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2004

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

Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

A. Argentina

Supreme Court of Justice of the Nation

*Proceedings for review of leave to appeal Jorge Francisco Baca Capodónico, Plea of no action, Case No. 35.295, 27 May 2004**

Question of jurisdictional immunity of an official of the International Monetary Fund requested for extradition—Determination of the stage of the judicial proceedings in which the issue of immunity shall be raised—Issue of diplomatic immunity not included in requirements laid down by the Montevideo Treaty on International Penal Law (1889)**—Definitive nature of the injury at stake—Issue of immunity requires a special prior ruling to the extradition trial

Office of the Attorney-General

Supreme Court:

I

Jorge Francisco Baca Campodónico, a Peruvian citizen residing in our country, was summoned by the judge of the Criminal and Correctional Court No. 6 of this city to attend the hearing provided for in articles 33 and 34 of the Montevideo Treaty on International Penal Law of 1889 and article 49 of Act No. 24767, under which the judicial authorities of the Republic of Peru are requesting his handover for trial in criminal proceedings brought against him. Mr. Baca Campodónico, on this first occasion in the proceedings and invoking his status as an official of the International Monetary Fund on an official visit to Argentina, invited by the local government authorities for a technical assistance mission, invoked the right to immunity from arrest accorded to him by international treaties (folios 41/42).

In response, the federal judge decided "to declare that Baca Campodónico has no immunity and/or privilege whatsoever with respect to the conduct of the present extradition trial" (folios 75 to 90 verso).

When Mr. Baca Campodónico appealed against this decision, division I of the National Federal Criminal and Correctional Appeals Court of this city concluded that "the

* Translated from Spanish by the Secretariat of the United Nations.

** OASTS 34, p. 1.

arguments put forward by Mr. Baca Campodónico's legal counsel concerning his 'functional' immunity are pleas on the merits relevant to the debate—though limited to the feasibility of extradition, since 'his guilt or innocence in the acts giving rise to the request for extradition' cannot be analysed (see, *inter alia*, judgements 97:39; 106:20; 139:94 and 150:317)—which this Court, as appeal court with respect to the judge bringing the extradition proceedings, is prohibited by law from evaluating". It added that "the conclusion that must be drawn from joint analysis of all the arguments put forward is that this is not the appropriate stage at which to raise such questions. This conclusion is closely linked to the argument put forward by the Appellant's legal counsel and resolves any doubts that might exist as to the sphere in which the case must continue to be handled, bearing in mind the reservations expressed by Mr. Roberto Durrieu and Mr. Guillermo Arias, with the result that this is the decision taken" (folios 442/443).

As can be seen, the lower court considers that the plea of immunity must be raised in the trial proper, despite which it does not annul the decision of the federal judge in ruling—erroneously, in the Appeal Court's opinion—on the merits of the issue, in other words, on whether or not the Appellant's jurisdictional immunity should be recognized.

A special federal appeal was lodged against this decision (folios 454 to 473) and it was the ensuing refusal of leave to appeal, on grounds that the requirements of a higher court and a final judgement or its equivalent (folio 497 and verso) had not been met, that gave rise to the present Complaint.

II

1. According to the doctrine established by the Court in the precedent *Proceedings for review of leave to appeal, Martinez Adalid, Jorge Oscar, concerning fraud by means of fraudulent administration and various incidents of pleas of no action* (M. 1286.XXXVI), this case raises an important federal issue in that the Appellant's argument concerning the jurisdictional immunity to which Mr. Baca Campodónico is entitled in his capacity as an official of the International Monetary Fund, a body with legal personality under international law, involves the interpretation and application of conventions signed by Argentina and hence the State's fulfilment of its obligations in this area (judgements 318:2639; 319:2411). Furthermore, the injury is definitive since the conduct of extradition proceedings would entail effective submission to jurisdiction and deprivation of the immunity to which the Appellant considers himself entitled (judgement 319:585). These exceptional circumstances warrant a finding by Your Excellency that the requirements of a final judgement and a higher court have been met for the purposes of the special appeal.

