CR 98/15

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1998

Public sitting

held on Monday 7 December 1998, at 10 a.m., at the Peace Palace,

President Schwebel presiding

in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights

(Request for Advisory Opinion)

VERBATIM RECORD

ANNEE 1998

Audience publique

tenue le lundi 7 décembre 1998, à 10 heures, au Palais de la Paix,

sous la présidence de M. Schwebel, président

en l'affaire du Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme

(Requête pour avis consultatif)

COMPTE RENDU

Present:

President	Schwebel
Vice-President	Weeramantry
Judges	Oda
	Bedjaoui
	Guillaume
	Ranjeva
	Herczegh
	Shi
	Fleischhauer
	Koroma
	Vereshchetin
	Higgins
	Parra-Aranguren
	Kooijmans
	Rezek
Registrar	Valencia-Ospina

Présents : M. Schwebel, président
M. Weeramantry, vice-président
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins,
MM. Parra-Aranguren,
Kooijmans
Rezek, juges

M. Valencia-Ospina, greffier

The Secretary-General of the United Nations is represented by:

His Excellency Mr. Hans Corell, Under-Secretary-General for Legal Affairs, The Legal Counsel,

Mr. Ralph Zacklin, Assistant Secretary-General for Legal Affairs,

Mr. Anthony Miller, Principal Legal Officer, Office of the Legal Counsel,

Ms. Mona Khalil, Legal Officer, Office of the Legal Counsel.

The Government of Costa Rica is represented by:

His Excellency Mr. José de J. Conejo, Ambassador of Costa Rica to the Netherlands,

Mrs. Gabriela Muñoz,

Mr. Charles N. Brower, White & Case LLP,

Mr. Charles H. Brower II, *Croft Visiting Assistant Professor of Law*, University of Mississippi School of Law

The Government of Italy is represented by:

Mr. Umberto Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs,

Mr. Luigi Sico, Professor of International Law at the University of Naples,

Mrs. Ida Caracciolo, researcher in international law at the University of Rome.

The Government of Malaysia is represented by:

Dato' Heliliah bt Mohd Yusof, Solicitor General of Malaysia,

Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*

His Excellency Mr. A. Ganapathy, Ambassador of Malaysia to the Netherlands, Embassy of Malaysia,

Datuk Ahmad bin Haji Maarop, Head of the Advisory and International Law Division, Attorney General's Department,

Mr. Daniel Bethlehem, Barrister, Deputy Director of the Lauterpacht Research Center for International Law and Lecturer in Law, University of Cambridge,

Mrs. Surina bt Ali, Federal Counsel, Advisory and International Law Division, Attorney General's Department,

Le Secretaire General des Nations Unies est représenté par :

S. Exc. M. Hans Corell, Secrétaire général adjoint aux affaires juridiques, conseiller juridique de l'Organisation des Nations Unies,

M. Ralph Zacklin, Sous-Secrétaire général aux affaires juridiques,

M. Anthony Miller, administrateur général au bureau du conseiller juridique,

Mme Mona Khalil, juriste au bureau au conseiller juridique.

Le Gouvernement du Costa Rica est représenté par :

S. Exc. M. José de J. Conejo, ambassadeur du Costa Rica aux Pays-Bas,

Mme Gabriela Muñoz,

M. Charles N. Brower, membre du cabinet White & Case LLP,

M. Charles H. Brower II, *Croft Visiting Assistant Professor of Law* à la faculté de droit de l'Université du Mississipi.

Le Gouvernement d'Italie est représenté par :

M. Umberto Leanza, chef du service du contentieux diplomatique du ministère des affaires étrangères,

M. Luigi Sico, professeur ordinaire de droit international auprès de l'Université de Naples,

Mme Ida Caracciolo, chercheur de droit international auprès de l'Université de Naples.

Le Gouvernement de Malaysie est représenté par :

Dato' Heliliah bt Mohd Yusof, *Solicitor General* de Malaisie,

Sir Elihu Lauterpacht, C.B.E., Q.C., professeur honoraire de droit international à l'Université de Cambridge, membre de l'Institut de droit international,

S. Exc. M. A. Ganapathy, ambassadeur de Malaisie aux Pays-Bas,

Datuk Ahmad bin Haji Maarop, jurisconsulte et directeur de la division du droit international du ministère de la justice,

M. Daniel Bethlehem, avocat, directeur adjoint du centre de recherche Lauterpacht en droit international de l'Université de Cambridge,

Mme Surina bt Ali, conseil fédéral, division des affaires juridiques et du droit international du ministère de la justice,

Miss Farhana bt Rabidin, Federal Counsel, Advisory and International Law Division, Attorney General's Department,

Mr. Abdul Rahman bin Mohd Redza, Federal Counsel, Drafting Division, Attorney General's Department.

Mme Farhana bt Rabidin, conseil fédéral, division des affaires juridiques et du droit international du ministère de la justice,

M. Abdul Rahman bin Mohd Redza, conseil fédéral, division de la rédaction du ministère de la justice.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, in accordance with Article 66, paragraph 4, of its Statute, to hear oral statements relating to the request for an advisory opinion submitted to it on the question of the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The Court was seised of this request following the adoption, on 5 August 1998, of a resolution by the Economic and Social Council of the United Nations (ECOSOC), requesting the Court to give an advisory opinion, on a priority basis. ECOSOC's decision refers, in its preamble, to "a difference [which] 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 . . ." This resolution, together with a note by the Secretary-General of the United Nations, was transmitted to the Court by facsimile on 10 August 1998. May I ask the Registrar to read out the operative clause of ECOSOC Decision No. 1998/297 of 5 August 1998, which sets forth the question on which the Court's opinion has been requested.

The REGISTRAR: The Economic and Social Council, 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, and on the legal obligations of Malaysia in this case.

The PRESIDENT: Pursuant to Article 66, paragraph 1, of the Statute, the Registrar, by communications dated 10 August 1998, gave notice of the request for an advisory opinion to all States entitled to appear before the Court. Pursuant to Article 66, paragraph 2, of the Statute, by an Order also dated 10 August 1998, the Senior Judge, acting President of the Court under

Article 13, paragraph 3, of the Rules of Court, decided that the United Nations and the States parties to the Convention on the Privileges and Immunities of the United Nations were likely to be able to furnish information on the question submitted to the Court. Bearing in mind that the request for an advisory opinion was expressed to be made "on a priority basis", he fixed 7 October 1998 as the time-limit within which written statements on the question might be submitted to the Court in accordance with Article 66, paragraph 2, of the Statute, and 6 November 1998 as the time-limit within which States and organizations having presented written statements might present written comments on other written statements, in accordance with Article 66, paragraph 4, of the Statute. The United Nations and the States parties to the Convention on the Privileges and Immunities of the United Nations were immediately so advised.

Written statements were submitted by the Secretary-General of the United Nations and by the following States: Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States of America. A written statement was received from Greece on 12 October 1998; leave was given for late filing. Written comments on those written statements were submitted by the Secretary-General of the United Nations and Costa Rica, Malaysia and the United States.

The Secretary-General has sent to the Court, in application of Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question.

By communications dated 13 October 1998, the Registrar informed the United Nations and the States to whom the original invitation to make written statements had been extended that the Court would hold public sittings as from 7 December 1998, for the purpose of hearing their oral statements or comments, if they wished to be heard. In addition to the United Nations, the following States have informed the Registrar of their intention to make oral statements: Costa Rica, Italy and Malaysia. The representative of the United Nations will be called upon to speak first, followed, in alphabetical order, by the representatives of Costa Rica, Italy and Malaysia.

The Court has decided, in accordance with Article 106 of its Rules, to make the written statements and comments submitted with respect to the request for an advisory opinion accessible to the public as of the opening of these oral proceedings.

I give the floor to the representative of the United Nations, Mr. Hans Corell, Under-Secretary-General for Legal Affairs and the Legal Counsel.

Mr. Corell, please.

Mr. CORELL: Mr. President, Members of the Court,

1. It is a great honour for me to be given the opportunity to address the International Court of Justice in order to assist the Court in responding to a legal question of particular importance and interest to the United Nations. By its decision 1998/297, adopted by consensus on 5 August 1998, the Economic and Social Council requested the International Court of Justice to give its advisory 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".

In operative paragraph 2, of that decision, the Council further

> "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".

2. In this connection, it should be noted that proceedings in the four lawsuits against Dato' Param Cumaraswamy have been fixed for hearing in the Malaysian civil courts during the first week of February 1999.

3. The circumstances leading to this request for an advisory opinion pertain to a difference that has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention. This difference is 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. At issue is the authority of the Secretary-General to determine whether or not the words spoken by Dato' Param Cumaraswamy in an interview and subsequently published in an article entitled "Malaysian Justice on Trial" in the November 1995 issue of the British magazine *International Commercial Litigation*, if these words were spoken in the course of the performance of his mission as Special Rapporteur and, if so, whether under the Convention, the Government of Malaysia has an obligation to give effect to the Secretary-General's assertion of the Special Rapporteur's immunity from legal process with respect to the words spoken.

4. Mr. President, while I do not intend to repeat the summary of the facts, I would like to refer to Part I, paragraphs 6 to 31, of the written statement submitted on behalf of the Secretary-General of the United Nations and to paragraphs 1 to 15 of the Note by the Secretary-General contained in ECOSOC document E/1998/94 (Dossier No. 59).

