Case No. 762

Difference Relating to Immunity from Legal Process of a Special Reporter (Rapporteur) of the Commission on Human Rights (1999)

Applicant: Dato' Param Cumaraswamy, United Nations Commission on Human Rights Special Reporter* on the Independence of Judges and Lawyers

(*Also referred to as a "Rapporteur" in UN documents)

Respondent: Government of Malaysia

Case No. 762 is a closed case. The enclosed record contains the only references permissible to bring forth before the United Nations International Court of Justice. Mention of materials outside this record constitute grounds for dismissal.

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Case Summary

Court says that Mr. Cumaraswamy is entitled to immunity from legal process

for the words spoken by him during an interview

THE HAGUE, 29 April 1999. The International Court of Justice (ICJ) today handed down its Advisory Opinion on the request of the Economic and Social Council (ECOSOC), one of the six principal organs of the United Nations, in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.
The Court was of the opinion, by fourteen votes to one, that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations was "applicable" in the case of Dato' Param Cumaraswamy, a Malaysian jurist who was appointed Special Rapporteur on the Independence of Judges and Lawyers by the United Nations Commission on Human Rights in 1994, and that he was "entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of International Commercial Litigation".

Mr. Cumaraswamy currently faces several lawsuits filed in Malaysian courts by plaintiffs who assert that he used defamatory language in the interview and seek damages in a total amount of US$ 112 million. However, according to the United Nations Secretary-General, Mr. Kofi Annan, Mr. Cumaraswamy spoke in his official capacity of Special Rapporteur and was thus immune from legal process by virtue of the above-mentioned Convention.
ECOSOC, of which the Commission on Human Rights is a subsidiary organ, requested an advisory opinion on the issue from the Court in August 1998, after efforts by the Secretary-General to ensure respect for Mr. Cumaraswamy's immunity had not, in his view, achieved the desired result.

In its Advisory Opinion, the Court held that the Government of Malaysia should have informed the Malaysian courts of the finding of the Secretary-General and that these courts should have dealt with the question of immunity as a preliminary issue to be expeditiously decided. It unanimously stated that Mr. Cumaraswamy should be "held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs".
The Court also found, by thirteen votes to two, that the Government of Malaysia now had "the obligation to communicate [the] advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected".

Although advisory opinions given by the Court are not generally binding, Article VIII, Section 30, of the above-mentioned Convention provides that those rendered in the event of a difference between the United Nations and a member State "shall be accepted as decisive by the parties". All proceedings in the Malaysian courts have been stayed pending receipt of the opinion.

Reasoning of the Court

The Court first states that ECOSOC's request for an advisory opinion meets the conditions set out in the Statute. The question asked is a legal one and it falls within the scope of the activities of ECOSOC. The Court thus has jurisdiction to answer it.

The Court then recalls that a special rapporteur who is entrusted with a mission for the United Nations must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations. It observes that Malaysia has acknowledged that Mr. Cumaraswamy is an expert on mission and that such experts enjoy the privileges and immunities provided for under the Convention in their relations with States parties, including those of which they are nationals.

The Court goes on to consider whether the immunity applies to Mr. Cumaraswamy in the specific circumstances of the case. It points out that the Secretary-General, as the chief administrative officer of the United Nations, has the primary responsibility and authority to assess whether its agents, including experts on mission, acted within the scope of their functions and, where he so concludes, to protect these agents by asserting their immunity. In doing so, the Secretary-General, in accordance with the provisions of the above-mentioned Convention, protects the mission with which the expert is entrusted. The Court observes that, in the present case, the Secretary-General was reinforced in his view that Mr. Cumaraswamy had spoken in his official capacity by the fact that he was referred to several times in the article in International Commercial Litigation in his capacity as Special Rapporteur and that, in 1997, the Commission on Human Rights had extended his mandate for another three years, thereby acknowledging that he had not gone beyond his functions by giving the interview.

Turning to Malaysia's legal obligations, the Court states that, when national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General and give that finding the greatest weight. Questions of immunity are preliminary issues which must be expeditiously decided by national courts in limine litis (at the very outset of the proceedings). Since the conduct of any organ of a State, including its courts, must be regarded as an act of that State, the Court concludes that the Government of Malaysia did not act in accordance with its obligations under international law in the present case.

ICJ Press Release

Statement of Fact

The Commission on Human Rights in 1994 appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Reporter on the Independence of Judges and Lawyers. His

mandate consists of tasks including, inter alia, to enquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the execution of his mandate. After the third report containing a section on the litigation pending against him in the Malaysian civil courts, the Commission, in April 1997, renewed his mandate for an additional three years.

As a result of an article published on the basis of an interview which the Special Reporter gave to a magazine (International Commercial Litigation) in November 1995, two commercial companies in Malaysia asserted that said article contained defamatory words that had "brought them into public scandal and contempt". Each company filed a suit against him for damages amounting to $30 million (approximately US $12 million each), "including exemplary damages for slander".

Acting on behalf of the Secretary-General, the Legal Counsel of the United Nations considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Reporter on the Independence of Judges and Lawyers that the article clearly referred to his United Nations capacity and to the Special Reporter's global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale, "requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Reporter's immunity from legal process" with respect to that particular complaint. On 20 January 1997, the Special Reporter filed an application in the High Court of Kuala Lumpur (the trial court in which the suit had been filed) to set aside and/or strike out the plaintiff's' writ, on the ground that the words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Reporter on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Reporter in the course of his mission" and that the Secretary-General "therefore maintains that Dato' Param. Cumaraswamy is immune from legal process with respect thereto". The Special Reporter filed this note in support of his above-mentioned application.

In spite of representations that had been made by the Office of Legal Affairs, a certificate filed by the Malaysian Minister for Foreign Affairs with the trial court failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e., in deciding whether particular words - acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had .to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

On 28 June 1997, the competent judge of the Malaysian concluded that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Reporter and appears to have room for interpretation". The Court ordered that the Special Reporter's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

In July 1997, the Legal Counsel called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, could be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it could not or did not wish to protect and to hold harmless the Special Reporter in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

> Section 30 of the Convention provides as follows: "Section 30: All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

On 10 July, yet another lawsuit was filed against the Special Reporter. On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government. On 23 October and 21 November 1997 new plaintiffs filed third and fourth lawsuits against the Special Reporter. On 27 October and 32 November 1997. the Secretary-General issued identical certificates of the Special Reporter's immunity.

On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and

about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy’s application for leave to appeal stating that he was neither a sovereign nor a full-fledged diplomat but merely "an unpaid, part-time provider of information".

The Secretary-General then appointed a Special Envoy, Maitre Yves Fortier of Canada, who, after two official visits to Kuala Lumpur, and after negotiations to reach an out of court settlement had failed, advised that the matter should be referred to the Council to request an advisory opinion from the international Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia had acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it would make its own presentations to the International Court of Justice, it did not oppose the submission of the matter to that Court through the Council.

Questions Before the Court

1. Does Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations apply in the case of Dato' Param Cumaraswamy as Special Reporter of the Commission on Human Rights on the Independence of Judges and Lawyers?

2. If Article VI, Section 22 applies, is Dato' Parain Cumaraswamy entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of International Commercial Litigation?

3. Does the Malaysian courts have the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided limine litis (at the beginning of the court procedure)?

Opinions of the Court

Summary of Opinions

Advisory opinion of 29 April 1999

The Court handed down its advisory opinion on the request of the Economic and Social Council (ECOSOC), one of the six principal organs of the United Nations, in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.

The Court was of the opinion, by fourteen votes to one, that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations was "applicable" in the case of Dato' Param Cumaraswamy, a Malaysian jurist who was appointed Special Rapporteur on the Independence of Judges and Lawyers by the United Nations Commission on Human Rights in 1994, and that he was "entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*".

In its Advisory Opinion, the Court held that the Government of Malaysia should have informed the Malaysian courts of the finding of the Secretary-General and that these courts should have dealt with the question of immunity as a preliminary issue to be expeditiously decided. It unanimously stated that Mr. Cumaraswamy should be "held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs".

The Court also found, by thirteen votes to two, that the Government of Malaysia now had "the obligation to communicate [the] advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected".

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

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The full text of the final paragraph of the opinion reads as follows:

"67. For these reasons,

The Court

Is of the opinion:

(1) (*a*) By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(*b*) By fourteen votes to one,

That Dato' Param Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(2) (*a*) By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that Dato' Param Cumaraswamy was entitled to immunity from legal process;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma;

(*b*) By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(3) Unanimously,

That Dato' Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs;

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to communicate this advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Dato' Param Cumaraswamy's immunity be respected;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma."