2. Your Excellency made such a finding, *mutatis mutandis*, in the domestic sphere when, on the occasion of the discussion as to whether or not summoning two national deputies to a conciliation hearing for privately actionable offences constituted the commitment to trial referred to in articles 68, 69 and 70 of the Constitution, you said that the ruling precluding a discussion of this issue caused a present damage and could not be repaired subsequently, since once the hearing was held the damage would be irreversible (case *Alvarez, Carlos Alberto*, judgement 319:585). This argument was reiterated by this Office in its ruling in the case *Marquevich, Roberto Jose* S.C.M. 216, L.XXXVII of 18 July 2002, to which you referred for reasons of brevity in the Judgement of 3 April 2003. The ruling said that "if the issue under discussion is the constitutional validity of the institution of judicial proceedings against a judge, then the mere institution of such proceedings

would immediately infringe the guarantee, in which case it would be pointless to expect final judgement to be passed against the person, especially when immunity is not personal but protects the institution and the free exercise of judicial functions".

3. The essence of the extradition trial is the discussion on "the identity of the person whose extradition is requested and fulfilment of the requirements laid down by the applicable laws or treaties" (Judgements 139:94; 150:316; 212:5; 262:409; 265:219; 289:216; 298:138; 304:1609; and 308:887, among many others).

In the present case, this would be verification of all the requirements laid down by the Montevideo Treaty on International Penal Law of 1889: the jurisdiction of the requesting State; that the nature or gravity of the offence justifies handing the person over (it is punishable by at least two years imprisonment, does not involve political crimes or crimes against the internal or external security of a State and does not involve duelling, adultery, insults and defamation or crimes against religion); that documents are submitted which under the laws of that State authorize the imprisonment and trial of the accused; that the crime is not time-barred; and that the person has not already been punished for the same crime (articles 19 to 23). It will also be necessary to verify whether the penalty to be applied is the death penalty, in which case the substitution of a lesser penalty must be requested (article 29); whether any other requests for extradition have been made by other countries, so that the person can be handed over to the country where the most serious crime was committed (article 27); and whether the person has been granted asylum (articles 15 and 16).

As can be seen, neither the Treaty nor the corresponding law, mention that the issue of diplomatic immunity must be discussed at the extradition trial. That is only logical, since this is an issue that must be discussed prior to the debate on the merits. It is obvious that the question of whether or not the person must be committed to trial cannot be discussed in the course of the trial itself, since that would mean analysing *a posteriori* something that should have been resolved *a priori*. Such a method would be absurd, in that it would make irreparable something that could have been remedied at the outset. Judicial procedure, however, has a way of avoiding precisely this arbitrary scenario: the situation that might preclude extradition is discussed as part of the trial preliminaries, in other words, in the context of issues requiring a special prior ruling.

4. Based on these reasons and the case law cited above, the lower court should rule on the plea of immunity from jurisdiction put forward by the Appellant, in the light also of the corresponding international law (Convention on the Privileges and Immunities of the United Nations, 1946; Convention on the Privileges and Immunities of the Specialized Agencies, 1947; Articles of Agreement of the International Monetary Fund, among others).

III

Accordingly, I believe that Your Excellency, in allowing the Complaint, can declare the special appeal admissible and return the proceedings to the lower court for a new decision on the lines indicated in the preceding paragraph.

Buenos Aires, 22 March 2004

Luis Santiago Gonzalez Warcalde

*Supreme Court of Justice**

Buenos Aires, 27 May 2004

Having considered the dossier "Proceedings for review of leave to appeal brought by the defence counsel of Jorge Francisco Baca Campodónico in the case: *Baca Campodónico, Jorge Francisco, Plea of no action*, Case No. 35.295", in order to decide on its admissibility,

Whereas the issues under debate in this case have been adequately dealt with in the ruling of the deputy Attorney-General, to whose conclusions reference is made for reasons of brevity,

Therefore, the Complaint is allowed, the special appeal is declared admissible and the appealed decision is annulled. Let the Complaint be added to the main dossier. Let the proceedings be returned to the court of origin for the appropriate person to issue a new ruling in keeping with the present decision. Let this decision be communicated and implemented.