5. Mr. President, with your permission, I now intend to focus on the four issues analysed in Parts II to V of the Secretary-General's written statement, namely: (1) the status of the Special Rapporteur as an expert on mission within the meaning of Article VI of the Convention; (2) the immunity from legal process of the Special Rapporteur under Article VI, Section 22 *(b)* of the Convention; (3) the Secretary-General's rights and duties with respect to the assertion or waiver of the privileges and immunities of experts on missions under Article VI, Section 23, of the Convention; and finally, (4) the obligations of the Government of Malaysia pursuant to Section 34 of the Convention.

6. Following this summary, I would like to make a few specific observations on the other written statements and written comments submitted in these proceedings. The question of responsibility for breach of obligations will be addressed separately before I draw the conclusions on behalf of the Secretary-General.

7. Before going into the specifics of the present case, Mr. President, I should like to emphasize that the advisory opinion of the Court will have effects that go far beyond the issue of

the status of experts on mission. As a matter of fact, it is not possible to distinguish the role of the Secretary-General in the present case and a situation where similar issues arise with respect to any agent, whether an expert on mission or an official, of the United Nations. Therefore, the coming advisory opinion will have far-reaching consequences for the Organization as a whole.

I. THE SPECIAL RAPPORTEUR IS AN EXPERT ON MISSION WITHIN THE MEANING OF ARTICLE VI, SECTION 22 OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

8. Mr. President, let me now focus on the first of the four main issues, namely, the status of the Special Rapporteur. Here I can be very brief.

9. The United Nations would first reiterate the fact that the Special Rapporteurs of the Commission on Human Rights are accorded the status of experts on missions and are therefore entitled to enjoy the privileges and immunities provided for under Section 22 of the Convention. This is firmly rooted in the established practice of the Organization and confirmed by this Court in its Advisory Opinion of 15 December 1989 in the case concerning *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, commonly known as the "Mazilu Opinion".

10. As a Special Rapporteur of the Commission on Human Rights, Dato' Param Cumaraswamy is therefore undeniably an expert on mission and is entitled to enjoy the privileges and immunities provided for under Section 22 of the Convention. The status of the Special Rapporteur is not an issue between the Parties.

II. THE SPECIAL RAPPORTEUR IS ENTITLED TO IMMUNITY FROM LEGAL PROCESS UNDER ARTICLE VI, SECTION 22 *(b)* OF THE CONVENTION

11. The second main issue, Mr. President, concerns the Special Rapporteur's immunity from legal process. In accordance with Article VI, Section 22 *(b)*, of the Convention, experts performing missions for the United Nations shall be accorded, "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". The immunity from legal process accorded to experts on missions by Article VI, Section 22, of the Convention is strictly functional.

12. Consequently, as an expert on mission, Dato' Param Cumaraswamy is entitled to immunity from legal process in respect of words spoken or written and acts done by him in the course of the performance of his mission as a Special Rapporteur of the Commission on Human Rights.

13. In the Mazilu Opinion, this Court confirmed that this immunity applies also in the State of which an expert on mission is a national. Paragraph 52 of the Opinion is of particular interest in the present case:

> "52. To sum up, the Court takes the view 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. During the whole period of such missions, experts enjoy these functional privileges and immunities whether or not they travel. They may be invoked as against the State of nationality or of residence unless a reservation to Section 22 of the General Convention has been validly made by that State." (*I.C.J. Reports 1989,* pp. 22-23.)

14. As Malaysia acceded to the Convention on 28 October 1957 without any reservation, the Special Rapporteur's immunity from legal process, under Article VI, Section 22 *(b)*, of the Convention, may therefore be invoked as against the State of his nationality, Malaysia.

III. SUBJECT TO ARTICLE VIII OF THE CONVENTION, THE SECRETARY-GENERAL HAS THE EXCLUSIVE AUTHORITY, UNDER ARTICLE VI, SECTION 23, OF THE CONVENTION TO WAIVE OR MAINTAIN THE PRIVILEGES AND IMMUNITIES ENJOYED BY EXPERTS ON MISSION UNDER SECTION 22

15. Mr. President, the third main contention is that, subject only to Article VIII of the Convention, the Secretary-General has the exclusive authority, under Article VI, Section 23, of the Convention, to waive or maintain the privileges and immunities enjoyed by experts on mission under Section 22. There are five aspects that I should like to address.

A. The legal basis of the Secretary-General's authority

16. The first aspect is the legal basis for the Secretary General's authority. This authority derives from Article VI, Section 23, of the Convention which provides as follows:

> "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 prejudice to the interests of the United Nations." (Emphasis added.)

17. The authority granted in Article VI, Section 23, of the Convention to waive the immunity of any expert on mission is vested exclusively in the Secretary-General, and waiver cannot be effected instead by the expert on mission him or herself or by the national courts of a member State party to the Convention. That the Secretary-General has exclusive authority in this regard is borne out not only by the terms of Article VI, Section 23, but also by the provisions of Article VIII, Sections 29 and 30, for the settlement of disputes regarding all differences arising out of the interpretation or application of the Convention. The Convention foresees that disputes are not to be settled by the national courts of a member State party to the Convention, but that differences between the United Nations and a Member are to be decided by having recourse to the advisory jurisdiction of this Court. In accordance with Section 30, the Court's advisory opinion shall be accepted as decisive by the parties.

18. Mr. President, in its Advisory Opinion of 11 April 1949 in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, known as the *Reparations* case, here the Court stated, *inter alia*,

> "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 . . . If he had to rely on [the] State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter . . .". (*I.C.J. Reports 1949,* p. 183.)

The Court further stated that

> "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." (*Ibid.*, p. 184.)

19. This statement of the Court's Opinion is in keeping with the position consistently maintained by the United Nations, pursuant to the Convention and the Charter, that it is for the Secretary-General, on behalf of the Organization, to afford experts on mission the functional protection they are entitled to when they are acting in the course of the performance of their United Nations missions.

20. The Staff Regulations of the United Nations and General Assembly resolutions support the conclusion that the Secretary-General has exclusive authority in matters of assertion and waiver of the functional immunity of United Nations officials. It follows therefrom that the Secretary-General has the same authority with respect to the functional immunity of experts on missions. Staff Regulation 1.8, which was established by the General Assembly in accordance with Article 101, paragraph 1, of the Charter, provides as follows:

> "In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom *alone* it rests to decide whether they shall be waived." (Emphasis added.)

21. The exclusive authority of the Secretary-General is inextricably linked to his role as the chief administrative officer of the Organization, under Article 97 of the Charter of the United Nations, and to member States' obligation, under Article 100, paragraph 2, of the Charter, "to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities". The exclusively international character of the responsibilities of the Organization and its agents, both officials and experts on missions, cannot be equally and uniformly maintained throughout the world if their official activities were subject to challenge in the national courts of each member State.

22. 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. Such a statement of the Secretary-General's exclusive authority was noted by the General Assembly without objection, in its resolution 36/232 of 18 December 1981. In that resolution, the General Assembly appealed to member States to recognize the functional immunity of a staff member asserted by the Secretary-General.

23. In subsequent resolutions, the General Assembly has repeatedly confirmed the responsibilities of the Secretary-General to safeguard the functional immunity of all United Nations officials. The Assembly strongly affirmed that disregard for the privileges and immunities of officials has always constituted one of the main obstacles to the implementation of the missions and programmes assigned to the organizations of the United Nations system by member States and called upon member States to enable the Secretary-General to exercise fully the right of functional protection. The General Assembly has thus confirmed the position consistently maintained by the United Nations with regard to the exclusive authority of the Secretary-General to determine the extent of the duties and functions of United Nations officials and has called for recognition of the Secretary-General's assertions of their functional immunity.

24. Therefore, subject only to Article VIII of the Convention, it is for the Secretary-General, and not for the national courts of member States, to determine whether or not an act by an agent of the Organization, be it a staff member or an expert on mission, has been performed in an official capacity or in the course of the performance of a mission for the United Nations.

B. The United Nations established practice invariably has maintained the Secretary-General's exclusive authority to assert or to waive immunity

25. Mr. President, the second aspect in this context is the practice of the Organization. It is the long-standing and established practice of the United Nations that the authority to determine what constitutes an "official" or "unofficial" act is vested exclusively in the Secretary-General and that the question of whether the acts concerned were official acts, cannot consistently with the Convention, be determined by a national court. It is equally the established practice of the United

Nations that, if the Secretary-General determines that the matter complained of is not related to official functions, then no immunity is asserted. Moreover, even where immunity might exist, it would always be incumbent upon the Secretary-General to waive immunity where, *in his opinion*, the immunity would impede the course of justice and where the immunity can be waived without prejudice to the interests of the United Nations.

26. The United Nations position is summed up in a statement to member States made by the Legal Counsel in the Fifth Committee of the General Assembly on 1 December 1981. I refer to Dossier No. 84. In this statement, the Legal Counsel noted that subjecting a staff member to legal process prevented the Secretary-General from exercising his rights under the international legal instruments in force to independently determine whether or not an official act had been involved. He noted that, where a determination was made that no official act was involved, the Secretary-General had, by the terms of the Convention, both the right and duty to waive the immunity of any official. The Legal Counsel stated that it was not the intent of the provisions regarding immunity from legal process or the principle of functional protection to place officials above the law but to ensure, before any action was taken against them, that no official act was involved and that no interest of the Organization was prejudiced.

27. The Dossier submitted by the United Nations in accordance with Article 65 of the Statute of the Court illustrates not only the Secretary-General's readiness to waive the privileges and immunities of officials and experts on missions when they would impede the course of justice and 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. I do not think that it is necessary to dwell upon this further.

