CR 98/16

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1998

Public sitting

held on Tuesday 8 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 mardi 8 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 Chambers, Malaysia,

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

Mrs. Suryna bt Ali, Federal Counsel, Advisory and International Law Division, Attorney General's Chambers, Malaysia,

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 Malaisie 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, membre du cabinet du ministre de la justice, Malaisie,

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

Mme Suryna bt Ali, conseil fédéral, division des affaires juridiques et du droit international du ministère de la justice, cabinet du ministre de la justice, Malaisie,

Miss Farahana bt Rabidin, Federal Counsel, Advisory and International Law Division, Attorney General's Chambers, Malaysia,

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

Mme Farahana bt Rabidin, conseil fédéral, division des affaires juridiques et du droit international du ministère de la justice, cabinet du ministre de la justice, Malaisie,

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

The PRESIDENT: Please be seated. The hearings are open. I call upon the distinguished Legal Adviser of the Foreign Ministry of Italy, Ambassador Leanza.

M. LEANZA :

Monsieur le président, Madame et Messieurs les juges de la Cour,

C'est pour moi un grand honneur de vous soumettre au nom du Gouvernement italien, quelques considérations essentielles sur le problème qui constitue l'objet de la procédure en cours.

Cette procédure dérive d'un différend entre l'Organisation des Nations Unies et le Gouvernement de la Malaisie portant sur l'applicabilité des règles sur l'immunité de la juridiction à M. Dato' Param Cumaraswamy, rapporteur spécial de la Commission des Nations Unies sur les droits de l'homme, relativement à la question de l'indépendance des juges et des avocats; différend à trancher aux termes de la section 30 (art. VIII) de la convention sur les privilèges et les immunités des Nations Unies de 1946 (dorénavant convention générale).

Le Gouvernement italien est intéressé à ce différend et à sa solution parce qu'il est conscient que seulement un fonctionnement physiologique de l'ordre international peut assurer un développement pacifique des relations interétatiques.

Ceci est le but de l'Organisation des Nations Unies, qui vise à favoriser la naissance et la consolidation des conditions grâce auxquelles la justice et le respect des obligations découlant des traités et des autres sources du droit international peuvent être gardés.

Le droit international contemporain n'impose plus seulement aux Etats des obligations concernant le déroulement de leurs relations réciproques mais aussi l'obligation de conformer les systèmes juridiques nationaux à des standards communs qui assurent le plein respect des droits de l'homme et des libertés fondamentales. Tout cela gagne une valeur morale et juridique particulièrement profonde, en tenant compte du cinquantenaire de la Déclaration universelle des droit de l'homme que nous allons célébrer le 10 décembre prochain.

Conscient de ses responsabilités pour la réalisation de ces buts, le Gouvernement italien a cru que c'était son devoir de participer à cette procédure, en déposant ses observations écrites dans le délai fixé du 7 octobre, et il désire donner maintenant son exposé oral.

Monsieur le président, Madame et Messieurs de la Cour.

1. La décision 297 adoptée par consensus le 5 août 1998 par le Conseil économique et social a posé à cette illustre Cour deux questions juridiques distinctes. La première consiste à vérifier si la section 22, article VI, de la convention générale, est applicable au cas de M. Cumaraswamy, rapporteur spécial de la Commission des droits de l'homme chargé des problèmes concernant l'indépendance des juges et des avocats. La deuxième, à déterminer quelles sont les obligations qui incombent à la Malaisie, au cas où la réponse à la première question serait positive.

La première question inclut de nombreux aspects qui se traduisent en autant de problèmes juridiques qui exigent une solution correcte pour que la question posée puisse avoir une réponse satisfaisante. Il faut avant tout établir si la relation entre le rapporteur spécial et l'Organisation des Nations Unies, matérialisée dans les tâches qui lui ont été confiées en tant que rapporteur spécial de la Commission des droits de l'homme, est telle qu'elle lui confère l'immunité ou en fait un bénéficiaire des situations d'immunité prévues par la convention générale.

On sait que la convention distingue trois positions juridiques auxquelles elle rattache, selon des modes et mesures différentes, des situations d'immunité. La première est celle des représentants des Etats Membres auprès des organes principaux ou subsidiaires des Nations Unies ou auprès des conférences convoquées par les Nations Unies. Les immunités des représentants des Etats sont prévues par l'article VI de la convention, sections 11 à 16. Il est important de rappeler que la section 15 pose une restriction qui n'a pas son parallèle dans les autres positions juridiques conférant l'immunité, lorsqu'elle exclut que les dispositions en la matière soient applicables aux relations entre le représentant d'un Etat Membre et les autorités de l'Etat dont il est ressortissant ou qui l'a désigné comme son représentant. On signale notamment que, M. Cumaraswamy ayant la nationalité malaisienne, il invoque dans le cas d'espèce l'immunité non pas en sa qualité de

représentant de la Malaisie, mais, comme on l'a déjà mentionné, en tant que rapporteur spécial de la Commission des droits de l'homme, à savoir en raison d'une mission spécifique qui lui a été confiée non pas pour des raisons inhérentes à sa nationalité mais pour ses qualités personnelles et ses connaissances, qui le rendaient spécialement apte à rapporter sur l'indépendance des organes de justice et des avocats. Ceci prouve que la position du rapporteur spécial n'est aucunement comparable avec celle d'un représentant d'Etat, de la Malaisie notamment. Par conséquent, les restrictions établies par la section 15 que nous venons de mentionner ne sont pas applicables à son égard.

La deuxième position qui, selon la convention générale, confère l'immunité est celle de fonctionnaire de l'Organisation des Nations Unies. En cette matière et notamment en ce qui concerne l'extension des privilèges et des immunités des fonctionnaires de cette Organisation, c'est l'article V de la convention générale qui dispose, en particulier les sections 17 à 21. Evidemment, ce n'est pas dans cette qualité que M. Cumaraswamy peut être considéré comme bénéficiaire d'immunité : comme nous l'avons plusieurs fois mentionné, dans le cas d'espèce ce qui relève c'est exclusivement le fait qu'une mission *ad hoc* lui ait été confiée, consistant dans la préparation d'un rapport pour la Commission des droits de l'homme.

La troisième position conférant l'immunité est celle des experts autres que les fonctionnaires chargés de missions par l'Organisation, auxquels est applicable la section 22 (article VI de la convention générale), expressément mentionnée dans la requête d'avis adressée par le Conseil économique et social à cette illustre Cour. En la matière, on ne peut pas se passer de l'important précédent de l'avis consultatif du 15 décembre 1989 sur l'affaire *Mazilu* (*C.I.J. Recueil 1989,* p. 176 et suiv.). Dans cet avis, la Cour a explicitement déclaré que la section 22 de la convention générale :

> «est applicable aux personnes (autres que les fonctionnaires de l'Organisation des Nations Unies) auxquelles une mission a été confiée par l'Organisation et qui sont de ce fait en droit de bénéficier des privilèges et immunités prévus par ce texte pour exercer leurs fonctions en toute indépendance» (par. 52).

Dans ledit prononcé, la Cour a interprété avec une précision philologique la notion de mission, en soulignant que la portée de ce terme est plus ample que celle qui lui est attribuée dans le langage courant, et en affirmant notamment que la notion de mission d'étude y était incluse (par. 55); par conséquent, les personnes chargées par l'Organisation d'effectuer une étude pour son compte et en toute indépendance «doivent être considérées comme experts en mission au sens de la section 22».

Pas de doute que pour les raisons sus-visées et compte tenu de la teneur du mandat qui lui a été confié, M. Cumaraswamy doit être considéré comme expert en mission pour le compte de l'Organisation des Nations Unies, et qu'il a donc le droit, au moins en principe, de jouir des privilèges et des immunités énumérés aux lettres *a)* à *f)* de la section 22.

Monsieur le président, Madame et Messieurs les juges de la Cour,

2. Au vu de ces dernières dispositions il faut donc établir la portée objective de ladite immunité, c'est-à-dire si les faits dont sont nés les procédures internes qui se sont déroulées ou qui sont en cours devant les tribunaux malaisiens contre M. Cumaraswamy doivent être considérés comme couverts par l'immunité. Nous rappelons en particulier, aux fins de la réponse à donner au problème que nous venons d'énoncer, que le libellé de la lettre *b)*, section 22 précitée, en disposant que les actes accomplis par les experts au cours de leur mission sont couverts par l'immunité, inclut expressément dans la notion d'actes les paroles et les écrits respectivement prononcées ou rédigés par les experts. Il faut donc retenir que sont couverts par l'immunité tous les écrits que l'expert chargé d'une mission donnée a rédigés, ou les paroles qu'il a prononcées pour déclarer des éléments de fait, ou pour exprimer des appréciations ou des opinions fonctionnellement liées à la mission que l'Organisation lui a confiée.

La raison d'être de l'immunité, dans l'hypothèse examinée, est éminemment motivée par la nécessité que l'expert s'acquitte de la mission d'étude que l'Organisation lui a confiée en toute indépendance et à l'abri de toute immixtion de la part des autorités de n'importe quel Etat Membre

de l'Organisation. C'est donc par rapport à la satisfaction de ce besoin qu'il faut apprécier si les paroles prononcées ou les écrits rédigés par l'expert sont, oui ou non, couverts par l'immunité, en tenant compte que la Malaisie n'a fait aucune réserve lors de son adhésion à la convention générale.

Or, on reproche en substance au rapporteur spécial le contenu d'une interview où il exprimait certaines appréciations laissant transparaître des graves doutes sur l'impartialité de la justice malaisienne. Les déclarations rendues à la presse ont été ensuite divulguées dans un article de la revue *International Commercial Litigation* sous le titre «Malaysian Justice on Trial». Incontestablement les déclarations rendues par le rapporteur spécial contenaient des critiques d'une gravité considérable contre la justice malaisienne. Mais il est également vrai que la mission confiée à M. Cumaraswamy était précisément d'investiguer et de porter à la connaissance de la Commission des droits de l'homme l'état de santé de la justice dans les divers pays concernés par l'étude, dont la Malaisie.

C'est donc pour ces raisons qu'il faut conclure que les déclarations rendues et diffusées par voie médiatique sont des actes directement liés à l'accomplissement de la mission confiée au rapporteur spécial, même des actes qui peuvent être qualifiés comme d'exécution de cette mission.

On ne peut pas non plus retenir le comportement de ce dernier comme susceptible de blâme au point de vue du moyen de divulgation employé. Certes, on ne peut pas affirmer que le fait de donner des interviews ou de publier par des voies autres que celles propres à l'Organisation, les données ou les évaluations obtenues, faisait partie des tâches expressément confiées à M. Cumaraswamy par la Commission des droits de l'homme. Mais, comme l'Organisation aurait en tout cas divulgué les résultats obtenus et les évaluations du rapporteur spécial, leur divulgation ultérieure et probablement anticipée ne peut guère s'estimer en contradiction avec les buts de la mission qui lui a été confiée. En effet, si l'on songe que tel genre de divulgation a pour résultat objectif indéniable de rendre les Etats concernés conscients des violations des droits de l'homme qui

se sont produites sur leur territoire, on doit nécessairement en conclure qu'elles constituent pour l'expert une forme possible et tout à fait licite, encore que non expressément autorisée au préalable par l'Organisation, de s'acquitter de sa mission.

D'ailleurs on ne saurait douter du caractère officiel de l'activité reprochée : M. Cumaraswamy a été interviewé en sa qualité de rapporteur spécial à la Commission des droits de l'homme et c'est dans cette qualité qu'il a répondu, en exprimant une partie de ses opinions sur le thème de l'enquête dont il avait été chargé. Il résulte aussi que M. Cumaraswamy, en délivrant son interview et en consentant à la publication de son contenu dans une revue, n'a pas été poussé par des motifs fallacieux : la raison principale — et probablement la seule — de son acte, était de s'acquitter de la mission qui lui avait été confiée en divulguant et en attirant l'attention de larges et d'importants milieux sur les résultats obtenus et sur les évaluations que ces résultats lui inspiraient.

Monsieur le président, Madame et Messieurs les juges de la Cour,

3. Il y a lieu d'approfondir un autre aspect de la question, concernant l'étude des pouvoirs du Secrétaire général de l'Organisation des Nations Unies en matière de détermination et de fixation des limites précises à l'immunité des experts. Que cette question soit de première importance, cela est prouvé par la décision dans laquelle on a demandé à cette illustre Cour d'adopter l'avis qui constitue le but de la procédure actuelle. Dans la décision précitée, en effet, le Conseil économique et social a souligné que la réponse à la question de l'applicabilité de la section 22, article VI, de la convention générale au cas de M. Cumaraswamy, doit être donnée en tenant compte des paragraphes 1 à 15 de la note du Secrétaire général (E/1998/94). On ajoute que dans les paragraphes 16 et 17 de la note, le Secrétaire général affirme que ses appréciations ont une valeur contraignante pour les Etats Membres de l'Organisation.

Le pouvoir d'adopter des déterminations contraignantes pour les Etats Membres a été fondé sur la section 23, article VI, de la convention générale qui attribue au Secrétaire général le pouvoir, voire le devoir, de lever l'immunité accordée à un expert dans tous les cas où «à son avis cette immunité empêcherait que justice soit faite et où elle peut être levée sans porter préjudice aux

intérêts de l'Organisation». Ladite norme attribue incontestablement un rôle considérable au Secrétaire général, mais la thèse — selon laquelle le pouvoir négatif de lever l'immunité comporte et présuppose le pouvoir positif de constater, avec une efficacité contraignante vis-à-vis des Etats, l'applicabilité à chaque cas d'espèce des dispositions en matière d'immunité — semble quelque peu forcée sur le plan logique.

