly there are instances where consideration of the facts* occurring during the time someone is employed *may lead to interference in the sovereign actions of an international organization.* That is not, however, true in this case. As I have said several times, Miller's claim does not stem from his working relationship with ICAO. The Organization's administrative procedures are therefore not applicable here.
>
> (emphasis added by the Court)

81. In 1997, in *Procureur général du Canada v. Lavigne et al*,[2] the Quebec Court of Appeals reaffirmed the immunity of ICAO. On page 405 we find that:

> In accordance with the international agreements that are binding on both the Attorney General of Quebec and the Applicant, ICAO is covered by the privileges and immunities set forth in articles II and III of the Convention on the Privileges and Immunities of the United Nations, to which Canada is a signatory. *Accordingly*, *its property and assets, wherever located and by whomsoever held, enjoy immunity from suit and every form of judicial process and are exempt from all excise duties and taxes* and from all import prohibitions and restrictions. *Its staff are also immune from prosecution in any court*. The Government of Quebec is itself bound by agreement, even if it were not necessary at the legal level, to respect all these privileges and immunities in its territory.
>
> (. . .)
>
> *ICAO enjoys absolute immunity*. This immunity does not apply to any particular court, to the court of Quebec or the Supreme Court. *It applies to the entire Canadian legal system*. ICAO is not subject—*and cannot be constrained by law—to the jurisdiction ratione materiae or ratione personae of any Canadian court; the same holds true for ICAO staff having diplomatic status*.
>
> (emphasis added by the Court)

[2] [1997] Recueil de Jurisprudence du Québec 405.

82. The Supreme Court of Canada had already issued a judgement on the matter in the case *Etats-Unis d'Amerique v. Alliance de la Fonction publique du Canada et al*.[3] This is what Judge Laforest wrote on pages 80, 88 and 89:

> Although an employment contract is primarily commercial in nature, the management and operation of a military base are definitely activities of a sovereign State. *The activities of embassies and extra-coastal military posts are the best examples of activities carried out by a State that should be covered by immunity from jurisdiction*. In the case in point, because of the lease and the CSF, the United States is entitled to operate the Argentia base as it sees fit. In practice, the *operation of a protected military post*, particularly one from which one can access sensitive information pertaining to security, *cannot be subject to the supervision of a foreign court*.
>
> There are two aspects to the "activity" of the Argentia base. It is both commercial and sovereign. It is now necessary to consider whether accreditation procedures "relate" to the commercial aspect of that activity.
>
> (. . .)
>
> Although *employment contracts* at the Argentia base may "relate" (in the broad sense of the word) to accreditation procedures, insofar as they are a prerequisite for the accreditation request, *they are not at the heart of the dispute*. The request seeks to replace the private contractual relationship between employees and employer by the legal regime pertaining to collective labour agreements which, by definition, governs the administration of the base. *Clearly, the request for accreditation relates directly to the attributes of sovereignty of a foreign State which must continue to have immunity with regard to these procedures*.
>
> (emphasis added by the Court)

83. The Court also took note of a judgement of the Court of Appeals for the District of Columbia in *Mendaro v. World Bank*.[4] We see on page 7:

> *The strong foundation in international law for the privileges and immunities* accorded to international organizations *denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action* through multinational organizations with specific missions. It is well established under international law that "an international organization is entitled to such privileges and such immunity from the jurisdiction of a member State as are necessary for the fulfillment of the purposes of the organization, including immunity from legal process, from financial controls, taxes and duties". The premises, archives, and communications of international organizations are shielded from interference by member States, and international agreements often grant limited immunities to the officials of international organizations. *One of the most important protections granted to international organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship. Courts of several nationalities have traditionally recognized this immunity, and it is now an accepted doctrine of customary international law*.
>
> (. . .)

[3] [1992] 2 Recueils des arrêts de la Cour Suprême du Canada 30.
[4] [1983] U.S. App. LEXIS 16532.

> Like the other immunities accorded international organizations, *the 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*. But beyond economies of administration, the very structure of an international organization, which ordinarily consists of an administrative body created by the joint action of several participating nations, requires that the *organization remain independent from the international policies of its individual members*. Consequently, the charters of many international financial institutions contain express provisions designed to guarantee the neutral operation of the organization despite the political policies of the member nations or the individual backgrounds of the organizations' officers, and most large international organizations have established administrative tribunals with exclusive authority to deal with employee grievances.
>
> (emphasis added by the Court)

84. In another judgement, *Broadbent v. Organization of American States*,[5] by the same court, we see on page 13:

> *We hold that the relationship of an international organization* with its internal administrative staff *is non-commercial*, and, absent waiver, activities defining or arising out of that relationship *may not be the basis of an action against the organization regardless of whether international organizations enjoy absolute or restrictive immunity.*
>
> (. . .)
>
> The employment disputes between the appellants and OAS were disputes concerning the internal administrative staff of the Organization. *The internal administration of the OAS is a non-commercial activity shielded by the doctrine of immunity*. There was no waiver, and accordingly the appellant's action had to be dismissed.
>
> (emphasis added by the Court)

85. The Court cannot disregard *Rhita El Ansari v. Gouvernement du Royaume du Maroc et al*,[6] a recent judgement by the Quebec Court of Appeals. In this case, the Applicant was suing her employer, the Government of Morocco, for terminating her employment at its consulate in Montreal.

