CR 98/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1998

Public sitting

held on Thursday 10 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 jeudi 10 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
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
	Deputy-Registrar	Arnaldez

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

M. Arnaldez, greffier adjoint

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 Rome,

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 Secrétaire général 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 du 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 de l'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 la 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. Judge Herczegh is absent today for urgent personal reasons and the Registrar is on duty in New York; the Deputy-Registrar is acting in his place. We have convened for the second round of the current hearings on the request for an advisory opinion and I call first on the Under-Secretary-General and Legal Counsel, Mr. Corell.

Mr. CORELL:

I. INTRODUCTION

1. Thank you, Mr. President, for allowing me to address the Court again in this important matter. My statement today will be focused exclusively on the questions put by Judges Vereshchetin and Higgins, and the salient features of the oral statement by the Government of Malaysia two days ago. I also have a few very brief final remarks.

II. QUESTIONS BY THE JUDGES

2. With your permission, Mr. President, I now intend to respond to the questions by Judges Vereshchetin and Higgins.

A. Question by Judge Vereshchetin

3. Judge Vereshchetin's question is:

> "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 were sustained by the Court, what would be, in the view of the Secretary-General, the legal remedies available to the Malaysian private plaintiffs?"

Answer

4. Mr. President, in order to answer this question I will describe the remedy régime envisaged by the Convention, and implemented by the United Nations, and then indicate what remedies are, therefore, available to the plaintiffs.

The remedy régime envisaged by the Convention and implemented by the United Nations

5. Unlike the immunity available to States and their agents under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, the immunity accorded to the United Nations by Article II of the Convention on the Privileges and Immunities of the United Nations, and the immunity accorded to agents of the United Nations by Articles V and VI, is offset by an *obligation* in Article VIII to make remedies available to private parties who might otherwise be harmed by the immunity of the Organization and its agents. This régime is what C. Wilfred Jenks described as "Immunities within the Law" (*International Immunities*, 1961), that is to say the provision "for legal process in determining any differences of opinion on the subject between States and international organizations" (at p. 21). As Jenks, so pertinently and succinctly stated

> "The essence of the matter is that the rule of law is placed in an international setting in which the equilibrium of all the factors in play can be reached rather than in a purely national setting in which purely local influences may determine and distort the outcome." (*Ibid.*, p. 28.)

6. Section 29 of the Convention requires the United Nations to make provision for appropriate modes of settlement of private law disputes in two situations which are intended to provide a complete remedy system to private parties who allege to have been harmed by actions of the United Nations or by its agents acting within the scope of their mandate.

7. Section 29 *(a)* requires the United Nations to make provision for appropriate settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.

8. The United Nations has implemented Section 29 *(a)* by inserting into all commercial agreements into which it enters an arbitration clause pursuant to the UNCITRAL Arbitration Rules. These Rules, Mr. President, universally recognized to be fair and impartial, provide a complete framework for the settlement of commercial disputes.

9. If the United Nations has a private law dispute arising out of a non-contractual situation and such dispute has not been settled by negotiation, it does make provision for suitable means to settle the dispute, usually by arbitration in accordance with the UNCITRAL Arbitration Rules. The United Nations has also agreed to formal conciliation through the UNCITRAL Conciliation Rules. I should emphasize, however, that the overwhelming majority of claims are settled through negotiation.

10. Section 29 *(b)* of the Convention requires the United Nations to make provision for appropriate settlement of disputes involving an official of the United Nations who, by reason of his official position enjoys immunity, if that immunity is not waived by the Secretary-General.

11. Paragraph 15 of our written comments notes that it is the evident intent of Section 29 to provide remedies to private parties who allege that they are harmed by acts of an agent of the United Nations not just a United Nations official. The United Nations considers that this provision applies *mutatis mutandis* to acts of experts since both officials and experts are agents of the Organization.

12. In motor vehicle cases the United Nations has a worldwide insurance policy and the claims are handled by the Organization's insurance carrier. We have already noted that commercial agreements contain provisions for appropriate means for the settlement of disputes. However, as other claims of a private law nature could arise in any of the 185 member States, and could arise out of innumerable factual situations, it is neither feasible, practical or economical to establish standing claims bodies to deal with these questions. The United Nations settles most claims through negotiation, referring those claims that cannot be settled to arbitration under the UNCITRAL Arbitration Rules or, sometimes, through conciliation under the UNCITRAL Conciliation Rules.