En réalité, la règle citée tout simplement qualifie le droit à l'immunité comme un droit de l'Organisation, dont elle peut disposer en y renonçant par acte du Secrétaire général. Mais si, au contraire, le Secrétaire décide de ne pas lever l'immunité à l'expert, cet acte n'a pas d'effet contraignant vis-à-vis de l'Etat concerné : il représente le point de vue de l'Organisation sur la question de l'applicabilité de l'immunité à un cas donné, et ce point de vue peut bien ne pas être partagé par l'Etat concerné.

Néanmoins, il y a lieu de reconnaître que dans une matière aussi délicate que l'immunité, les décisions du Secrétaire général des Nations Unies paraissent spécialement influentes. Que l'on réfléchisse sur le fait que la réponse à la question si, oui ou non, l'immunité est applicable, bien souvent présuppose la détermination de la manière la plus appropriée dont les experts peuvent ou doivent s'acquitter de leur tâche et que cette détermination ne peut être faite que par les organes de l'Organisation. Il s'ensuit donc que l'acte du Secrétaire général ne serait contestable par les autorités de l'Etat concerné que s'il était en contradiction évidente avec la lettre et l'esprit de la norme conférant l'immunité ou si — hypothèse possible sur le plan logique, mais en fait fort peu probable — ces déclarations étaient atteintes de dol ou formulées en mauvaise foi.

Mais si, comme au cas échéant, une différence d'opinion subsiste, elle ne pourra être réglée que d'après la section 30, article VIII, de la convention générale, à laquelle se réfère expressément la résolution 297 du Conseil économique et social. Il s'agit d'une disposition supplémentaire qui — en tant qu'applicable uniquement à défaut d'autres méthodes de solution — attribue à la Cour internationale de Justice la compétence pour donner un avis consultatif «sur tout point de droit soulevé». «L'avis de la Cour», énonce la section 30, «sera accepté par les parties comme décisive».

L'acte conclusif de la procédure, qualifié d'«avis», se voit donc attribuer une fonction — et une efficacité — en outre que celles typiques, puisque, à l'instar d'un arrêt ou d'une sentence, il tranche un différend et oblige les parties au litige. Il y a même lieu de retenir que le terme «avis» — qui désigne l'instrument spécifique de coopération de l'organe suprême de justice des Nations Unies, destiné à assurer le fonctionnement administratif correct et régulier de la vie des relations internationales —, a été employé dans la section 30 précisément du fait qu'une des parties au différend devant être réglé par ce moyen, est l'Organisation des Nations Unies. Il y a par conséquent une connexion, au moins indirecte, avec l'exercice de la fonction d'administration internationale.

Monsieur le président, Madame et Messieurs les juges de la Cour,

4. Il nous reste à examiner la deuxième question : celle relative à une identification ponctuelle des obligations qui incombent à la Malaisie au cas où, comme nous le souhaitons, cette illustre Cour constate que les situations et les faits qui ont donné lieu à ce différend sont couverts par l'immunité.

A ce propos, qu'il nous soit permis de rappeler au préalable que les obligations pesant sur la Malaisie pour la mise en oeuvre ponctuelle et complète des dispositions de la convention générale ne peuvent pas faire l'objet d'exemptions pour le fait que la Malaisie est l'Etat dont M. Cumaraswamy est ressortissant. En effet, contrairement à ce qui est établi à ce sujet dans la section 15, article IV, de la convention générale, relative, comme vous vous en souviendrez, aux représentants des Etats Membres, les immunités dont jouissent les fonctionnaires et les experts en mission pour le compte de l'Organisation des Nations Unies doivent être appliquées vis-à-vis de tous les Etats Membres. Ce sont même les Etats auxquels les sujets chargés d'une mission sont liés par un rapport spécial comme la nationalité, la résidence ou le domicile, qui sont les destinataires privilégiés de la règle de l'immunité car c'est précisément à ces Etats qu'il incombe le plus souvent d'assurer que le fonctionnaire ou l'expert s'acquitte des tâches qui lui sont confiées par l'Organisation en toute liberté ou indépendance.

D'ailleurs, la règle sur l'immunité ou, pour mieux dire, les principes généraux que l'on peut dégager de la convention et du fonctionnement de l'institution dans le cadre du droit international général, posent des limites à la liberté d'action de la Malaisie déjà bien avant l'émanation de l'avis de la Cour internationale de Justice. On remarque notamment que le seul fait que l'interessé ait soulevé l'exception d'immunité et que, du côté du Secrétaire général des Nations Unies, une décision ait été adoptée et adressée à la Malaisie dans laquelle il a invoqué l'immunité et déclaré sa pertinence avec les faits déduits devant les organes de justice de ce pays, entraîne des conséquences non négligeables. En effet on doit bien reconnaître que, lorsqu'un acte de ce genre est émané, les autorités tant gouvernementales que judiciaires de l'Etat où la question de l'immunité est soulevée sont quand même tenues d'accorder une considération immédiate et attentive aux délicats problèmes relatifs à l'immunité, et elles doivent tenir dûment compte de l'influente décision prononcée à ce sujet par le Secrétaire général des Nations Unies.

On ne pourrait pas affirmer que la situation décrite impose aux tribunaux de l'Etat où la question de l'immunité a été soulevée, une obligation juridique de suspendre les procédures en cours, en attendant que le problème de l'existence ou pas de l'hypothèse d'immunité soit constaté sur le plan international. Mais au moins on devrait s'attendre à ce que ces tribunaux fassent preuve de prudence en évitant de déterminer, par des décisions hâtives, des situations de responsabilité à la charge de cet Etat.

Une fois que la Cour aura constaté l'applicabilité des dispositions en matière d'immunité de la convention générale en l'affaire *Cumaraswamy*, aussi bien le Gouvernement que les tribunaux malaisiens seront tenus d'en tirer les conséquences qui s'imposent et notamment que l'Organisation est en droit de réclamer la réparation du tort par elle subi directement et dans la personne de son expert. Il est évident que telle réparation, d'après l'avis consultatif sur l'affaire *Bernadotte,* adopté par cette Cour le 11 avril 1949 (*C.I.J. Recueil 1949,* p. 174 et suiv.), inclut tous coûts, dépenses et dommages encourus par l'Organisation elle-même, et par M. Cumaraswamy bien entendu, se rattachant aux faits de l'affaire.

Il faut reconnaître que l'exécution correcte de certains aspects de l'obligation de respecter les immunités des experts de l'Organisation des Nations Unies, tels qu'ils ont été précisés, pourrait se heurter à des difficultés considérables par rapport au système constitutionnel des Etats tour à tour tenus au respect de cette obligation. Nous nous en référons notamment à la prescription de clôturer, moyennant un arrêt de rejet de la demande d'indemnisation (introduite par quiconque) et un arrêt d'acquittement, tous les procès civils et pénaux intentés contre le bénéficiaire de l'immunité, ou bien, si ces procès sont terminés, de bloquer l'exécution des prononcés de condamnation du fonctionnaire ou de l'expert des Nations Unies.

Sous cet angle, il est évident que dans un Etat où les organes du pouvoir judiciaire jouissent d'une indépendance complète vis-à-vis du pouvoir exécutif, le gouvernement de l'Etat concerné ne pourra pas stopper l'activité des tribunaux. Les juges pourraient même aboutir à l'émanation d'un arrêt définitif de condamnation dont l'exécution ne pourrait être bloquée qu'en faisant appel à des moyens judiciaires exceptionnels, s'ils sont prévus; en d'autres cas, l'exécutif pourrait empêcher l'accomplissement d'un acte illicite international en dédommageant directement ou indirectement le bénéficiaire de l'immunité. Mais il faut affirmer aussi clairement que possible et de façon décisive que ces difficultés ne peuvent et ne pourront jamais justifier d'éventuels manquements de la part de la Malaisie.

Monsieur le président, Madame et Messieurs les juges de la Cour,

5. D'après les considérations qui ont été présentées et les arguments qui ont été portés à l'attention de cette illustre Cour, le Gouvernement italien demande :

I. qu'il soit reconnu que les dispositions de la convention générale sont applicables à l'affaire et notamment :

a) que M. Cumaraswamy, en tant qu'expert en mission pour le compte de l'Organisation des Nations Unies soit déclaré bénéficiaire de la situation d'immunité établie dans la section 22 de l'article VI, de la convention générale;

b) et qu'il soit décidé que les faits qui ont donné origine à cette affaire sont couverts par la section 22, lettre *b)* du même article de la convention;

II. que la Malaisie soit déclarée obligée de réparer tout coût, dépense et dommage subi par l'Organisation directement et en la personne de M. Cumaraswamy.

Les conclusions auxquelles nous sommes parvenus semblent certaines et inévitables : elles découlent, comme on peut bien le comprendre, d'une interprétation correcte des dispositions en matière d'immunité. Tout Etat qui se trouverait à contester, à tort ou avec des raisons plus ou moins fondées, l'existence d'une situation d'immunité vis-à-vis d'un expert des Nations Unies doit donc s'attendre à ce que ces contestations se retournent contre lui, si les obligations prévues par la convention générale ne sont pas entièrement et correctement respectées.

Monsieur le président, Madame et Messieurs les juges de la Cour, nous vous remercions de votre bienveillante attention.

The PRESIDENT: Thank you, Mr. Ambassador. I now call on the distinguished Solicitor-General of Malaysia, Dato' Heliliah Yusof.

Mr. DATO' HELILIAH YUSOF: Mr. President and Members of the Court,

1. I have the honour, Sir, to appear on behalf of the Government of Malaysia in the present oral proceedings relating to the request by ECOSOC for an advisory opinion. Appearing with me is my learned friend, Sir Elihu Lauterpacht, QC.

2. At the very outset, I wish to emphasize that Malaysia is not an unwilling or reluctant participant in these proceedings. Malaysia welcomes this opportunity to appear before the Court and to present publicly, and especially to the other parties to the 1946 General Convention on Privileges and Immunities, its interpretation of Section 22 of that Convention within the framework of the question put to the Court as understood by Malaysia.

3. Malaysia is fully supportive of the human rights system to which the United Nations has made so massive and useful a contribution over the past half-century. However, Malaysia greatly regrets that the position that it has taken in this case has been publicly pilloried as one which threatens this system. Malaysia greatly regrets that its position should have been represented by critics as amounting to a denial without qualification of the immunities of human rights rapporteurs. That, Mr. President and Members of the Court, is not Malaysia's position. Rapporteurs do not enjoy an absolute personal immunity. There are limits to their functional immunity, limits which all States accept and insist on. That immunity is limited to words spoken or written and acts done by the Rapporteurs "in the course of the performance of their mission". It is for that reason alone that the wording of the Certificate of the Minister for Foreign Affairs of Malaysia was phrased as it was. All that it intended to state was that the immunity is functional and that it was up to the Malaysian court to decide whether the words were spoken or written in the performance of the Special Rapporteur's mission. The only question now before this Court is, in Malaysia's submission, who is to decide whether the allegedly defamatory words were spoken or written in the performance of the Rapporteur's mission. The decision on this point does not affect the substantive range of the immunity. If the words were truly spoken in the performance of the Rapporteur's mission, he is and will remain entitled to immunity in respect of them.

4. It is, if I may respectfully say so, rather an exaggeration for the Secretary-General to say that "what is at stake in this case is not just the Special Rapporteur's interests and independence but that of the entire human rights system". This is certainly not what is at stake, for that is tantamount to asserting that the system can be pursued without regard for the right to be heard of those accused, rightly or wrongly, of any departure from actual or emerging human rights standards. What Malaysia is calling for in the present case is the correct application of the system of immunity in such a way as to maintain the operation of the rule of law for all concerned.

5. We take heed Mr. President and Members of the Court, of the Secretary-General's concern for the preservation and indeed for the proper advancement of the United Nations human rights

system. And that includes the use of Special Rapporteurs to look into questions that arouse international concern. But the efficient operation of the system of Special Rapporteurs does not require that they should be put above the law or even outside it. The very idea that a Special Rapporteur is immune from jurisdiction in respect of words spoken or written in the performance of his mission places him, and indeed the organization which he represents, under an even greater responsibility than would otherwise be the case to ensure that his observations are not only always accurate and within the bounds of fair comment but also reflect his integrity and absence of bias.

6. I would like to turn now to the scope of the question before the Court. This is necessary because there is some lack of consistency in the statements submitted to the Court by Governments. The absence of consistency may have its roots in the manner in which the matter was approached by the Secretary-General of the United Nations and by ECOSOC.

7. In the Note of the Secretary-General to ECOSOC of 28 July 1998 (E/1998/94; Dossier No. 59) the Secretary-General set out the history of the matter, making it quite plain in paragraphs 16 and 17 that the principal issue was the acceptability of

> "the principle . . . that it is for himself, that is the Secretary-General, alone to determine whether a member of the staff of the Organization or an expert has spoken or written words or performed an act 'in their official capacity' (in the case of officials) or 'in the performance of their mission' (in the case of experts on mission)".

8. This approach to the matter was reflected in the first paragraph of the draft question originally submitted by the Secretary-General to the ECOSOC on 28 July 1998: subject only to Section 30 of the Convention "does the Secretary-General have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention"? The second paragraph of the draft question relates to the obligations of a party once the Secretary-General has made his determination. But leaving aside the second paragraph, it was clearly understood in the first draft of the resolution that the main target of the question was whether the Secretary-General alone has the authority to

determine conclusively whether the words were spoken in the course of the performance of a mission.