B. Austria

Supreme Court

Firma Baumeister Ing. Richard L v. *O…*

*14 December 2004, File No. 100b53/04y***

Question of Immunity of an international organization having its headquarters in Austria—Agreement between the Republic of Austria and the OPEC Fund for International Development regarding Headquarters of the Fund***—Immunity from any legal proceedings granted to international organizations—The purpose of immunity is to protect international organizations from interference from and the exertion of influence through the organs of individual States—Immunity more extensive for international organizations based on the functional character of their legal personality as compared to foreign States—Immunity of international organizations is considered as absolute when acting within the limits of their functions—Immunity considered as valid until expressly waived—Passive conduct not deemed to constitute a tacit waiver of immunity—Immunity constitutes a procedural barrier to enforcement of the law but does not alter the validity of the substantive law—Service of official documents, as summons of courts, to international organizations, shall be effected exclusively through the good offices of the Austrian Ministry for Foreign Affairs—Waiver of immunity shall not extend to any measure of execution

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* Composition of the Court: Enrique Santiago Petracchi, Augusto Cesar Belluscio, Carlos S. Fayt, Antonio Boggiano, Adolfo Roberto Vazquez, Juan Carlos Maqueda, and E. Raul Zaffaroni.

** Translated from German by the Secretariat of the United Nations.

*** Agreement between the Republic of Austria and the OPEC Fund for International Development regarding the Headquarters of the Fund (BGBl. 1982/248), United Nations, *Treaty Series*, vol. 1291, p. 210.

The Supreme Court,* in its capacity of court of appeal, has adopted the following decision in the case of the registered company *Firma Baumeister Ing. Richard L*, Plaintiff, represented by Dr. Hans-Georg Mondel, counsel, Vienna, *versus O…*, Defendant, concerning the sum of €13,614.70 plus interest and any incidental claims, in respect of the appeal filed by the Plaintiff, against the Decision issued on 23 July 2004 by the Higher Regional Court of Vienna, acting in its capacity of court of appeal, file number 12 R 127/04s-16, which upheld the Decision of the Regional Court for Civil Law Cases of Vienna, of 4 May 2004, file number 27 Cg 179/03x-12, subject to a proviso.

Judgement

The appeal on a point of law is rejected. The Plaintiff shall bear the costs of the appeal proceedings.

Reasoning

The Plaintiff demanded payment by the Defendant of the sum of €13,614.70 plus interest and any incidental claims, as consideration for work done as a master builder, in the Application to initiate the summary procedure for obtaining authority to levy execution, which was received by the court of first instance on 29 August 2003. The Plaintiff submitted, with regard to the jurisdiction of the national courts that, in conformity with article 3, paragraph 3, of the Headquarters Agreement, (BGBl 1982/248), the transactions of the Defendant were subject to the jurisdiction of the Austrian courts. The court of first instance issued the requested payment order which, according to the receipt of delivery dated 8 September 2003, was accepted personally by a "director" of the Defendant.

In a note verbale dated 6 October 2003 addressed to the Federal Ministry of Foreign Affairs, the Defendant contested the grounds for the Plaintiff's claim, but did not state whether, in the instant case, it waived its immunity under international law. The Federal Ministry of Foreign Affairs registered this "objection" of the Defendant on 8 October 2003. The Defendant's "objection", together with the accompanying letter of the Federal Ministry of Foreign Affairs, was received by the court of first instance on 17 October 2003.

The Judge of first instance subsequently addressed a request to the Federal Ministry of Justice for the performance of good offices under article 33 of the 1997 Decree on mutual judicial assistance in civil cases and requested that a statement be obtained from the Defendant indicating whether it waived immunity from the jurisdiction of the national courts, as provided for in article 9 of the Headquarters Agreement. In this request, the Judge of first instance likewise stated that he was proceeding on the assumption that the payment order had not yet been served in a legally effective manner. On 31 March 2004, the Defendant stated, in a note verbale addressed to the Federal Ministry of Foreign Affairs, that it did not waive its immunity.

The court of first instance thereupon rejected the Application as inadmissible and, at the same time, revoked the payment order of 3 September 2003. The payment order should not have been served directly on the Defendant. Article 11, paragraph 2, of the Service of

* Composition of the Court: Dr. Bauer, Chairman, as Presiding Judge and Dr. Hopf, Dr. Fellinger, Hon. Prof. Dr. Neumayr and Dr. Schramm, Members of the Supreme Court, as the other Judges on the Panel.