86. The Court of Appeals overturned the decision of the High Court which had recognized that the Moroccan Government had immunity from prosecution in Canadian civil courts. In the opinion of the Court of Appeals, the case was a commercial matter which did involve immunity. On page 9, the Court of Appeals wrote:

> WHEREAS the foreign State does not enjoy immunity from jurisdiction for actions relating to its commercial activities, under article 5 of the State Immunity Act;

[5] [1980] U.S. App. LEXIS 21563.

[6] Judgement of 1 October 2003, not yet entered, C.A.M. 500–09–012573–028.

WHEREAS a simple employment contract is generally considered to be a commercial activity (Re: Canada Labour Code, (1992) 2 R.C.S 50), unless the duties performed by the employee include aspects that involve the sovereignty of the foreign State and the proceedings involved relate thereto;

WHEREAS a case based on an employment contract falls within the jurisdiction of the Quebec authorities if the worker is domiciled or resident in Quebec;

WHEREAS article 3118 of the Civil Code of Quebec on the law applicable to employment contracts (. . .)

87. This Court is of the opinion that there is a clear distinction between this case and the one decided by the Quebec Court of Appeals. In this case, there is, on the one hand, the Headquarters Agreement and, on the other the Service Code; this does not appear to be so in the case involving Morocco.

88. It is on this basis that the Court concludes that all the Respondents have immunity under above-mentioned legislative texts.

89. One final issue remains. The applicant has raised the issue of constitutionality.

90. He claims that he did not have an opportunity to be heard on the merits of his complaint against ICAO. Judging from the documents submitted it appears that the appeal he filed in accordance with ICAO's internal procedures was rejected on the grounds that it was time-barred and that no consideration was given to the merits of his appeal.

91. The Applicant claims that since he was not given a hearing by an independent and impartial court, his fundamental rights were infringed. He cites article 7 of the Canadian Charter of Rights and Freedoms which states:

7. [Life, liberty and security of person] Everyone has the right to life, liberty and *security* of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(emphasis added by the Court)

92. Interpreting this article 7, the Applicant alleges that the provisions of the Headquarters Agreement threaten his security, particularly his psychological security which is affected by the fact that he has not been given a hearing in accordance with the principles of basic justice.

93. The Court is of the opinion that this argument has no justification. The issue raised appears to have been decided by the Supreme Court of Canada in *J.G. v. N.B. (Min. de la Sante)*.[7] On page 77, Chief Judge Lamer writes:

Determining the limits of protection of the psychological integrity of the individual from State interference is not an exact science. Chief Judge Dickson in the Morgentaler judgement says that security of the person could be limited by serious psychological stress caused by the State. Chief Judge Dickson was trying to express, in qualitative terms, the type of State interference that might constitute an infringement of that right. *Clearly the right to security of person does not protect an individual from the normal stress and anxiety that a reasonably sensitive person would feel as a result of Government action*. If that right were to be interpreted very broadly countless Government initiatives could be contested on the grounds that they violated the right

[7] [1999] 3 Canada Law Reports- Supreme Court of Canada 46.

> to security of person; that would result in considerable broadening of judicial control and a consequent trivialization of the constitutional protection of rights. Nor would infringements of a fundamental freedom safeguarded under article 2 of the Charter necessarily lead to restriction of the security of person.
>
> (emphasis added by the Court)

94. These remarks apply to the present case. Since the Constitutional argument has no justification there is no reason to consider the constitutional arguments.

95. Ordinarily, in rejecting the two cases the Court would order the Applicant to pay the costs. That is the rule as stated in article 477 of the Code of Civil Procedure, the first paragraph of which reads as follows:

> 477. The losing party must pay all costs, including the costs of the stenographer, unless by decision giving reasons the court reduces or compensates them or orders otherwise.

96. In the present case the Applicant, who is not represented by counsel, instituted two proceedings—one against the ICAO Staff Association for $300,000 and the other against ICAO for $14,000,000; altogether that comes to $14,300,000, which is the amount of damages the Applicant claims to have suffered as a result of being dismissed from his post where his annual salary was $18,000. Without saying anything about the amount of the damages sought, these figures appear, on first sight, to be ridiculous because they are obviously excessive.