13. Finally, Mr. President, we again emphasize that in the event that immunity is asserted, a claimant seeking a redress against the Organization shall be afforded an appropriate means of settlement. The immunity of the United Nations, or its agents, does not leave a plaintiff without

remedy as would a successful assertion of sovereign immunity by a State. What an assertion of the United Nations immunity does is to ensure that the claim will not be adjudicated by national courts but by independent arbitrators pursuant to rules collectively agreed upon by the international community, that is the UNCITRAL Rules. These rules are not the creature of one national jurisdiction.

Remedies available to plaintiffs in this case

14. By determining that the words spoken by Mr. Cumaraswamy were performed during the performance of the mission for the United Nations, the words complained of are now the responsibility of the United Nations. It follows that any private plaintiff who considers himself harmed by the publication of those words may submit a claim to the United Nations which, if the suits in national courts are withdrawn, will attempt to negotiate a settlement with the plaintiffs; if this is not possible, the United Nations will make provision for an appropriate means of settlement, for example, by submission of the dispute to arbitration in accordance with the UNCITRAL Arbitration Rules. I hope Judge Vereshchetin, that that answer satisfies your question.

B. Questions by Judge Higgins

First question

15. Mr. President, I now come to Judge Higgins' questions. The first question is:

> "Are there examples where the Commission of Human Rights has declined to ratify acts of a Special Rapporteur as being appropriate to his mission?"

Answer

16. In responding to this question. I should first point out that while the Commission on Human Rights is the intergovernmental body that appoints the Special Rapporteurs and establishes their mandates, mandates which are often delicate and always sensitive, Special Rapporteurs are experts who function independently of the Commission. Nevertheless, the

Commission does maintain a broad oversight function of both the mandate and the methods of work of the Special Rapporteurs, as well as the content and conclusions of their reports, and occasionally suggests modifications.

17. While the Commission has only infrequently intervened — out of respect for the integrity and independence of the Special Rapporteurs — it has, as we have noted, occasionally declined to ratify the words or acts of a Special Rapporteur as being appropriate to the mandate or mission. One recent example which illustrates the role of the Commission arose in 1997. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance reproduced a text to which several delegations of member States of the Organization of the Islamic Conference reacted strongly (E/CN.4/1997/71). The Commission decided, without a vote, to express its indignation and protest at the content of such a blasphemous reference to Islam and the Holy Koran and affirmed that the offensive reference shall be excluded from the report. The Chairman was requested to ask the Special Rapporteur to take corrective action. After various consultations, a corrigendum was published deleting the sentence in question.

Second question

18. Mr. President, Judge Higgins' second question is:

> "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?"

Answer

19. In order for the Secretary-General to determine whether words spoken or written, or acts performed, were in the course of an expert's mission he must assess, as a question of fact, whether in his opinion the words spoken or acts performed were done during the course of the

mission and secondly whether, in his opinion, those remarks related to the mission (see written statement, para. 51 and written comments, paras. 6 and 7). With due regard to the independence of the Special Rapporteurs it is submitted that, when determining questions of immunity the content of the remarks does have a bearing on the Secretary-General's determination. That the Special Rapporteur indicated, either explicitly or implicitly, that the remarks were made in his capacity as Special Rapporteur is not determinative. The determination whether the conduct is within the performance of a mission and therefore is immune is exclusively for the Secretary-General to make, subject to his right and duty to waive immunity in accordance with the Convention and to the jurisdiction of this Court. This is so because, just as the content has to be looked at to determine whether the words relate to the mandate, the content of those remarks may be so egregious as to lead to the conclusion that they cannot be characterized as mandate related despite the views of the expert that he was acting in the discharge of his mandate.

Mr. President, those were the answers to the questions put by Judge Higgins.

III. COMMENTS ON THE ORAL STATEMENT BY THE GOVERNMENT OF MALAYSIA

A. General Comments

20. I now come to the oral statement by the representatives of Malaysia. I will comment on this statement in three parts: (A) general comments, (B) the scope of the question before the Court, and (C) some specific comments.

21. With respect to the general comments, I should, first, like to refer to the observation made by the counsel for Malaysia that the Secretary-General, Costa Rica and Italy has not added significantly to their written statements. This may be so. The Secretary-General saw his role at this stage to set out the framework of the case, as he perceives it, to highlight certain aspects in order to assist the Court in order to arrive at its opinion and to respond to any questions that the judges might have. Now is not the moment when "significant additions" should be made.