9. However, the form of the question was altered between 28 July 1998 and its final adoption on 7 August. In the final version the Court was asked for

> "an advisory opinion on the legal question of the applicability of Article VI, Section 22, of the Convention in the case of Dato' Param Cumaraswamy . . . taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, contained in document E/1998/94, and on the legal obligations of Malaysia in this case".

The content of the question appears to have been adjusted to limit it more precisely to the circumstances of the Special Rapporteur's activity. This may be a limitation of some importance in that the proceedings against Mr. Cumaraswamy are civil, not criminal, proceedings.

10. The change in wording from the 28 July draft to the 7 August request has not been the subject of specific discussion in any of the statements made to the Court. However, some of the States filing statements appear to have read the 7 August request as an invitation to the Court to range more widely than was foreseen in the 28 July text. The earlier text made it plain that the case was limited to the question of the Secretary-General's authority. The altered text appears to have been read by some as placing before the Court the question of whether the Secretary-General in using his supposed authority to qualify the Special Rapporteur's conduct has properly determined that the Special Rapporteur was acting in the performance of his mission. The misunderstanding probably flows from the use in the later draft of the word "applicability" in the phrase "the legal question of the applicability of Section 22" and from the insertion of the phrase "taking into account the circumstances set out in paragraphs 1 to 15 of the note of the Secretary-General contained in document E/1998/94".

11. In Malaysia's submission, the question does not range so widely. The correct interpretation of the 7 August wording is that the first question is limited to the extent of the Secretary-General's authority. It does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the character of the Special

Rapporteur's action, he had properly exercised that authority. Malaysia observes that the word used was *"applicability"*, not *"application"*. "Applicability" means "whether the provision is applicable to someone" not "how it is to be applied".

12. The principal consideration favouring this view is that the jurisdiction of the Court to give the advisory opinion now requested of it derives from Section 30 of the General Convention. This section presupposes the existence of a "difference" between the United Nations on the one hand and a Member on the other. Indeed the preamble to the question refers to the existence of a difference between the United Nations and Malaysia within the meaning of Section 30. But the only difference that has arisen between the United Nations and Malaysia regarding the immunity of the Special Rapporteur was identified in the draft question proposed by the Secretary-General to ECOSOC: does the Secretary-General of the United Nations have the exclusive authority to determine whether the words were spoken in the course of Mr. Cumaraswamy's mission. That was the only issue that had previously been discussed between the United Nations and Malaysia. Consequently, it would not have been open to the United Nations unilaterally to redefine and enlarge the scope of the already defined dispute by rewording the question in broader terms. The principal reason why no such enlargement was permissible and therefore could not have occurred is that the "difference" between the United Nations and Malaysia had never been discussed in any such enlarged terms. Nor I submit, would it be correct for the Court, in the exercise of its power to interpret the question, itself to enlarge the question in a manner which even the Secretary-General and ECOSOC would not have been entitled to do; and to which Malaysia would not have consented.

13. It is on that basis that Malaysia approaches the question now before the Court. Malaysia notes that the original issue is the one treated in the written statements of the Secretary-General, the Federal Republic of Germany, Sweden, the United Kingdom and the United States of America as central to the matter. Malaysia has not come here to consider whether, objectively viewed, the Special Rapporteur's conduct occurred in the performance of his mission. That is not the question

at this stage of the proceedings. At this moment, the sole question is: who decides whether the Special Rapporteur's conduct did or did not occur in the course of the performance of his mission.

14. To the extent that some of the written statements have ventured into consideration of the substantive question, there is no valid basis for their having done so. Treatment of the question of whether the relevant acts were done in the performance of the Rapporteur's mission is a second question which can only follow a determination of the first question, of who may classify the relevant conduct. The second question cannot be considered until the first has been resolved; the issue now before the Court is limited to the first question.

15. In short, Mr. President and Members of the Court, Malaysia's submission is that the proper scope of the question is limited to the issue of principle involved in the first question set out in paragraph 21 of the Secretary-General's Note of 18 July 1998.

16. The limitation of the principal question in the manner just indicated does not preclude consideration of the content of Malaysia's obligations pursuant to Section 34 of the 1946 Convention. That, however, is one of the matters which will be discussed by Sir Elihu Lauterpacht.

17. Malaysia would like **to echo the statement of another member State that "the provisions of the General Convention require a particular result". Malaysia does not believe that the Convention dictates or prescribes the manner in which Malaysia has to meet its obligation**. There already exists in Malaysia legislation that has been place almost since the time when the General Convention entered into force. The United Nations Secretary-General has always been aware of this legislation and has been silent about it. Our obligations, as stated in Section 34, are to be implemented in accordance with our laws. If Malaysia is found not to be correct in its position, the legislation of many other parties to the Convention whose manner of implementing their Convention obligations has been similar to that of Malaysia will also need to be reviewed.

18. I have been at pains, Mr. President and Members of the Court, to insist on the narrowness of the issue now before the Court. At the same time, in concluding my remarks I feel bound to observe that at least part of the origin of the present problem lies in the relatively undeveloped state

of the procedures and devices which the United Nations has come to utilize in its understandable and notable zeal for methods of ensuring compliance with human rights standards. Malaysia has not complained of the unexpected selection of one of its nationals as a Special Rapporteur. Nor, in principle would the Malaysian Government complain if continued observations were made about any aspects of its Government if they were indeed true and fair. But Malaysia does suggest that there seems to be very little guidance, at any rate of a public nature, given to Special Rapporteurs as to the suitable limits of theirs comments on various aspects of governmental behaviour or the appropriate means by which they give currency to such comments. There is, it seems, no properly established code of conduct to govern their practices and procedures. I make these observations only to suggest that, if there had been, the events which have given rise to this whole controversy might well have been avoided; and I would urge that whatever else may come out of this case, the opening of discussions on this subject should no longer be delayed.

19. As I have already submitted, the sole issue before the Court is whether the Secretary-General possesses the right exclusively to determine the quality of the conduct in question. Before concluding, Mr President and Members of the Court, allow me, Sir, to refer to the several certificates issued by the Secretary-General.

20. Quite apart from the consideration that the 1946 General Convention does not give the Secretary-General any such powers, a matter to which Sir Elihu Lauterpacht will presently be referring, there is an important factor which relates to the actual content of the Secretary-General's certificates namely that the certificates are peremptory in format as well as in content.

21. Perhaps the format does not matter, at any rate in other than political terms, though the Government of Malaysia feels obliged that for the Secretary-General to address his certificate to "To Whom It May Concern" when the intended recipient is known to be the Government of Malaysia and should accordingly be identified as such and, accordingly, should be addressed directly and in appropriate terms, falls short of the courtesies of diplomatic practice to which, in other contexts, the Government of Malaysia has become accustomed.

22. More important is the point about the peremptory content of the certificate. This does matter because it affects the persuasive quality of the certificate even though it is, in any event, not legally binding. The point would of course matter even more if the certificate were binding. The certificate is peremptory because it gives no reasons for its conclusion. It merely recites Section 22 of the 1946 Convention which states the Secretary-General's determination that the words which constitute the basis of the plaintiff's complaints were spoken by the Special Rapporteur in the course of his mission and the Secretary-General "therefore" maintains the Special Rapporteur's immunity. The certificate contains no recitation of the relevant facts and not a word of reasoning or justification by reference to which the validity of its conclusion can be assessed.

23. If a certificate so absolute in its contents is legally controlling, then the Secretary-General would be able to certify that conduct of no matter what kind has occurred in the course of the performance of an expert's mission. Of course, Malaysia does not doubt the good faith of the Secretary-General, but the correctness of his conclusions could be questioned. Those conclusions cannot be assessed in the absence of any satisfactory reasoning, on the facts of this specific case, by which he reached that conclusion. And therefore, arbitrariness may be possible. It is not acceptable that this possibility should be permitted.

24. Mr. President and Members of the Court, I thank you for the opportunity you have afforded me of addressing you; and I now respectfully ask you, Mr. President, to invite Sir Elihu Lauterpacht to continue the argument on behalf of Malaysia.

The PRESIDENT: I wish to thank the Solicitor-General and I call now on Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT: Mr. President and Members of the Court, please forgive the croak in my voice. I would like to think that it is more pneumatic than geriatric.

1. INTRODUCTION

1. Once again I have the privilege and pleasure of appearing before you, this time on behalf of the Government of Malaysia.

2. All present in the Court have reason to be grateful to the representatives of the Secretary-General, Costa Rica and Italy for the lucid manner in which they have expressed their respective positions. I intend no disrespect to them in observing, however, that, by and large, they have not gone significantly beyond their written statements. By way of contrast, however, I shall have to go into the matter rather more deeply then was possible in the Malaysian written statements. The arguments that I now submit should therefore be taken as representing the up-dated position of the Government of Malaysia. For reasons that will presently become clear the submissions that I am obliged to make will be somewhat longer than might otherwise have been expected. I must therefore ask the Court to hear me with even more than its customary tolerance and patience. I will not give references during my speech; these will be included in my text handed to the Registry, and will appear in the transcript.

The principal legal obligation of Malaysia

3. Before indicating the general lines of my argument on the principal question before the Court, it may be helpful if I refer to the main aspect of the second part of the question put to the Court, namely, the legal obligations of Malaysia. If I do this, it will be clear from the very beginning how narrow is the division between, on the one hand, the Secretary-General and, on the other, not only Malaysia but a very large number of the Members of the United Nations who appear to share Malaysia's position.

4. Malaysia does not dispute the Secretary-General's assertion that a party is under a legal obligation to ensure that the requirements of Section 22 of the 1946 General Convention are met in any given case. If those requirements are not met, the Party would be in breach of the Convention and a case would then have arisen suitable for a reference to the Court or to another mode of settlement pursuant to Section 30. Of course, it cannot be established that a party is in

breach of the Convention until the local remedies in that party's court system have been exhausted in the manner familiar to this Court. We agree with the learned counsel of Costa Rica that the obligation is one of result.

5. As the Court is aware, Malaysia's view of the main question is that it is for courts of Malaysia to assess the character of the conduct as a preliminary or threshold question, without entering into the substance of the case more than is necessary for that limited purpose. In the course of that preliminary procedure a certificate from the Secretary-General would have a role to play. That role is one of conveying detailed information to the local court about the character of the activity in which the expert was involved. Such a certificate would naturally be one to which the greatest respect would be paid. It would be of the highest authority in establishing the relevant facts. But it would not be conclusive of the legal question of whether the relevant conduct fell within the scope of the limited functional immunity accorded to the official or expert.

The PRESIDENT: Could you speak a little more slowly, please?

Sir Elihu LAUTERPACHT: I am sorry Mr. President, I am conscious of the fact that I have rather a lot to say and that time is limited.

Indeed, within the legal system as at present operative in Malaysia and in many other Members of the United Nations, it *could not* be conclusive.

6. The position of Malaysia in this regard is thus virtually identical to the position taken by the United Kingdom and the United States as expressed in their written statements in this case.

7. So long as the certificate of the Secretary-General reaches the relevant court and is taken into account by it, the precise manner in which the certificate is communicated to the court is not of controlling importance. In the present case, the Secretary-General has complained that the certificate issued to the court by the executive branch of the Government of Malaysia did not itself specifically refer to the position adopted by the Secretary-General. In the light of the position to which Malaysia adheres, no such reference was required. However, it must be recalled that even

so two of the Secretary-General's certificates and other communications from the United Nations came before the Malaysian court by reason of having been attached to affidavits filed on behalf of the Respondent and the court thus knew of their contents[1].

8. Once the national court has been informed of the claim to immunity, it will stay the substantive proceedings while the question of immunity is considered. If the immunity is accorded, the claim will be dismissed. If the immunity is not recognized, then the case will proceed on its merits unless the Secretary-General decides to take steps to seek an advisory opinion of the Court under Article 30 of the Convention, in which event the local proceedings will be stayed again. I must emphasize, Mr. President, that the decision as to whether the Respondent falls within the scope of the immunity is not a matter for the discretion of the local court, as was suggested in one of the written statements, but of the application of law to the facts of the case. If the merits stage of the case is eventually reached, the Special Rapporteur will be able to defend his position by reference to such defences as justification or fair comment if they happen to be appropriate. No assumption should be made that because the courts may find that the Special Rapporteur does not enjoy immunity therefore he will necessarily be found liable on the case that is made against him. That is a matter for the Court to decide.

9. I should just refer in passing to the complaint of the Secretary-General that the certificate issued by the Malaysian Ministry of Foreign Affairs was in some way defective because it introduced the word "only" before the phrase "in respect of the words spoken or written and acts done by him in the course of the performance of his mission"[2]. This complaint, with the greatest respect, seems quite pointless. How could the word "only" possibly change or narrow the scope of the immunity in question? In its absence, would the Malaysian court have been able to accord

---

[1]See Dossiers No. 23 and Nos. 18 and 22 referred to the therein; No. 30 and No. 29 therein referred to (which was communicated to the Court even before it was received by the Government of Malaysia).

[2]See Dossier No. 31.

immunity in respect of matters that did not arise in the course of the performance of the Rapporteur's mission?