C. The Secretary-General exercised his exclusive authority to determine the scope of the Special Rapporteur's mission and the applicability of his immunity from legal process

28. Mr. President, I come now to the third aspect: the scope of the Special Rapporteur's mission. In the present case, the Secretary-General at no point waived, or for that matter was ever requested to waive, the immunity from legal process of the Special Rapporteur. The Secretary-General determined that, in this particular situation, Dato' Param Cumaraswamy had been interviewed in his official capacity as Special Rapporteur; that the article in the magazine *International Commercial Litigation* clearly referred to his official capacity and to his United Nations mandate to investigate allegations concerning the independence of judiciary; and that the article itself and the passages at issue related to such allegations. Moreover, it is within the discretion of Special Rapporteurs of the Commission on Human Rights to publicize their activities, and the Commission values such publicity as a means to raise consciousness about human rights standards and violations. The Special Rapporteur had reported to the Commission on his working methods and intention to conduct his own promotional activities in addition to those of the then Centre for Human Rights.

29. Based on the foregoing, the Secretary-General determined that the words which constitute the basis of the plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission and he, therefore, maintained that Dato' Param Cumaraswamy is immune from legal process with respect to these words. In this regard, it should be noted that, in its resolutions 1995/36 of 3 March 1995, 1996/34 of 19 April 1996 and later in 1997/23 of 11 April 1997 and 1998/35 of 17 April 1998 (Dossier Nos. 5-8), in all these resolutions, the Commission on Human Rights has consistently noted with appreciation the Special Rapporteur's determination to achieve wide dissemination of his activities. Moreover, when it renewed the Special Rapporteur's mandate for an additional three years in its resolution 1997/23 (Dossier No. 7), the Commission, having had the benefit of three of the Special Rapporteur's reports, was fully aware of the basis for his investigation of the Malaysian judiciary; of his dealings with the press; and

of the lawsuits against him in the national Malaysian courts. The Commission's decision to renew his mandate, therefore confirmed its approval of the Special Rapporteur's working methods as well as of the performance of his mission of which public statements were a part, including making statements to members of the press.

D. Maintaining the Special Rapporteur's immunity would not impede the course of justice

30. Mr. President, the fourth aspect is that maintaining the Special Rapporteur's immunity would not impede the course of justice. Article VIII of the Convention provides remedies both to private plaintiffs as well as to the Governments of member States parties to the Convention. The Secretary-General acknowledges that cases of conflict may arise as to whether an act was "official" or whether an official or expert had exceeded his mandate, but the Convention expressly provides for appropriate modes of settlement of private law disputes if the United Nations is a party to such a dispute or if immunity has not been waived by the Secretary-General under Section 29. It also provides for the referral of differences between the Organization and its member States to the advisory jurisdiction of this Court pursuant to Section 30. These are the appropriate procedures for settlement of a difference of interpretation or application of the Convention, not the disregard or adjudication of the Secretary-General's determination by national courts.

E. Waiving the Special Rapporteur's immunity would prejudice the interests of the United Nations

31. Mr. President, the fifth and last aspect with respect to the Secretary-General's rights and duties is that waiving the Special Rapporteur's immunity would prejudice the interests of the United Nations.

32. The Secretary-General considers it most important that the principle be accepted that it is for himself alone to determine whether members of the staff of the Organization or experts on missions have spoken or written words or performed acts "in their official capacity" (in the case of officials) or "in the performance of their missions" (in the case of experts on missions). Unless

recognition is accorded to the Secretary-General's determinations in this respect, it will be for national courts to determine — and in respect of a given word or act there may be several national courts, Mr. President — to determine whether an official or an expert, or a former official or expert, enjoys immunity in respect of his or her words or acts. The adjudication of United Nations privileges and immunities in national courts would be certain to have a deleterious effect on the independence of officials and experts, who would then have to fear that at any time, whether they were still in office or after they had left it, they could be called to account in national courts, not necessarily their own, civilly or criminally, for their words spoken or written, or acts performed, as officials or experts.

33. In the absence of complete independence, human rights experts and Special Rapporteurs would hesitate to speak out against and report violations of international human rights standards. National adjudication would inevitably frustrate and, if allowed to proliferate, potentially endanger the entire human rights mechanism of the United Nations system. Moreover, any diminution of the Secretary-General's exclusive authority to waive or maintain the privileges and immunities of experts on missions constitutes a parallel attack on his exclusive authority to preserve and protect the privileges and immunities of the United Nations itself and its officials. I refer to what I said at the outset about the effects of this case for the Organization as a whole.

F. Conclusion

34. In conclusion, with respect to this third main issue, Mr. President, the United Nations maintains, and has consistently maintained that the Secretary-General has the exclusive authority, subject to Article VIII of the Convention, 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 shall fall within the scope of the mandate entrusted to a United Nations expert on mission. These matters cannot be determined by, or adjudicated in, national courts. It is clear that if national courts could overrule 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. In many cases, it would be tantamount to a total denial of immunity.

35. Likewise, it is unacceptable that what the Secretary-General determines to be an "official act" can be judged by a national court to have ceased to have been such an act because that court decides that the act is in excess of the mandate. This again, would be tantamount to a total denial of immunity. The contention that it is for an official or an expert on mission or the United Nations, on his or her behalf, to prove in a particular national court that the words complained of were spoken in an official capacity; that it was within the scope of the performance of his or her mission to do so; and that the official or expert on mission in question is therefore immune from legal process with respect thereto, in and of itself constitutes a violation of their immunity and the Organization's immunity from legal process.

36. Mr. President, in order to have any real meaning, the words "immunity from legal process of any kind" in Article VI, Section 22 *(b)*, of the Convention must include immunity from legal proceedings to determine the applicability and scope of that very immunity. Compelling an official or an expert on mission to prove or defend his or her functional immunity in the national courts of any member State effectively subjects him or her to legal process and thereby violates his or her immunity, as well as the immunity of the Organization.

IV. THE GOVERNMENT OF MALAYSIA HAS AN OBLIGATION, UNDER SECTION 34 OF THE CONVENTION, TO GIVE EFFECT TO THE PRIVILEGES AND IMMUNITIES ENJOYED BY THE SPECIAL RAPPORTEUR UNDER SECTION 22 *(b)*

37. Mr. President, I have now come to the fourth main issue, namely the obligation of the Government of Malaysia pursuant to Article 34 of the Convention. There are two aspects that I should like to highlight briefly: the obligation and the ensuing responsibility.

A. The Government of Malaysia has an obligation to give effect to the Special Rapporteur's immunity from legal process

38. Mr. President, the first aspect. 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.

39. In accordance with Section 34, 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 Article VI, Section 22 *(b)*, of the Convention. At the very least, the latter obligation includes the obligation of the Government to inform the competent judicial authorities of the fact 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 has therefore maintained the immunity from legal process of the expert on mission concerned with respect to those words or acts. In addition, it is also incumbent upon the Government, if necessary, to further intervene in the proceedings to uphold and ensure the respect for that immunity, thereby giving it effect. Such interventions by the executive agents of a Government do not constitute interference with the independence of the judiciary. In this respect, the United Nations further 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. As a matter of fact, Mr. President, interventions of this kind occur quite frequently.

40. The United Nations is of the view that Malaysia did not fulfil her 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 to its competent judicial authorities. Nor has the Government 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.

41. Moreover, 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". The word "only" is nowhere to be found in Section 22 *(b)* of the Convention. In effect, the Minister's Certificate 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.

42. Mr. President, by failing to amend or supplement the Minister's Certificate of Immunity, or otherwise intervene in the legal proceedings, so as to uphold or ensure respect for the Secretary-General's certificate, the Government of Malaysia implicitly permitted its courts to adjudicate the merits or otherwise of the Secretary-General's determination as to the capacity and scope of the mission of the Special Rapporteur. Thereby the Government failed to fulfil its obligation under Section 34 of the Convention to give effect to the privileges and immunities enjoyed by the Special Rapporteur under Article VI, Section 22 *(b)*, thereof.

43. If, for whatever reason, the Government of Malaysia disagreed with the Secretary-General's assertion of the Special Rapporteur's immunity from legal process, in the absence of an agreed recourse to another mode of dispute settlement, they could have unilaterally or jointly with the United Nations referred the difference to the International Court of Justice for an advisory opinion in accordance with Article VIII, Section 30, of the Convention. Pending the

resolution of the difference between the Government and the United Nations, the Government of Malaysia was and is required to ensure that all judgments and proceedings are stayed. The Government of Malaysia is called upon to do so, in operative paragraph 2 of the Council's decision 1998/297, pending receipt of the Court's advisory opinion which shall be accepted as decisive by the parties.

B. The Government of Malaysia is ultimately responsible for any costs, expenses or damages arising out of proceedings in its national courts

44. Mr. President, the second aspect: the ensuing responsibility. The United Nations maintains that, if a Government fails to take appropriate action to give effect to the immunities of the Organization or its agents and thereby allows the proceedings in its national courts to proceed, the Government concerned would be responsible for any actual costs, expenses or damages arising out of, or assessed by its courts.

45. While the United Nations intends to elaborate further on this matter in a few moments, it should be recalled here that this Court, in the *Reparations* case (*I.C.J. Reports 1949*, at p. 174), stated that the Organization has the capacity to make an international claim for reparation for breach of the obligations owed to it by a member State.