22. Be that as it may, the Secretary-General can certainly not make the same complaint with respect to the submission of the Government of Malaysia. What we experienced last Tuesday was, in fact, a completely revised presentation of Malaysia's position. The oral statement bears little resemblance to what was said in the written statements. I am not particularly concerned with the arguments that have been brought forward; these will be addressed in the course of my statement, even if I am afraid, Mr. President, that it will take some time. It would have assisted all involved in these proceedings if Malaysia's observations had been made earlier in the proceedings.

23. I am, however, concerned over another element that has crept into Malaysia's arguments. It is argued that the Secretary-General has lacked in diplomatic courtesy, that he has made exaggerations and generalizations that "stand as an implied slur upon all the national systems of adjudication that the Special Rapporteur was considering", and that the Secretary-General has advanced the position in an "obscure and shrouded manner".

24. Mr. President, with respect to diplomatic courtesy, the Secretary-General of the United Nations is certainly not lacking in his respect to member States, nor would he condone such behaviour on the part of his staff. Also, we who work for the Organization take pride in this and endeavour to discharge our duties in a professional and courteous manner. I, therefore, feel compelled to refute the allegations made by the Solicitor-General of Malaysia that the Notes Verbales he issued in connection with the legal proceedings in the Malaysian civil courts were peremptory in nature and did not contain the usual courtesies.

25. The Notes Verbales "To Whom It May Concern" were formulated in such a manner since it was impossible for the Secretary-General to know how this paper would be used by the Government of Malaysia and to which authorities and judicial institutions it might be sent. What the Solicitor-General failed to recognize is that these Notes Verbales were sent under the cover of other Notes Verbales containing the customary courtesies. Furthermore, the contacts between the Secretariat and the Permanent Mission of Malaysia to the United Nations were always professional, courteous, and indeed amicable.

26. As to the peremptory format of the Notes Verbales issued by the Secretary-General, the United Nations refers to the Dossier. The Note Verbale of 7 November 1998 was preceded by three Notes Verbales from the Legal Counsel to the Permanent Mission of Malaysia to the United Nations: that is of 28 December 1995 (Dossier No. 12), of 29 March 1996 (Dossier No. 19) and of 15 January 1997 (Dossier No. 27). The Note Verbale of 11 July 1997 was transmitted to the Permanent Mission of Malaysia by a cover letter of the same date signed by the Secretary-General himself (Dossier No. 44). The Note Verbale of 25 November 1997 was transmitted by a Note Verbale of the same date from the Legal Counsel to the Permanent Mission (Dossier No. 52).

27. In addition, Mr. President, the Secretary-General took the unprecedented step of appointing a Special Envoy to assist him in his contacts with the Government of Malaysia to ascertain if an amicable settlement to the differences arising between the United Nations and the Government of Malaysia could be reached. He also discussed the matter at the highest levels with the authorities of Malaysia on several occasions, including during a visit to Kuala Lumpur.

28. The United Nations finds it somewhat ironic that it is the Government of Malaysia that complains of a breach of courtesy when it has failed to respond, or even acknowledged receipt of, at least 20 official communications from the United Nations.

29. With respect to the "slur", the Secretary-General has merely stated that this case has far reaching consequences for the Organization as a whole. The High Commissioner of Human Rights, who is best placed to assess the matter, has expressed great concern, and so have the States participating in these proceedings, except Malaysia. The Secretary-General fails to see that this can be interpreted in such pejorative terms as advanced by the Government of Malaysia. I intend to revert to this matter in a few moments.

30. With respect to the way in which the Secretary-General had advanced his position, I will deal with that in the course of my statement. Let me say at this juncture that the Government of Malaysia can at no time have been unaware of the Secretary-General's position in this matter; he has been very clear indeed. The fact that some of the legal opinions referred to have been

"depersonalized", if I may say so, simply is due to the practice of the Secretariat in publishing opinions of this kind; the Secretariat does not wish to embarrass the member State that was the recipient of the opinion in question. This is common practice in similar situations in many States.

31. Mr. President, I realize that these comments that I have just made may not be of much assistance to the Court in formulating its opinion, but what was said could simply not remain uncontested.

B. The scope of the question before the Court

32. Mr. President, I now come to the scope of the question before the Court. As I said a few moments ago, Malaysia's oral statement, containing its updated position, appears to bear little relationship to the submissions and arguments previously submitted in writing. While Malaysia is of the view that her position is shared by the other States parties to the Convention, no such support is evident in the written statements, written comments and oral statements which have been presented to the Court by the other States participating in these advisory proceedings.