10. In short, therefore, so far as the question of the principal legal obligation of Malaysia is concerned, Malaysia concludes that the position in general terms is quite plain: there is an important, even essential, role for the certificate of the Secretary-General, but it is not a conclusive role. It must set out the facts on the basis of which the Secretary-General offers his conclusions on the nature of the mission and the manner in which the activity which was the basis of the proceedings can be said to have been carried out in the course of the mission. Such evidence will necessarily be most authoritative. In the absence of evidence to the contrary, it will in all likelihood conclude the matter. But it will be conclusive by virtue of its weight as evidence; not by virtue of any rule of law that attributes determinative effect to the Secretary-General's mere affirmation.

11. With these opening remarks made, I may turn now to the outline of my argument in relation to the first part of the question — the applicability of Section 22 in the case of Dato' Param Cumaraswamy. I am assuming, Mr. President, that the Court has before it copies of that outline and that they have been given to my friends who are participating. I shall return at the end of my argument to a few remaining aspects of Malaysia's obligations.

12. The main part of the question relates to the issue on which the Secretary-General has touched, namely: as a matter of principle, is the Secretary-General's determination, characterization, qualification or certification — I shall use these words as being virtually synonymous with each other — of the character of the conduct legally conclusive of the question whether it is covered by the expert's immunity. I propose, first, to place the question of the immunity of officials and experts of the United Nations within the framework of the overall treatment by international law of the whole question of jurisdictional immunity. My purpose will be to demonstrate that entitlement to immunity from the jurisdiction of national courts has always been decided by those courts, not by the State or authority that is the beneficiary of the immunities. This will demonstrate, incidentally, that to accord to national courts the right to qualify the character of the conduct in

question is not tantamount to a total denial of immunity. Nor in that wider context has it ever been suggested that it might be, except in these proceedings on behalf of the Secretary-General.

13. My second submission will be that there is only one category of exception to this situation, namely, where a specific provision is included in a treaty which expressly vests in the sending State or its authorities the right to qualify or characterize the nature of the conduct in respect of which the immunity is claimed.

14. My third submission will be that the attribution of immunity to international organizations is no more than the latest development in the overall history of the international system of immunity. The 1946 General Convention is but one amongst several examples of the development — though it is no doubt the most prominent. The Convention incorporates the distinction between, on the one hand, absolute personal immunity and, on the other, functional immunity. The very concept of functional or limited immunity necessarily carries with it an acknowledgement that a decision must be taken by someone as to whether the conduct, in respect of which the immunity is claimed, falls within the scope of the immunity. The General Convention contains no provision on this point. The position under that Convention is in this respect indistinguishable from the position under international law in relation to other situations where immunity is restricted or qualified. There has been no open discussion between the United Nations and the States concerned as to whether the Organization possesses an exceptional right of unilateral qualification — a right that does not exist anywhere else in the immunity system except by virtue of specific treaty provision.

15. I shall then submit, Mr. President, that the interpretation of the Convention does not support the United Nations view that it possesses a right of unilateral qualification. Malaysia's interpretation is based upon the factors usually adopted as pertinent to interpretation of treaties. The literal interpretation of the treaty does not support the United Nations claim. Nor do the *travaux préparatoires*. Nor does the practice of the parties. This practice is demonstrated both in the legislation by which States have given effect to their duties under the Convention and by the

manner in which courts have dealt with immunity claims. The practice asserted by the Secretary-General, such as it is, cannot have the effect which he seeks for it. Even leaving aside the technical consideration that the United Nations is not a party to the General Convention, the conduct of the United Nations alone cannot evidence, and I quote the words of the Vienna Convention, "the agreement of the parties" when the other parties have pursued a course of conduct that contradicts the assertions made by the United Nations. Lastly, it is notable that apart from a rare, perhaps even singular, limited and uncritical echo of the United Nations claim, text writers do not support the United Nations position.

16. I shall also submit that the fact that the United Nations has, on a number of occasions, made a claim to a right of unilateral qualification is insufficient in all the circumstances to effect a change — as opposed to mere interpretation — in the content of the Convention. As hardly needs saying, it is the function of the Court to apply the Convention as it is, not to revise it.

17. I will then deal very shortly with a number of other points made in the Secretary-General's arguments. And at the end, I shall return briefly to the remaining obligations of Malaysia.

18. I can now turn to the substance of my argument, Mr. President, but if you wish to have a break, this would be a convenient moment at which to do so.

The PRESIDENT: Thank you, Sir Elihu, let us recess for 15 minutes please.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Please be seated.

Sir Elihu LAUTERPACHT:

PART ONE

2. THE QUESTION BEFORE THE COURT IS A NARROW AND LIMITED ONE

19. On the basis of what the Solicitor-General has already said, the Court will recognize that the question before it is one of narrow compass. It really relates only to the interpretation of one phrase in Article VI, Section 22, of the Convention. The immunity of experts is particularized, in so far as it is relevant to the facts which occasion the request for the present opinion, as follows: "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".

20. The question is also of limited scope: who is to decide in the first place whether, in a case where other conditions for immunity exist, the act is done "in the course of the performance of their mission".

21. The United Nations says that the Secretary-General must decide. Malaysia says the Malaysian courts are entitled to decide.

22. In considering this division of opinion, it is possible at the outset to identify certain matters that this case is *not* about — and to exclude them from further discussion.

(a) This case is not about whether Mr. Cumaraswamy is or is not an expert falling within the scope of Section 22. Malaysia has never disputed Mr. Cumaraswamy's status.

(b) This case is not about whether Mr. Cumaraswamy is, in general, entitled to immunity. He is entitled to the immunities laid down in Section 22 of the Convention — to the extent therein provided and no more.

(c) It is not about whether Mr. Cumaraswamy's position is affected by the fact that he is a national of Malaysia. It is no part of Malaysia's case that Mr. Cumaraswamy's immunities, such as they may be, are limited by the fact that he is a Malaysian national.

(d) This case is not about whether Mr. Cumaraswamy's words were spoken or written in the course of the performance of his mission. As the Solicitor-General has just made

abundantly plain, this is not the question that is now before the Court, and Malaysia will not be drawn into a discussion of it.

(e) The case is not about whether Mr. Cumaraswamy has, or has not, incurred liability in defamation under the law of Malaysia. That is not a question which has yet been reached in the proceedings in Malaysia and it may never be. If the Malaysian courts decide in due course that the allegedly defamatory words were spoken or written in the performance of Mr. Cumaraswamy's mission, he will enjoy immunity in respect of them and the question of whether they are or are not defamatory will never be reached.

(f) Finally, this case is not about the nature and effect of any international responsibility that Malaysia may incur if at some later date it should be found in the light of any decision that its courts may reach to have breached its obligations under the 1946 Convention. Any such consideration would be entirely speculative, and it is not the Court's practice to consider purely hypothetical questions. Indeed, the Court has in the past said that it will not assume that States may fail to comply with their international obligations. And I can assure the Court that Malaysia has no intention of acting in a manner violative of its international duties.

23. So, Mr. President, this case is solely about *who is to decide* in the first instance whether the words attributed to Mr. Cumaraswamy were spoken or written "in the course of the performance of his mission".

24. Narrow though the question now is, it is on its own quite sufficiently important to engage the full interest of the Court to the exclusion of the consideration of other matters that have been raised here by the other participants in these proceedings.

25. For Malaysia the case is important as raising a matter of basic principle. Malaysia sees the Secretary-General as asserting a right not accorded to him by the 1946 Convention, namely, to decide a question that initially falls within the exclusive province of Malaysia's courts.

26. For the United Nations the case is said to be important because, so it is alleged, the outcome could affect the freedom and independence of those who work as rapporteurs in the field of human rights and a mass of conflicting decisions would be inevitable.

27. Naturally, such a claim coming from the Secretary-General must be considered seriously, but one may observe immediately, apart from everything else, that the Secretary-General has made no distinction between immunity from criminal suit and immunity from civil suit — a distinction which in terms of the "functioning" of an official is of critical importance. These proceedings relate to a civil case. There is no question here of any interference with the person of Mr. Cumaraswamy. He has not been arrested or imprisoned or threatened with arrest or imprisonment. Nor has his freedom of movement been impaired. The Court will recall that the question put to it requests the Court to take "into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General"[3] and that those paragraphs refer only to the development of the civil proceedings against Mr. Cumaraswamy.

28. And turning to the Secretary-General's assertion of a risk of "a mass of conflicting decisions", this seems to be more than a little exaggerated. One must bear in mind that the United Nations has already been in existence for 53 years and the law reports reflect only a few cases of this kind and, as will be seen, not in the terms asserted by the Secretary-General. True, the Secretary-General has for long been aware of the existence of the problem. He cannot have been unaware of the fact that if States were confronted by the issue they might take a position different from his own. The content of the written statements filed in this case by the United Kingdom cannot have come as a surprise to him. Even less could he have been surprised by the statement of the United States, for this was written notwithstanding the clear assertion of the Secretary-General's present position made to the United States in 1976[4] — an assertion which the United States has clearly not accepted. Yet, the Secretary-General has never proposed a specific

---

[3]E/1998/94.

[4]Dossier No. 81.

open discussion of the problem, nor has he suggested that this provision of the Convention should be clarified, if necessary by amendment. And, it may also be noted, that despite the alleged "inevitability" of "a mass of conflicting decisions", an inevitability which necessarily presupposes a mass of situations likely to occasion the need for recourse to the dispute settlement procedures contemplated in Section 29 of the Convention, the United Nations has not, as yet, made any provision for appropriate modes of settlement as required by that Section, even though the requirement — "The United Nations shall make provisions for appropriate modes of settlement" — is not on its face limited to the establishment of *ad hoc* settlement arrangements only after a particular dispute has arisen.

3. THE BASIC PRINCIPLES INVOLVED IN THE CASE

29. Mr. President and Members of the Court, permit me now to turn in more detail to the basic points of principle involved in the case.

30. All who are taking part in the present proceedings are agreed that the task of the Court is to interpret the Convention.

31. In approaching this task it is desirable to place the Convention in its proper setting. The Convention is not a text that exists in a vacuum. It is part of an extensive body of law that deals with the limitations upon the jurisdiction that each State normally possesses over all that goes on in its territory. Thus, more prominently perhaps than in most legal questions that come before this Court nowadays, the starting point, in this case, is the sovereignty of the State.

32. Every immunity represents a reduction of State jurisdiction. The existence of immunity cannot be presumed in the absence of a clear rule establishing its existence. Moreover, because immunity is a subtraction from sovereignty the determination of its extent must be approached cautiously and in a manner favouring the State that grants it. In making these observations I do no more than echo the classic statement by the Permanent Court of International Justice in the *Lotus* case that "restrictions upon the independence of States cannot be presumed".

4. THE RANGE OF IMMUNITIES IN INTERNATIONAL LAW

33. Immunity from the jurisdiction of the courts of a State in favour of certain categories of person is not a concept that was introduced into international law by the 1946 Convention. Immunity has existed in relation to various categories of persons for centuries — States, diplomats, consuls and foreign armed forces. Let me briefly take the Court through those categories for the purpose of identifying the relevance to our present situation. Let me start with State immunity.

A. State immunity

34. It is now generally accepted that a distinction must be drawn between acts *jure imperii*, in respect of which the State enjoys immunity, and acts *jure gestionis*, in respect of which the State does not possess immunity. The important point about this distinction is that the determination of whether the facts of a case place it within one or the other category is a matter entirely for the courts of the State in which the proceedings are brought. The State claiming the immunity and the party seeking to deny it have to argue their positions in the courts of that State. The determination or classification of the nature of the act is treated as a preliminary step in the procedure. But the defendant State must answer in the proceedings and present its position. If the court holds that the matter is one *jure gestionis*, the State must answer on the substance.

35. No doubt there is a measure of inconvenience for a State in having to participate in this process of determination, by the national courts of another State, of the character of the sending State's activities — a determination which necessarily involves the court in examining some details of the transaction. No doubt there are occasional differences between the ways that the courts of different States may classify the same conduct. Nonetheless, States have accepted that the consequence of departing from the concept of absolute immunity is that the process of classification is one that has to be carried out by national courts.

35A. Of course, it is always open to the State to waive its immunity. Just as it is open to the Secretary-General to waive the immunity of officials in this situation. The State may do this before the national court embarks on the preliminary process of classification and thus avoid it. But

the fact of the existence of this power does not mean that the State thereby retains a right unilaterally to control the national court's power to determine the question.

35B. What goes for States is true equally for heads of State or even for ex-heads of State, as is shown by the recent proceedings in England relating to Mr. Pinochet. The circumstances of this case have become so well known that I need not take the time of the Court in rehearsing them. The point to which I would draw attention in the context of the present proceedings is that the positive expression of the immunity of an ex-head of State is limited to "acts performed in the exercise of his functions as a head of State". Who is to decide this question? Only the English courts — as is evident from the outcome. Nor, indeed, was the contrary even suggested. Although all the relevant conduct took place in Chile, only the English courts could classify or qualify, for the purposes of extradition, the character of the Senator's conduct are in the United Kingdom.

B. Diplomatic immunity

36. I turn to diplomatic immunity, the same is true of the classification of acts involved in a claim to qualified or functional immunity. Article 31 of the Vienna Convention on Diplomatic Relations distinguishes between immunity from criminal jurisdiction and immunity from civil jurisdiction. Immunity from civil jurisdiction is qualified. The diplomat is not entitled to immunity in an action relating to any professional or commercial activity exercised by the agent in the receiving State "outside his official function". If the plaintiff contends that the cause of action relates to a commercial activity outside the official functions of the diplomat, it is for the national court in which the proceedings are brought to qualify or categorize the activity.