Documents Act required that use be made of the good offices of the Federal Ministry of Foreign Affairs for the service of documents on international organizations. In the instant case, it had been impossible to remedy faulty service as provided for in article 7 of the Service of Documents Act. In keeping with article 9 of the Headquarters Agreement, the Defendant enjoyed immunity from every form of legal process except insofar as in any particular case, it had expressly waived immunity. No such waiver had been given and, for that reason, the Application must be rejected in accordance with article 42, paragraph 1, of the Court Jurisdiction Act. The Court of appeal rejected the Plaintiff's appeal on points of law and upheld the impugned decision with the provis o that the payment order of 3 September 2003 be nullified and the Application rejected. It endorsed the legal opinion of the court of first instance that the payment order had not been served on the Defendant lawfully. A remedy for faulty service through the actual delivery of the document, as provided for in article 7 of the Service of Documents Act, could not be contemplated in the instant case, owing to the violation which had taken place of the rules on the service of documents contained in article 11, paragraph 2, of the Service of Documents Act, for the obligatory procedure laid down by article 11, paragraph 2, of the Service of Documents Act was designed to ensure respect for immunities and privileges under international law and the protection of persons enjoying such privileges. Similarly, the procedure laid down in article 33 of the 1997 Decree on mutual judicial assistance in civil cases, according to which it was first necessary to raise the question whether immunity was waived and service was possible only in the event of immunity being waived, argued against the possibility of there being a remedy for faulty service within the meaning of article 7 of the Service of Documents Act.

Furthermore, according to article 5, paragraph 1, of the Headquarters Agreement (BGBl 1982/248), no officer or official of the Republic of Austria, or any other person exercising any public authority within the Republic of Austria might enter the headquarters seat to perform any duties therein except with the consent of, and under conditions approved by, the Director-General. This provision also indicated that a remedy for faulty service, when such service constituted an official act, was not possible in this case. After all, the Administrative Court of Appeal had held that consideration of the generally recognized rules of international law made it impossible to interpret article 7 of the Service of Documents Act in such a way as to mean that even violations of express prohibitions on the service of documents contained in treaties, and thus impermissible interference in the sovereign rights of another State, would be remedied (VwSlg 14813 A/1997). Although this legal rule referred to another State and not to an international organization and although it was based on an express prohibition of the service of documents in a treaty and not, as in the instant case, on a comprehensive clause like article 5 of the Headquarters Agreement, the reasoning of the Administrative Court of Appeal could be applied generally and was therefore applicable to the instant case. The service of the payment order on the Defendant had not therefore been conducted in a legally effective manner and thus the proceedings had not yet been concluded.

The national courts' lack of jurisdiction on account of immunity meant that an absolute prerequisite for proceedings was missing; at the same time, irrespective of any waiving of immunity, a remedy through action by one of the parties was impossible. Even if immunity could be tacitly waived, it was clear that the filing of an objection to a payment order could not be regarded as submission to the jurisdiction of the national courts. Moreover, in

its note verbale of 31 March 2004, the Defendant had expressly stated that it did not waive its immunity. The impugned decision should therefore be upheld with the proviso that the payment order which had been issued be nullified and that the Application be rejected on the grounds of the national courts' lack of jurisdiction.

The ordinary appeal on points of law was admissible because, as far as could be seen, no previous decisions of the Supreme Court had been concerned with the legally relevant question of whether, when the provisions of article 11, paragraph 2, of the Service of Documents Act were violated, a remedy for faulty service as provided for in article 7 of the Service of Documents Act was possible through actual delivery.

The Plaintiff's appeal on points of law, which was submitted on time, raises an objection to this decision on the grounds that there were errors in procedure and that the wrong legal decision was reached. It further requests the quashing of both the impugned decision and the decision of the court of first instance and confirmation of the validity of the payment order which was issued. Alternatively it requests that the impugned decision be quashed and that the case be sent back to the court of first instance with a view to holding a fresh hearing and arriving at a fresh decision.