33. So as not to impede the Court's ability to provide the advisory opinion requested on a priority basis by the Economic and Social Council in its decision 1998/297 of 5 August 1998, the United Nations therefore has no intention of responding to all the points introduced for the first time on Tuesday. We will, however, briefly address the salient features of the position put forth by Malaysia in these oral proceedings. If the Members of the Court, Mr. President, find that any points not addressed here today merit its further consideration and require further information on these points or any other matters, on behalf of the Secretary-General, I would of course welcome the opportunity to assist the Court.

34. In the light of Malaysia's efforts to narrow the scope of the legal question on which the Council requested an advisory opinion, I think it is necessary to quote the explicit words of the Council in operative paragraph 1 of its decision. The Council requested an advisory opinion

> "on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the

> independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the Note by the Secretary-General, and on the legal obligations of Malaysia in this case",

I repeat, *and on the legal obligations of Malaysia in this case.*

35. It is not for the United Nations nor for any of the States participating in these proceedings to redefine or narrow the scope of that legal question. It is for the Court to determine how it understands the question submitted to it by the Economic and Social Council. We must also not forget that, in accordance with Section 30 of the Convention and operative paragraph 2 of the Council's decision, the advisory opinion shall be accepted as decisive by the parties. As the United Nations must continue to function in the territories of each of its member States, the Secretary-General would appreciate the Court's guidance on the issues presented in the written statement and oral submissions presented on his behalf.

36. Mr. President, based on the undisputed facts set out in paragraphs 1 to 15 of the Note of the Secretary-General, the United Nations has maintained and continues to maintain that Article VI is applicable to Dato' Param Cumaraswamy as a Special Rapporteur of the Commission on Human Rights; that pursuant to Section 22 *(b)* of Article VI, he is therefore immune from legal process of every kind in respect of words spoken or written in the course of the performance of his mission; that, to the extent that the Secretary-General has determined that the words giving rise to these complaints in the Malaysian civil courts were spoken by him in the course of the performance of his mission and that he is therefore immune from legal process of every kind with respect thereto, the Government of Malaysia has a legal obligation, under Section 32 of the Convention, to give effect to that immunity; and that to the extent that it neither gave effect to the immunity nor invoked the settlement of dispute provisions of Article VIII of the Convention, it breached its obligations under the Convention and is consequentially responsible for any actual costs, expenses or damages which reasonably or proximately resulted from such breach such as the costs and expenses incurred in the proceedings and the costs which have already been taxed to the Special Rapporteur by the Malaysian courts.

37. In this context, I must confess that we were very surprised to hear the Solicitor-General of Malaysia maintain in her oral statement (para. 12) that the question of the Secretary-General's authority to determine whether the words of Dato' Param Cumaraswamy were spoken in the course of the performance of his mission was the only issue that had been previously discussed between the United Nations and Malaysia. As a matter of fact, all the issues that the United Nations has referred to in its written and oral presentations to the Court have been extensively discussed with the competent Malaysian authorities over the last two years.

C. Specific comments

38. I will now briefly address four salient features of the oral statement delivered by the Government of Malaysia; these are (1) the concept of functional immunity; (2) the Secretary-General's authority; (3) the obligations of the Government of Malaysia; and, finally (4) the harm to the interests of the United Nations.

1. The functional immunity of United Nations officials and experts on missions

39. Mr. President, the first aspect is the functional immunity of the officials and experts on missions of the United Nations. Malaysia has submitted that the Special Rapporteur does not enjoy absolute immunity and that it is for the Malaysian courts, not the Secretary-General, to decide whether the words complained of are protected by his limited functional immunity.

40. The United Nations has stipulated that the privileges and immunities to which the Special Rapporteur is entitled as an expert on mission within the meaning of Article VI of the Convention are strictly functional. It has explicitly referred to this fact in paragraph 25 of its written statement, paragraph 6 of its written comments and paragraph 11 of its oral statement.

41. The United Nations has maintained and continues to maintain, however, that subject only to Article VIII of the Convention, it is the Secretary-General who decides whether words or acts are spoken, written or done in the course of the performance of a mission for the United Nations.

42. In so doing, the United Nations agrees that there is no absolute immunity accorded to officials and experts on mission but rather that any determination as to the official or unofficial nature of a word or act and that any assertion of immunity or refusal to waive immunity is subject to review by this Court, unless in any case it is agreed by the parties to have recourse to another mode of settlement.