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Vice-President Weeramantry and Judges Oda and Rezek appended separate opinions to the Advisory Opinion of the Court. Judge Koroma appended a dissenting opinion.

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Review of the proceedings and summary of facts (paras. 1-21)

The Court begins by recalling that the question on which it has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the "Council") on 5 August 1998. Decision 1998/297 reads as follows:

"*The Economic and Social Council,*

Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,[1]

Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

Recalling General Assembly resolution 89 (I) of 11 December 1946,

1. *Requests* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General[1], and on the legal obligations of Malaysia in this case;

2. *Calls upon* the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties."

Enclosed with the letter of transmittal of the Secretary-General was a note by him dated 28 July 1998 and entitled "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" (E/1998/94) and an addendum to that note.

After outlining the successive stages of the proceedings (paras. 2-9), the Court observes that in its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the "circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General" (E/1998/94). The text of those paragraphs is then reproduced. They set out the following:

In 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter, the Convention on the Privileges and Immunities of the United Nations (the Convention), to which 137 member States have become parties and provisions of which have been incorporated by reference into many hundreds of agreements relating to the United Nations and its activities. The Convention is, inter alia, designed to protect various categories of persons, including "Experts on Mission for the United Nations", from all types of interference by national authorities. In particular, Section 22 (*b*) of Article VI of the Convention provides:

"*Section 22*: Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:

(*b*) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations."

In its Advisory Opinion of 14 December 1989 (in the so-called "*Mazilu*" case), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an "expert on mission" within the meaning of Article VI of the Convention.

The Commission on Human Rights in 1994 appointed Dato' Param Cumaraswamy, a Malaysian jurist, as the Commission's Special Rapporteur on the Independence of Judges and Lawyers. His mandate consists of tasks including, inter alia, to enquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials. Mr. Cumaraswamy has submitted four reports to the Commission on the execution of his mandate. After the third report containing a section on the litigation pending against

[1] E/1998/94.

him in the Malaysian civil courts, the Commission, in April 1997, renewed his mandate for an additional three years.

As a result of an article published on the basis of an interview which the Special Rapporteur gave to a magazine (International Commercial Litigation) in November 1995, two commercial companies in Malaysia asserted that the said article contained defamatory words that had "brought them into public scandal, odium and contempt". Each company filed a suit against him for damages amounting to M$ 30 million (approximately US$ 12 million each), "including exemplary damages for slander".

Acting on behalf of the Secretary-General, the Legal Counsel of the United Nations considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale, "requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process" with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the suit had been filed) to set aside and/or strike out the plaintiffs' writ, on the ground that the words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission" and that the Secretary-General "therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto". The Special Rapporteur filed this note in support of his above-mentioned application.

In spite of representations that had been made by the Office of Legal Affairs, a certificate filed by the Malaysian Minister for Foreign Affairs with the trial court failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e., in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation". The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

In July 1997, the Legal Counsel called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, could be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it could not or did not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

Section 30 of the Convention provides as follows:

> "*Section 30*: All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

On 10 July, yet another lawsuit was filed against the Special Rapporteur. On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 and also communicated a note verbale with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government. On 23 October and 21 November 1997, new plaintiffs filed third and fourth lawsuits against the Special Rapporteur. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur's immunity.

On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy's application for leave to appeal stating that he was neither a sovereign nor a full-fledged diplomat but merely "an unpaid, part-time provider of information".

The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, who, after two official visits to Kuala Lumpur, and after negotiations to reach an out-of-court settlement had failed, advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia had acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it would make its own presentations to the International Court of Justice, it did not oppose the submission of the matter to that Court through the Council.

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After reproducing paragraphs 1-15 of the Secretary-General's note, the Court then refers to the dossier of documents submitted to it by the Secretary-General, which contains additional information that bears on an understanding of the request to the Court, concerning the context in which Mr. Cumaraswamy was asked to give his comments; concerning the proceedings against Mr. Cumaraswamy in the High Court of Kuala Lumpur, which did not pass upon Mr. Cumaraswamy's immunity *in limine litis*, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity, a decision upheld by both the Court of Appeal and the Federal Court of Malaysia; and concerning the regular reports, which the Special Rapporteur made to the Commission on Human Rights and in which he reported on the lawsuits initiated against him. The Court further refers to the consideration and adoption without a vote by the Council of the draft decision requesting the Court to give an advisory opinion on the question formulated therein, and the fact that at that meeting, the Observer for Malaysia confirmed his previous criticism of the Secretary-General's note, but made no comment on the terms of the question to be put to the Court as now formulated by the Council. Finally, Malaysia's information on the status of proceedings in the Malaysian courts is referred to.

The Court's power to give an advisory opinion
(paras. 22-27)

The Court begins by observing that this is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, quoted above.

This section provides for the exercise of the Court's advisory function in the event of a difference between the United Nations and one of its Members. The existence of such a difference does not change the advisory nature of the Court's function, which is governed by the terms of Article 96 of the Charter and Article 65 of the Statute. A distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such, ... has no binding force". These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that "[t]he opinion given by the Court shall be accepted as decisive by the parties". That consequence has been expressly acknowledged by the United Nations and by Malaysia.

The power of the Court to give an advisory opinion is derived from Article 96, paragraph 2, of the Charter and from Article 65 of the Statute. Both provisions require that the question forming the subject matter of the request should be a "legal question". This condition is satisfied in the present case, as all participants in the proceedings have acknowledged, because the advisory opinion requested relates to the interpretation of the General Convention, and to its application to the circumstances of the case of the Special Rapporteur, Dato' Param Cumaraswamy.

Article 96, paragraph 2, of the Charter also requires that the legal questions forming the subject matter of advisory opinions requested by authorized organs of the United Nations and specialized agencies shall arise "within the scope of their activities". The fulfilment of this condition has not been questioned by any of the participants in the present proceedings. The Court finds that the legal questions submitted by the Council in its request concern the activities of the Commission since they relate to the mandate of its Special Rapporteur appointed "to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials".

Discretionary power of the Court
(paras. 28-30)

As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72). In the

present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested by the Council. Moreover, no participant in these proceedings questioned the need for the Court to exercise its advisory function in this case.

The question on which the opinion is requested
(paras. 31-37)

As the Council indicated in the preamble to its decision 1998/297, that decision was adopted by the Council on the basis of the note submitted by the Secretary-General on "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers". Paragraph 1 of the operative part of the decision refers expressly to paragraphs 1 to 15 of that note but not to paragraph 21, containing two questions that the Secretary-General proposed submitting to the Court. The Court would point out that the wording of the question submitted by the Council is quite different from that proposed by the Secretary-General.

Participants in these proceedings, including Malaysia and other States, have advanced differing views as to what is the legal question to be answered by the Court. The Court observes that it is for the Council — and not for a member State or the Secretary-General — to formulate the terms of a question that the Council wishes to ask. Accordingly, the Court will now answer the question as formulated by the Council.

Applicability of Article VI, Section 22, of the General Convention to Special Rapporteurs of the Human Rights Commission
(paras. 38-46)

The Court initially examines the first part of the question laid before the Court by the Council, which is:

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General ...".

From the deliberations which took place in the Council it is clear that the request of the Council does not only pertain to the threshold question whether Mr. Cumaraswamy was and is an expert on mission in the sense of Article VI, Section 22, of the General Convention but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case. The Court notes that Malaysia became a party to the General Convention, without reservation, on 28 October 1957. [Part of Section 22 of Article VI of that Convention is quoted above, on p. 2.]

The Court then recalls that in its Advisory Opinion of 14 December 1989 (in the so-called "*Mazilu*" case) it stated:

> "The purpose of Section 22 is ... evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'. ... The essence of the matter lies not in their administrative position but in the nature of their mission." (*I.C.J. Reports 1989*, p. 194, para. 47)

In that same Advisory Opinion, it concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention.

The Court finds that the same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It observes that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions. After examining Mr. Cumaraswamy's mandate, the Court finds that he must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capacity the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

The Court finally observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.

