

INTERNATIONAL COURT OF JUSTICE

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

WRITTEN COMMENTS  
SUBMITTED ON BEHALF OF  
THE SECRETARY-GENERAL OF THE UNITED NATIONS

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## INTRODUCTION

1. The United Nations has the honour to refer to the written statement submitted by the Government of Malaysia in respect of the proceedings in the International Court of Justice (hereinafter, "the Court") with respect to the question upon which the Economic and Social Council (hereinafter, "ECOSOC") requested an advisory opinion, in its decision 1998/297 of 5 August 1998, on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The United Nations also has the honour to refer to the written statements submitted by the Governments of Costa Rica, Germany, Greece, Italy, Sweden, United Kingdom of Great Britain and Northern Ireland and the United States of America.

2. In paragraph 10 of its written statement, Malaysia reaches three final conclusions as follows.

"(a) Malaysia 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" (the Convention on the Privileges and Immunities of the United Nations (hereinafter, "the Convention")).

"(b) Malaysia has not acted in a manner which constitutes a breach of her obligations under the General Convention.

"(c) The claim to immunity does not limit the jurisdiction of courts to ascertain whether there is immunity."

3. The written statement submitted on behalf of the Secretary-General of the United Nations drew three contrary conclusions.

(a) Subject only to Section VIII of the Convention, the Secretary-General of the United Nations has 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.

(b) The Government of Malaysia has not fulfilled its obligations under the Convention.

(c) A difference between the United Nations and a Member State on the immunity from legal process of a United Nations expert on mission is not a matter to be adjudicated in national courts.

**I. SUBJECT ONLY TO SECTION VIII OF THE CONVENTION, THE SECRETARY-GENERAL HAS 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**

**A. The legal basis for and practice of the United Nations on the rights and duties of the Secretary-General**

4. In its written statement, the United Nations substantiated the legal basis for its position, which has been invariably maintained by its established practice, that, subject only to Article VIII of the Convention, the Secretary-General has the exclusive authority to determine whether or not words were spoken in the course of the performance of a mission for the United Nations and whether such words fall within the scope of the mandate entrusted to a United Nations expert on mission within the meaning of Article VI, Section 22(b) of the Convention (see paras. 38 to 49 of written statement). The United Nations has also stated that the latter is coupled with the Secretary-General's right and duty, in accordance with the terms of Article VI, Section 23 of the Convention, to waive the immunity where, in his opinion, it would impede the course of justice and it can be waived without prejudice to the interests of the United Nations (see paras. 46 to 48 of written statement).

5. This position which has consistently been maintained by the United Nations was supported in the written statements submitted by Costa Rica (in Part V.A of its written statement), Germany (on page 1 of its written statement) and Sweden (on pages 2-3 of its written statement). In paragraph 4 of its written statement, Italy noted that, although each Party had the right to interpret the Convention, any differences were to be settled by the Court. The United Nations' position also received support in the written statements submitted by the United Kingdom of Great Britain and Northern Ireland and the United States of America who argue that unless there are compelling or powerfully contrary circumstances, the Secretary-General's determination must be given great weight and deference (in paragraph 6 of the United Kingdom's written statement and in paras. 19 to 24 of the United States' written statement). In this case, they conclude that no such circumstances exist (see para. 6 of the United Kingdom's written statement and para. 41 of the United States' written statement).

**B. Rationale for the Secretary-General's Assertion of the Immunity from Legal Process of the Special Rapporteur on the Independence of Judges and Lawyers**

6. In paragraphs 7.5 and 7.13 of its written statement, the Government of Malaysia correctly states that the juridical basis of the immunity from legal process of experts on missions is functional in nature and whether it exists in a particular situation is a factual question to be determined by the Secretary-General in a judicious manner. In paragraph 7.12, however, the Government of Malaysia indicates that it does not accept the Secretary-General's

determination as conclusive. In paragraphs 35 and 48 of its written statement, the United Nations explicitly confirmed that the privileges and immunities accorded to experts on missions by Section 22 of the Convention are functional and that the distinction between acts performed in an official capacity and those performed in a private capacity, which lies at the heart of the concept of functional immunity, is a question of fact which depends on the circumstances of the particular case. The position of the United Nations is that it is exclusively for the Secretary-General to determine the extent of the duties and functions of United Nations officials and experts on missions. (Dossier No. 113, paragraph 7). Any differences concerning the Secretary-General's determination must be settled in accordance with the provisions of Article VIII, Section 30 of the Convention.