43. This matter before the Court concerns the functional immunities of international organizations and their agents. It is not about sovereign immunity, diplomatic immunity, consular immunity or the immunity of foreign armed forces. The Organization's right to determine and protect the functional immunities of its agents is essential to the preservation of its international character and independent functioning under the Charter. Bilateral concepts of reciprocity cannot be made applicable to the Convention and therefore cannot define relations between the United Nations and its 185 member States. Suffice it to say that the United Nations is neither a sending State nor even a State for that matter. Another obvious distinction is that Article VIII of the Convention vests the right to resolve differences between the United Nations and its member States in the advisory jurisdiction of this Court, not in the national courts of the member State concerned. I can also refer to my reply to Judge Vereshchetin's question in this context.

44. Mr. President, writing in 1961, C. W. Jenks elaborated this view as follows:

> "States enjoy a substantial measure of protection against partial treatment, denial of justice or unreasonable interference by each other or by each other's courts by reason of the reciprocal nature of their relations. International organizations are not in a comparable position. In the absence of jurisdictional immunities they are completely at the mercy of their member States, both collectively and individually. The law defining their status and responsibilities is too little developed, both internationally and in an even more marked degree municipally, to be safely left to municipal interpretation; the danger that it may be consistently interpreted in a manner restrictive of the future development of international organization is still too widespread and acute. Alexander Hamilton argued that 'thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed'; the same reasoning applies with equal force to the exercise of national jurisdiction over international organizations. In many cases, moreover, the independence of municipal courts from political influence is not sufficiently secure to afford adequate guarantees of impartiality and protection to international organizations in time of strain." (*International Immunities*, pp. 40-41).

2. The exclusive authority of the Secretary-General

45. The Government of Malaysia contends that the Secretary-General has purported to exercise a power which he has not been accorded. The United Nations respectfully submits that the position it has consistently maintained is consistent with the Charter of the United Nations, the Convention on the Privileges and Immunities and the findings of this Court in the *Mazilu* Opinion and in the *Reparations* case.

46. The United Nations has consistently maintained that the Secretary-General has the exclusive authority to determine whether words are spoken or written in the course of the performance of a mission for the United Nations. His authority in this regard is coupled with his exclusive right and duty to waive immunity where, in his opinion, it would impede the course of justice and it could be waived without prejudice to the interests of the United Nations.

47. The United Nations also maintains that, unless the Government of Malaysia requests the waiver of immunity or invokes Article VIII of the Convention, it has a legal obligation to give effect to that immunity in accordance with Article 34 of the Convention.

***(a)* The Secretary-General has publicly confirmed his position**

48. Contrary to Malaysia's contention that the Secretary-General has advanced his position in an "obscure and shrouded manner", the United Nations position that the Secretary-General has the exclusive authority to determine whether acts are official or in the course of the performance of a mission has been publicly and consistently maintained. It is explicitly stated in Staff Regulation 1.8 which was adopted by the General Assembly in accordance with Article 101 of the Charter (Dossier No. 105). It has been publicly stated in the Fifth Committee of the General Assembly on at least two occasions. All member States are represented on the main committees of the General Assembly. The Fifth Committee in particular adopts its decisions and resolutions by consensus and is the subsidiary organ to which the Assembly has allocated the agenda item on the privileges and immunities of officials of the United Nations. In recognition of the legal aspects of this item, the majority of member States are normally represented by their legal advisers during

the consideration of this most important item in the Fifth Committee. The United Nations position has been unequivocally stated in the official reports of the Secretary-General to the General Assembly and noted without objection thereby (Dossier No. 106). It has been further confirmed by the General Assembly resolutions calling for the respect of the Secretary-General's assertions of functional immunity (Dossier Nos. 107 to 115). Disclosure to the 185 member States of the General Assembly in its official documents cannot be "obscure" or "shrouded".

***(b)* The Secretary-General has failed to distinguish between civil and criminal suits**

49. The Government of Malaysia seems to attach greater significance to whether the subject-matter is criminal or civil litigation. The Secretary-General respectfully submits that this distinction is irrelevant. The provision of the Convention clearly states that the expert on mission is exempt from "legal process of every kind". It is also not correct to belittle the effects of civil litigation. A civil litigation involving a claim for millions of dollars can have disastrous effects for the persons concerned that could well be comparable to the effects of a judgment in a criminal case. On the other hand, a modest fine in a criminal case might be of less significance. The attempts to make a distinction here is contrary to the object and purpose of the Convention. The Secretary-General does not distinguish between civil and criminal suits because Article VI and Section 22 *(b)* of Article VI, do not distinguish between civil and criminal suits.