Applicability of Article VI, Section 22, of the General Convention in the specific circumstances of the case
(paras. 47-56)

The Court then considers the question whether the immunity provided for in Section 22 (*b*) applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in *International Commercial Litigation* (November 1995 issue), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 (*b*), the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the

Organization, has the authority and the responsibility to exercise the necessary protection where required. Article VI, Section 23, of the General Convention provides that "[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves". In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission.

The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from "every kind" of legal process. The Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media.

The Court notes that Mr. Cumaraswamy was explicitly referred to several times in the article "Malaysian Justice on Trial" in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers, and further that in its various resolutions the Commission took note of the Special Rapporteur's reports and of his methods of work. In 1997, it extended his mandate for another three years. The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission's position.

The Court concludes that it is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (*b*), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

Legal obligations of Malaysia in the case
(paras. 57-65)

The Court then deals with the second part of the Council's question, namely, "the legal obligations of Malaysia in this case". Rejecting Malaysia's argument that it is premature to deal with that question, the Court points out that the difference which has arisen between the United Nations and Malaysia originated in the failure of the Government of Malaysia to inform the competent Malaysian judicial authorities of the Secretary-General's finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process. It is as from the time of this omission that the question before the Court must be answered.

As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings. That finding, and its documentary expression, creates a presumption of immunity which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts. The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

Section 22 (*b*) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of law, and Malaysia was

under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur, thereby nullifying the essence of the immunity rule contained in Section 22 (*b*). Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

The Court adds that the immunity from legal process to which it finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

It further observes that, according to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30. Since the Court holds that Mr. Cumaraswamy is an expert on mission who under Section 22 (*b*) is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected.

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Finally, the Court points out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, such compensation claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that the "United Nations shall make provisions for" pursuant to Section 29. The Court furthermore considers that it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

Separate opinion of Vice-President Weeramantry

Vice-President Weeramantry, in his separate opinion, stresses his agreement with the principles set out in the Court's Opinion that national courts should immediately be notified of any finding by the Secretary-General concerning the immunity of a United Nations agent, and that the Secretary-General's finding carries a presumption of immunity which can only be set aside for the most compelling reasons.

This Opinion draws attention to the differences between claims to immunity of State functionaries and such claims by United Nations functionaries, for the latter function in the interests of the community of nations as represented by the United Nations, and not on behalf of any particular State. The jurisprudence that has grown up regarding the rights of domestic courts to determine questions relating to the immunities of the representatives or officials of one State for their actions in another State is therefore not necessarily applicable in its entirety where United Nations personnel are involved. If a domestic court is free to disregard the determination of the Secretary-General on their immunities, many problems would arise in relation to United Nations activity in a number of areas.

There is also a need for uniformity in the jurisprudence relating to this matter, irrespective of where a particular rapporteur functions. It is not conducive to the evolution of a uniform system of international administrative law if rapporteurs could have different privileges depending on where they function. This underlines the importance of the conclusiveness of the Secretary-General's determination.

It need scarcely be stressed that rapporteurs, in making statements to the media, will always be expected to ensure that they act within the limits of the performance of their mission.

Separate opinion of Judge Oda

Judge Oda points out that, while the Court was requested by ECOSOC to reply on the issue relating to the legal immunity to be granted to Mr. Cumaraswamy, the Special Rapporteur of the United Nations Commission on Human Rights, with regard to the words he spoke during an interview with a business journal, the question had, however, originally been formulated differently, the issue then being whether the United Nations Secretary-General had the exclusive authority to determine whether Mr. Cumaraswamy would be entitled to legal immunity. Judge Oda expresses his apprehension that the Court's Advisory Opinion seems to be more concerned with the Secretary-General's competence, rather than with the legal immunity to be granted to Mr. Cumaraswamy.

Judge Oda considers that the issue to be decided is whether Mr. Cumaraswamy should be immune from legal process of the Malaysian courts in respect of what he stated in the interview with a business journal on account of which defamation suits were brought against him in the Malaysian courts by certain private companies. The essential issue, according to Judge Oda, is related *not to the words* spoken by Mr. Cumaraswamy *but to* whether he spoke the words *in the course of the performance of his mission* as a Special Rapporteur of the Commission on Human Rights. Judge Oda takes the view that the contact the Special Rapporteur maintained with the media in connection with his mandate falls in general within the mission of a special rapporteur. In this respect, Judge Oda supports the conclusion of the Court as set out in paragraphs (1) (*a*), (1) (*b*) and paragraph (3) of the operative part.

Judge Oda is in full agreement with the Court when it states in paragraph (2) (*b*) of the operative part that the Malaysian courts had the obligation to deal with the

question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*.

Judge Oda cannot, however, agree with the Court's findings in paragraph (2) (*a*) and paragraph (4) of the operative part, which relate to the legal obligations of Malaysia, as put to the Court in the second question contained in the request for advisory opinion. In his view, Malaysia, as a State, is responsible for not having ensured that Mr. Cumaraswamy enjoyed legal immunity. However, whether the Government of Malaysia should have informed its national courts of the view of the United Nations Secretary-General is not a relevant matter in this respect. Furthermore, Judge Oda cannot see any such obligation of the Government of Malaysia to communicate this Advisory Opinion to the Malaysian national courts, as it is obvious that Malaysia, as a State, is bound to accept this Advisory Opinion, under Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations, as decisive.

Separate opinion of Judge Rezek

Judge Rezek, while sharing the views of the majority, wishes to emphasize that the obligation incumbent upon Malaysia is not merely to notify the Malaysian courts of the finding of the Secretary-General, but to ensure that the immunity is respected. In his view, a government will ensure respect for immunity if it uses all the means at its disposal in relation to the judiciary in order to have that immunity applied, in exactly the same way as it defends its own interests and positions before the courts. Membership of an international organization requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations.

Dissenting opinion of Judge Koroma

In his dissenting opinion Judge Koroma stated that, much as he would have liked to vote in favour of the Advisory Opinion if it would help to settle differences between the United Nations Organization and the Government of Malaysia, however, he was unable to do so in the face of the Convention, the general principles of justice and his own legal conscience.

Judge Koroma emphasized that the dispute was not about the human rights of the Special Rapporteur or whether the Government of Malaysia was in breach of its obligations under the Human Rights Conventions to which it is a party. Rather the dispute was about whether the Special Rapporteur was immune from legal process for words spoken by him and whether such words were spoken in the performance of his mission, and hence the applicability of the Convention.

Judge Koroma pointed to the differences in the question proposed by the Secretary-General to the Economic and Social Council (ECOSOC) for submission to the Court for an advisory opinion and the Council's subsequent reformulation of the question without explanation. While he recognized the right of ECOSOC to formulate the question, he maintained that the Court in exercising its judicial discretion need not answer the question if it was tendentious and left the Court with no option but to give its judicial imprimatur to a particular viewpoint. On the other hand, in his view, if the Court was disposed to answer the question, it should have answered the "real question". Moreover, in order to determine whether the Convention was applicable, the Court should have enquired into the facts of the case and not relied on the finding of another organ.

He stressed that whether the Convention was applicable to the Special Rapporteur was not an abstract question and that the answer should have been predicated on whether the words spoken were spoken in the performance of his mission — a matter of mixed law and fact — to be determined on its merits, that it would be only after such a determination that the Court would be in a position to say whether the Convention was applicable. In his opinion, the criteria taken into consideration by the Court — such as the Special Rapporteur's appointment by the Human Rights Commission and the finding by the Secretary-General that Mr. Cumaraswamy had acted in the performance of his mission — while they were to be given recognition and treated with respect, were not conclusive, and judicially insufficient to conclude that the Convention was applicable.

He noted that the observation by the Court that "[i]t need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations", is not without particular importance and significance in this case.

In Judge Koroma's view, the Government of Malaysia's obligation under the Convention is one of result not one of means and the Convention does not stipulate any particular method or means of implementation. Once the Court had responded that the Convention was applicable, the Government of Malaysia would assume its obligations, including holding the Special Rapporteur harmless for any taxed costs imposed upon him, which was unnecessary to reflect in the operative paragraphs of the Opinion.

Finally, while he shared the Court's position that the rendering of an advisory opinion should be seen as its participation in the work of the Organization to achieve its aims and objectives and that only compelling reasons should restrain it from answering a request, he considered it equally important that, even in giving an advisory opinion, the Court cannot and should not depart from the essential rules guiding its activity as a court.