7. In paragraph 7.6 of its written statement, the Government of Malaysia asserts that it has not been given a rationale for the Secretary-General's assertion of the immunity from legal process of the Special Rapporteur on the independence of judges and lawyers (hereinafter, "the Special Rapporteur"). The documents contained in Dossier Nos. 19, 21, 22, 27, 28, 29, 32, 33, 37, 38, 43, 44, 47, 48, 49, 51 and 52 explicitly state that the Secretary-General maintains the Special Rapporteur's immunity because he had determined that the words which constitute the basis of plaintiffs' complaints in this case were spoken by the Special Rapporteur in the course of the performance of his mission. The article "Malaysian Justice on Trial" in the November issue of the British magazine *International Commercial Litigation* (Dossier No. 14) clearly refers to the Special Rapporteur's official capacity and to his United Nations mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations.

8. Moreover, it is clear from both the United Nations' and the Government's statement of the facts that the Government of Malaysia did not request further substantiation of the basis for the Secretary-General's assertion of the Special Rapporteur's immunity from legal process. In this connection, it is also worthy of note that between 28 December 1995 and 19 February 1998, taking into account only the documents contained in the Dossier, while the United Nations sent 20 communications to the competent authorities of the Government of Malaysia (Dossier Nos. 17, 18, 19, 21, 22, 27, 29, 32, 33, 37, 38, 39, 42, 43, 44, 47, 48, 49, 51 and 52), the United Nations only received two in reply (Dossier Nos. 26 and 31).

### C. Secretary-General's Waiver of Privileges and Immunities

9. In paragraphs 7.8 and 7.9 of its written statement, the Government of Malaysia contends that there is a general recalcitrance to exercise waiver and that, in this particular case, no facts have been disclosed that waiver would operate against the interests of the United Nations. At the outset, it must be noted that, at no point, did the Government of Malaysia or the private plaintiffs request a waiver of the Special Rapporteur's immunity.

10. With respect to the first statement, Dossier Nos. 72, 74, 76, 78, 79, 82, 83, 84, 87, 90, 92, 93, 94, 95, 96, 98, 99, 103, 104, and paragraph 6 of 115 illustrate not only the Secretary-General's readiness to waive the privileges and immunities of officials and experts on missions where they would impede the course of justice and where they could be waived without prejudice to the interests of the United Nations, but also his meticulousness in not asserting any immunity where the words or acts complained of are not related to the official functions of a United Nations official or to the mission or mandate entrusted to an expert on mission (Dossier Nos. 103 and 104).

11. As to the United Nations contention that waiver would operate against the interests of the United Nations generally, and the human rights mechanism of the United Nations system specifically, the United Nations respectfully refers to Dossier Nos. 28, 32, 33, 36, 37, 40, 44, and 54 and to Part IV (E) of its written statement. The importance of these interests is confirmed in the written statements submitted by Costa Rica (in Part IV.B of its written statement), Sweden (on page 1 of its written statement), the United Kingdom of Great Britain and Northern Ireland (in para. 4 of its written statement) and the United States of America (in para. 40 of its written statement). The negative effect that the adjudication of the privileges and immunities of human rights special rapporteurs is further elaborated in the High Commissioner for Human Rights' letter of 2 October 1998 (Dossier No. 54 bis).

#### D. Applicability of Article VIII

12. In paragraphs 9.7 and 9.8 of its written statement, the Government of Malaysia contends that it is futile to refer the dispute to the Court pursuant to Article VIII, Section 30 of the Convention, at this stage, and that disputes involving experts on missions are not covered by the dispute settlement mechanisms provided for under paragraphs (a) and (b) of Article VIII, Section 29 of the Convention.