***(c)* Secretary-General's obligation under Section 29 of the Convention**

50. Mr. President, it has been contended, the Secretary-General has not fulfilled his obligation to make provision for appropriate modes of settlement as required by Section 29 of the Convention. As the United Nations has elaborated, the remedies available under Section 29 of the Convention in response to Judge Vereshchetin's question, I do not believe it is necessary to elaborate any further on this question.

51. I would like to briefly reiterate that Article VIII of the Convention does not require the establishment of a permanent or standing dispute resolution mechanism. Moreover, it would be

impractical and financially burdensome for the United Nations to establish and sustain permanent or standing settlement mechanisms given the many countries in which it operates; the innumerable kinds of possible private lawsuits that may arise, and the demonstrated commitment of the United Nations to settle its disputes by negotiation. The rare instances where it cannot settle its disputes do not justify the financial and human resources required to maintain permanent or standing settlement mechanisms.

(d) ***Pacta Sunt Servanda***

52. Mr. President, with all due respect to the sovereignty of States, the Secretary-General submits that the fulfilment of legal obligations freely undertaken by sovereign States does not "subtract from that State sovereignty". Such fulfilment is owed to the Organization pursuant to Article 105 of the Charter, Article 34 of the Convention, and customary principles of international law. *Pacta sunt servanda.*

(e) **Right and duty to waive immunity**

53. Mr. President, we are grateful that the Government of Malaysia agrees that Section 23 authorizes the Secretary-General to waive immunity. It indicates that the Secretary-General's right to waive, however, is only operative if there is an immunity to be waived. The United Nations respectfully agrees on the clear understanding that since the Convention vests the right to waive immunity exclusively in the Secretary-General, it must also therefore intend to vest the Secretary-General with the exclusive right to determine, in the first instance, whether there is any immunity to be waived.

(f) **The Secretariat study on privileges and immunities**

54. The counsel for Malaysia seems to suggest that the Secretariat's study on the practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities is silent on the issue of the Secretary-General's authority.

55. The Secretariat study referred to was prepared to assist the International Law Commission in fulfilling the request made by the General Assembly in its resolution 1289 (XIII) of 5 December 1958 and was subsequently revised and updated at the explicit request of the International Law Commission at its fifty-third session in 1983. The introduction to the supplement revising and updating the original study explicitly states that it "is intended to be read together" with the original 1967 study. Much has been made of the fact that the study does not refer to the position defined by the United Nations as its established practice. Indeed, the original study does refer to the Organization's right to exercise functional protection in accordance with the *Reparations* case (para. 251). Moreover, the supplement which I have indicated is an integral part of the study, makes ample reference to the United Nations position on the Secretary-General's exclusive authority. We refer in general to Sections 23 and 31 of the supplement and in particular to paragraphs 54, 55, 56 and 57 thereof. Thus, the study does indeed confirm the practice and position which has been consistently maintained by the United Nations both in and outside, and before and during, these advisory proceedings.

3. The obligations of the Government of Malaysia

56. Mr. President, I now come to the third point: the obligations of the Government of Malaysia. In support of its arguments, the Government of Malaysia has made reference to highly selective passages attributed to various writers, has resurrected a curious array of domestic cases, and has invoked the exhaustion of local remedies rule.

***(a)* References to C.W. Jenks and Hans Kelsen**

57. With respect to Jenks, the reference to his book is interesting, and the Secretary-General has no major problem with Jenks' three solutions, or a combination of the three. Please note also that the author talks about suspension of national proceedings pending the outcome of arbitration. Thus, Jenks does not suggest that the solution should be that the issue should be adjudicated by the national courts of a member State. The Organization, therefore, has no difficulty with a member State fulfilling its Article 34 obligation to give effect to the privileges and immunities provided for

under the Convention if its courts were to either (1) accept as conclusive a statement of immunity by the Secretary-General, or (2) accept as conclusive a statement of immunity by the executive of the member State concerned, or (3) stay the proceedings whilst the matter went to arbitration. This is consistent with the United Nations position with respect to the Secretary-General's Note Verbale of 7 March 1997, with respect to the inconclusive nature of the certificate by the Minister for Foreign Affairs of Malaysia; and with respect to the remedies provided for under Section 29 of the Convention.