46. As the United Nations has maintained that the words that constitute the basis for the plaintiffs' complaints were spoken by the Special Rapporteur in the course of the performance of his mission, the Special Rapporteur should be held harmless for any costs, expenses or damages incurred by, or assessed to, him in connection with the legal proceedings against him and the United Nations may make a claim for reparation in respect of those costs. The Special Rapporteur is therefore entitled to reimbursement by the United Nations for any such costs, expenses or damages. Also, in the event that the Organization is compelled to directly assume those costs, expenses and damages, the United Nations maintains that the Government of Malaysia is ultimately responsible for any and all such costs, expenses or damages actually paid or incurred by the Special Rapporteur

and/or by the Organization directly or on his behalf. As I said, Mr. President, we intend to revert to this issue in a few moments.

V. IN RESPONSE TO THE WRITTEN STATEMENTS AND WRITTEN COMMENTS SUBMITTED BY STATES

47. Allow me now to make a few specific remarks in response to some of the observations and conclusions put forward in the written statements and written comments submitted by the States participating in these proceedings.

48. Mr. President, 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. The United Nations maintains that a difference relating to the immunity from legal process of an expert on mission is quintessentially 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 State on the other hand. 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 must be accepted as decisive by the parties in accordance with Section 30 of the Convention and operative paragraph 2 of ECOSOC decision 1998/297.

49. In paragraph 4.7 of its written comments, the Government of Malaysia notes that the written statement of the United Nations has never addressed the Secretary-General's right and duty to waive but has instead focused on who has the right to waive. Quite the contrary, the United Nations has consistently maintained that it is incumbent upon the Secretary-General to waive immunity where, in his opinion, the immunity would impede the course of justice and where the immunity could be waived without prejudice to the interests of the United Nations. Moreover, the fact that the Secretary-General's authority to determine whether words were spoken in the course of the performance of a mission and within the scope of a mandate entrusted to a United Nations

expert on mission is coupled with his right and duty to waive immunity in accordance with Section 23 of the Convention, is the first conclusion reached by the United Nations in its written statement.

50. Furthermore, the United Nations again makes reference to the Dossier which clearly illustrates not only the Secretary-General's readiness to waive privileges and immunities where, in his opinion, 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 or to a United Nations mission or mandate.

51. In paragraph 7.8 of its written statement, the Government of Malaysia contends that 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. As to the United Nations contention that the adjudication of the privileges and immunities in a national court 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 Dossiers Nos. 28, 32, 33, 35, 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, Sweden, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

52. In her letter to the Secretary-General of 2 October 1998, the High Commissioner for Human Rights elaborates on the negative effect that the national adjudication of the privileges and immunities of Special Rapporteurs would have on the United Nations human rights mechanism. In that letter, the High Commissioner states, *inter alia*, that

> "the unacceptable consequence of the Malaysian courts' rulings is that the special rapporteur is ordered to defend himself on the merits of the suits filed against him before the courts of Malaysia and that the Malaysian courts have arrogated to themselves the power to determine the special rapporteur's capacity and the scope of his mission or mandate. It has to be further underlined that since the mandate has been formulated and established by the Commission on Human Rights, it is for the

> Secretary-General to determine whether a person seeking the protection of the immunities provided for in the General Convention fits within the class of persons that the Convention seeks to protect in light of the mandate given by the Commission on Human Rights and whether such person spoke words in the course of his mission for the United Nations. By having been ordered by the Malaysian courts to defend his case at a full trial, the Special Rapporteur has effectively been denied the 'immunity from legal process of every kind' to which he is entitled as an expert on mission under Section 22 (b) of the General Convention."

The High Commissioner has also concluded that

> "threatening the immunity of one expert constitutes an attack on the entire United Nations system of experts on mission employed in the Organization's human rights mechanism. What is more, the decisions of the Malaysian courts not only affect the immunities of experts on mission but also of the United Nations, UN officials, and other persons working for the Organization. Indeed, if these decisions are not corrected, they could have a chilling effect on the ability of independent experts to speak out, in complete independence and impartiality, against violations of international human rights standards."

53. In paragraph 4.13 of its written comments, the Government of Malaysia contends that the position put forth by the United Nations and by the Government of the Republic of Costa Rica, if accepted, "would appear to accord the expert immunity in respect of anything and everything uttered or stated anywhere, everywhere and anytime which in other words means limitless immunity" and that "it appears that for as long as in form there is publicity, the substance of contents are to be disregarded even if the publicity is done indiscriminately". Mr. President, such a characterization of the Secretary-General's determination completely disregards the undisputed facts of this case. The Government of Malaysia ignores that the Commission on Human Rights values publicity as a means to raise consciousness about human rights standards and violations; it ignores that the Commission repeatedly noted with appreciation the Special Rapporteur's determination to achieve wide dissemination of his activities; and it ignores that the Commission endorsed his dealings with the press, including making public statements on investigations within his mandate, when it renewed that mandate.

54. With respect to the substance of the contents of the article "Malaysian Justice on Trial" which appeared in the November 1995 issue of the British magazine *International Commercial Litigation*, the Government of Malaysia seems to ignore that Dato' Param Cumaraswamy had been

interviewed in his official capacity as Special Rapporteur; that the article clearly referred to his official capacity; that the article clearly referred to his United Nations mandate to investigate allegations concerning the independence of the judiciary; and that the article and passages in question clearly related to such allegations. This is explicitly set out in paragraphs 50 and 51 of the United Nations written statement. Contrary to Malaysia's assertion in this regard, it is precisely the substance of the content of the article which led the Secretary-General to determine that the words complained of in the four lawsuits against the Special Rapporteur were spoken in the course of the performance of his mission and within the mandate entrusted to him by the Commission on Human Rights.

55. In Part V of its written comments, the Government of Malaysia addresses the question of the binding force of General Assembly resolutions. Notwithstanding the conclusions reached in this regard, and as quoted in paragraph 5.5 of Malaysia's written comments, General Assembly resolutions "constitute an embodiment of the general views and wishes of the world community". The General Assembly resolutions contained in Dossiers Nos. 106 to 112 reaffirm the Secretary-General's authority with respect to privileges and immunities and appeal to member States to recognize the functional immunities asserted by the Secretary-General. It is submitted that these resolutions would seem to unequivocally demonstrate that the general views and wishes of the international community confirm the position which has been consistently maintained by the United Nations.

56. In Part VI of its written comments, the Government of Malaysia endeavours to establish that recognition of the Secretary-General's exclusive authority to determine whether words or acts are spoken, written or done in the course of the performance of a mission, would constitute a derogation of the sovereign jurisdiction of member States and their national courts. The United Nations respectfully reiterates that calling upon the 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.

57. It is also worth mentioning in this connection that in paragraph 6.15 of its written comments, the Government of Malaysia contends that the Notes Verbales issued by the Secretary-General certifying the Special Rapporteur's immunity from legal process are "juridically considered a nullity" and are "therefore of no effect for Malaysia to comply in issuing the Certificate of the Minister". The United Nations considers Malaysia's conclusions in this regard unacceptable. Moreover, Malaysia's conclusion does not find support among the member States which have submitted written statements and comments. In their written statements, the Governments of Costa Rica, Germany and Sweden supported the United Nations position with regard to Secretary-General's exclusive authority. The United Kingdom and the United States argued that unless there are compelling or powerfully contrary circumstances, the Secretary-General's determination must be given great weight and deference. Such weight and deference are a far cry from Malaysia's characterization of the Secretary-General's certificates as being a nullity having no legal effect.

58. In paragraph 7.8 of its written statement, the Government of Malaysia argues that "even assuming that the Secretary-General has such an authority the question is which, then, will be the authority to determine whether the exclusive authority has been properly exercised, reasonably exercised or exercised in good faith". Malaysia proceeds to conclude that the vesting of such authority solely in one person would establish absolute immunity. The United Nations, in accordance with Section 30 of the Convention has stipulated and consistently maintained that, absent recourse to another agreed mode of settlement, all differences arising out of the interpretation or application of the Convention shall be referred to the advisory jurisdiction of the International Court of Justice, this very court. Accordingly, any member State could question the propriety, reasonableness or good faith of the Secretary-General's determination and/or decision to assert or waive immunity in accordance with the settlement of dispute provisions of Article VIII of the

Convention. As consistently maintained by the United Nations, the Secretary-General's authority is not absolute but is subject to Article VIII of the Convention and can therefore be reviewed by the International Court of Justice. Thus if a member State disagrees with the Secretary-General's decision not to waive immunity and therefore does not wish to give effect to the immunity in its national courts, that member State has an opportunity and maybe even an international obligation to seek recourse through the settlement of dispute provisions provided for in Article VIII of the Convention.

59. In Part II (C) (2) of its written comments, the Government of the Republic of Costa Rica argues that while the Secretary-General's determinations as to whether or not immunity exists may be reviewed by the Court, the Secretary-General's decision to waive or not to waive immunity cannot be so reviewed. The United Nations submit that, in accordance with Section 30 of the Convention, all differences arising out of the interpretation or application of the Convention may be referred to the advisory jurisdiction of the Court, including differences over the Secretary-General's right and duty to waive immunity.

60. In paragraph 4 of its written comments, the Government of the United States of America indicates "a well developed practice under which the judiciary plays a significant role in giving effect to immunities". The United Nations position does not deny national courts a role in giving effect to the privileges and immunities of the Organization, its officials and experts on missions. The United Nations in fact expects national courts to give effect to such privileges and immunities if and when the competent national authorities of member States party to the Convention on the Privileges and Immunities of the United Nations have advised their courts of the fact of the Secretary-General's assertion thereof in a particular case.