97. Costs are determined according to the tariff of fees for lawyers. According to article 42 of the tariff, in addition to the basic fees plus expenses, there is an additional fee of 1 per cent of the amount sought in excess of $100,000. A recent judgement of the Court of Appeals confirmed that article 42 is applicable when a case is rejected on grounds of inadmissibility.[8] If the Applicant were to be ordered to pay costs in full, he would have to pay more than $140,000 and this, under the circumstances, seems equally ridiculous. Accordingly, the Court is of the opinion that this is a case which calls for reduction or even outright cancellation of costs. Its reasoning is as follows.

98. Firstly, as has already been pointed out, the Applicant did not have the help of a lawyer who could have advised him, *inter alia*, regarding the issue of the amount he could claim.

99. Secondly, the circumstances surrounding the Applicant's dismissal are unusual to say the least. In November 1992, he was informed that his contract would not be renewed beyond 1 January 1993. The official reason given was that his post was being abolished. Since he had a one-year contract and his post was being abolished he could not file an appeal at that point.

100. It was not until early January 1993 that he found out that his post had not been abolished. At that point he had reason to believe that he had been dismissed and that under the Service Code he could ask for the decision to be reviewed. According to the procedure outlined in the Service Code he contacted the Secretary General as soon as the latter returned from vacation on 20 January 1993.

101. The Secretary General replied, in a letter dated that same day, that he would have been prepared to consider the request but that he could not do so because he felt

[8] *Bélec v. Dube* [1996] Revue de Droit Judiciaire 454.

that the request should have been submitted within 30 days of receipt of the notice dated 6 November. Consequently, he considered that the Applicant had not observed the time limits. At the same time, he conceded in that reply that, had he observed the time limits, the Applicant would have been able to get a hearing in accordance with the Service Code.

102. Subsequently the Secretary General did not heed the recommendation of the appeals board which recommended that the time limit be waived and that the appeal be considered on its merits.

103. The Secretary General also refused to give the Applicant permission to file an appeal directly with UNAT.

104. The Applicant then filed an appeal with UNAT and the latter, while upholding the Secretary General's decision, added that: "*If the Chief of the Personnel Branch*—and this has not been confirmed—*gave inaccurate information to the Applicant, that was wrong*."

105. It is clear from all of the above that, ordinarily, the Applicant would have been entitled to a hearing on the merits, but that his appeal was rejected on the grounds that it was submitted late; judging from the facts of the case, this contention seems debatable to say the least. How could the Applicant have filed an appeal before the beginning of January 1993, which is when it became apparent that his post had not been abolished but that he had been dismissed? To put it mildly, all this seems debatable and far from clear.

106. As was stated earlier, it is not up to this Court to make a ruling on decisions taken by the Secretary General and UNAT, but these facts can, nonetheless, be taken into account for purposes of the adjudication of costs.

107. While the Applicant may have acted recklessly in filing the appeals, the appeals were by no means frivolous for, from his point of view, he had been unjustly treated and a citizen is always entitled to appeal to the courts.

108. Indeed, the decision in this case has been based on form rather than on substance. The Applicant has not been heard as regards the substance of the matter and has not had an opportunity to make himself heard, whence his feeling of having been unjustly treated. Had he been given an opportunity to speak and to put forward his point of view, the outcome might not have been any different but he would at least have had the satisfaction of having been heard.

109. Filing an appeal which proves, for complex legal reasons, to be ill-founded is not so reckless an action as to not deserve careful consideration of the consequences in terms of costs.

110. In the present case, the Applicant took on an international organization which asked the Canadian Government to adopt its cause. The Attorney-General intervened and in so doing used public funds against a citizen who was without resources. This was a very unequal struggle and that fact must be taken into consideration.

111. For all the above reasons the Court, in exercise of its discretion, is of the view that, given the circumstances, although the two actions are being dismissed the Applicant should not be required to pay any costs.

ACCORDINGLY, the Court

GRANTS the Attorney General's request that case No. 500–05–061028–005 be declared inadmissible and therefore dismisses the action brought by the Applicant Gérald René

Trempe, against the Staff Association of the International Civil Aviation Organization and Wayne Dixon;

GRANTS the Attorney General's request that case No. 500–05–063492–019 be declared inadmissible and therefore dismisses the action brought by the Applicant, Gérald René Trempe, against the International Civil Aviation Organization and Dirk Jan Goossen;

ORDERS that this Judgement be placed in both files;

WITHOUT COSTS.

(*Signed*) Claude TELLIER j.c.s.

Mr. Gérald René TREMPE
Not represented by counsel

Mr. René LEBLANC
Mr. Bernard LETARTE
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