58. Also, I think it is important to note that Kelsen also commented on the 1946 Convention, since the learned counsel from Malaysia referred to Kelsen. The following quote may serve to illustrate his thinking with respect to the matter which is at issue here:

> "Another question is whether the provision of Section 29, clause *(a)*, intends to substitute for the jurisdiction of the territorially competent national Courts the jurisdiction of agencies established by the United Nations for the settlement of the disputes referred to in Section 29; that is to say, whether Section 29, clause *(a)*, imposes upon the contracting States the obligation to recognize the exemption of these disputes from their jurisdiction? If the provision of Section 29, clause *(a)*, shall not have this effect, why should it be inserted into a treaty between the United Nations and the Member States? As to the disputes referred to in Section 29, clause *(b)*, the same question arises. If immunity of the official involved in the dispute is not waived, the jurisdiction of the Member State concerned is excluded. Why insert this provision into a treaty with Member States if by this provision no obligation is imposed and no right is conferred upon the Member State? Besides, it should be noted that immunity of an official for acts that he performs in his official position is immunity for acts imputable to the Organization, and hence not a privilege of the official but a privilege of the United Nations, established by Article 2, Section 2, of the Convention." (At p. 317)

***(b)* The United States position**

59. To ascertain the United States position on the legal question on which the ECOSOC has requested an advisory opinion, one need not go to Juridical Yearbooks, National Commentaries on Foreign Relations or to 35-year-old domestic cases, some of which do not even involve functional immunities and in some of which no immunity has been asserted by the Secretary-General. The United States has kindly provided this Court and all participants in these proceedings its position on the matters before the Court. Far from being "virtually identical" to Malaysia's position that a Secretary-General's assertion of immunity is a nullity having no legal effect, the United States and

for that matter the United Kingdom have explicitly stated that unless there are compelling or powerfully contrary circumstances, the Secretary-General's determination must be given great weight and deference. I refer to paragraph 6 of the United Kingdom's written statement and to paragraphs 19 to 24 of the United States' written statement. Moreover, they conclude that no such circumstances exist on the undisputed facts of this particular case. I refer again to paragraph 6 of the United Kingdom's written statement and to paragraph 41 of the United States' written statement.

***(c)* Exhaustion of Local Remedies**

60. Finally, Malaysia has alluded to the exhaustion of local remedies. It is true that this Court in the *Interhandel* case reaffirmed the rule of customary international law that local remedies must be exhausted before international proceedings can be instituted. It was a classic case of diplomatic protection of alien nationals, that is to say, one in which "a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law" (*I.C.J. Reports 1959*, p. 27). The character of a claim brought by an international organization is different. As we have already noted, in our previous statements, in bringing a claim in respect of injury to its agent, the Organization is actually seeking reparation for a breach of an obligation due to itself. While the exhaustion of local remedies is undoubtedly a rule of customary international law which is applicable to cases of diplomatic protection of aliens, it is doubtful if such a rule could be applicable in cases involving claims for injury to the rights and interests of international organizations. The redress of claims of injury by international organizations falls within the competence of the executive branch of the Government in consultation with the organization concerned.

61. Moreover, where a specific contract, agreement or convention, otherwise provides a remedy or settlement of dispute mechanism, the express provisions of the contract, agreement or convention must and do prevail. Article VIII of the Convention on the Privileges and Immunities makes explicit provisions for the settlement of disputes. Section 30 in particular expressly provides that when a difference arises between the United Nations and a Member, "a request shall be made

for an advisory opinion . . .". While the use of the word "shall" may also be said to have a temporal character, it undeniably has a mandatory and binding character. As such, when a difference arising out of the interpretation or application of the Convention arises, as it has done in this case, it should not be exhausted in the local Malaysian courts but rather shall be the subject of a request for an advisory opinion.

62. Mr. President, as it has been contended that it is for the Malaysian courts to assess the character of the Special Rapporteur's conduct as "a preliminary or threshold" question, we wish to recall that the question of the Special Rapporteur's immunity from legal process has been before the Malaysian courts since January 1997 and has been the subject of unfavourable judgments in the Court of Appeals and the Federal Court of Malaysia.