37. While the terms in which diplomatic immunity is limited are not identical with those in which the immunity of experts on missions for the United Nations are expressed, the various treaty texts are all conceptually comparable. They all involve a decision as to whether the activity to which the claim relates falls inside or outside the limitation.

38. So again, in relation to diplomatic immunity, who decides whether the activity of the diplomat is "outside his official functions"? The answer is undoubtedly that it is *not* the diplomat's

home-State (the authority which, for present purposes, is to be compared to the United Nations). The answer in positive terms is that the decision lies with the courts of the State in which the proceedings have begun and in which the diplomat is pleading his immunity.

39. This position has never been questioned. It is helpfully set out in an extended footnote in Volume 1 of *Oppenheim's International Law*[5]. The same will be found in many other textbooks. Reference is made there to cases in the French, Italian and American courts which involves those courts in examining the nature of the diplomat's activity for the purpose of determining whether or not immunity attached to it. Although the outcome of those cases varied, the decision was always taken by the courts of the receiving State on the basis of their assessment of the facts and their appreciation of the law. Sometimes the immunity was granted; sometimes not[6].

40. Again, simply by way of illustration, reference may be made to two cases taken almost at random from the *International Law Reports*.

41. There is, for example, a Chilean case of *Szurgelies* v. *Spohn (1988)*[7] which is of particular interest. The petitioners claimed that certain investigations by the Counsellor at the German Embassy in Santiago violated their constitutional rights. The German Embassy claimed that the Respondent was entitled to jurisdictional immunity since he had been acting in the exercise of his functions as a diplomat protecting the interests of German nationals. The Supreme Court nonetheless felt free to investigate the nature of the Counsellor's activities.

42. Again, in the Belgian case of *Portugal* v. *Goncalves*, the Brussels Civil Court had to deal with the contention by Mr. Goncalves that the request by the Director of the Portuguese

---

[5] 9th Edition, at p. 1094.

[6] See Hackworth's *Digest of International Law*, Vol. 4, p. 550 and 13 ILM 217 (1974) which reprints a German Circular Diplomatic Note of 1973. This Note starts by setting out the distinction between contracts concluded on behalf of a foreign State and those concluded on behalf of individual members of diplomatic missions. The basis of the Note is evidently the fact that all such cases were to be decided by the German courts. Moreover, the Note also stated that: "judicial decisions may be influenced only by the parties to the proceedings, through the pleadings provided by law and may be contested, after their pronouncements, only with the remedies to which the parties are entitled. The Federal Foreign Office has no such means of recourse since it is not a party to the proceedings."

[7] 89 *ILR* 45.

Commercial Office in Brussels for the preparation of a translation was not a matter covered by the functions of a diplomatic mission and was a commercial activity outside the official's function. The Court examined the matter and held that the transaction was covered by immunity[8].

43. Once again, it hardly needs saying that the fact that Article 32 of the Vienna Convention lays down that immunity may be waived by the sending State has never been treated as a ground for the suggestion that the sending State is the sole authority entitled to qualify the nature of the Act in respect of which the immunity is claimed.

C. Consular immunity

44. The same analysis is applicable to consuls. The Vienna Convention on Consular Relations (1963) provides that "Consular officers . . . shall not be amenable to the jurisdiction of the judicial and administrative authorities of the receiving State in respect of acts performed *in the exercise of consular functions*".

45. Once again this provision raises the question of who decides whether an act falls within the excepted category. The answer is: only the courts before which the proceedings have been instituted. A number of the relevant cases were collected in a useful article by Mr. (later Sir) Eric Beckett in the *British Year Book of International Law (1945)*[9]. Sir Eric was, at the date it was written, Second Legal Adviser to the British Foreign Office. A factually pertinent illustration is provided by the French case of *Zizianoff* v. *Kahn and Bigelow*[10]. In this case, Princess Zizianoff sued Kahn and Bigelow for defamation. Bigelow, the Director of the Passport Section of the United States Consulate in Paris, pleaded consular immunity. The French court held that the actions of Bigelow did not form a part of his official functions. In so doing, they evidently had to examine the nature of his functions and the character of the alleged act. No guidance was sought from the

---

[8]82 *ILR* 117.

[9](1945) Vol. 21, p. 34.

[10]4 *ILR (Annual Digest)*, 1927-28, p. 384.

United States authorities. Additional cases of the same kind are to be found in the United States written statement in the present proceedings[11].

46. Once more, it is hardly necessary to say that the fact that a sending State can waive the immunity of its consuls does not justify the assertion that the sending State alone is entitled to characterize the nature of their activities.

D. Immunity of foreign armed forces

47. I turn now to the immunities of foreign armed forces. Here the position is for present purposes even more interesting. The status of foreign armed forces is now normally governed by treaty, in just the same way as the position of international officials and experts of the United Nations is governed by the 1946 Convention.

48. For example, the NATO Status of Forces Agreement of 1951 provides that in some matters jurisdiction is exclusive to the sending State. In other matters it is exclusive to the receiving State and, in yet a third category, jurisdiction is concurrent. Thus, primary jurisdiction is accorded to the sending State if the offence was one "arising out of any act or omission done in the performance of official duty". The situation was analysed by the late Judge Baxter in an article written in 1958[12]. He said:

> "The proper authority to determine whether an act was committed in the performance of official duties was at one time quite clear, but subsequent events have made it less so. According to the *travaux préparatoires* of the NATO Status of Forces Agreement, the certificate of the military authorities of the sending State would be taken as determinative of that fact."

However, no specific provision to that effect was inserted in the treaty. Judge Baxter continued: "Notwithstanding this clear history, the Legal Adviser to the Department of State testified to the Foreign Relations Committee of the United States Senate that *it rested with the courts of the receiving State to review any such certificate and to reach its own conclusions* about the question".

---

[11]See paras. 21-24.

[12]*ICLQ*, Vol. 7, pp. 77-79.

Judge Baxter then referred to the British Visiting Forces Act 1952, which he said "reflects the same view". He continued: "The certificate is merely to be 'sufficient evidence of that fact unless the contrary is proved'. This language was not in the text originally submitted to Parliament, which would have given the certificate a conclusive effect". The reason stated by Judge Baxter "for making this certificate merely sufficient evidence unless the contrary is proved, was that to give the final say to the man's commanding officer might lead to abuses, for a stroke of the pen would thus oust the courts of Great Britain of jurisdiction which was rightfully theirs".

49. So even in respect of *criminal* prosecution the determination whether an offence arose out of "any act or omission done in the performance of official duty" was one over which it was expected that the courts of the receiving State would have the right of decision. The treatment of civil cases does not affect our situation here.

50. An example of the determination by the courts of the receiving country of the character of an act in relation to foreign visiting forces is provided by the decision of the Japanese Supreme Court in *Japan* v. *Cheney* decided in 1955[13]. Cheney was charged with breaking into a private house and attempting to commit rape. Although the defendant argued that the offence had been committed while he was on patrol duty, the Japanese courts assumed jurisdiction under the relevant Agreement. This Agreement provided that, where the right to exercise jurisdiction was concurrent, the military authorities of the United States would have the primary right to exercise jurisdiction over United States armed forces *in relation to offences arising out of any act or omission done in the performance of official duty*. The Japanese courts examined the nature of the act and concluded that they had jurisdiction because the act in respect of which the accused was convicted was of a personal nature. In other words, the courts of the receiving State, Japan, asserted the right to qualify the offence.

---

[13]23 *ILR* 264.

51. But what really matters in relation to the immunity of foreign visiting forces is that in some of the treaties relating to their position we find examples of specific provisions asserting the exclusive right of the sending State to qualify or characterize the conduct in question.

52. In at least three agreements provision is made that a certificate to be issued by the authorities of the visiting force will constitute evidence as to the nature of the conduct in question. This is true of two agreements relating to the position of foreign armed forces in Germany[14] and, more pertinently here, of paragraph 13 of the 1964 Agreement between the United Nations and Cyprus concerning the status of the United Nations force in Cyprus. This treaty[15] provides that, as regards criminal offences, members of the force shall be subject to the exclusive jurisdiction of their respective national States. As regards civil jurisdiction, members of the force shall *not* be subject to the civil jurisdiction of the Courts of Cyprus *in any matter relating to their official duties*. From this it follows that members of the Force *are* subject to the civil jurisdiction of Cyprus in matters *not* related to their official duties. Article 13 provides that the Force Commander shall certify to the court whether or not the proceeding is related to the official duties of such member. In other words, it was thought desirable, in that particular context, that the question of who determines the scope of "official duties" should be dealt with specifically — in this case by giving that power to the Commander of the Force[16]. But, I must emphasize, the right of qualification thus accorded to the Commander of the Force was *specifically provided for in the agreement.*

53. And because the point is so important — the exception being one that most cogently proves the rule — I should refer to a further example, the 1976 Agreement for the Implementation of the Treaty of Friendship between the United States and Spain. This provides in Article XXVI that military members of the United States personnel in Spain shall *not* be subject to suit before

---

[14]The Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany (1952) and Article VIII (17) of the Finance Convention 1952, as amended in 1954, between the US, UK, France and the Federal Republic of Germany.

[15]*UNJYB* 1964, p. 40, para. 11.

[16]*Ibid.*, p. 40.

Spanish courts or authorities for *claims arising out of acts or omissions attributable to such persons done in the performance of their official duties*.

54. The Agreement then provides that if it should be necessary to determine the applicability of this Article, the military authorities of the United States *may issue an official certificate stating* that a certain act or omission of a military member of the United States personnel in Spain or civilian employee of the United States Forces *was done in the performance of his official duties. The Spanish authorities will accept such certificate as sufficient proof of the performance of official duty*[17].

E. Conclusions of this section

55. On the basis of the material presented thus far it should, I submit, be clear that the problem of determining whether any given case falls within the scope of qualified immunity is one that has always been resolved by the courts of the receiving State. There is only one category of exception. That is the case where there has been an express provision to a different effect — as in the Cyprus and Spanish agreements — that the question should be determined by a certificate of the sending authority.

56. Apart from these treaty exceptions, all the situations set out above are comparable to the 1946 Convention. It is difficult to see why there should be a difference in approach between these cases — which exclude any role for the sending authority in the absence of specific provision — and the position under the 1946 Convention.

57. Subject to immaterial variations in wording, the concept of qualified immunity as it appears in the United Nations Convention is the same as it is in the examples already cited to the Court. Such waiver provisions as there are, are no further reaching. There is no express provision giving the Secretary-General special powers of unilateral determination. The meaning of the words is clear.

---

[17] *Digest of United States Practice, 1976*, p. 295.

58. Does the nature of the 1946 Convention make any difference? This is a crucial question, yet none of the statements made in this case, whether written or oral, approach it. If the Court is to find in favour of the United Nations, it must be able to point to some effective distinction between the position of the United Nations under the 1946 Convention and the position of States generally in relation to the types of immunity that I have just discussed. If no clear distinction can be identified, then the decision that the sending State is as a matter of law entitled to determine the character of the act in respect of which qualified immunity is sought would amount to a massive extension of immunity and a major and unprecedented invasion of the sovereignty of States.

59. It is not for Malaysia to speculate on the grounds which might be advanced by the United Nations for such a distinction. If any such grounds are developed by the United Nations, Malaysia must, on the basis of the rule of *audi alterem partem*, be entitled to respond to them. But even now, in case it should be suggested that the protection of those working in the field of human rights is distinguishable, the Court may find one case particularly helpful. It is in some respects comparable to Mr. Cumaraswamy's case. In 1954 Sir Humphrey Waldock, before he became a Member and President of this Court, who had by that time been a member and President of the European Commission on Human Rights, was sued for negligence and corruption by a person whose petition to the Commission had been unsuccessful. The case was *Zoernsch* v. *Waldock* (1964)[18], an English decision. Under the Convention members of the Commission were entitled to immunity "in respect of words spoken or written and all acts done in their official capacity". One judge of the English Court of Appeal said: "I construe this as meaning that the immunity depends on the quality of the words spoken or the acts done, and not on the time when suit is brought"[19]. Yet nowhere in the case is any hint to be found that the determination of the quality of the acts done rested with anyone other than the English courts. No suggestion appears ever to have been made that the Secretary General of the Council of Europe had the power to determine the quality

---

[18]41 *ILR* 438.

[19]At p. 445.

of the acts done. This case, of the immunity conferred upon persons working for an international organization in the field of human rights, was treated in the same way as any other case raising questions of immunity in the English courts.

5. THE INTERPRETATION OF THE 1946 CONVENTION

60. Mr. President and Members of the Court, I now turn to develop Malaysia's interpretation of the 1946 Convention. I will do so by reference to:

(a) The literal wording of the Convention;

(b) The *travaux préparatoires*;

(c) The practice of all involved in the application of the Convention; and

(d) The views of writers of authority.

(a) The literal interpretation

61. Section 22 of the 1946 Convention accords experts such immunities "as are necessary for the independent exercise of their functions during the period of their missions". This is quite evidently a limited grant.

62. The particulars of this limited grant are then spelled out: "In particular they shall be accorded . . . *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission immunity from legal process of every kind". Permit me to emphasize the character of the words actually used: the text does not say that experts shall enjoy absolute immunity unless they act outside the course of the performance of their mission. It says that they shall enjoy immunity if they act in the course of their mission. They do not start with an absolute immunity which is reduced to functional immunity, they start with no immunity and are raised up to a limited immunity no more than can be justified by the needs of the performance of their mission.