Advisory Opinion (Majority Opinion)

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

ADVISORY OPINION OF 29 APRIL 1999

1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DIFFÉREND RELATIF À L'IMMUNITÉ DE JURIDICTION D'UN RAPPORTEUR SPÉCIAL DE LA COMMISSION DES DROITS DE L'HOMME

AVIS CONSULTATIF DU 29 AVRIL 1999

graph 20 above). The Court would point out that the wording of the question submitted by the Council is quite different from that proposed by the Secretary-General.

36. Participants in these proceedings have advanced differing views as to what is the legal question to be answered by the Court. The Court observes that it is for the Council and not for a member State nor for the Secretary-General — to formulate the terms of a question that the Council wishes to ask.

37. The Council adopted its decision 1998/297 without a vote. The Council did not pass upon any proposal that the question to be submitted to the Court should include, still less be confined to, the issue of the exclusive authority of the Secretary-General to determine whether or not acts (including words spoken or written) were performed in the course of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to an expert on mission for the United Nations. Although the Summary Records of the Council do not expressly address the matter, it is clear that the Council, as the organ entitled to put the request to the Court, did not adopt the questions set forth at the conclusion of the note by the Secretary-General, but instead formulated its own question in terms which were not contested at that time (see paragraph 20 above). Accordingly, the Court will now answer the question as formulated by the Council.

* * *

38. The Court will initially examine the first part of the question laid before the Court by the Council, which is:

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General . . ."

39. From the deliberations which took place in the Council on the content of the request for an advisory opinion, it is clear that the reference in the request to the note of the Secretary-General was made in order to provide the Court with the basic facts to which to refer in making its decision. The request of the Council therefore does not only pertain to the threshold question whether Mr. Cumaraswamy was and is an expert on mission in the sense of Article VI, Section 22, of the General Convention but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case.

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40. Pursuant to Article 105 of the Charter of the United Nations:

> "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
>
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
>
> 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

Acting in accordance with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. Malaysia became a party to the General Convention, without reservation, on 28 October 1957.

41. The General Convention contains an Article VI entitled "Experts on Missions for the United Nations". It is comprised of two Sections (22 and 23). Section 22 provides:

> "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> . . . . . .
>
> *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.
>
> . . . . . ."

42. In its Advisory Opinion of 14 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court examined the applicability of Section 22 *ratione personae, ratione temporis* and *ratione loci*.

In this context the Court stated:

> "The purpose of Section 22 is . . . evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them 'such privileges and immunities as are necessary for the independent exer-

cise of their functions'. . . . The essence of the matter lies not in their administrative position but in the nature of their mission." (*I.C.J. Reports 1989*, p. 194, para. 47.)

In that same Advisory Opinion, the Court concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention (*ibid.*, p. 197, para. 55).

43. The same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It may be observed that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions.

44. By a letter of 21 April 1994, the Chairman of the Commission informed the Assistant Secretary-General for Human Rights of Mr. Cumaraswamy's appointment as Special Rapporteur. The mandate of the Special Rapporteur is contained in resolution 1994/41 of the Commission entitled "Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers". This resolution was endorsed by the Council in its decision 1994/251 of 22 July 1994. The Special Rapporteur's mandate consists of the following tasks:

"*(a)* to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;

(c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers".

45. The Commission extended by resolution 1997/23 of 11 April 1997 the Special Rapporteur's mandate for a further period of three years.

In the light of these circumstances, the Court finds that Mr. Cumaraswamy must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capa-

city the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

46. The Court observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.

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47. The Court will now consider whether the immunity provided for in Section 22 *(b)* applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in *International Commercial Litigation* (November issue 1995), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

48. During the oral proceedings, the Solicitor General of Malaysia contended that the issue put by the Council before the Court does not include this question. She stated that the correct interpretation of the words used by the Council in its request

> "does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the character of the Special Rapporteur's action, he had properly exercised that authority"

and added:

> "Malaysia observes that the word used was *'applicability'* not *'application'*. 'Applicability' means 'whether the provision is applicable to someone' not 'how it is to be applied'."

49. The Court does not share this interpretation. It follows from the terms of the request that the Council wishes to be informed of the Court's opinion as to whether Section 22 *(b)* is applicable to the Special Rapporteur, in the circumstances set out in paragraphs 1 to 15 of the note of the Secretary-General and whether, therefore, the Secretary-General's finding that the Special Rapporteur acted in the course of the performance of his mission is correct.

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 *(b)*, the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:

> "Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 184.)

51. Article VI, Section 23, of the General Convention provides that "[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves". In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

> "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . ." (*Ibid.*, p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from "every kind" of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: "it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work".

54. As noted above (see paragraph 13), Mr. Cumaraswamy was explicitly referred to several times in the article "Malaysian Justice on Trial" in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission (see paragraph 18 above), Mr. Cumaraswamy

had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

55. As noted in paragraph 18 above, in its various resolutions the Commission took note of the Special Rapporteur's reports and of his methods of work. In 1997, it extended his mandate for another three years (see paragraphs 18 and 45 above). The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission's position.

56. The Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 *(b)*, of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

* *

57. The Court will now deal with the second part of the Council's question, namely, "the legal obligations of Malaysia in this case".

58. Malaysia maintains that it is premature to deal with the question of its obligations. It is of the view that the obligation to ensure that the requirements of Section 22 of the Convention are met is an obligation of result and not of means to be employed in achieving that result. It further states that Malaysia has complied with its obligation under Section 34 of the General Convention, which provides that a party to the Convention must be "in a position under its own law to give effect to [its] terms", by enacting the necessary legislation; finally it contends that the Malaysian courts have not yet reached a final decision as to Mr. Cumaraswamy's entitlement to immunity from legal process.

59. The Court wishes to point out that the request for an advisory opinion refers to "the legal obligations of Malaysia in this case". The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent

Malaysian judicial authorities of the Secretary-General's finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process (see paragraph 17 above). It is as from the time of this omission that the question before the Court must be answered.

60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

61. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.

The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information.

Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

62. The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State." (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.)

Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

63. Section 22 *(b)* of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 *(b)*. Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

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64. In addition, the immunity from legal process to which the Court finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

*

65. According to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30.

Since the Court holds that Mr. Cumaraswamy is an expert on mission who under Section 22 *(b)* is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected.

*

66. Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

6. Decision on Immunity by the Malaysian Courts *In Limine Litis*

20. I agree entirely with the Court in its finding in paragraph (2) *(b)* of the operative part that the Malaysian national courts should have decided the issue of immunity at the outset: "the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*". Assuming that Mr. Cumaraswamy was entitled to immunity under the Convention, at which stage did Malaysia begin to fail to ensure that immunity? When did the responsibility of Malaysia as a State in this respect begin? Certain Malaysian commercial companies initiated defamation suits against Mr. Cumaraswamy before the Malaysian national courts. The matter of whether the Malaysian courts should have dismissed the suits before issuing Mr. Cumaraswamy with the Order of Summons on 12 December 1996, or after having heard his views in writing or in his presence at the formal proceedings, is a matter relating to diplomatic privileges and immunities and constitutes a controversial issue — and, in fact, the practice and jurisprudence of States in this respect varies.

21. In fact, the national courts of any State cannot reach a decision concerning the immunity of a special rapporteur until they are aware of his or her status as a person entitled to claim legal immunity. The writ of summons issued by the Malaysian national courts may well have been justifiably issued against Mr. Cumaraswamy. However, upon being informed of the mission entrusted to Mr. Cumaraswamy by the United Nations — whether directly by Mr. Cumaraswamy himself upon his being summoned to appear before the relevant court, or by the Malaysian Foreign Office, or even by receiving directly a note or certificate issued by the United Nations Secretary-General — the Malaysian national courts should at that point have determined the preliminary issue, namely, whether Mr. Cumaraswamy was immune in respect of words spoken by him in the course of an interview with a business journal.

22. The Malaysian High Court of Kuala Lumpur failed to rule on this matter and instead, on 28 June 1997, ordered the Special Rapporteur to join his plea for immunity to his defence on the merits. Mr. Cumaraswamy could have claimed — and actually did claim, with the support of the certificate issued by the Secretary-General — his privileges and immunities before the Malaysian domestic courts. In this particular case, the Malaysian domestic courts should, at the jurisdictional phase, have then disposed *in limine litis* of the suits brought by the Malaysian commercial firms against Mr. Cumaraswamy.

