

*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

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

Chapter VIII. Decisions of national tribunals



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	<i>Page</i>
D. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA . . . .	366
1. Judgements delivered by the Appeals Chamber . . . . .	366
2. Judgements delivered by the Trial Chambers . . . . .	366
E. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA . . . . .	366
Judgements delivered by the Appeals Chamber . . . . .	367
F. MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS . . . . .	367
Judgement . . . . .	367
G. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA . . . . .	367
Judgement and decision delivered by the Trial Chamber . . . . .	368
H. SPECIAL TRIBUNAL FOR LEBANON . . . . .	368
1. Decisions delivered by the Contempt Judge . . . . .	368
2. Decision delivered by the Appeals Chamber . . . . .	368
3. Pending cases and proceedings as at 31 December 2014 . . . . .	368
I. RESIDUAL SPECIAL COURT FOR SIERRA LEONE . . . . .	369
 CHAPTER VIII. DECISIONS OF NATIONAL TRIBUNALS	
AUSTRIA	
Austrian Supreme Court, Decision of 23 April 2014, 10Obs40/14a	
Claim for childcare allowance out of the Austrian Family Bur-	
den Equalization Fund by employee of the United Nations Of-	
fice on Drugs and Crime in Vienna—Exclusion of non-Austrian	
United Nations officials under Section 39 lit. (b) of the Headquar-	
ters Agreement due to privileges and immunities resulting from	
status as United Nations officials—Precedence of the Headquar-	
ters Agreement over relevant national laws providing for childcare	
allowance . . . . .	371

#### **Part Four. Bibliography**

A. INTERNATIONAL ORGANIZATIONS IN GENERAL	
1. General . . . . .	375
2. Particular Questions . . . . .	376
3. Responsibility of International Organizations . . . . .	376
B. UNITED NATIONS	
1. General . . . . .	377
2. Principal organs and subsidiary bodies . . . . .	378
International Court of Justice . . . . .	378
Secretariat . . . . .	379
Security Council . . . . .	380

## Chapter VIII

### DECISIONS OF NATIONAL TRIBUNALS

#### AUSTRIA

*Austrian Supreme Court, Decision of 23 April 2014, 10ObS40/14a*

CLAIM FOR CHILDCARE ALLOWANCE OUT OF THE AUSTRIAN FAMILY BURDEN EQUALIZATION FUND BY EMPLOYEE OF THE UNITED NATIONS OFFICE ON DRUGS AND CRIME IN VIENNA—EXCLUSION OF NON-AUSTRIAN UNITED NATIONS OFFICIALS UNDER SECTION 39 LIT. (B) OF THE HEADQUARTERS AGREEMENT DUE TO PRIVILEGES AND IMMUNITIES RESULTING FROM STATUS AS UNITED NATIONS OFFICIALS—PRECEDENCE OF THE HEADQUARTERS AGREEMENT OVER RELEVANT NATIONAL LAWS PROVIDING FOR CHILDCARE ALLOWANCE

In 2014, the Austrian Supreme Court dealt with the claim of an employee of the United Nations Office on Drugs and Crime (UNODC) against the Vienna Regional Health Insurance Fund concerning childcare allowance. By decision of 29 February 2012, the Respondent had rejected the Claimant’s application for childcare allowance for her daughter born on 15 January 2012, pointing to Section 39 lit. (b) of the Agreement between the Republic of Austria and the United Nations regarding the Seat of the United Nations in Vienna (hereinafter referred to as “Headquarters Agreement”). According to this provision “Officials of the United Nations and the members of their families living in the same household to whom this Agreement applies shall not be entitled to payments out of the Family Burden Equalization Fund or an instrument with equivalent objectives, unless such persons are Austrian nationals or stateless persons resident in Austria”. The claimant, a citizen of the Russian Federation, challenged the Respondent’s decision to reject her application for childcare allowance, arguing that the exclusion provided for in Section 39 lit. (b) of the Headquarters Agreement was not applicable in her case because her husband and child were Austrian citizens. She argued that the rejection of her childcare allowance application would subject an Austrian citizen married to a non-Austrian United Nations employee to additional financial burden, for which there was no justification. The Claimant further emphasized that despite her position as employee of the United Nations she did not enjoy immunity or diplomatic privileges.

The court of first instance dismissed the claim and stated that childcare allowance was encompassed by Section 39 lit. (b) of the Headquarters Agreement. In view of the tax privileges that the Claimant enjoyed as an employee of the United Nations, the exclusion did not constitute an unjustified differentiation. The childcare allowance was financed out of the Austrian Family Burden Equalization Fund to which employees of the United Nations did not contribute. The fact that the Claimant was the only family member who did not hold Austrian citizenship was not relevant. According to Section 37 lit. (f) of the Headquarters Agreement, officials of the United Nations assigned to Vienna enjoy “[e]xemption from

taxation on all income and property of officials and members of their families forming part of their households, insofar as such income derives from sources, or insofar as such property is located, outside the Republic of Austria". The citizenship of further family members was irrelevant under Section 37 lit. (f). As a member of the Claimant's household, the Austrian spouse also participated in the Claimant's privileges enjoyed by virtue of her employment with the United Nations. The Claimant further argued that Section 39 lit. (b) had to be interpreted in conformity with the principle of equal treatment according to the Austrian Constitution. This argument was rejected with reference to Section 53 lit. (b) of the Headquarters Agreement which stated that "[p]rivileges and immunities are granted to officials and experts on mission, in the interests of the United Nations and not for the personal benefit of the individuals themselves". The individual interests of the claimant were not relevant for the interpretation of the provision, as the privileges and immunities were granted in the interest of the United Nations, not the individual.

The appeal court confirmed the ruling by the court of first instance and underlined that the reason for the exception in Section 39 lit. (b) was the fact that the persons covered enjoyed a number of privileges as a consequence of their employment with the United Nations. The actual impact of the privileges on the income of the Claimant as well as the extent of concrete economic advantages was irrelevant. The Claimant's interpretation of the Section in question would require an assessment in every single case whether and to which extent employees of the United Nations benefitted from the privileges granted in the Headquarters Agreement. This approach had not been intended by the parties to the Headquarters Agreement. As the court of first instance, the appeal court underlined that the claimant's husband, albeit being an Austrian citizen, participated in the privileges enjoyed by his wife.

Before the Supreme Court, the Claimant repeated that she in fact had not enjoyed any financial advantages as a result of the privileges accorded under the Headquarters Agreement. Therefore, her exclusion from the childcare allowance was not justified. The Respondent countered that the mere fact that the claimant was working for the United Nations was sufficient for her falling under the exception of Section 39 lit. (b) of the Headquarters Agreement. The Court came to the conclusion that the Headquarters Agreement had precedence over the respective national laws providing for childcare allowance, namely the Childcare Allowance Act (Kinderbetreuungsgeldgesetz-KBGG) and the Austrian Family Charges Equalization Act (Familienlastenausgleichsgesetz-FLAG), to which the KBGG refers. The exception provided in Section 39 lit. (b) of the Headquarters Agreement constituted a special norm applicable to specified persons. The Claimant, being a citizen of a third state, lacked the entitlement to allowance according to the laws mentioned above. The Austrian husband would be able to apply for the childcare allowance if the further requirements were met. The Claimant's argument that she only enjoyed minor privileges under the Headquarters Agreement was rejected.

The Supreme Court also decided in a similar case between a Lebanese citizen married to an Austrian who was working for the International Atomic Energy Agency, and the Vienna Regional Health Insurance Fund concerning childcare allowance (see decision of 28 January 2014 of the Austrian Supreme Court 10ObS170/13t).