63. There then follows a reference to the right and duty of the Secretary-General to waive the immunity in cases, where, in his opinion, the immunity would impede the course of justice and

can be waived without prejudice to the interests of the United Nations. The right and duty of waiver is *not* expressed as *a right to qualify the act* as being, or not being, one performed in the official capacity of the official. Waiver can only occur where there exists an immunity to waive. There can be no immunity for non-official acts. So there can be no right or duty to waive immunity in respect of such non-official acts. There is no immunity to waive. The fact that the Secretary-General may have chosen not to waive immunity in a given case does not necessarily mean that an immunity exists that could have been waived. Conversely, the fact that the Secretary-General may choose to waive immunity in a given case, does not mean that there would have been immunity if he had not purported waive it. The decision of the Secretary-General can be seen merely as a reflection of his view of what he considers appropriate in the circumstances. In short, there can be no waiver of an immunity that does not exist; and a refusal to waive a non-existent immunity cannot positively create an immunity where none would otherwise have existed.

64. In summary, there is nothing in the literal analysis of Section 22 to support the Secretary-General's view an overriding right of qualification is vested in him. In particular, the text does not contain any words that reserve for the benefit of the Secretary-General or of the United Nations a right to decide in a binding manner the *character* of the activity in question.

(b) **The *travaux préparatoires***

65. The Secretary-General has included in the dossier that he has prepared for the Court a number of items evidencing the *travaux préparatoires* of the Convention[20]. Reference may be made on the basis of Article 32 of the Vienna Convention on the Law of Treaties for the purpose of confirming the meaning resulting from the application of Article 31, the traditional literal or grammatical approach which I have just pursued. These items consist principally of extracts from the Report of the Preparatory Commission of the United Nations in 1946. Perusal of those items

[20]Dossier 62-68.

reveals nothing that can alter the clear wording of the Convention — nothing that justifies the introduction into the text of words that are not there for the purpose of reserving to the Secretary-General the conclusive power that he now claims. The only feature of interest is the fact that the Rapporteur of the Sub-Committee on Privileges and Immunities of the Preparatory Commission of the United Nations is identified as being Mr. W. E. Beckett of the United Kingdom — that same Mr. Beckett who only two years earlier had published in the *British Year Book of International Law* the article on consular immunity to which I have already referred. In that article he had dealt in detail with the immunity of consuls in respect of their official functions and had referred to the many cases in which the courts of the receiving State had examined the character of the conduct in order to determine whether it had occurred in respect of official functions. No one could have been better qualified than he to identify and grapple with any special problem that might occur in a parallel situation in the United Nations. But he does not refer to it in any of his reports; nor does anyone else refer to the problem in the course of the debates. In short, in 1946 the problem of qualification was a non-problem. It was passed over in total silence. This must be the strongest indication that no departure was contemplated from the practice that had until then prevailed in the existing system of immunity — of States, diplomats, consuls and foreign armed forces — to which I have already referred in detail.

(c) **The practice of all concerned**

66. Under Article 31 (3) *(b)* of the Vienna Convention on the Law of Treaties, the Court is directed to take into account, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

67. What is the relevant body of practice? In the submission of Malaysia it consists of three separate elements:

(i) the legislation of the parties;

(ii) the decisions of those courts that have applied the Convention; and

(iii) the conduct of the United Nations itself.

(i) The legislation of the parties

68. The most cogent evidence of the view taken by the Parties to the 1946 Convention of the scope of their obligations is to be found in the legislation adopted by most of them to implement those obligations.

69. It is essential in looking at this legislation to bear in mind that the function of the legislation was to give binding directions to the national courts of that party regarding the manner in which they were to treat cases brought against United Nations officials and experts. So the starting point in any given case is the assumption that proceedings have been brought in that nation's courts. A question is: what instruction does the legislation give to the national courts regarding the treatment of the question of whether or not the challenged conduct falls within the qualified immunity?

70. The expectation would be that in the absence of any specific provision on such a matter, the courts would apply their normal rule. That is to say, they would treat all the issues that come before them as justiciable. Does any national legislation prescribe different or special procedures in this regard?

71. I have examined the national legislation implementing the obligations of members under the 1946 Convention as collected together in the volume published by the Secretary-General in 1959[21] and I have also looked at some of the later legislation published in the *United Nations Juridical Yearbook.* I can find no statute which directs a national court to seek or receive a certificate from the Secretary-General, let alone to accept such a certificate as *conclusive* and *determinative* of the issue of qualified immunity. Maybe I have not looked carefully enough and, if I have not, no doubt I shall be corrected, but that is the present state of my reading.

72. This is significant for two reasons. First, if the Secretary-General, holding the views that he does, had reason to believe that the legislation of any given member precluded him from issuing a certificate binding on the courts of that country, he should have said so. Of course, it is possible

---

[21] *United Nations Legislative Series,* United Nations Doc. ST/LEG/SER.B/10.

that the Secretary-General may have taken the view that what happens within the national legal system is not his concern and, provided that the courts eventually reached the right decision, he was not concerned as to how they might get there. But if, as the Secretary-General now maintains, he believed that his certificate would be a necessary and conclusive element in that process, he could hardly have been satisfied with the situation that his own collection of domestic legislation revealed. He could not have been unaware of the limited extent to which the executive branches of member States can influence national courts. He could not have assumed that the United Kingdom and the United States to take but two, would have been in a position to convey in a manner binding on the courts an intimation from the Secretary-General that he considered the particular kind of conduct to be or not to be of an official character. Moreover, though certificates may be issued in relation to "fact", they cannot be issued in relation to "law"; and the statement that conduct is or is not of an official nature is not simply a statement of fact; it is also an application of law.

73. Thus, confronted by an accumulation of national legislation which does not reflect the Secretary-General's position regarding the effect of his own certificate, it could have been expected that the Secretary-General would either confront the issue by raising it openly or that he would have protested to each of the legislating parties to the Convention. So far as I am aware only one case of such protest has been identified — the letter addressed to the United States in 1976.

74. It is also important to look at national legislation from another point of view. Given its content, how can one say that any agreement of the parties has been established regarding the interpretation of the Convention along the lines now asserted by the Secretary-General? It takes the concordant practice of all, or most of, the parties to a Convention to establish an agreement regarding its interpretation. The only identity of outlook that can be perceived in this case amongst the State parties to the 1946 Convention is that they all appear to have approached the question of the immunities of international organizations and officials along the lines of the other types of immunity in the international system.

(ii) Decisions of national courts

75. One may look at these as elements in the practice of the parties to the 1946 Convention, with a view to seeing to what extent these courts have felt free to form their own judgment of the character of the act in question.

76. A number of cases may be cited to show that domestic courts have not approached the problem in the same way as the Secretary-General.

77. In *United States* v. *Egorov* (1963)[22] a United States district court applied the United States International Organisations Immunity Act. This is the reflection in United States law of the obligations of the United States under Article 105 of the Charter and serves in place of the 1946 Convention. It provides *inter alia* that "officers and employees of such organisations shall be immune from suit and legal process relating to acts performed by them in *their official capacity* and falling *within their functions*". It might have been expected that if the position now taken by the Secretary-General were accepted in the United States, the court would have declined to decide the classification question without the assistance of a controlling certificate from the Secretary-General. However, in this case the court decided the matter without any such assistance by forming its own view of the extent to which the defendant's duties and functions in the Personnel Section of the United Nations did or did not include such acts as those charged in the indictment.

78. The same is true of the approach in *United States ex rel. Casanova* v. *Fitzpatrick*[23]. Casanova was charged with conspiracy to commit sabotage in violation of United States criminal law. He contended that he was not subject to arrest or prosecution by the United States authorities because he was entitled to immunity under Article 105 of the Charter. The court took the view that under the Charter, the petitioner was entitled only to a functional immunity. If the position taken

---

[22] 34 *ILR* 151.

[23] 34 *ILR* 154.

in the present case by the Secretary-General were correct, the court should not have proceeded to review the petitioner's conduct. However, the court had no hesitation in making that assessment[24]?

79. Again in the case of *Menon* v. *Weil* in 1971, which was decided by the Small Claims Court of New York City[25], the estranged wife of a United Nations field worker instituted actions for support and maintenance against officials of the United Nations Headquarters staff. The United States attorney made a suggestion of immunity and moved to dismiss. The court accepted the suggestion but observed that "where an immunity claim was asserted not by the Department of State but by the alleged sovereign entity itself, the court could enquire whether the activity was governmental or commercial and proceed on the merits in the latter case". In other words clear distinction being drawn between a certificate of the United States executive, which the court was prepared to accept, and the certificate that might be issued by someone else which the court was not prepared to accept.

80. A similar position was taken by the Administrative Court of Vienna in the case of *X* v. *Vienna Federal Police Board* in 1975[26]. There the issue involved the interpretation of the Headquarters Agreement between Austria and the International Atomic Energy Agency, which conferred immunity from legal process on officials of that organization "in respect of words spoken or written, and of acts performed by them, in their official capacity". The Police Board took the view that the plaintiff's travel at the time of the offence was of a purely private nature and in no way arose from the exercise of his official duties on behalf of the Agency. The court expressed its agreement with the opinion, evidently the court did not feel prevented from making its own

---

[24]34 *ILR* 162. The independence of the court in this respect is clearly reflected in the following quotation: "Whether, upon the facts presented by both the Government and the individual involved or his Government, immunity exists by reason of the agreement, is not a political question, but a justiciable controversy involving the interpretation of the agreement and its application to the particular facts. In this instance the decision is for the court and it is not concluded by the unilateral statement of the Government, a party to that Agreement and to this controversy, that the individual is not entitled to immunity thereunder".[24] The court also said: " . . . by its very language the immunity is confined to acts necessary for the independent exercise of functions in connection with the United Nations. Conspiracy to commit sabotage against the Government of the United States is not a function of any mission."

[25]*UNJYB* 1971, p. 249.

[26]*UNJYB* 1975, p. 214.

assessment of the character of the conduct in respect of which the immunity was invoked, without any assistance from the Director-General of the International Atomic Energy Agency.

81. Nor are these the only cases — as will be seen when I refer in my next section to the Secretariat's own study of immunity prepared in 1967.

(iii) The position of the United Nations

82. So I come now, Mr. President, Members of the Court, with your leave, to the practice of the United Nations. The written statement of the United Nations contains a section[27] entitled "The United Nations established practice invariably has maintained the Secretary-General's exclusive authority to assert or to waive immunity". In fact, it is in this section that the Secretary-General most specifically develops his position[28], and I quote, "it is the long-lasting and uncontested practice of the United Nations that the authority to determine what constitutes an 'official' or an '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".[29]

83. Malaysia agrees, of course, that reference may be made to the practice of the parties in interpreting a treaty. But the matter is far from being as simple as the Secretary-General seems to suggest.

84. One must ask, in what manner precisely does the assertion made on behalf of the Secretary-General establish a relevant practice.

85. What is the practice? The Secretary-General's statement contains five references to documents in his dossier. I shall look at each of them — in chronological order.

---

[27]Section B of Chapter IV, paras. 45-49.

[28]Stated in para. 46.

[29]See also paras. 48 and 49 of the Secretary-General's Statement.

86. The first is the Secretary-General's letter to the United States written on 11 February 1976 in reaction to a decision of the New York City Criminal Court of 19 January 1976[30]. The letter contains a clear assertion of the Secretary-General's present position. No indication is given in the Secretary-General's written statement of whether the United States Government responded specifically to this letter. But the United States has by its own subsequent conduct — not least by the position it has taken in its written statement in the present proceedings — made it plain that it does not accept the Secretary-General's view of the matter.

87. Five years later, on 4 November 1981[31], the Secretary-General submitted a Report to the Fifth Committee of the General Assembly in connection with "Personnel Questions". This Report was not addressed to the Sixth Committee — the Legal Committee — where, if anywhere, its legal content might have been better appreciated. We all know how we feel about non-lawyers in the Fifth Committee. But that is a relatively minor, though not unimportant, point.

88. What matters more is the content of the Report and the date at which it was made. As can readily be seen, the principal focus of the Report is on the personal protection of staff members. Indeed, the section which contains the statement of principle on which the Secretary-General relies is headed "Arrest and detention of staff members". It is not directed in terms to the immunity of staff from civil jurisdiction. Nonetheless, the principle is stated in the following terms[32]:

> "First, the distinction between acts performed in an official 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."

89. It is unlikely that that statement, unconnected to any suggestion that it was applicable at the threshold stage of civil proceedings, would have troubled any but the most prophetic of lawyers, even if they had seen it. Taken in its particular context, it can hardly be regarded as a general

---

[30]Dossier 81.

[31]Dossier 113.

[32]In para. 7.

statement of position in relation to the provisions of the 1946 Convention bearing on the immunity of officials from civil jurisdiction.

90. However, the Secretary-General's written statement and Mr. Corell's oral statement yesterday attribute significance to the November 1981 Report by asserting that "the latter 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"[33]. Malaysia suggests that it is necessary to look more closely at the terms of that resolution. It is true that the third preambular paragraph of the resolution reads: "Noting the Report of the Secretary-General", not an operative paragraph. The Report is identified as the report requested by the General Assembly in 1980 on cases in which the international status of staff of the United Nations or the Specialized Agencies had not been fully respected[34]. The Report gave details of 47 cases of arrest, detention or disappearance of officials in various parts of the world. The Report was not concerned with the question of who is to decide in the course of civil litigation whether the conduct of the official or the expert occurred "in the course of the performance of their mission".