7. Legal Obligation of Malaysia

23. *(In general.)* I would have some doubts as to whether paragraph (2) *(a)* and paragraph (4) of the operative part really answer the *second question* put by ECOSOC, namely, "[ECOSOC] . . . [r]equests . . . an advisory opinion from the International Court of Justice . . . on the legal obligations of Malaysia in this case". Putting aside the issue of whether ECOSOC's *second question* was itself adequately formulated by that organization, the Court's answer to the *second question* should be simply that Malaysia is legally obliged to ensure that Mr. Cumaraswamy, Special Rapporteur of the Commission on Human Rights, enjoys in this case the immunities granted under Article VI, Section 22, of the Convention.

24. *(Paragraph (2)* (a) *of the operative part.)* The Malaysian national courts decided to examine Mr. Cumaraswamy's plea in the merits phase of the proceedings against him. Malaysia, as a State, is responsible for the actions of its national courts in allowing the proceedings against Mr. Cumaraswamy to be pursued, rather than dismissing them. In other words, it is Malaysia, as a State, that is responsible for the failure of its organs — the judicial power in this case — to ensure Mr. Cumaraswamy's legal immunity. The matter of whether or not an executive department of the Malaysian Government informed its courts of the position taken by the Secretary-General is not a relevant issue in this case. I cannot agree with the conclusion reached by the Court in paragraph 62 of its Advisory Opinion that:

> "the *Government* of Malaysia had an obligation, under Article 105 of the Charter and under the [Convention], to inform its courts of the position taken by the Secretary-General" (emphasis added).

Thus, I do not support what the Court has stated in paragraph (2) *(a)* of the operative part:

> "the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that [Mr.] Cumaraswamy was entitled to immunity from legal process".

25. *(Paragraph (4) of the operative part.)* The Malaysian Government is obliged by Article VIII, Section 30, of the Convention to accept this Advisory Opinion *as decisive* and it is therefore not necessary for the Court to make any explicit statement such as that in paragraph (4):

> "the Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected".

Paragraph (4) is superfluous. It would be desirable that the views of the International Court of Justice should be communicated to the relevant Malaysian courts through the channel of the Foreign Office, but I do not agree that the Government of Malaysia is *obliged* to do so.

26. *(Summary.)* I thus voted against paragraph (2) *(a)* and against paragraph (4) of the operative part for the reasons stated above. In responding to the *second question* concerning the matter of Malaysia's legal obligations, the Court should, instead of making unnecessary statements concerning the responsibility to be borne by the United Nations for any damage arising from acts performed by the United Nations or by its agents acting in their official capacity, or concerning the scope of the agents' functions which they "must take care not to exceed" (Advisory Opinion, para. 66), have indicated whether the Government of Malaysia should make reparation to the United Nations as well as to Mr. Cumaraswamy for its non-compliance with the responsibility which it has to bear and how that reparation for the damages caused to the United Nations and/or to its Special Rapporteur, Mr. Cumaraswamy (if any is due), should be effected.

(Signed) Shigeru ODA.

SEPARATE OPINION OF VICE-PRESIDENT WEERAMANTRY

Importance of protection of United Nations personnel — Immunities of United Nations functionaries distinguished from those of State representatives — Conclusiveness of Secretary-General's determination — Need for uniform international jurisprudence on this matter — Duty of rapporteurs to ensure that they act within the terms of their mandate.

I agree with the conclusions of the Court as set out in the Court's Opinion. I would wish also to stress my agreement, in particular, with the principles set out in paragraph 61 of the Opinion that when national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity, that the Secretary-General's finding, and its documentary expression, create a presumption of immunity which can only be set aside for the most compelling reasons, and that they are thus to be given the greatest weight by national courts.

I would wish, however, to add a few observations stemming from the issues involved in this Opinion.

IMPORTANCE OF PROTECTION OF UNITED NATIONS PERSONNEL

It is manifest that the protection of its personnel, when engaged about their duties, is of prime importance to the proper functioning of the United Nations system.

Rapporteurs must be able to perform their duties without fear or favour as their investigations often cover sensitive ground in the country whose instrumentalities are the subjects of their enquiry. They cannot discharge their responsibilities with the independence essential to free and complete enquiry if they need to keep looking over their shoulder for adverse personal consequences that may ensue from an independent investigation. Should this be the case, there would be an impairment both of the efficiency of the rapporteur and of the integrity of the entire machinery of independent enquiry which is so vital to the working of the United Nations.

This is important also in the interests of the ability of the United Nations to recruit to its service the best talent that might be available. It scarcely advances the interests of the Organization if individuals most suitable for a particular assignment should keep away from such assignments through fear that they may in some way be victimized when

engaged in their duties. As this Court observed in the *Reparation* case: "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it."[1]

Apart from such basic considerations and the conventional principles relating to this matter, numerous resolutions of the General Assembly have stressed the necessity for protection of United Nations personnel against such impediments in the way of the performance of their duties.

Such protection is especially important when United Nations personnel are investigating matters concerning the host State or its governmental institutions. Just as it is the special duty of the host State to take every step within its power to avoid situations interfering with the freedom of enquiry of functionaries of the United Nations, so also is it the special duty of the United Nations to do all within its power to ensure for them the enjoyment of such freedom. Moreover, the responsibilities that apply to foreign States apply even more strongly to States which, as in the present case, are the home States of United Nations personnel engaged on their international duties in their home State itself.

Conceptual Antecedents of the System of United Nations Immunities

In working out a system of immunity for United Nations officials who are engaged upon their official duties, the international legal system has drawn upon its past experience of the international system of immunity which had evolved in regard to diplomats, consuls, members of armed services, and others, who are physically within the territory of another State, while performing functions for their home State. The relevant provision for the United Nations is to be found in Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1946.

All claims to immunity in customary international law raised two important questions relevant to the matters now before the Court — determining whether the act in question was performed in the course of the official's mission, and determining questions relating to the jurisdiction of domestic courts of the host country.

The case-law regarding diplomatic immunity contains a strong current of decisions indicating that the domestic courts of the host State have strongly and successfully asserted their authority to determine these questions.

[1] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 183.

For a representative selection of decisions on this topic, it will suffice to refer to the 1928 case of Bigelow, the Director of the Passport Section of the United States Consulate in Paris[2] decided by the French courts; the 1955 case of the American serviceman Cheney[3] decided in the Japanese courts; the 1982 case of the Director of the Portuguese Commercial Office in Brussels[4] decided by the Belgian courts; and the 1988 case of the Counsellor of the German Embassy in Chile[5] decided by the Chilean courts. These are sufficient to indicate that domestic courts have in general claimed the exclusive right to determine, in cases of qualified immunity, whether the act in question was performed within the ambit of the official functions of the functionary concerned.

UNITED NATIONS FUNCTIONARIES DISTINGUISHED FROM STATE REPRESENTATIVES

Some important distinguishing features must, however, be noted between the immunities of State officials and those of the functionaries of the United Nations.

The duties of the latter are not restricted to the service of any particular State, but are owed to the community of States as represented by the United Nations. The limits of their functions are not determined by any particular State, but are defined on behalf of the international community by the Secretary-General of the United Nations. Their protections are claimed, not on behalf of any particular State, but on behalf of the international community whom such functionaries serve. A dispute arising out of their activities is not justiciable within the limited perspectives of the States involved, but engages the global interests of the United Nations. As "the supreme type of international organization"[6], the functions and interests of the United Nations are on a different plane from those of any individual nation State.

These essential differences lift the matter into a different frame of reference and cannot pass unnoticed as international law moves towards a universally applicable system of administrative jurisprudence covering the conduct and protections of United Nations personnel wherever in the world their missions may take them.

It follows that the jurisprudence that has grown up around the exclu-

[2] *Princess Zizianoff* v. *Kahn and Bigelow*, (1927-1928) 4 *ILR (Annual Digest)*, p. 384.

[3] *Japan* v. *Cheney*, (1960) 23 *ILR* 264.

[4] *Portugal* v. *Goncalves*, (1990) 82 *ILR* 115.

[5] *Szurgelies and Szurgelies* v. *Spohn*, (1992) 89 *ILR* 44.

[6] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 179.

sive rights of the domestic courts of the host State to determine these questions is not necessarily applicable in its totality where United Nations personnel are involved. There may well need to be some differences of approach which, while paying due regard to the autonomy of domestic courts, also take into account the wider interests of the world community, and the competence and special responsibilities of the United Nations as representing that community. As this Court has observed concerning the United Nations:

> "It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged."[7]

United Nations activity in a number of sensitive areas is fraught with a diversity of problems if a domestic court is free to disregard the determination of the Secretary-General, the chief administrative authority of the United Nations, in relation to the immunity enjoyed by a United Nations functionary.