Legal principle

The Plaintiff's appeal on points of law is admissible but not justified. In his appeal, the Plaintiff first submits that, according to the Headquarters Agreement, the Defendant is subject to the jurisdiction of the Austrian courts insofar as the law of contract is concerned and that, for this reason, no immunity exists in this respect.

In addition, it must be noted, as a matter of principle, that the question of whether a person enjoys immunity must be examined independently by the court. In case of doubt, the court must seek the advice of the Federal Ministry of Justice in accordance with article IX, paragraph 3, of the Introductory Act to the Court Jurisdiction Act (SZ 74/20; 3 Ob 258/98g *inter alia*, with further sources). As a rule, the exemption of international organizations and their property from national jurisdiction (immunity) results from the relevant international agreements, or the agreements between them and the Republic of Austria (headquarters agreements), the purpose being to protect international organizations from interference from and the exertion of influence through the organs of individual States (cf. RIS-Justiz RS0045442). International organizations enjoy more extensive privileges than foreign States. While, under national law and prevailing international law, foreign States enjoy immunity only in respect of sovereign acts, but not in their capacity of legal entities in private law, the immunity of international organizations must, a matter of principle, be regarded as absolute when they are acting within the limits of their functions (SZ 65/87, SZ 63/206 *inter alia*, with further sources). The different treatment of foreign States and international organizations in the national legal system can be explained by the fact that, as a result of the functional character of the legal personality of each international organization, all its actions must be closely connected with its purpose (Seidl-Hohenveldern/ Loibl, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften* 7Rz 1908 *inter alia*). Thus it has already been decided that international organizations enjoy immunity deriving from leasing agreements regarding their headquarters in the event of claims from the lessor (SZ 65/87). Immunity constitutes merely a procedural barrier to the enforcement of the law; it does not, however, alter the validity of

substantive law. In a particular case, the administrative head of the international organization may waive immunity (cf. Neuhold/Humer/Schreiner, *Österreichisches Handbuch des Völkerrechts* I3 174).

The Defendant has the status of an international organization and has signed an Agreement between the Republic of Austria and the OPEC Fund for International Development regarding the Headquarters of the Fund (BGBl. 1982/248) (cf. Matscher in *Fasching 2*, Art. IX EGJN [Introductory Act to the Court Jurisdiction Act] Rz 316). As noted in the above-mentioned general submissions, article 3, paragraph 3, of the Headquarters Agreement states that, except as otherwise provided in the Agreement, the courts or other appropriate organs of the Republic of Austria shall have jurisdiction, as provided in applicable laws, over acts done and transactions taking place in the headquarters seat. The Government recognizes the legal personality of the Fund and, in particular, its capacity to contract, to acquire and dispose of movable and immovable property, to perform all its financial and other operations as defined by the Agreement Establishing the Fund and to institute legal proceedings (article 7). According to article 9, the Fund and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case the Fund shall have expressly waived its immunity. It is, however, understood that the waiver of immunity shall not extend to any measure of execution.

From the Defendant's written order of 13 July 1999, which was enclosed with its appeal on points of law, it appears that the construction work forming the subject of the action concerned renovation work at the permanent headquarters of the Defendant in Vienna, at the address . . . , and was therefore closely connected with the functions of the Defendant. For this reason, the Defendant indubitably enjoys immunity in the instant case, notwithstanding the Plaintiff's reference to article 3, paragraph 3, of the Headquarters Agreement for, according to this provision, the courts and other appropriate organs of the Republic of Austria have jurisdiction, as provided in applicable laws, over acts done and transactions taking place in the headquarters seat only insofar as the Agreement does not provide otherwise. However, under article 9 of the Agreement, the Fund and its property, wherever located and by whomsoever held, enjoys immunity from every form of legal process except insofar as in any particular case the Fund has expressly waived its immunity. As further submissions will show, in the instant case, the Defendant did not waive its immunity. In accordance with article 11, paragraph 2, of the Service of Documents Act, for service to persons of foreign nationality (including foreign States (cf. 9 ObA 14/03d and further sources)), or international organizations having been granted privileges and immunities under international law, no matter where they are resident or located, the service of the Federal Ministry of Foreign Affairs shall be used. Similarly, in accordance with article 23, paragraph 3, of the Court Jurisdiction Act, the good offices of the Ministry of Foreign Affairs must be used in order to carry out court orders concerning persons enjoying immunity. Article 33, paragraph 2, of the 1997 Decree on mutual judicial assistance in civil cases requires that the statement by means of which a person waives immunity from the jurisdiction of national courts must be obtained through the good offices of the Federal Ministry of Justice. When statements of a claim and other commercial documents which are to be served on this person in the event of the person having waived immunity from the jurisdiction of national courts are presented, they must be accompanied by a duly made out certificate of service. The same applies when it is necessary to obtain a declara-