91. The preamble of the resolution goes on to note the position consistently upheld by the United Nations "in the event of the arrest and detention of United Nations staff members by governmental authorities". That is language descriptive of criminal proceedings. It does not refer to the position of the United Nations in relation to civil litigation — a distinction which may have significant implications for the problem now before the Court. When one comes to the operative part of the resolution, one observes that the first paragraph contains an appeal to any member State in relation to the "arrest or detention" of a staff member to inform the Secretary-General of the fact so as to enable him to apprise himself of the grounds for the arrest or detention. This appeal is included in a paragraph concerned with criminal proceedings, not civil proceedings.

---

[33]Dossier 106.

[34]Dossier 113.

92. Nothing else in the resolution has any direct bearing on the problem presently under consideration by the Court[35].

93. The Report of 4 November 1981[36] was followed on 1 December 1981 by a statement in the Fifth Committee by the Legal Counsel[37] in which he said:

> "the substance of the Secretary-General's protest in such cases [i.e., violations of immunity from legal process] was not that a particular staff member had been subjected to legal process but that he [the Secretary-General] had been prevented from exercising his right under the international instruments in force to independently determine whether or not an official act had been involved".

This observation, it must be recognized, approximates to the principle which the Secretary-General now asserts, but it does not itself refer to instances of practice. In so far as it refers generally to the earlier Report, one finds of course that the report contains illustrations of the non-application of the practice rather than of its application.

94. The Legal Counsel repeated the United Nations position in an internal memorandum on 5 April 1983[38]. An internal memorandum, particularly one published two years after the event, can hardly add to the relevant body of practice.

95. The next mention of the matter is in a Report by the Secretary-General to the Fifth Committee dated 25 October 1983[39] on the subject of staff of UNRWA detained in Lebanon. The report refers to an exchange of correspondence with the Government of Israel, in particular to a

---

[35]In paragraph 43 of the Secretary-General's statement, there are a number of assertions about the content of resolutions of the General Assembly after 1981 confirming the responsibilities of the Secretary-General in relation to the functional immunity of all United Nation officials. But these references do not advance the argument that the Secretary-General alone has authority to determine whether the conduct or the words of experts fall within "the course of the performance of their mission". It is not correct to say "the General Assembly has thus confirmed the exclusive authority of the Secretary-General to determine the extent of the duties and functions of United Nations officials and called for recognition of his assertions of their functional immunity". The General Assembly has not said that in civil litigation of the kind involved in this case the Secretary-General has the right to displace the function of national courts. And even if the General Assembly had said that, would it be sufficient to exclude the dominating significance of the manner in which Members of the United Nations have dealt with the matter in their national legislation?

[36]Dossier 113.

[37]Dossier 84.

[38]Dossier 85.

[39]Dossier 114.

letter from the Secretary-General of 28 June 1983. In that letter[40] the Report states, "the Secretary-General also referred to the recognized principle that it is exclusively for the Secretary-General . . . to determine the extent of the duties and functions of the United Nations officials".

96. A further brief allusion to his position was made by the Secretary-General in a letter to a Permanent Representative, unnamed, of 22 May 1985[41].

97. The next item mentioned in the Secretary-General's written statement is a letter of 24 January 1995 addressed to one of the missions in New York[42]. In this letter — which is clearly not a public document and is one in which the Secretary-General has even deleted the name of the recipient — he states that "the United Nations cannot accept as a matter of principle, the assertion contained in your letter that 'Whether the alleged acts by Mr. X giving rise to this suit were performed in his official capacity is a question for the court'."

98. A last example of the assertion of the principle addressed by the Secretary-General is another non-public note of 25 February 1998 addressed to an unnamed Minister for Foreign Affairs in which the Secretary-General "maintains the position that it is *exclusively* for the Secretary-General, not for the Government of the [unnamed country] to determine whether certain words or acts fall within the course of the performance of a United Nations mission".

99. Now before summarizing very briefly the items invoked by the Secretary-General on his practice and my comments thereon, it is necessary to address one very important fact. This is that the earliest of the items in the Secretary-General's list of episodes establishing his practice is 11 February 1976, some 30 years after the 1946 Convention was adopted. If the principle for which the Secretary-General contends was so important to the United Nations, it is surprising that there had been no earlier expression of it. And this was not for lack of opportunity. In 1967 the

---

[40]At para. 9.

[41]Dossier 87.

[42]Dossier 100.

Secretariat produced a major study entitled "The Practice of the United Nations, the Specialized Agencies and the IAEA concerning their status, privileges and immunities". This was prepared in connection with the International Law Commission's agenda item on relations between States and international organizations. The document covers 180 closely printed pages of the *Yearbook of the International Law Commission*[43]. The chapter dealing with privileges and immunities of officials begins with a general section which contains no reference to the alleged principle or practice[44].

100. The next section is entitled "judicial decisions". This contains summaries of four cases in national courts involving proceedings against officials of the United Nations. In three of them it is quite clear that the decision depended upon a finding that the official's conduct had not been performed in his official capacity. In none of them was there a determination by the Secretary-General of the character of the conduct[45]. In not one of the summaries is any reference made to the alleged principle or practice. There then follows a number of sections which do not bear on the alleged practice and contain nothing of relevance. The section on "Waiver"[46] contains nothing which could suggest a connection between it and the principle and practice now claimed.

101. There is nothing else in this part of the 1967 study that relates to this matter except an observation in the section on "Settlement of Disputes" that

> "Where the Secretary-General determines that the dispute involves the staff member in an official capacity and that the interests of the United Nations do not permit the waiver of the immunity, the usual method of settlement has been by means of discussions and correspondence with the Government concerned in an effort to reach agreement."[47]

This, as will be appreciated, is hardly a direct statement of the principle, or indeed of the practice, to which the Secretary-General now attaches such importance.

---

[43]*YILC*, 1967, Vol. II, pp. 154-334.

[44]From p. 264.

[45]See *Westchester County* v. *Ranollo*, p. 267; *US* v. *Coplon, id.;* and *People of the State of New York* v. *Coumatos, ibid*, p. 268.

[46]At p. 283.

[47]P. 296, para. 387.

102. In short, the so-called "established practice" of the United Nations in a matter now represented to you by the Secretary-General as being of vital importance to United Nations operations was quite disregarded in the part of the 1967 study devoted to the United Nations itself and was only mentioned in an obscure and incomplete manner in the section on the Specialized Agencies.

103. So, how may we summarize the Secretary-General's case for the existence of an established practice? — silence for the first 30 years of the Convention and particularly in 1967 when he had the opportunity fully to assess it within a comprehensive and systematic statement of the United Nations position but in fact then cited examples to the contrary; then a protest to the United States in 1976 which that State evidently did not accept and which led to no change of position on its part; then two statements of the principle in 1981, in the Fifth Committee, in the context of a report on criminal, not civil, proceedings affecting officials; then one open statement in the Fifth Committee in 1983 in a context where his remarks were unlikely to generate wider concern; a brief allusion to the matter in 1985; and, finally, two assertions of the principle in 1995 and 1998 in non-public documents which could not have come to the attention of anyone other than their anonymous recipients? These are hardly the building blocks of a practice to support the assertion of a major point of principle.

104. But let us, for the sake of argument, and conceding nothing as to the value of these episodes, assume that they could be regarded as evidence of the practice of the United Nations as a party to the 1946 Convention. How can one find in these episodes evidence of "the agreement of the parties" regarding the interpretation of the 1946 Convention? The answer is, it is impossible. This is not a situation in which the other parties have tacitly acquiesced in a position advanced by the Secretary-General. They could hardly have done so in view of the obscure and shrouded manner in which he expressed his position.

105. But much more to the point is the fact that the Secretary-General's practice, whatever it may be, is contradicted by the widespread counter-practice of States parties to the Convention

who have expressed their understanding of their obligations under the Convention in a quite different manner. I need not repeat here what I have already said about the significance of the States parties' domestic legislation. It cannot be disregarded. Nor is it possible to disregard the practice evidenced by the judicial decisions to which I have already referred. These items quite outweigh in significance the items of so-called "practice" produced by the Secretary-General. In Malaysia's submission, the Secretary-General's reliance upon a so-called established practice is quite unsustainable.

Mr. President, I am sure that you and Members of the Court may be becoming conscious of the time. I am too. I am reminded of the story about the public speaker who said that I will not worry if you look at your watches, I will worry if you put them to your ear and shake them. It is going to take me, Mr. President, approximately 25 minutes to finish. I hope you will allow me to continue.

D. The Views of Writers

106. I come now to the view that have been expressed by writers who have given special attention to the law of international organizations or the law of immunities. Only a few of those who have dealt with this subject have grappled with the specific question of who is to decide whether conduct falls within the scope of a functional immunity. On the whole the authors may be grouped in four categories — only one of which, the smallest, lends any support to the Secretary-General's position.

107. The first group consists of those who, though they deal with the question of immunity generally, have failed to identify the existence of the problem. Their silence on the matter suggests either a lack of awareness of its importance or, as is more likely, an implied acceptance that the matter falls within the competence of the national court[48].

---

[48]An example is provided by the major treatise of Professors Schermers and Blokker entitled *International Institutional Law (1995)*. Though it contains paragraphs (Nos. 534 and 535) on immunity from jurisdiction, it does not really touch on the problem of identifying the nature of official acts. The same is true of the more recent work by C. F. Amerasinghe on *Principles of the Institutional Law of International Organisations*. His section on the immunity of officials completely passes over the problem.

108. The second group consists of publicists who identify the problem but do not provide a solution to it. In effect, therefore, they do not accept the idea that the beneficiary organization should determine for itself the scope of its own functions. The two writers concerned are amongst the most distinguished in the international legal sphere.

109. The first was Kelsen. In his study *The Law of the United Nations* (1950) he discusses one of the formulae in which the concept of qualified immunity is expressed, "namely, such privileges and immunity as are necessary". Of this formulae he says that "for certain purposes [it] requires an authority to determine what is necessary"[49]. Having quoted from the Report of Committee IV/2 of the San Francisco Conference, Kelsen continues: "However, the interpretation of the phrase, 'such privileges and immunities as are necessary' is not authentic — authentic is his word which I presume means not self-evident — and the Charter does not answer the question as to who is competent to decide what is 'necessary'". He then mentions that Article 105, paragraph 3, provides for "recommendations" to be made by the General Assembly "with a view to determining the details of the application of paragraphs 1 and 2 of this Article" or for "conventions to be concluded between Members and the Organization for this purpose". He concludes: "If no convention exists there is no possibility of imposing upon a Member a definite interpretation of the provisions of Article 105, paragraphs 1 and 2." The 1946 Convention is, of course, the Convention that Article 105 contemplated. However, the whole problem now before the Court stems from the fact that the Convention did not see the problem of qualification as one requiring specific treatment — in all likelihood because it was obvious to those preparing it that the matter would be determined in the first instance by the courts of the receiving State, subject to the possibility of arbitration or of appeal to this Court.

110. The more detailed consideration of the problem, but in equally inconclusive terms, is to be found in the work by Wilfred Jenks on *International Immunities* (1961). The relevant

---

[49]At p. 341.

passage[50] has already been quoted by Malaysia in its observations. Jenks identified the problem and then stated that there appeared to be three possible ways of avoiding difficulty in the matter. One would be for the municipal court, before which the question of the official or private character of a particular act arose, to accept as conclusive in the matter any claim by the international organization that the act was official in character. That is of course the position of the Secretary-General in this case. But, it must be observed, Jenks does not identify it as being the only or necessarily the right position. He goes on to a second approach. This would be for a court to accept as conclusive in the matter a statement by the executive branch of the country where the matter arises, certifying the official character of the act. And the third approach would be to have recourse to the procedure of international arbitration and the suspension of any national proceedings pending the outcome of the arbitration. He recognizes that it may well be that none of these three solutions would be applicable in all cases. The first might be readily acceptable only in the clearest case and the second is available only if the executive government of the country where the matter arises concurs in the view of the international organization concerning the official character of the act. He concludes that "taken in combination these various possibilities may afford the elements of a solution of the problem"[51].

111. It is thus absolutely clear that Jenks — the best informed and most practical writer on the law of international organization in his time — was aware of the problem. Nonetheless, writing about it in 1961, some 15 years after the adoption of the 1946 Convention, he did not find in the practice of the United Nations, or of other international organizations, any basis for asserting that the only correct approach was the one now asserted by the Secretary-General. Nor did he mention

---

[50]At pp. 117-118.

[51]The views of Jenks were echoed, albeit without express acknowledgement, by Professor Bowett in his textbook on *The Law of International Institutions*. 2nd edition, 1982, p. 356. He identified the problem and its possible solutions in the following passage: "This raises the problem, to which there is no clear solution, of who decides the official or private character of a particular act; a municipal court could well accept as conclusive a statement by the organisation, or by the executive of the State in which the matter has arisen, or proceedings might be stayed whilst the matter went to arbitration. Certainly a conflict of view between the organisation and domestic courts is possible".

that approach in terms indicating that this was currently a rule of law or even an established practice.

112. The third category of writer clearly recognizes that the decision as to the character of the conduct in question is one to be taken by the domestic court. The *Restatement of the Law, (Third), Foreign Relations Law of the United States* (1986) confronts the problem squarely. After stating that officials of international organizations are immune from a State's jurisdiction "in the exercise of their official functions", the Restatement concludes:

> "whether an act was performed in the individual's official capacity is a question for the court in which the proceeding is brought, but if the international organization disputes the court's finding [i.e., after the finding] the dispute between the organization and the state of the forum is to be resolved by negotiation, by an agreed mode of settlement, or by the International Court of Justice"[52].