Locally sensitive issues could crowd out perspectives regarding the global norms applicable to such situations. Divergent and incompatible domestic decisions in different countries could blur the general principles applicable. The authority of considered opinions reached at the highest possible level of United Nations administration regarding the functions of its own personnel could be weakened. The effectiveness of the United Nations in discharging its far-flung responsibilities could be impaired.

All these are important concerns raised by the matter under consideration by the Court.

The Need for Uniformity in the Jurisprudence Relating to This Matter

If domestic courts can make their rulings without regard to the opinion of the Secretary-General, the lack of uniformity among these rulings, and the different principles and standards thereby applied in different countries would impede both the fairness of international administration and the evolution of a uniform system of international administrative law.

While domestic autonomy is a principle which must be accorded the greatest respect, it must be acknowledged that the United Nations system, as an organization functioning in the global interest, can only use its authority effectively in that global interest if its agents can discharge their

[7] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 179.

duties according to a common set of principles, and not if the régime governing their actions varies from country to country depending on the disparate ways in which various domestic judiciaries may choose to determine the self-same issue.

The expanding scope and growing complexity of United Nations activities render the evolution of a uniform administrative jurisprudence in this area a matter of vital importance. That jurisprudence, while not neglectful of the varying nuances of different local conditions and backgrounds, would at the same time exhibit an ordered harmony of general principles and standards commanding international recognition.

Acceptance of the binding nature of the Secretary-General's opinion, unless there is manifest reason to depart therefrom, helps considerably towards establishing such uniformity, irrespective of the venue of the investigation.

The evolution of a common set of principles applicable to matters of this sort would, by producing a more uniform system of international administrative law, in turn reinforce the authority of these principles in specific situations wherever they may occur. It would also avoid the incongruous situation of different rapporteurs — or indeed the same rapporteur — enjoying different degrees of immunity in different countries, depending on where the relevant duties are performed. This possibility is well illustrated by the case of the present Rapporteur, whose duties require him to function in a diversity of jurisdictions. Such a result is to be avoided as far as is possible within the limits of the principles applicable.

In so sensitive a field as human rights, the freedom and independence of rapporteurs would be gravely affected if there should be varying standards and hence a resulting uncertainty regarding the principles applicable to this matter.

CONCLUSIVENESS OF SECRETARY-GENERAL'S DETERMINATION

Since it is essential to United Nations staff that they receive sufficient protection to be able to discharge their missions with independence, and since the duty of protecting its staff in the exercise of such duties lies so heavily on the United Nations, great importance must attach to the views of its chief functionary, the Secretary-General, regarding the question whether immunity does or does not attach in a given case.

The Secretary-General is better informed than any external authority regarding such questions as the limits of a given agent's functions, the purpose or purposes the appointment was intended to serve, and the needs of the United Nations in relation to any particular enquiry. He is better informed than any other authority of the practice relating to, and the factual background surrounding, the particular matter. With his

unique overview of the entire scheme of United Nations operations, he, more than any other authority, can assess a given agent's functions within the overall context of the rationale, traditions and operational framework of United Nations activities as a whole.

Any attempt to determine the applicability of the privileges and immunities of the United Nations to a particular rapporteur in particular circumstances without reference to the opinion of the Secretary-General would fail to take into account an important part of the material essential to an informed decision.

Moreover, within the United Nations system, there is a practice of recognition of the conclusiveness of the Secretary-General's authority in this regard, and there are General Assembly resolutions, such as resolution 36/238 of 18 December 1981, which indicate the special importance accorded to the view of the Secretary-General on the entire range of matters relating to administration within the Organization. The views of the United Nations' highest administrative authority on an essentially administrative matter such as the extent of a particular official's sphere of authority — a question so eminently within his knowledge and supervisory functions — cannot be disregarded without detriment to the entire system.

The Secretary-General's determination as to whether a particular action was within an official's or rapporteur's sphere of authority should therefore be viewed as binding on the domestic tribunal, unless compelling reasons can be established for displacing that weighty presumption. I am in complete and respectful agreement with the Court in this regard. There is no element of arbitrariness here, for if a State disputes such a ruling by the Secretary-General, there is always room for the matter to be brought before this Court for an advisory opinion in terms of Section 30 of the Convention.

Correlative Obligations of Rapporteurs

In the present case, the Human Rights Commission has noted with appreciation the work of the Special Rapporteur, as shown in resolutions 1995/36 of 3 March 1995, 1996/34 of 9 April 1996, 1997/23 of 11 April 1997, and 1998/35 of 17 April 1998[8]. It has also extended the Special Rapporteur's mandate for an additional period of three years by resolution 1997/23[9], after the statement in question. The Secretary-General has determined that the Special Rapporteur's statements were made while acting in the course of the performance of his mission as Special Rapporteur of the Commission. The Court has specifically endorsed the cor-

[8] Dossier Nos. 5-8.
[9] Dossier No. 7.

rectness of the Secretary-General's determination (para. 56). For the purposes of this reference, matters are thus definitively settled.

Yet this reference affords an opportunity to stress the essentiality of the duty of rapporteurs, and indeed of all United Nations functionaries, to ensure always that they act within the terms and the limits of their mandate.

As the Court has observed:

> "it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations" [10].

A basic premise underlying the Court's Opinion, as well as this separate opinion, is that there is a duty of protection lying upon the United Nations to ensure that its officials are preserved harmless for acts performed in the course of their duty. It follows that any right a United Nations official enjoys by virtue of this principle is matched by a correlative duty.

It is thus an important corollary to the propositions set out earlier in this opinion that, complementary to the United Nations' duty of protection of its functionaries, a corresponding duty and responsibility lie on all United Nations personnel to ensure that whatever actions they take or statements they make are always within the limits of the performance of their duties — thus translating into this specific sphere of international law the principle of correlativity so well recognized in analytical jurisprudence. Unless this precondition is satisfied, United Nations personnel would be travelling outside the area of protection accorded to them. In this way, they protect both themselves and the United Nations, which owes a duty of protection to them. This obligation applies especially in regard to public statements which their duties may oblige them to make from time to time regarding their work.

CONCLUSION

For all these reasons, I am in agreement with the Court in its conclusions regarding the question referred to it.

(Signed) Christopher Gregory WEERAMANTRY.

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[10] Present Advisory Opinion, para. 66.

DISSENTING OPINION OF JUDGE KOROMA

Reasons for dissenting opinion — Unable to justify Advisory Opinion on the face of the Convention, general principles of justice and peculiar circumstances of this case — Dispute not about human rights of Special Rapporteur or whether Government of Malaysia is in breach of its obligations under Human Rights Conventions to which it is a party — Dispute is about whether Special Rapporteur is immune from legal process for words spoken in performance of his mandate and Malaysia's obligations - Circumstances of the case — Interview given to International Commercial Litigation *— Defamation lawsuits — Finding by Secretary-General that Special Rapporteur immune from legal process — Differences between Organization and Government of Malaysia — Matter referred to Economic and Social Council (ECOSOC) by Secretary-General — ECOSOC's formulation of question — ECOSOC entitled to formulate question but real question must be answered by Court — Court should have exercised discretion and declined to answer question because of its role as a judicial organ — For Court to determine applicability of Convention necessary to enquire into the merits — Insufficient for Court to rely on finding of another organ — Court's statement that United Nations experts must take care not to exceed scope of their mandate not without particular import and significance in this case — Obligation of Malaysia one of result and not of means — Convention does not stipulate particular method of implementation - Even in exercising advisory function, Court should not depart from essential rules guiding its activity as a judicial organ.*

1. Much as I would have liked to vote in favour of the Advisory Opinion, as it might assist in settling the differences which had arisen between the United Nations and the Government of Malaysia with regard to the interpretation and application of the General Convention on the Privileges and Immunities of the United Nations (hereinafter "the Convention"), however, in view of the fact that the Opinion is to be regarded as an authoritative legal pronouncement by the Court on the Convention, and is to be accepted as decisive by the Parties, and in view of the peculiar circumstances surrounding the dispute, I find myself unable to support and justify the Opinion, by reason of the terms of the Convention, the general principles of justice, the peculiarities of the dispute and my own legal conscience. I have therefore been constrained to vote largely against the Opinion and my views for doing so are set out in this opinion.