61. Paragraphs 5 and 7 of its written comments — in those paragraphs — the Government of the United States also contends that

> "General Convention clearly contemplates that a legitimate difference of opinion between the Secretary-General and a member State could arise, and hence provides in Article VIII, Section 30, for reference of such questions to this Court".

The latter statement echoes the United Nations position; in paragraph 53 of its written statement, the United Nations stated as follows:

> "The Secretary-General acknowledges that cases of conflict may arise as to whether an act was 'official' or whether an official or expert had exceeded his mandate, but the Convention expressly provides for appropriate modes of settlement of private law disputes if the United Nations is a party to such a dispute, or if immunity has not been waived by the Secretary-General, under Article VIII, Section 29; and for the referral of differences between the Organization and its Member States to the advisory jurisdiction of the Court pursuant to Section 30 . . ."

62. The United Nations therefore fully concurs with this interpretation of the Convention and has so indicated in Parts IV and VI of its written statement and in Parts I and II of its written comments. The United Nations has stipulated that the Secretary-General's authority is subject to Article VIII. The United Nations maintains, however, that the Secretary-General's authority is subject *only* to Article VIII. It is not subject to adjudication in national courts.

VI. RESPONSIBILITY FOR BREACH OF OBLIGATIONS

63. Mr. President, as I indicated at the outset and a few moments ago, the United Nations should like to address in some detail the question of the responsibility that breaches of obligations under international law entails. With your permission, Mr. Zacklin will now address this issue before I finally sum up and present our conclusions.

The PRESIDENT: Thank you Mr. Corell. I call upon Mr. Zacklin.

Mr. ZACKLIN: Mr. President, Members of the Court, it is an honour for me to have the opportunity to address the Court, as Mr. Corell has indicated, on the question of the responsibility for breach of obligations as it arises in this request for an advisory opinion.

64. In its written and oral submissions, the United Nations has indicated that it is seeking reparation for the damages sustained by the Government of Malaysia's failure to respect the obligations it undertook by acceding to the Convention. The Government accepts that the question of its liability is dependent upon the advisory opinion of the Court — I refer to its written

comments, in paragraph 9.10 — but it argues that issues relating to responsibility should be resolved separately for two reasons:

A. First, even if the Court upholds the assertion of immunity by the Secretary-General, it is for the Government to determine how to give effect to that immunity and there are "various stages that have to be undertaken, if immunity is established, before Malaysia has to assume responsibility"; and

B. Second, the "injuries" sustained in this case, unlike the *Reparations* case, are not physical but are costs arising out of a civil action instituted by an individual and were not caused by actions of the Government of Malaysia and the United Nations claim for reparation is not a result of a breach of a treaty provision but is rather the result of a difference of opinion on the interpretation of a treaty.

I refer in this context to Malaysia's written comments under paragraphs 9.10, 7.13 and 7.14, respectively.

65. If the Court pleases, Mr. President, I will deal with these points in turn.

A. Malaysia is obligated to implement the advisory opinion

66. With respect to the first point, Malaysia argues that if the Court finds that Malaysia was in breach of her obligations under the Convention, it is for the Government to determine how to rectify that breach and that, somehow, prior to such determination by Malaysia it has no responsibility for the breach until a later date after undefined further "stages" are passed.

67. It is submitted that if the Court finds that Malaysia has breached her obligations, Malaysia must immediately take steps to restore the situation to what it would have been had the Secretary-General's assertion of immunity been given effect in Malaysia. This flows from Section 30 of the Convention, which gives the advisory opinions of this Court a decisive binding character.

B. Claim for reparations

68. Mr. President, I should now like to turn to our second point: that Malaysia is responsible for any damage sustained by the Special Rapporteur, or the United Nations, if the Court finds that Malaysia was in breach of her obligations. Our submission on this aspect of the case is on four points:

(1) The United Nations has the capacity to claim reparation;

(2) The Court has jurisdiction to advise on Malaysia's responsibility to make reparation;

(3) Malaysia's responsibility to make reparations requires it to ensure that the immunity of the Special Rapporteur is respected and to make reparations for the damage proximately flowing from its breach; and

(4) The losses for which reparation is sought by the United Nations are a proximate reasonably foreseeable result of the breach of obligation.

(1) The United Nations has capacity to claim reparation

69. With respect to the first point, that the United Nations has the capacity to claim reparation, I should like to observe the following. The Court, in its Advisory Opinion of 11 April 1949 in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* (*Advisory Opinion, I.C.J. Reports 1949*, at page 174), hereinafter the *Reparations* case, unanimously found that in the event of an agent suffering injury in the performance of his duties the United Nations has the capacity to bring an international claim against both a member State and a non-member State with a view to obtaining reparation in respect of direct damage caused to the United Nations. The Court noted that this means the "damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian" (p. 180).

70. The Court by a majority of eleven votes to four found that the United Nations had the capacity to also bring an international claim to seek reparation due in respect of the indirect

damages caused to its agents or to the persons entitled through them. On this point the Court found that:

> "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 (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that — whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent — he should know that in the performance of his duties he is under the protection of the Organization . . ."
>
> "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." (*Ibid.*, pp. 183-184.)

71. In reaching this conclusion the Court went on to state:

> "The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form'; as was stated by the Permanent Court in its Judgement No. 8 of July 26th, 1927 (Series A., No. 9 p. 21). In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.
>
> Having regard to the foregoing considerations, and to the undeniable right of the Organization to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him." (*Ibid.*, p. 184.)

72. Mr. President, the Secretary-General asks the Court to affirm these principles which are directly applicable in this case. It is quite clear that the Court, in the *Reparations* case, has foreseen precisely the situation which the Special Rapporteur has encountered in the present case. In

performing his mission, it is essential that the Special Rapporteur need not have to rely on any other protection than that of the Organization. He should not have to rely on the protection of his own State or else his independence might well be compromised. Moreover, Malaysia's obligations are undertaken not in the interest of the Special Rapporteur but in that of the United Nations. In claiming reparation based on injury suffered by the Special Rapporteur, the Organization is asserting its own right to secure respect for undertakings, and to demand that its Members shall fulfil the obligations entered into by them towards the Organization. In the case of a breach of these undertakings and obligations, the United Nations has the capacity to claim adequate reparation including the damages suffered by the Special Rapporteur.

73. The United Nations, of course, notes that it is premature to determine the exact *quantum* of liability at this stage. Indeed, we have just been informed by the Special Rapporteur that the courts in Malaysia have fixed the four cases for trial between 2 and 9 February 1999. Obviously, this may lead to further expenses being incurred. However, as noted in the *Reparations* case (at p. 181), the impossibility at this stage to finally quantify the claim does not affect the ability of the Court to advise on the principle of responsibility to make reparation that flows from the fact of breach.

(2) The Court has jurisdiction to advise on Malaysia's responsibility to make reparation

74. With respect to the second point, that the Court has jurisdiction, I should like to refer simply to ECOSOC's decision 1998/297, adopted on 5 August 1998 (Dossier No. 61). By that decision, the Council requested the Court to give its advisory opinion, on a priority basis, *inter alia*, "on the legal obligations of Malaysia in this case". This question thus confers jurisdiction on the Court to advise on the legal obligations of Malaysia to make reparations.

(3) A breach of a treaty obligation involves a duty to make reparations for damage caused by the breach

75. Mr. President, on the third point, that a breach of a treaty obligation involves a duty to make reparations for damage caused by the breach, I have the following observations.

76. The principles of international law which govern the duty of a State to make reparation for damage caused by a breach of its obligations were formulated some 70 years ago in the case concerning *Factory at Chorzów (Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, Claim for Indemnity). In that case, Germany claimed reparations for the taking of a factory at Chorzów by Poland. This taking was found by the Court not to have been in conformity with the Convention Concerning Upper Silesia concluded at Geneva on 15 May 1922 between Germany and Poland (at p. 12). The Court first noted that its jurisdiction was based solely on Article 23 (1) of the 1922 Convention which provided that if "differences of opinion" arose between Germany and Poland on the interpretation of Articles 6 to 22 of the Convention they were to be submitted to the Court. The Court then stated:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations which may be due by reason of failure to apply a convention, are consequently differences relating to its interpretation." (*Ibid.*, p. 21.)

The Court then concluded as follows:

> "An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes." (*Ibid.*, p. 25.)

77. The Government of Malaysia argues that the United Nations is not in the situation of a State espousing the claim of one of its nationals and thus the extension of the principle in the *Reparations* case requires "due consideration". I refer to the written comments in paragraph 7.14. The United Nations submits that there is no reason why these principles of State responsibility

should not apply to the bringing of a claim for reparations by the United Nations. Indeed the *Factory at Chorzów* case was specifically cited with approval in the *Reparations* case.

78. In its written comments, however, Malaysia makes several points which she submits preclude the doctrine of responsibility established in the *Reparations* case to make reparation to the United Nations. These arguments relate to (1) the type of loss; (2) the cause of loss; and (3) the nature of the breach.

Type of loss

79. Mr. President, with respect to the type of loss, the Government of Malaysia in her written comments argues that the *Reparations* case is not applicable because to

> "hold a member State responsible for the liabilities incurred as a result of civil proceedings instituted in this case by a private individual is a rule without proper legal basis and is a strain on the rule of construction of necessary intendment in the *Reparations* case" (para. 7.24).