tion from an intergovernmental organization whether or not it waives immunity from the jurisdiction of national courts (article 33, paragraph 2, of the 1997 Decree on mutual judicial assistance in civil cases). According to article 34, paragraph 1, of the 1997 Decree on mutual judicial assistance in civil cases, commercial documents to whose service article 11, paragraph 2, of the Service of Documents Act applies must be presented to the Federal Ministry of Justice for further transmission to the Federal Ministry of Foreign Affairs.

Previous judicial decisions have already drawn attention to the fact that article 11, paragraph 2, of the Service of Documents Act and article 32, paragraph 2, of the Court Jurisdiction Act make service solely through the good offices of the Federal Ministry of Foreign Affairs obligatory and that service in any other manner (such as, for example, in the instant case, direct service by the post) would be illegal (9 ObA 14/03d and further sources). In this connection, attention has been drawn to the fact that, in the absence of an agreement between the States concerned which regulates this operation, service abroad as a sovereign act occasions interference in the sovereign rights of the foreign State concerned. For this reason, in such cases of service on persons or international organizations enjoying privileges under international law, the good offices of the Federal Ministry of Foreign Affairs are required. The Ministry maintains close contact with the circle of persons in question and it is responsible for observing the aspects of international law involved (9 ObA 14/03d relying on the statutory material RV 162 BlgNR XV GP 10).

Above all, it is a moot point whether, in keeping with article 7 of the Service of Documents Act, this faulty service could be remedied by the fact that the payment order was actually received by a "director" of the Defendant on 8 September 2003. The answer to the question whether the procedure used to deliver a court document may be regarded as valid "service" can be determined solely by Austrian law in proceedings before an Austrian court. In particular, the question of the conditions on which faulty service of documents may subsequently be remedied must also be answered in accordance with Austrian law (RIS-Justiz RS0036434). If errors occur during the service procedure, service shall, under article 7 of the Service of Documents Act, be considered to have been made as soon as the document has actually been received by the addressee specified by the authority. The question whether an error which has occurred can be remedied, in view of article 7 of the Service of Documents Act, must be examined by the authority *ex officio*. According to the precedents of the Supreme Court, any errors in the service procedure must be regarded as remedied when the document to be served has really reached its addressee abroad (Gitschthaler in *Rechberger*, ZPO2, § 87 (§ 7 ZustG) Rz 3 with further sources; 10 Ob 99/00g *inter alia*, with further sources; RIS-Justiz RS0083735, RS0036481). For example, it was decided that direct service by the post which was impermissible in relations of mutual judicial assistance (article 121, paragraph 1, of the Code of Civil Procedure and article 11, paragraph 1, of the Service of Documents Act) was remedied within the meaning of article 7 of the Service of Documents Act by the fact that the decision had actually been received by the addressee (cf. Ob 545/84; RIS-Justiz RS0036481). In its case-law, the Higher Administrative Court also proceeds on the assumption that, in principle, article 7 of the Service of Documents Act is the authoritative text when it comes to the question of the remedying of errors in the service of a document to destinations abroad, unless otherwise expressly provided in an international agreement, or unless this would be contrary to its purpose (VwGH, 23.6.2003, Zl 2002/17/0182 and further sources). If international treaties contain express prohibitions on the service of documents, impermissible interference in

the sovereign rights of another State through service may not be remedied by relying on article 7 of the Service of Documents Act (VwSlg 14813 A/1997).