13. In Part IV (D) of its written statement, the United Nations submits that asserting the Special Rapporteur's immunity from legal process would not impede the course of justice as the Convention provides remedies both to the private plaintiffs in the four lawsuits as well as to the Government of Malaysia.

14. Article VIII, Section 29(a) deals with disputes of a private law character to which the United Nations is a party. It is clear that a claim of libel and/or slander constitutes a dispute of a private law character. Moreover, once the United Nations maintained that the words giving rise to the lawsuits were spoken by the Dato' Param Cumaraswamy in his official capacity and within the course of the performance of the mission entrusted to him by the United Nations Commission on Human Rights, the United Nations had an obligation to protect the Special Rapporteur and to ensure respect for his immunity from legal process. As this immunity was at the heart of the litigation and as the United Nations had formally ratified the words of its expert on mission, the plaintiffs could have pursued the matter with the United Nations as the party to the dispute. Article VIII, Section 29(a) of the Convention is therefore applicable to the dispute.

15. Article VIII, Section 29(b) of the Convention refers to disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General. In paragraph 9.8 of its written statement, the Government of Malaysia asserts that Section 29(b) is limited to disputes involving officials. In this connection, it should be noted that although the provisions of Article VIII were included in the original draft Convention forwarded by the Preparatory Commission of the United Nations, Article VI, in its entirety, was only later added to the draft Convention (See Dossier Nos. 62 through 66). It is argued here that it is the intent of Section 29(b) to cover the situation of third party plaintiffs faced with an assertion of immunity by the United Nations for the words or acts of its agents, officials and experts on missions alike. In any case, the United Nations maintains that Section 29(b) could be made applicable, *mutatis mutandis*, to experts on missions who enjoy immunity, if immunity has not been waived by the Secretary-General. The United Nations has never sought to deny plaintiffs an appropriate remedy; it has merely sought to ensure that the forum and the remedy are in conformity with the Convention.

16. As to the applicability of Article VIII, Section 30 of the Convention, the United Nations maintains that a difference relating to the immunity from legal process of an expert on mission is precisely a difference arising out of the interpretation or application of the Convention. In this case, the difference arises between the United Nations on the one hand and a Member on the other hand, and it is precisely a difference of this kind which shall be referred to the Court on the basis of a request for an advisory opinion in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court is not futile but shall rather be accepted as decisive by the parties in accordance with Section 30 of the Convention and operative paragraph 2 of ECOSOC decision 1998/297.

## **II. THE GOVERNMENT OF MALAYSIA HAS NOT FULFILLED ITS OBLIGATIONS UNDER THE CONVENTION**

17. Pursuant to Section 34 of the Convention, "[i]t is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention". Malaysia acceded to the Convention on 28 October 1957 without reservation.

18. In Part V of its written statement, the United Nations argued that the Government of a Member State party to the Convention has an obligation to give effect to the immunity from legal process of an expert on mission under Section 22(b) of the Convention. At the very least, the latter obligation includes the obligation of the Government to inform its competent judicial authorities that the Secretary-General of the United Nations has determined that the words or acts giving rise to the proceedings in its national courts were spoken, written or done in the course of the performance of a mission for the United Nations and that the United Nations therefore maintains the immunity from legal process of the expert on mission concerned with respect to those words or acts.

19. The United Nations is of the view that Malaysia did not fulfil its obligations under the Convention. To date, the Government of Malaysia has not transmitted or even referred to the certificate of immunity issued by the Secretary-General on 7 March 1997 (Dossier No. 29) to its competent judicial authorities nor otherwise formally informed them that the Secretary-General of the United Nations had determined that the words giving rise to the proceedings in its national courts were spoken in the course of the performance of a mission for the United Nations and that the United Nations had maintained the immunity from legal process of the Special Rapporteur with respect thereto.