In this respect, Malaysia seems to suggest that the Court should take a "conservative" view of the Secretary-General's authority and thus not assess damages because his decision can involve the responsibility of a State (paras. 7.25 and 7.26).

80. This argument is without merit. The costs incurred were approximate, and reasonably foreseeable, consequence of the litigation. The Government made no effort to mitigate such loss, either through an intervention or through the appearance of their counsel to address the courts on the immunity of the Special Rapporteur. The Government did not seek to have its difference with the United Nations on the issue of immunity dealt with according to Article VIII of the Convention; it simply permitted the litigation to continue and thereby engaged its responsibility to make reparations for the costs incurred because of the litigation. Nor is there any reason in logic why reparations sought by an international intergovernmental organization should be confined to reparations for injury or death to its agents.

Cause of loss

81. Mr. President, with respect to the cause of the loss, Malaysia argues that the Court should not assess reparation because the financial loss was not caused by a civil suit that Malaysia herself initiated but was caused by a civil suit brought by private parties, over whom the Government has no control (written comments of Malaysia, para. 7.13). The Government also emphasizes that the Malaysian judiciary is independent and so the Government cannot direct the courts to accept the assertion of immunity without investigation (written statement, paras. 7.4, 7.12 and 8.4).

82. I should first note that the losses arose because the Government did not fulfil its obligations to ensure that the Secretary-General's assertion of immunity was properly presented to the Court *as a statement of fact* supported by the Government. The Government failed to intervene, or to take further action, once it was advised that its certificate was defective. In addition to incorrectly quoting Section 22 *(b)* of the Convention, the Government also *failed to state as a fact* that the Secretary-General had determined that the Special Rapporteur was immune from suit. As a result, the Government breached its obligation to use all reasonable efforts to ensure respect for the privileges and immunities of the Organization. The United Nations is not asserting that the Government can or should interfere with the judiciary; what it does submit is that, under the Convention, the Government of Malaysia has a legal obligation to give effect to the Secretary-General's assertion of immunity or to seek to resolve any differences relating thereto in accordance with Article VIII of the Convention.

Nature of breach

83. Mr. President, with respect to the nature of the breach, Malaysia submits that a breach of a treaty is

> "conduct consisting of an action or omission attributable to a State or to an international organization under international law, that State or organization being a party to the treaty in force and the conduct being incompatible with an obligation governed in that treaty" (written comments, para. 7.15).

However, Malaysia argues that her actions do not constitute a breach of the Convention since Malaysia fulfilled her obligations by enacting legislation to give the Convention force of law in Malaysia and by issuing a certificate. The Government argues that there is thus only a difference "in interpretation of the provisions" of the Convention, rather than a breach, and this "difference of opinion" does not engage financial responsibility (written comments, para. 7.21).

84. The United Nations would first of all note that it has no quarrel with the definition of breach of obligation, a definition formulated by Rosenne and cited by Malaysia, being applied to this case. However, the United Nations submits that the issue of breach of an obligation is precisely the issue before the Court, which is asked to advise on "the legal *obligations* of Malaysia in this case". It is the view of the United Nations, and all Governments who have submitted statements except Malaysia, that the assertion of immunity by the Secretary-General was proper; if so, Malaysia was under a legal *obligation* to give effect to that immunity. Even Malaysia agrees that "the actions by the judiciary does not relieve the State from responsibility" (written comments para. 7.21).

85. Malaysia also argues that the issue of liability should be treated separately from breach because if "immunity is maintained it is for the Government of Malaysia to determine, within the framework of the Constitution of Malaysia, the manner in which such immunity is to be enforced" (written statement, para. 9.10). It is submitted that while this statement doubtless reflects the process that the Government of Malaysia must undertake domestically in order to have the immunity of the Special Rapporteur respected, it does not provide a reason in international law for the Court not to address the principle of responsibility to make reparation.

(4) Losses for which reparation must be made

86. Mr. President, as far as the losses for which reparation must be made, I should like to emphasize that the breach of the Convention by Malaysia was a failure to ensure that the immunity of the Special Rapporteur was respected. As noted in paragraph 64 of our written statement the

damage that flows from this breach is evident: costs incurred in the defence of the legal proceedings in the Malaysian courts and any costs taxed to the Special Rapporteur by those courts and for which he is legally responsible in Malaysia.

87. In the case concerning *Factory at Chorzów (Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No.17* , p. 47) the Permanent Court stated:

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

88. Malaysia, however, suggests that the "question of costs expenses or damages which are actually incurred or paid out by the Special Rapporteur, or by the United Nations to him or on his behalf are to be resolved separately . . . since the alleged breach has arisen over differences regarding a question of the interpretation of a treaty it should not be made retroactive to the present case" (para. 7.24).

89. The United Nations submits that it is for this Court to ascertain whether the conduct of Malaysia constituted a breach of its obligations under the Convention; if Malaysia breached those obligations it must annul or dismiss the judgments and all on-going proceedings, against the Special Rapporteur and make reparations for damages caused by that breach *from the date of breach*, and not from the date of the Court's Advisory Opinion. There is no question of retroactivity; the issue is Malaysia's responsibility for her actions.

90. Mr. President, this concludes our remarks with respect to responsibility for breach of obligations. With your permission, Mr. Corell will now sum up and present our conclusions in the present case.

The PRESIDENT: Thank you Mr. Zacklin. Mr. Corell how long do you anticipate your summary will be?

Mr. CORELL: Mr. President, five minutes. I will be very brief.

The PRESIDENT: Please proceed.

Mr. CORELL:

VII. CONCLUSIONS

91. Mr. President, the foregoing considerations confirm the conclusions reached by the United Nations, and they could be summarized in the following five points:

First, 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.

Second, that such matters cannot be determined by, or adjudicated in, the national courts of the member States parties to the Convention. 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.

Third, that when cases of conflict may arise as to whether an act was "official" or whether an expert had exceeded his or her mandate, the Convention expressly provides for appropriate modes of settlement of disputes with aggrieved parties, if immunity has not been waived by the Secretary-General, in its Article VIII, Section 29, and for the settlement of differences with member States over the interpretation or application of the Convention, in its Section 30. These are the appropriate procedures for settlement, not the adjudication of the Secretary-General's determination by national courts.

Fourth, unless it seeks the remedies provided for in Article VIII, Sections 29 and 30, of the Convention, when the Secretary-General maintains the immunity from legal process of an expert

on mission for the United Nations, a Government of a member State party to the Convention has an obligation, under Section 34 of the Convention to take whatever measures are necessary to give effect to that immunity. If it fails or refuses to do so, the Government concerned is in breach of its obligations under the Convention and is ultimately responsible for any costs, expenses or damages arising out of the proceedings in its national courts.

Fifth, unless the Secretary-General's exclusive authority in this regard is upheld, the exclusively international character and the functional independence of officials and experts which Articles 100 and 105 of the Charter and the Convention aim to protect will be seriously undermined. Moreover, if national courts of member States parties to the Convention are allowed to adjudicate the privileges and immunities of the United Nations and its officials and experts on mission, the meaning of Sections 20, 23 and 30 of the Convention would be seriously called into question.

92. Mr. President, these general conclusions, if applied to the circumstances of the present case, would compel the following specific three conclusions.

First, that to the extent the Secretary-General had determined that the words giving rise to the legal proceedings in Malaysia's national courts were spoken by Dato' Param Cumaraswamy in his official capacity as Special Rapporteur in the course of the performance of his mission for the United Nations and that he was therefore immune from legal process with respect thereto, the Government of Malaysia had an obligation to give effect to his immunity from legal process or, alternatively, to invoke the settlement of dispute provisions of Article VIII of the Convention.

Second, by refusing to adequately inform its courts of the Secretary-General's determination of the scope and applicability of the Special Rapporteur's immunity from legal process and, in the alternative, to ensure that all judgments and proceedings are stayed pending the resolution of the difference arising between it and the United Nations, the Government of Malaysia failed to respect its obligation, under Section 34 of the Convention, to give effect to Article VI, Section 22 *(b)*, thereof.

Third, that the Government of Malaysia is ultimately responsible for any costs, expenses or damages which are actually incurred or paid out by the Special Rapporteur, or by the United Nations to him or on his behalf.

93. Mr. President, as I said at the very beginning of my intervention, the advisory opinion of the Court in this matter will have far reaching consequences.

94. Over the past half century, the International Court of Justice has, through its advisory jurisdiction, played a significant role in the development of the law of international institutions. Mention may be made *inter alia* of the Advisory Opinions regarding Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter); the Competence of the General Assembly for the Admission of a State to the United Nations; Effects of Awards of Compensation Made by the United Nations Administrative Tribunal; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter); and last but not least Reparations for Injuries Suffered in the Service of the United Nations to which ample reference has been made in our statements today.

95. The question before the Court relates to a fundamental principle of the law of international immunities; it is not a question solely of concern to one Special Rapporteur or even to one class of Special Rapporteurs. It is a question which relates to the independent functioning of any agent of the Organization whether an official or an expert on mission. Furthermore, because the twin pillars of the law of international immunities — the General Convention of 1946 and the Specialized Agencies Convention of 1947 — are virtually identical in content, the practical significance of this opinion will be very wide indeed.