When examining the question whether, in the cases provided for by article 11, paragraph 2, of the Service of Documents Act (service on persons of foreign nationality or international organizations entitled to privileges and immunities under international law), in the event of illegal service, the possible remedy provided for in article 7 of the Service of Documents Act applies, it is necessary to bear in mind that the exercise of jurisdiction over a person enjoying immunity would be a breach of international law and might constitute an offence against international law. An application for the annulment of a procedure endowed with the effect of *res judicata*, in accordance with article 42, paragraph 2, of the Court Jurisdiction Act, serves the purpose, *inter alia,* of subsequently eliminating the consequences of such an offence against international law (Matscher op. cit Rz 119 and further sources). Immunity does not, however, preclude an immune person from appearing as plaintiff or applicant before a national court or otherwise submitting themselves voluntarily to the jurisdiction of a national court (article IX, paragraph 2, first subparagraph, of the Introductory Act to the Court Jurisdiction Act). Immune persons thus escape the jurisdiction of the national courts insofar as, in principle, they may not be either defendants or respondents, or in any other way whatsoever the addressees or object of any judicial activity of the State; this includes summonses or the service of other documents through which binding orders are issued, or subsequent coercive measures are threatened. According to the opinion of one learned author, "simple" delivery (of a statement of a claim, for example, or summons to a hearing as a witness, party or informant) is, however, permissible under international law for, in some circumstances, only from the addressees' reaction is it possible to ascertain whether these persons enjoy immunity, whether they waive the latter, or whether they are prepared to accept the invitation to appear as a witness. The right of the plaintiff or applicant to have justice administered requires such service, or the obtainment of a declaration of waiver or a declaration of willingness (Matscher, *op. cit.* Rz 120 et seq. and further sources).

In the instant case, in the opinion of the Chamber hearing the appeal, any remedy under article 7 of the Service of Documents Act of what, under article 11, paragraph 2, of the Service of Documents Act, constituted the unlawful direct service on the Defendant of the payment order entailing coercive measures could therefore be contemplated only if the Defendant had (also) waived its immunity. Attention has already been drawn to the fact that immunity may be waived pursuant to article IX, paragraph 2, first subparagraph, of the Introductory Act to the Court Jurisdiction Act. The organ competent to represent an international organization in its external relations is competent to make the declaration of waiver. The waiver must be expressly stated and is binding solely in respect of the case for which it was issued (SZ 37/94). Mere acceptance of documents issued by the court in the dispatching of its work may not be deemed to constitute a waiver of immunity (ZBl. 1926/105; VwGH, 28.10. 1981, Zl 81/13/0031 *inter alia*). The waiver may be stated before or after a legal dispute or while judicial proceedings are pending. Immunity claimed for contentious proceedings does not extend to the enforcement process (Matscher *op. cit.* Rz 151 *et seq.*). The Defendant certainly did not expressly waive immunity. In the opinion of Matscher, *op. cit.* Rz 156 and 144, immunity may be waived tacitly in order to protect persons acting in good faith, a principle which also applies in international law, but purely passive conduct (taking receipt of a statement of a claim or summons, or non-appear-