2. At the outset it should be noted that this dispute is not about the

human rights of Mr. Cumaraswamy, Special Rapporteur of the Human Rights Commission, as such. Nor is it about whether Malaysia is in breach of its obligations under the Human Rights Conventions to which it is a party. The dispute is about whether Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable to Mr. Cumaraswamy — that is to say, whether words spoken or written by him were done so in his capacity as Special Rapporteur and *in the course of the performance of his mission* — and about the legal obligations of Malaysia.

3. The circumstances of this case are unusual. According to the material presented to the Court, Mr. Cumaraswamy, in an interview published in the 5 November 1995 issue of the magazine *International Commercial Litigation*, and in which he was referred to as Special Rapporteur on the independence of judges and lawyers, was reported to have said with reference to a specific case (the *Ayer Molek* case), that it looked like "a very obvious, perhaps even glaring example of judge-choosing", while stressing that he had not finished his investigation. Mr. Cumaraswamy was also quoted as having said: "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice." He added: "But I do not want any of the people involved to think I have made up my mind." He was further reported to have said: "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."

4. As a result of that interview a number of lawsuits were filed against Mr. Cumaraswamy by companies and individuals asserting that the published article contained defamatory words that had "brought them into public scandal, odium and contempt", and sued for damages including exemplary damages for slander.

5. The Legal Counsel of the United Nations acting on behalf of the Secretary-General of the United Nations, and later the Secretary-General himself, having considered the circumstances of the interview and the controverted passages of the interview, determined that Mr. Cumaraswamy was interviewed in his official capacity as Special Rapporteur and requested the Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process with respect to the lawsuits.

6. On 12 March 1997 the Minister for Foreign Affairs of Malaysia filed a certificate with the trial court in which that court was invited to determine at its own discretion whether immunity applied, the certificate having stated that this was the case "only in respect of words spoken or written and acts done by him in the course of the performance of his mission".

7. On 28 June 1997 the Judge of the Malaysian High Court concluded

that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation". The Malaysian court ordered that the Special Rapporteur's motion be dismissed with costs; that the costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July the Court of Appeal of Malaysia dismissed Mr. Cumaraswamy's motion for a stay of execution.

8. After efforts to resolve the dispute did not materialize in a negotiated settlement, the Secretary-General's Special Envoy advised that the matter should be referred to the Economic and Social Council (ECOSOC) to request an advisory opinion from the International Court of Justice. The Government of Malaysia acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it would make its own presentation to the International Court of Justice, it did not oppose the submission of the matter to the Court through the Council.

9. The note by the Secretary-General (E/1998/94), referring the matter to the Council, concluded with a paragraph 21 containing a proposal for two questions to be submitted to the Court for an advisory opinion:

> "21. . . .
>
> 'Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:
>
> 1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention?
>
> 2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts

and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?

. . . . . .'"

10. Section 30 of the Convention provides:

"*Section 30:* All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

11. After considering the note by the Secretary-General, ECOSOC, without any explanation, changed the question, as it was entitled to do, and requested the Court to render an advisory opinion

"on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case".

Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations provides that

"*Section 22. Experts* (other than officials coming within the scope of Article V) performing missions for the United Nations *shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions* during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

. . . . . .

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations." (Emphasis added.)

In other words, the Convention would be applicable to an expert in respect of words spoken or written and acts done by him in the course of the performance of his mission.

12. The Court in its Advisory Opinion reached the conclusion that Article VI, Section 22, of the Convention is applicable in the case of Mr. Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, and that Mr. Cumaraswamy is entitled to immunity from legal process of any kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*.

13. In my respectful opinion, for the Court to conclude that the Convention is applicable to Mr. Cumaraswamy *in this case*, that question is intrinsically and inextricably related to a finding whether the controverted words were spoken in the course of the performance of his mission. Furthermore, it would be inappropriate to reach such a conclusion by applying only the first part of the provision. It would also be injudicious as well as insufficient for the Court in making such a determination to rely on the findings of some other organ or institution to reach its conclusion, as the Court would appear to have done in this case. The references (see paragraphs 50 and 51 of the Opinion) to the authority and responsibility of the Secretary-General as chief administrative officer of the Organization and protector of the mission with which an expert is entrusted are, while incontestable, irrelevant to the question posed by ECOSOC. Indeed, the Court itself has stated that it is the Council's question as formulated which is to be answered by the Court. It cannot therefore be both ways. Nor, in my view, is it necessarily conclusive that

> "In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from 'every kind' of legal process."

While such information is to be given due weight and respect, the Convention does not stipulate that it is conclusive, let alone binding. Nor should it be considered adequate in order for the Convention to be applicable, or for the judicial purposes of this case, that it has become standard practice for Special Rapporteurs of the Commission to have contact with the media. It is one thing to have contact with the media to enable a Special Rapporteur to carry out his mandate, but, as the Court implied in paragraph 66 of the Advisory Opinion, special rapporteurs, like all agents of the United Nations, must take care not to exceed the scope of their functions, and must express themselves with requisite prudence so as to remain within their mandate.

14. The question whether the Convention is applicable to Mr. Cumaraswamy is one of mixed law and fact, and would have required the Court not only to undertake an interpretation of the Convention but an enquiry into the facts before arriving at its conclusion. It therefore does not seem sufficient *for this case* for the Court to conclude that the Convention is applicable to Mr. Cumaraswamy based on the formality of his appointment as Special Rapporteur of the Human Rights Commission, or on the fact that he may have been entrusted not only to do research but also with the task of monitoring human rights violations and reporting on them. With respect, notwithstanding his appointment or the fact that he has been entrusted with a mission by the United Nations, this does not of itself allow a special rapporteur to operate outside his mandate, and whether or not the Special Rapporteur was acting within the scope of his mandate, given the facts and circumstances of this case, ought to have been enquired into for the Court to be in a position to conclude that the Convention is applicable to him. It is also my considered view that this requirement is not vitiated or become superfluous by the fact that it has become standard practice for special rapporteurs of the Human Rights Commission to have contact with the media. Having contact with the media cannot be regarded as a licence for a special rapporteur to operate outside his mandate; whether or not the Special Rapporteur did so or not in this particular case and for the purposes of the Convention is a matter to be determined by the Court before it can conclude that the Convention is applicable.

15. It is also my considered opinion that this request for an advisory opinion, because of the peculiar circumstances[1] of the dispute, the issues it involves, and its implication for the judicial character and function of the Court, ought not to have been submitted to the Court. The dispute between the Organization and the Government of Malaysia should rather have been resolved on the basis of Article VIII — Settlement of Disputes — (Section 29) of the Convention which provides as follows

> "*Section 29.* The United Nations shall make provisions for appropriate modes of settlement of:
>
> *(a)* disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."

On the other hand, once the request had been submitted, the Court should have exercised its judicial discretion and declined to answer the question put to it. Nor do I find the argument persuasive that, because no party had argued against giving the advisory opinion, the Court should therefore have rendered an opinion. For the Court itself has emphasized

[1] See *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61.

that it is the guardian of its role as a judicial organ and has made it clear that, although it considers the rendering of an advisory opinion as a duty, at the same time, as a judicial organ, it has certain limits to its duty to reply to a request for an opinion[2]. The Court should not have felt constrained to exercise its discretion of not answering the question as formulated because of the Advisory Opinion it had earlier rendered in the *Mazilu* case[3]. In my view, not only is the instant case not identical with *Mazilu*, but the circumstances are entirely different. Had due account been taken of those differences as well as of the peculiar circumstances, a different conclusion might have been reached.

16. Furthermore, and as noted earlier, the note of the Secretary-General referring this matter to ECOSOC concluded with a paragraph 21 in which he proposed two questions to be submitted to the Court for an advisory opinion.

17. The Council, after considering the note at the forty-seventh and forty-eighth meetings of its substantive session held on 31 July 1998 and pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I) authorizing the Council to request an advisory opinion from the Court, adopted decision 1998/297, in which it requested the Court to give an opinion, on a priority basis, on

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case".

18. As indicated in paragraph 33 of the Advisory Opinion, following submission of the request to the Court, the Legal Counsel of the United Nations presented a written statement on behalf of the Secretary-General, in which he requested the Court:

> "to establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission".

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[2] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71.

[3] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177.