96. Mr. President, while the Secretary-General would have wished to resolve this issue without resort to the advisory jurisdiction of the Court, despite his best efforts he was unable to do so. In requesting this advisory opinion, the Economic and Social Council has placed into your hands the responsibility of deciding this matter with decisive effect.

97. In our written submissions and in our oral presentation today we have provided the Court with our arguments based on the law and practice of the Organization — arguments which we believe will enable the Court to reaffirm the competence of the Secretary-General of the United Nations as the guardian of the privileges and immunities and the interests of the Organization.

98. I do hope, Mr. President, that these remarks will assist the Court in rendering the advisory opinion requested by the Economic and Social Council. Thank you.

The PRESIDENT: Thank you so much Mr. Corell and Mr. Zacklin. The Court will now adjourn for 15 minutes and then resume.

The Court adjourned from 11.55 a.m. to 12.10 p.m.

The PRESIDENT: Please be seated. May I call on the distinguished Ambassador of Costa Rica to the Netherlands.

Mr. CONEJO:

Introduction

1. Mr. President, Mr. Vice-President, distinguished Members of the Court. As I am the Ambassador of the Republic of Costa Rica to the Kingdom of the Netherlands and the representative of the Republic of Costa Rica in this case, I am very honoured to address this distinguished Court today.

2. The Republic of Costa Rica has long recognized the fundamental importance that the respect for human rights has for democracy, peaceful development and stability. The promotion of human rights therefore constitutes a long-standing priority of the national policy of Costa Rica, a peace-loving country with a long history of democracy now celebrating the fiftieth anniversary of the abolition of its armed forces as a permanent institution. This is evidenced not only by Costa Rica's active role in the United Nations, of which it is a founding Member and where it currently

occupies a seat on the Security Council, but also by the fact that distinguished nationals of Costa Rica have devoted years of service, especially to the Commission on Human Rights, including service as chairman and special rapporteur. In this regard I refer in particular to the service as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of Mrs. Elizabeth Odio Benito, who has just resumed her duties as Second Vice-President of the Republic, following completion last month of her service as judge of the International Criminal Tribunal for the former Yugoslavia in The Hague.

3. Thus it is on the basis of both its own experience and its active participation in the support of international human rights that the Republic of Costa Rica attaches great importance to the question submitted to the Court for an advisory opinion. The response of this Court is crucial to the functioning of the United Nations global system of implementing and monitoring human rights. The Special Rapporteurs of the United Nations Commission on Human Rights constitute one of the most important means available to the world community to ensure that States are accountable in the area of human rights. As has been stated repeatedly during the written proceedings, and as the United Nations High Commissioner for Human Rights herself has declared, and reiterating the quote of Mr. Corell this morning, "Threatening the immunity of one [special rapporteur] constitutes an attack on the entire system and institution of the United Nations [human rights] special procedures and mechanisms."

4. The Republic of Costa Rica notes that just a few days hence the fiftieth anniversary of the proclamation of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948 will be celebrated. Especially at this moment, therefore, Costa Rica feels itself compelled to urge this Court to act unambiguously and with resolve to safeguard one of the foundations of the encouraging progress achieved in these last 50 years in the global implementation of human rights.

5. Thank you, Mr. President, Mr. Vice-President and other distinguished Members of the Court, for your kind attention, and I now introduce Mr. Charles N. Brower of White & Case LLP

in Washington, D.C., who will address with a specificity the important legal questions before the Court on behalf of the Government of Costa Rica.

The PRESIDENT: Thank you, Mr. Ambassador. I call now on Mr. Brower.

Mr. BROWER:

6. Mr. President, Mr. Vice-President and distinguished Members of the Court. It is a great honour and a privilege for me once again to appear before you. I take special pleasure in doing so on behalf of the Republic of Costa Rica, which is making a signal contribution here as the sole participant in these proceedings (other than the actual parties to the difference being addressed) from outside Europe and North America.

7. Rather than reiterating arguments already set forth in Costa Rica's written submissions to the Court, which I reaffirm by reference, I will concentrate here on those points that Costa Rica perceives still require attention at the conclusion of the written phase of the proceedings.

8. I will address first the issue of why the Court may and should opine on whether the Special Rapporteur is indeed immune from legal process of every kind.

The request for an advisory opinion specifically asks the Court to decide whether the Special Rapporteur is immune from legal process of every kind

9. At the outset, it is appropriate, once again, to recall the objects of ECOSOC's request for an advisory opinion. They are, first, the "legal question of the applicability of the [General Convention] *in the case of* . . . [the] Special Rapporteur . . . *taking into account the circumstances* set out in paragraphs 1 to 15 of the note by the Secretary-General", and, second, "the legal obligations of Malaysia in this case". A perusal of the written statements and comments submitted to the Court reveals that none of the participants in these proceedings has opposed the notion that the issue of whether the Special Rapporteur is immune from legal process of every kind in this case is within the scope of the Court's jurisdiction in this proceeding. This is so, I respectfully submit, notwithstanding the puzzling statement by Malaysia, at page 2 of its written comments, of "the

Questions that have been referred to the Court" which statement omits any reference to this issue. Quite obviously that statement is drawn, be it noted, not from the questions in fact presented to the Court by ECOSOC in its Decision 1998/297 of 5 August 1998 that gave rise to this proceeding, but instead from the questions as they were proposed in paragraph 22 of the Secretary-General's note. While ECOSOC's decision incorporated by reference "the circumstances set out in paragraphs 1 to 15" of that note, it did not adopt the statement of issues set forth in paragraph 22 thereof.

10. Malaysia suggests that the determination of immunity requires consideration of facts and, therefore, that the Court must refrain from addressing the Special Rapporteur's entitlement to immunity, which constitutes the chief question raised by ECOSOC's request for an advisory opinion. In essence, Malaysia suggests that it would not be proper for the Court to consider facts in the context of an advisory opinion. Malaysia, however, confuses adjudication of contested facts on the one hand with consideration of undisputed facts on the other. A determination of immunity may sometimes require adjudication of contested facts, and Costa Rica recognizes that the adjudication of contested facts may be inappropriate in the context of an advisory opinion. This case does not, however, require the Court to resolve disputed facts. To the contrary, none of the Parties to these proceedings has identified any disputed material fact, and none would appear to exist. Instead, these proceedings require the Court to perform the conventional legal task of deciding how the language of the General Convention applies to the undisputed circumstances of the Special Rapporteur.

11. Such consideration of undisputed facts not only is proper, but in fact is essential to the task at hand. As Judge Oda stated in paragraph 22 of his separate opinion in *Mazilu*, "it is not . . . possible to determine the *applicability* of [Article VI, Section 22 of the General Convention] to a concrete case without adequate reference to *the way in which it may apply*". Moreover, ECOSOC's request for an advisory opinion specifically asks the Court to *"tak[e] into account the circumstances"* of this case, and thus makes it clear that that request was drafted with *Mazilu* in mind and hence with the intention that the Court consider the underlying factual circumstances in opining on whether the Special Rapporteur is immune from legal process of every kind. In short,

the Court's jurisdiction to rule on the Special Rapporteur's immunity could not have been more clearly invoked.

12. Mr. President, Mr. Vice-President, distinguished Members of the Court. I will now turn to the reasons why the Court should find that the Special Rapporteur is indeed immune from legal process of every kind.

The Special Rapporteur is immune from legal process of every kind

13. In its written submissions to this Court, Costa Rica already has pointed to the long-standing and accepted practice of Special Rapporteurs, who regularly disseminate information to the press and public as one of the means of carrying out their mandate to promote increased compliance with human rights standards. Costa Rica also has established that the Commission on Human Rights' actual practice as it relates to Mr. Cumaraswamy's specific mission makes clear that in his particular case statements to the media repeatedly have been approved as a practice appropriate to such mandate. Doubtless it is in reliance on this record of approvals, both general, or generic, and specific, that the United Nations has confirmed, at page 5, paragraph 14, of its written comments, that the Special Rapporteur indeed acted within the confines of his mandate by stating that "the United Nations had *formally ratified* the words of its expert on mission". Any doubt possibly remaining as regards the Organization's approval of the specific statements made by the Special Rapporteur to *International Commercial Litigation* should be dispelled by such formal expression of ratification. The Court will, I think, recognize that such formal ratification constitutes a weightier and more definite sign of approval than the release of statements by the Special Rapporteur on United Nations stationery, which Malaysia itself describes as significant evidence of official approval.

14. The fact is that all participants in this proceeding, save Malaysia, concur in concluding that the Special Rapporteur is immune. For its part, Malaysia does not conclude that he is not immune; rather it pleads the authority of its judicial system to determine the issue at length.

15. Particularly given that it does not expressly acknowledge immunity as an issue before the Court, and that it disclaims any position on the issue, it is somewhat surprising to see Malaysia's statement at page 14, paragraph 4.13, of its written comments that "if . . . the interpretation rendered by . . . the Republic of Costa Rica . . . is accepted, it would appear to accord the expert immunity in respect of anything and everything uttered or stated anywhere, everywhere and anytime which in other words means limitless immunity". In any event, such statement is misguided as it entirely ignores the legal significance of the aforementioned approvals and ratification. Just as Malaysia itself has stated, "[e]xperts are not staff", and they are, for this reason, quite free to utilize public appearances and media contacts in the performance of their mandates. This is evidenced in the consistent practice of Special Rapporteurs, as noted in detail in Costa Rica's written submissions to this Court, to issue their own statements to the media which only subsequently are reissued or reported on by press releases of the United Nations itself. Malaysia's conclusion that "as long as in form there is publicity, the substance of contents are to be disregarded even if the publicity is done indiscriminately" accordingly is without any basis.