But first always the courts of the national State.

113. Fourthly and lastly, there is at any rate one writer who supports the position of the Secretary-General. In the commentary on the *Charter of the United Nations*, edited by Professor Simma, reference is made in connection with Article 105 of the Charter to the fact that "for good reason, the United Nations claims exclusive competence to decide — generally and case by case — what constitutes an official act. Immunity of the United Nations would be jeopardized if precedence of scrutiny and decision had to be left to the national courts". But this is evidently not a deeply reasoned analysis of the situation in a work where more might have been expected; nor is it convincing.

114. The conclusion which, it may be submitted, should be drawn from this analysis of the views of a number of publicists who have written on or around this question (and there are no doubt many more — so many that it is impossible in the time available to me to have examined them all), it is possible that the view presented by the Secretary-General is not one that has commended itself as the only or obvious solution. Certainly nobody has sought to explain the present position of the

---

[52]P. 512.

Secretary-General as being a reflection of the modification of the 1946 Convention by practice. Equally, certainly, nobody has seen the Secretary-General's position as flowing from a literal interpretation of the text of the 1946 Convention. In these circumstances, one is driven back to the analysis which formed the first part of this argument, namely, that there is no reason why the immunities of international organizations should be approached on a basis different from the immunities of States, diplomats, consuls and foreign armed forces.

6. CONSIDERATION OF SOME OTHER POINTS MADE BY THE SECRETARY-GENERAL

115. The Secretary-General has attached weight[53] to the fact that under Section 30 differences arising out of the interpretation or application of the Convention shall be referred to the Court by means of a request for an advisory opinion. But the conclusion which the statement draws from the existence of Section 30, does not at all follow from what precedes it. The conclusion is expressed in the last sentence of paragraph 39 as follows:

> "The fact that such a procedure [that is Article 30] is mandated demonstrates the weakness of the assumption that national courts may adjudicate the question whether certain words or acts were spoken, written or done in the course of the performance of a mission for the United Nations."

To Malaysia the position appears quite different. The fact that the procedure of Section 30 is mandated in the case of a difference arising out of the application of the Convention rests on the basis that a national court, having adjudicated on the question of whether certain words were spoken or written in the course of the performance of a mission for the United Nations, may reach a conclusion with which the Secretary-General does not agree. In such a case Malaysia accepts the prospect of recourse to this Court. But that does not displace the necessity that the issue must first have been considered by a national court. We are speaking, in effect, of a requirement of exhaustion of local remedies before proceeding to an agreed international forum.

---

[53] See para. 39.

116. The Secretary-General next seeks[54] to extract from the Court's Advisory Opinion on *Reparation for Injuries*, and the obligation acknowledged therein of the Organization to exercise a measure of functional protection on behalf of its agents, the conclusion that it is for the Secretary-General to afford experts on mission the functional protection to which they are entitled when acting in the course of the performance of their United Nations mission. As a general proposition Malaysia would not contest that assertion. But unless the expert has been deprived of an immunity to which he is objectively and lawfully entitled there is nothing that requires protection.

117. The Secretary-General also recalls the terms of Staff Regulation 1.8[55], which restate the proposition that immunities and privileges attached to the United Nations are conferred in the interests of the organization and requires staff members to report to the Secretary-General in any case where these immunities need to be invoked. Once again, the Secretary-General asserts that it is he who *alone* decides whether immunity should be waived. Once more, however, this statement reaches a conclusion which is not connected to the observations which precede it. Then again he says: "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 they were subject to challenge in the national courts of each member State". This observation does not connect with what preceded it. Nor is it supported by any reasoning or authority. It confuses the proposition that the responsibilities of the Organization and its agents are international in character (a proposition which Malaysia does not question) with a pretended legal consequence that this international character cannot be equally and uniformly maintained throughout the world if the officials and experts "were subject to challenge in the national courts of each member state". It is difficult to see the connection between the premise and the conclusion. Again the important point is that the observation fails to appreciate that immunities are only enjoyed for

---

[54]See para. 40.

[55]See para. 41.

acts done "in the course of the performance of their mission". The determination of what acts are done in the performance of an official's mission is something that cannot in any event be maintained equally and uniformly throughout the world when the responsibilities of the officials or experts manifestly differ from country to country and situation to situation. Moreover, one must ask, do the problems of the United Nations in this respect differ from the comparable exposure to diversity in national approaches by which States are faced when making claims of State, diplomatic or consular immunity or of immunity for their armed forces abroad?

118. It has to be appreciated that the matter now in issue before the Court has never been the subject of open and specific debate. This may well be because the Secretary-General has taken the view that if a debate were to take place, a difference of views could be revealed that would be quite inconsistent with his position; and he may well have concluded that in the circumstances it was better to leave the position obscure than risk an open exposure of disagreement.

119. In these circumstances what is the proper way of approaching the problem that arises when civil litigation is instituted against United Nations officials or experts? Malaysia is far from wishing to add to the enormous burden that the Secretary-General so admirably discharges. Malaysia has deeply appreciated the way in which the Secretary-General and his staff discharge their onerous responsibilities. At the same time, Malaysia considers that the work of the Secretary-General must be conducted within the established legal framework. What is true for every other organ of the United Nations is no less true for the Secretary-General. If there is doubt or obscurity in the rules by which he has to operate, then it is his responsibility to bring those doubts and obscurities specifically and prominently to the attention of all the Members of the Organization so that the problems may be tackled openly and effectively.

120. In relation to the qualification of conduct in the context of functional immunity, the alternatives are limited, even though the choice may not be simple. The options were foreseen by Wilfred Jenks 37 years ago. If the Secretary-General insists that the determination of the character on conduct in issue must be a matter for him and him alone, then either there must be an

amendment to the General Convention or the Secretary-General must negotiate with member States on a bilateral basis to establish expressly the right which he now claims. Malaysia would not necessarily be opposed to changes in the present situation brought about by agreement and with due respect for the sovereignty of the parties to the 1946 Convention. What Malaysia cannot accept is that it should be the State that is internationally criticized for insisting on a position which is fully consistent with the history and policy of the system of international immunity — a position which has never been openly challenged and which is shared by a number of other member States.

121. It is, of course, unfortunate that the present difference of opinion between Malaysia and the Secretary-General should have occurred in the context of the work of the Human Rights Commission. By taking a position that appears to be adverse to the promotion of human rights in the judicial sphere, Malaysia may incur the disapproval of those who generally support the promotion and protection of human rights but who may be unaware of all the aspects of the present legal situation. A dispute of a purely legal character becomes emotionally charged; and that is unsatisfactory. The Secretary-General has asserted[56] that "national adjudication would inevitably frustrate and, if allowed to proliferate, potentially endanger the entire human rights mechanism of the United Nations system". This is an overstatement which goes far beyond the needs of the present situation and falls short of the admirable standards of fairness and objectivity that normally characterize the work of the Secretariat. Malaysia must ask the Court to detach itself from this kind of generalization which stands as an implied slur upon all the national systems of adjudication that the Special Rapporteur was considering. If the assertion of the Secretary-General is correct, then the task of strengthening judicial independence within national legal systems is one which is quite beyond any prospect of achievement.

---

[56]See para. 55.

PART TWO

7. THE SECOND QUESTION: THE LEGAL OBLIGATIONS OF MALAYSIA

122. Mr. President, Members of the Court, this brings me to the end of Part One and I can deal with Part Two quite briefly. My remaining comments are on "the legal obligations of Malaysia in this case". My submissions in this connection follow directly from the tenor of the submissions that I have been making on the principal question. Malaysia maintains that its obligations under the 1946 Convention are to ensure that its courts properly perform their duties in relation to cases in which immunity is pleaded — as I have already stated at the beginning of this argument and will not repeat now. In the absence of a change in the present system that would take treaty form and could then be incorporated into national systems by appropriate implementing legislation, Malaysia cannot accept that the normal judicial process may be properly interfered with by any intervention of the executive branch of government going beyond the presently accepted role of the executive certificate. Malaysia ventures to believe that what is true for it is probably also true for many other Members of the United Nations, especially those with a common law background.

123. The Secretary-General suggests[57] that if the Government of Malaysia disagreed with his assertion of the Special Rapporteur's immunity from legal process, the Government could have invoked the dispute settlement mechanism provided for under Section 29 of the Convention. Malaysia cannot allow this observation to pass without comment. Section 29 does not itself provide for any dispute settlement mechanism, nor has the dispute settlement mechanism which is contemplated in it yet been established. There was therefore no mechanism under this Section to which Malaysia could have turned. In any case, it is doubtful if it would have been appropriate for Malaysia as a State to take the initiative under this Section. Section 29 appears to contemplate proceedings between the plaintiff in civil cases and the defendant claiming immunity. It does not extend on its face to disputes between States parties to the Convention and the United Nations. These are covered by Section 30. And in that regard, though Malaysia might take an initiative, it

---

[57]See para. 61.

would be dependent upon the willingness of some authorized organ of the United Nations actually to seek the advisory opinion from the Court. There is no way in which Malaysia can directly initiate the advisory opinion process.

124. But the truth of the matter is that any initiative should have been taken by the Secretary-General, as eventually it was when the matter was placed before the Economic and Social Council. At that point the dispute was not one between the plaintiffs in civil litigation in Malaysia and the Special Rapporteur, but was one between the Secretary-General and Malaysia, with the former alleging and the latter denying that the Secretary-General could oust the interlocutory jurisdiction of the Malaysian courts to make a preliminary determination of the nature of the conduct in question.

125. Lastly, the Secretary-General has asserted that Malaysia is ultimately responsible for any costs, expenses or damages arising out of proceedings in the International Court. It follows from all that Malaysia has so far submitted to this Court that this contention is entirely premature. The costs in the civil proceedings will be borne in accordance with the usual practice by the unsuccessful party or otherwise in accordance with the order of the Malaysian court. The costs incurred by the United Nations or by Malaysia in the present proceedings before this Court are a matter for this Court to determine after having heard such submissions as the Parties may make after and in the light of the Court's eventual opinion.

126. Mr. President and Members of the Court, that brings me to the end of the oral submissions which I have been instructed to make on behalf of the Government of Malaysia. Needless to say, I regret their length, but having regard to the nature of the issues and of the arguments previously placed before you, I would not have felt justified in withholding from you an analysis and authorities not previously presented by any participating State. I hope that you will not judge me wrong in my estimate of the needs of the situation.

127. Mr. President and Members of the Court, I thank you very much for having heard me so patiently.

The PRESIDENT: Thank you, Sir Elihu. There are questions of Members of the Court, and I call first on Judge Vereshchetin.

Question by Judge Vereshchetin

Mr. VERESHCHETIN: Thank you Mr. President. I have the following question which I would like to address to the Secretary-General. Under Section 23 of the 1946 Convention, the immunity of any expert must be waived if in the opinion of the Secretary-General "*the immunity would impede the course of justice* [emphasis added] and it can be waived without prejudice to the interests of the United Nations". In the light of this provision of the Convention, if the position of the Secretary-General in this case were sustained by the Court, what would be in the view of the Secretary-General the legal remedies available to the Malaysian private plaintiffs?

The PRESIDENT: Thank you. I now call on Judge Higgins.

Question by Judge Higgins

Judge HIGGINS: I have two questions for the Secretary-General. First, are there examples where the Commission on Human Rights has declined to ratify acts of a Special Rapporteur as being appropriate to his mission? Second, is it the position of the United Nations that an expert, if he is answering questions put to him as Special Rapporteur, related to the topic of his mission, is acting "in the course of performance of his mission" regardless of the content of his remarks? Put differently, does the content of an expert's remarks have any role to play in determining whether he has immunity under Article VI, Section 22, of the Convention?

The PRESIDENT: Thank you. That completes the proceedings for this morning. The Court contemplates, in the light of the views expressed to it by some of the participants in these proceedings, affording them the opportunity to put forth their observations on the positions that have been stated. I contemplate doing that on Thursday if all of those concerned will be able to participate then; at any rate, if not with the whole of their delegations then with part of their

delegations. And it so proposes in the light of consultations on the matter that have gone on, and therefore the preparations made in the light of those consultations. Is that satisfactory to those participants who contemplate making further statements? The Court would thus contemplate meeting on Thursday morning of this week at 10 a.m. and we assume that the proceedings would conclude that morning.

Mr. Corell, did you wish to comment on that?

Mr. CORELL: Thank you, Mr. President. May I consult a little before you rule please? Thank you.

The PRESIDENT: The Solicitor-General, please, you have a comment?

Mr. DATO' HELILIAH YUSOF: If it pleases the Court, the proposal is acceptable to us. Thank you.

The PRESIDENT: Thank you so much, Solicitor-General. Mr. Corell, please?

Mr. CORELL: Mr. President, thank you very much for your indulgence. I have consulted and the proposal is also acceptable to us. I must add that the reason why I wanted to ponder upon this was that the statement made by the counsel for Malaysia requires some careful study on our part, but it is acceptable to us. Thank you.

The PRESIDENT: Thank you so much. Well, I think meeting on Thursday will afford you the more time for that study.

I believe that the proceedings then for today are concluded. I wish to thank all those that have participated yesterday and today for the excellence of their presentations and we look forward to further observations on Thursday. Those who contemplate speaking should of course confirm their intentions to the Registrar. We stand adjourned.

The Court rose at 1.15 p.m.