19. Similarly, States participating in the proceedings expressed varying views as to whether the General Convention requires dispositive legal effect to be given to the Secretary-General's determination. According to the United States, *"the views of the Secretary-General in a given case are highly relevant"* (emphasis added); the United Kingdom takes the position that it is *"essential that all due weight is given to [the views of the Secretary-General] by the national courts"* (emphasis added). Italy had expressed the following viewpoint on the issue:

> "once . . . a decision has been adopted, both the government and the judicial authorities of the State where the issue of immunity has been raised are nonetheless obliged to give immediate and careful consideration to the delicate problems of immunity, and they must take due account of the weight to be accorded to the determination made in this regard by the Secretary-General of the United Nations.
>
> *It would be going too far to say that this imposes a legal duty on the courts of the State where the issue of immunity has been raised to stay all proceedings until the issue of immunity has been settled at the international level.* But, at the very least, it is to be expected that those courts would display caution by avoiding hasty decisions which might entail responsibility on the part of that State." (Emphasis added.)

20. Malaysia, for its part, as stated in the Advisory Opinion, contended that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia, which in its view consists of the question, as formulated by the Secretary-General himself, whether the Secretary-General of the United Nations has the exclusive authority to determine whether words or acts of an expert on mission are spoken, written or done in the course of the performance of his or her mission and if, in consequence, the expert is entitled to immunity from legal process pursuant to Section 22 *(b)* of the General Convention. In its written statement Malaysia maintains that it

> "considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention".

In its oral pleadings, Malaysia maintained that

> "in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary-General and Malaysia before the Court. *ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than in the context in the operation of Section 30.* ECOSOC . . . is no more than an instrument of reference, it cannot

change the nature of the difference or alter the content of the question." (Emphasis added.)

21. In the light of the foregoing, it is to be observed that the question asked by ECOSOC corresponds neither with the questions proposed by the Secretary-General in his note to ECOSOC nor with those same issues as were raised and discussed by the participating States in their written statements or at the oral proceedings. A difference exists between the legal question posed by ECOSOC relating to the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, and the one recommended by the Secretary-General and understood and addressed by Malaysia and a number of participating States, which concerns the issue of whether the Secretary-General of the United Nations is vested with exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations and whether such words fall within the meaning of Section 22 *(b)* of the Convention.

22. Where a request to the Court for an advisory opinion involving the interpretation and application of the Convention is in conformity with Article 65, paragraph 2, of the Statute of the Court, that is to say it contains an exact statement of the question upon which an opinion is required, and is also in conformity with Article 96 of the Charter, then it would appear, as in this case, formally to meet all the required criteria for the Court to perform its advisory function. However, notwithstanding the fulfilment of such procedural criteria, the Court has in the past taken the position that, while it is in principle under a duty to give an answer to a request, it need not give the opinion requested. In other words, the Court will answer the real question as it sees it, even though it is bound by the request[4]. Accordingly, the Court has stated that, in answering a question, it must have full liberty to consider all the relevant data and circumstances available to enable it to form an opinion on the question submitted to it for an advisory opinion.

23. As pointed out above, in this instant matter not only is the question posed by ECOSOC not identical with that which had been proposed to it by the Secretary-General of the United Nations for submission to the Court, and which had constituted the difference between the Secretary-General and Malaysia and was also the question which the majority of the States that participated in the proceedings had addressed, but there is in fact no dispute between Malaysia and the United Nations whether

[4] *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, and *ibid., Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

the Convention applies to the Special Rapporteur as such, which as we have seen is not the real question.

24. Accordingly, either the dispute should have been properly presented to the Court or the Court's judicial character should have been observed. While it is for ECOSOC to formulate the question to be submitted to the Court for an advisory opinion, the Court is, however, not obliged to answer such a question, if it would have a negative implication for its judicial character and function. The Court is enjoined by its Statute to observe the principles of judicial integrity, even in exercising its advisory jurisdiction, and not to lose sight of its judicial character. Its role as a judicial organ would come under a cloud, not to say be impaired, where a question submitted to it was formulated in such a way as to appear tendentious or ambiguous or have as its underlying purpose to support or promote a particular point of view, or merely to obtain a judicial affirmation of that viewpoint. If a question submitted to the Court were to appear to suffer from any of these defects, I consider it the Court's duty and an exercise of the judicial function as well as in the interest of justice that it should decline to answer the question as submitted and not give a judgment which cannot be obtained by the proper procedure. In other words, where it would appear that the object of a request to the Court is simply to obtain a formal endorsement of the requesting party's position, the Court, as a judicial body, should decline to answer the question. The Court cannot dissociate itself from the effect to which its decision is going to be put. This is all the more so in the instant case, whose specific facts and circumstances are so very different from the *Mazilu* case, where the Court had held that

> "Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view *to the independent exercise of their functions.*"[5] (Emphasis added.)

25. It is also worth recalling that, under Section 30 of the Convention, the advisory opinion given in this case is to be regarded as decisive and binding and would have effect for the State concerned. Indeed, in paragraph 39 of the Advisory Opinion the Court stated that the request of the Council does not only pertain to the threshold question but also to the consequences of the answer thereto. In my view, for a judicial determination of the consequences to be reached, the Court would have to enter

[5] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, pp. 195-196.

into the merits of the dispute, as the question whether words spoken were done in performance of a mission is one of mixed law and fact. The Court, in determining whether words spoken by the Special Rapporteur were spoken in the performance of his mission and whether he is therefore entitled to immunity, must do so in the light of all the circumstances of the case.

26. The question whether, in this case, the Convention is applicable to Mr. Cumaraswamy and the obligations of Malaysia thereunder is not an abstract one. Nor did the question require clarification as in the *Peace Treaties* case. Viewed from this perspective, the Convention would be applicable to Mr. Cumaraswamy as Special Rapporteur of the Human Rights Commission and therefore an expert under the Convention, if the words spoken were *done in the performance of his mandate*. Malaysia, as a party to the Convention, would be under obligation to afford Mr. Cumaraswamy such immunities. The request asked to take into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General. What the Court had to determine was whether the Convention should be applicable to the Special Rapporteur and whether he should therefore be immune from legal process of every kind, in respect of words spoken in the performance of his mission, a matter, which in my view, is one for assessment by the Court.

27. The Court's statement in paragraph 56 of the Advisory Opinion that it is not called upon in the present case to pass upon, to adjudge, the aptness of the terms used by a Special Rapporteur, or his assessment of the situation, but that in any event, and in view of all the circumstances of this case, it is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article, was acting in the course of the performance of his mission as Special Rapporteur of the Commission is not without import and significance in terms of this case. The Court also found it necessary to warn that

> "It need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations".

I fully concur with these statements of the Court.

28. I have voted against operative paragraph 2, as I consider it is not the proper response to the question posed to the Court. I also voted against that paragraph because Malaysia's obligation under the Convention is one of result and not one of method of implementation of the obligation. In this regard the Court stated in paragraph 60 of the Advisory Opinion that the Secretary-General has the authority to *request* (emphasis added) the Government of a member State to bring his finding to the knowledge of the local courts if acts of an agent have given rise to court proceedings. In my view, whereas the Secretary-General is authorized to

make such request, how a party implements its obligations under the Convention is a matter for that State. The Court was not asked to pass on the means or methods of implementation. Once the Court has responded that the Convention is applicable to the matter, Malaysia would assume its obligations, including making Mr. Cumaraswamy financially harmless for any taxed costs imposed upon him. To have included this as an operative paragraph was unnecessary. Nor does the Convention stipulate any particular method of implementation, or for that matter a uniform method of implementation. Therefore, to hold a State in breach of its obligation for not adopting a particular method or means of implementing or achieving the object appears to find no justification on the face of the Convention.

29. Finally, I share the Court's position as reflected in its jurisprudence that its response to a request for an advisory opinion should be seen as participation in the work of the Organization with a view to the achievement of its aims and objectives, and that only compelling reasons should restrain the Court from answering a request. I, however, consider it more important that this Court, as a judicial organ, cannot and should not, even in giving an advisory opinion, depart from the essential rules guiding its activity as a court[6].

(Signed) Abdul G. KOROMA.

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[6] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27.

Appendix I:

Excerpt from the Convention on the Privileges and Immunities of the United Nations

ARTICLE VI

EXPERTS ON MISSIONS FOR THE UNITED NATIONS

SECTION 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in con-nection with their missions. In particular they shall be accorded:

(a) immunity from personal arrest or detention and from seizure of their personal baggage;

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwith-standing that the persons concerned are no longer employed on missions for the United Nations;

(c) inviolability for all papers and documents;

(d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

SECTION 23. Privileges and immunities are granted. to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without preju-dice to the interests of the United Nations.

Appendix II: Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association.

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right of equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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