16. Similarly without foundation is Malaysia's conclusion at page 26, paragraph 5.18, of its comments, that the view expressed by Costa Rica "puts any Special Rapporteur in an unassailable position". To the contrary, a Special Rapporteur remains "assailable" outside of the scope of his immunity, which is limited by the scope of his mandate as defined by the United Nations: the Secretary-General does not assert immunity for statements and actions not relevant to an expert's mission; the Secretary-General does in fact waive the immunities of experts when a waiver may be accomplished in accordance with Article VI, Section 23, of the General Convention; Article VIII, Section 30, of the General Convention preserves the sovereign prerogative of Malaysia to challenge the asserted immunity of the Special Rapporteur in proceedings properly brought before this Court; and, notwithstanding the Special Rapporteur's immunity, the United Nations is willing to afford the plaintiffs in the underlying litigation a remedy as required by Section 29 of the General Convention.

17. Approaching the point differently, one may grant, as Malaysia suggests, at page 29, paragraph 5.24, of its written comments, that in a particular case "such modes of publicising materials to be compiled for reports may not necessarily be in the interests of the United Nations", but any determination of such an issue is for the United Nations to make when appointing a Special Rapporteur, continuing his mandate and noting his reports with approval (or for the Secretary-General to make when exercising "the right and duty" under Section 23 of the Convention to waive immunity). Thus Malaysia's further reference, at page 29, paragraph 5.24, of its written comments, to United Nations human rights mechanisms as potentially being "a cloak and dagger situation to advance personal interests" similarly ignores the legal relevance of the exercise by the United Nations, in this case by the Commission on Human Rights, of its supervisory and oversight functions as regards special rapporteurs. Moreover, given the Special Rapporteur's mandate in this case to enquire into the independence of judges and lawyers, "words which give States 'bad publicity' or put persons to mistrust a judicial system", and which Malaysia, at page 29, paragraph 5.25, of its comments, implicitly doubts "were uttered . . . for the performance of his mission", are patently within the scope of the Special Rapporteur's mission as it has been precisely his duty to uncover instances in which the independence of the judiciary appears to be prejudiced.

18. For these reasons, and for the reasons stated in Costa Rica's written submissions to this Court but not reiterated here, the Court should find that the Special Rapporteur is indeed immune from legal process of every kind.

19. Mr. President, Mr. Vice-President and distinguished Members of the Court. I now turn to the question of Malaysia's obligations in this case, in particular the reasons why Article VI, Section 22, of the General Convention requires States parties to accord "immunity from legal process of every kind" where such immunity exists. Again, I will refrain to the extent possible from reiterating the arguments already advanced by Costa Rica in the written proceedings.

Article VI, Section 22, of the General Convention requires States parties to accord "immunity from legal process of every kind" where it exists

20. When we come to the issue of the implementation of the Special Rapporteur's immunity, the opinions of the participants in this proceeding divide in so far as the precise means are concerned, yet not, save Malaysia, as regards the result. Turning it around, and putting it more precisely, while all those who have addressed the issue of Malaysia's obligations, other than Malaysia itself, unite in concluding that Malaysia has failed to comply with the General Convention's requirement that the Special Rapporteur be accorded "immunity from legal process of every kind", they differ as to the technique required for compliance: Costa Rica, joined by Germany and Sweden, supports the Secretary-General's view that his certification must be given conclusive effect in national courts, while the United Kingdom and the United States, for example, view themselves as being in compliance with the Convention when their courts either accord the Secretary-General's determination great weight and deference, or follow it absent unspecified compelling or powerful circumstances. The fact that in 50 years the dispute resolution clause of Section 30 of the General Convention has been invoked only twice indicates the general absence of any "difference" arising between the rather frequent determinations of immunity by the Secretary-General and the views of national courts. It also demonstrates broad acceptance by States of the Secretary-General's consistent practice as documented in the dossier.

21. Thus, while adhering to its view that giving the Secretary-General's certification of immunity conclusive effect in national courts absolutely, and most surely, results in compliance with Section 22 of the General Convention, Costa Rica suggests that, conceptually speaking, the obligation of the General Convention, in the end, is an obligation to achieve an objective, an obligation of result, and not necessarily one to employ a specific means. That is to say, a State party to that Convention must in fact act so as to ensure "the immunity from legal process of every kind". It thus must insulate a Special Rapporteur as to whom immunity is invoked by the Secretary-General from any "burden of litigation", including any "trial" regarding his entitlement

to immunity. So long as that is achieved, by whatever means, the State party has complied with the General Convention.

22. As soon, however, as it appears that a State party cannot assure this result for an expert certified by the Secretary-General to be immune, that State party is under an obligation to desist and to seek resort to Section 30 of the General Convention to resolve the "difference". It may not itself proceed to adjudicate immunity, unless freed to do so as a result of a Section 30 proceeding, because, as the United Nations, at page 9, paragraph 25, of its written comments has stated, "[t]he adjudication of an immunity from legal process would be tantamount to a denial of that very immunity".

23. This view of the General Convention would provide a workable balance between the legitimate interest of the United Nations to protect its experts to the extent necessary in the performance of their mandates and the sovereignty of States parties to the General Convention. It should be obvious that, in order for this balanced mechanism to function, as pointed out by the United Nations, at page 7, paragraph 18, of its written comments, the State party's obligations must include

> "[a]t the very least . . . 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".

The statement at page 5, paragraph 3.3, of Malaysia's written comments that the Government of Malaysia "could [not] intercede on behalf of the Special Rapporteur as he is not the agent of the Government of Malaysia" thus ignores Malaysia's international legal obligation to insulate the Special Rapporteur from a "trial" or any other "burden of litigation". Malaysia's further argument, at pages 52 to 54 of its written comments, implicitly likening the Secretary-General's certification of immunity to a self-judging reservation to the acceptance of the compulsory jurisdiction of this Court, and concluding that it is therefore invalid, equally misses the point. As demonstrated by the

existence of a dispute settlement mechanism in Section 30 of the General Convention, Malaysia is in no way obligated to accept as finally binding the Secretary-General's determination of immunity, which therefore does not constitute a unilateral determination of Malaysia's obligations. Indeed, Section 30 of the General Convention presupposes the potential for a "difference" to arise, in which case referral to this Court may be sought.

24. In this context, the United Nations unequivocal statement at page 6, paragraph 15, of its written comments that in its view "Section 29 (b) of the General Convention could be made applicable, *mutatis mutandis*, to experts on mission who enjoy immunity" deserves particular mention because it emphasizes that Article VIII of the General Convention provides a complete dispute settlement system and thus removes any doubt that initially respecting immunity in national courts, where it has been certified by the Secretary-General, would not impede the course of justice.

25. Here I should express on behalf of Costa Rica its recognition and appreciation of the view expressed by the United States, at page 5 of its written comments, that once this Court finds that Mr. Cumaraswamy is immune, it need not, in order to answer fully ECOSOC's request, address the issue of exactly how Malaysia should have handled the case procedurally. I would like to stress that this takes, as Costa Rica sees it, an artificially narrow view of that request. While the "difference" between the United Nations and Malaysia, of course, technically is resolvable without the Court addressing that issue, ECOSOC's request clearly invites the Court to proceed further. Costa Rica strongly urges this Court to rule on the issue I have just discussed, as a legitimate act of judicial statesmanship in support of international human rights, and to better ensure that the next 50 years also will see no more than two cases, hopefully none, here involving Section 22 of the General Convention.

Malaysia is obligated to compensate for all costs, expenses, losses, damages or injury caused to the Special Rapporteur by its non-compliance with the General Convention

26. Finally, Malaysia must make good all costs, expenses, losses, damages or injury resulting to the Special Rapporteur from its failure to meet its obligation to respect his immunity as required by the General Convention.

27. The fact that the *Reparations* case involved personal injuries, rather than strictly financial ones, is a factual distinction without legal relevance. In addition, there is no reason that the Court's binding advisory opinion in this case should have any less effect as regards the consequences of Malaysia's breach than it does as regards the existence thereof. That is to say, there is nothing unacceptably retroactive about either aspect of this Court's decision in this case.

Final Submissions

28. Mr. President, Mr. Vice-President and distinguished Members of the Court. For the reasons given in its written submissions as well as for the reasons just stated in this sitting, Costa Rica submits that the Court should find that Article VI, Section 22, applies in the case of Mr. Cumaraswamy as Special Rapporteur of the Commission on Human Rights to the words and acts attributed to him in the article entitled "Malaysian Justice on Trial" that appeared in the November 1995 issue of *International Commercial Litigation*. The Court should decide further that as a result the Special Rapporteur is immune from legal process of every kind in regard to those words and acts, and hence that Malaysia's legal obligation in this case is to accord him immunity from legal process of every kind. In addition, the Court should decide that Malaysia must compensate for all costs, expenses, losses, damages or injury, including all court-ordered costs and legal fees, incurred by Mr. Cumaraswamy as a result of having to defend himself in Malaysian courts. Finally, and for the future, the Court should decide that Malaysia must conform its legislation to the General Convention in so far as it presently deviates from it.

29. Mr. President, Mr. Vice-President and distinguished Members of the Court. I thank you for your attention and for your consideration of these arguments.

The PRESIDENT: Thank you Mr. Brower. The Court will now adjourn until tomorrow morning. Thank you.

The Court rose at 12.50 p.m.