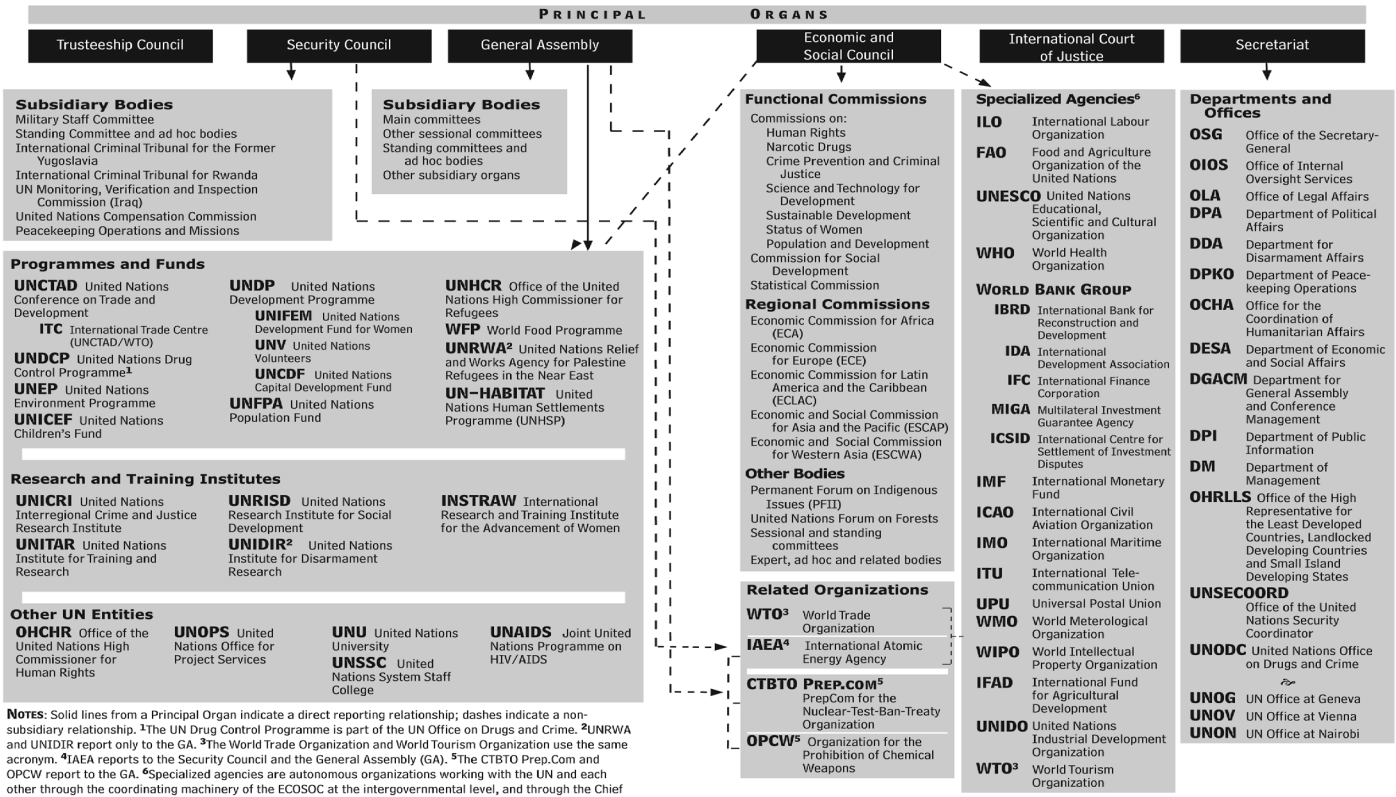
ance at a hearing) may not be deemed to constitute a tacit waiver. The conduct implying a waiver of immunity may be that of the party enjoying immunity itself or that of its attorney; the rules concerning compulsory legal representation also apply to a declaration of waiver made before the court, or while court proceedings are pending. Even according to this opinion, the objection to the payment order does not, however, imply submission to the jurisdiction of the national courts (Matscher *op. cit.* Rz 165). An effective waiver of immunity by the Defendant does not therefore exist even in the light of these arguments. The Defendant, in its note verbale of 31 March 2004, expressly states that it does not waive its immunity.

Since the Defendant has not therefore waived its immunity, a remedy of the unlawful service as provided for by article 7 of the Service of Documents Act is out of the question. It follows from this that no effective service of the payment order on the Defendant has yet taken place and that the proceedings have not yet been concluded. For this reason the Application from the lower courts was rightly rejected on the grounds of the lack of domestic jurisdiction in accordance with article 42, paragraph 1, of the Court Jurisdiction Act.

The Plaintiff's appeal therefore had to be rejected. The costs order is based on articles 40 and 50 of the Code of Civil Procedure.

ANNEX

The United Nations system



NOTES: Solid lines from a Principal Organ indicate a direct reporting relationship; dashes indicate a non-subsidiary relationship. [1]The UN Drug Control Programme is part of the UN Office on Drugs and Crime. [2]UNRWA and UNIDIR report only to the GA. [3]The World Trade Organization and World Tourism Organization use the same acronym. [4]IAEA reports to the Security Council and the General Assembly (GA). [5]The CTBTO Prep.Com and OPCW report to the GA. [6]Specialized agencies are autonomous organizations working with the UN and each other through the coordinating machinery of the ECOSOC at the intergovernmental level, and through the Chief Executives Board for coordination (CEB) at the inter-secretariat level.