20. In paragraphs 5.5, 9.9 and 10(b) of its written statement, the Government of Malaysia has argued that it fulfilled its obligations when the Minister for Foreign Affairs of Malaysia issued the Certificate of Immunity on 12 March 1997 (Dossier No. 31). The Minister's Certificate is not in conformity with Malaysia's obligations under the Convention. In accordance with Section 22(b) of the Convention, 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". The Minister's Certificate states that Dato' Param Cumaraswamy "shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission" (emphasis added). The word "only" is not found in Section 22(b) of the Convention; the addition of that word, in effect, invited the national courts to conclude that it was for them to decide whether or not the Special Rapporteur spoke the words complained of in his official

capacity and whether doing so was within the scope of the mandate entrusted to him by the United Nations Commission on Human Rights.

21. By failing to amend or supplement the Minister's Certificate of Immunity or otherwise intervening in the legal proceedings so as to refer to the Secretary-General's certificate and by implicitly authorizing its courts to disregard the Secretary-General's determination as to the capacity and scope of the mission of the Special Rapporteur, the Government of Malaysia failed to fulfil its obligations under the Convention.

22. In paragraph 2.7 of its written statement, the Government of Malaysia indicates that there are two legislative instruments applicable to the privileges and immunities of experts on missions. The first is the Diplomatic Privileges Ordinance of 1948 (contained in Annex I to the written statement submitted by Malaysia). The second is the International Organizations (Privileges and Immunities) Act of 1992 (contained in Annex II to the written statement submitted by Malaysia). Section 12(b) of the Diplomatic Privileges Ordinance provides that "[e]xcept in so far as in any particular case any privilege or immunity is waived by the Secretary-General of the United Nations, persons employed on missions on behalf of the United Nations shall enjoy immunity from legal process of every kind in respect of words spoken or written and all acts done by them in the exercise of these functions". Section 7(1) of the International Organizations (Privileges and Immunities) Act, pursuant to which the Minister for Foreign Affairs issued the Certificate of Immunity, provides that "[t]he Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges and immunities" (emphasis added). Section 7(2) of that Act further provides that, "[i]n any proceedings, a certificate given under this section is evidence of the facts certified".

23. Based on the foregoing, the Minister for Foreign Affairs could have certified that the Secretary-General had issued a certificate of the Special Rapporteur's immunity in accordance with Malaysia's international obligations under the Convention. If the Government disagreed with the Secretary-General's conclusion that the Special Rapporteur had spoken the words complained of in the course of the performance of his mission for the United Nations, the Government should have resorted to the dispute resolution mechanism of Article VIII of the Convention to resolve that difference. It was not consistent with the Government of Malaysia's obligations under the Convention to disregard the Secretary-General's certificate and to issue a certificate (Dossier No. 31) which not only left it open to the Malaysian Courts, but in effect invited them, to resolve the difference between the United Nations and the Government.

### **III. A DIFFERENCE BETWEEN THE UNITED NATIONS AND A MEMBER STATE ON THE IMMUNITY FROM LEGAL PROCESS OF A UNITED NATIONS EXPERT ON MISSION IS NOT A MATTER TO BE ADJUDICATED IN NATIONAL COURTS**

24. In paragraph 7.4 of its written statement, the Government of Malaysia contends that for it to reiterate the determination made by the Secretary-General in his certificate is tantamount to asking Malaysia to oust the jurisdiction of its courts and to treat her judicial organs with disrespect. The United Nations respectfully submits that calling upon a Government of a Member State to fulfil international obligations it had freely and legally undertaken by virtue

of its accession to the Convention without reservation constitutes no disrespect to, or infringement upon, the proper jurisdiction of the national courts of that Member State.

25. For the reasons set out in its written statement, the United Nations maintains that differences concerning the immunity from legal process of an expert on mission for the United Nations cannot be adjudicated in national courts. It is clear that if the national courts of Member States could substantively dispute the Secretary-General's determination that a word or act was spoken, written or done in the course of the performance of a mission for the United Nations, a mass of conflicting decisions would be inevitable, given the many countries in which the Organization operates. The adjudication of an immunity from legal process would be tantamount to a denial of that very immunity. Member States party to the Convention are obliged to settle any disputes in their own right, or on behalf of their courts and/or citizens, in accordance with the settlement of dispute provisions of Article VIII of the Convention.

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30 October 1998