63. Thus, even assuming, for the sake of argument, that the rule of exhaustion of local remedies applies in the present case, an effective remedy must be available as a matter of reasonable possibility. In this connection, the United Nations recalls that the Secretary-General's best efforts to resolve this difference, including appointing a Special Envoy who undertook two official visits to Kuala Lumpur proved futile. Moreover, the undisputed facts of this case, in particular the judgments of the High Court of Kuala Lumpur (Dossier No. 35), the Court of Appeals (Dossier No. 45), and the Federal Court of Malaysia (Dossier No. 55) unequivocally demonstrate the futility of attempting to ensure the respect for the Secretary-General's determinations in the Malaysian courts. The judge in the High Court has ruled that she has jurisdiction to conduct a full trial on the merits including the question of the Special Rapporteur's immunity. The Court of Appeals has upheld that judgment concluding that it is for the Malaysian courts to determine the applicability and scope of the privileges and immunities asserted by, and the missions performed on behalf of, the United Nations. And finally, the Federal Court has delivered an oral ruling that Dato' Param Cumaraswamy is not a sovereign or a full-fledged diplomat: "He is someone called a Rapporteur who has to act, in the present case, within a mandate of, in layman's terms, an unpaid, part-time provider of information".

4. Harm to the interests of the United Nations

64. Mr. President, I now come to the fourth point: the harm to the interests of the United Nations. Malaysia has contended that the Secretary-General has made exaggerations and generalizations that "stand as an implied slur upon all the national systems of adjudication that the Special Rapporteur was considering". In short that the harm to United Nations interests is exaggerated.

65. Again, Mr. President, I regret to take up any more of your time but I have an obligation to the Secretary-General to represent as clearly as possible all the United Nations interests that will be affected by this advisory opinion. The United Nations statement of the harm to its interests is supported in the written statements submitted by the Governments of Costa Rica, Sweden, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The Secretary-General's concern is also shared and confirmed by the High Commissioner for Human Rights in her letter to the Secretary-General of 2 October 1998 (Dossier No. 54bis). She, I am sure you are aware, is uniquely qualified to assess the impact of events on the human rights mechanism of the United Nations system.

66. In his statement to this Court on Tuesday, counsel for Malaysia described the United Nations concerns as to the precedential aspects of this case as exaggerated or an overstatement falling short of the standards of fairness and objectivity that normally characterizes the work of the Secretariat of the United Nations. We do not believe that these concerns are exaggerated. Neither do the above-mentioned Governments. In my closing remarks last Tuesday, I stated that the question before the Court is not solely of concern to one Special Rapporteur or even to one class of Special Rapporteurs. It is a question which relates to the independent functioning of any agent of the Organization whether an official or an expert on mission.

67. In so far as experts on mission are concerned, the position taken by the Government of Malaysia, if upheld by the Court, would have the most serious implications for the functioning of the Organization as a whole. For just as the functions of the Organization have expanded over the

years far beyond what could have been foreseen in 1945, so has the use of experts on missions since 1946. The Secretary-General's written statement in the *Mazilu* case provided a number of illustrations of the variety of circumstances in which experts on missions are deployed. Today this category of agents is even more extensive. Experts are to be found among the inspection personnel of the United Nations Special Commission (UNSCOM) in Iraq, the claims commissioners of the United Nations Compensation Commission who consider the claims arising out of damages caused by Iraq as a result of the Gulf War, and a great number of the personnel attached to the *ad hoc* Criminal Tribunals for Rwanda and the former Yugoslavia.

68. I give these illustrations which are by no means exhaustive to indicate not only the extent to which the United Nations must rely on experts on missions but also the serious consequences that would flow from any diminution in the protection afforded to them by the Convention.

IV. Final Remarks

69. Mr. President, I have now come to my final remarks. They are very brief.

70. You have now before you, Members of the Court, a question by the Economic and Social Council and a quite extensive elaboration of the subject-matter, both in written and oral submissions. I think that it is important now to focus also on the more overriding aspects of the case; it is important not to lose sight of the *ratio legis* aspect. Why was it necessary to adopt the Convention on the Privileges and Immunities of the United Nations and what is the purpose of the immunity? The purpose must, of course be, to enable the United Nations to discharge the responsibilities entrusted to it by member States with freedom, independence and impartiality. Each member State can thus be sure that the organization will not become an instrument of the policy of individual States but will represent the common interest as defined and determined by the competent legislative intergovernmental organs, that the United Nations should be able to exercise its functions in an unimpeded manner.

71. But, Mr. President, is that possible if the very question of whether functional immunity exists is left entirely for the national courts to decide? As we have concluded, the

Secretary-General does not deny that the national courts can have a role to play in this context. Normally, the question of immunity does not even arise until a national courts is seised with a case in which immunity is invoked. But, even if this is the case, the responsibility to ensure that the obligations under the Convention are not violated always rests with the Government. In the present case, the Government of Malaysia has not in any way assisted the United Nations in asserting its immunity. Mr. President, I respectfully submit that the *Cumaraswamy* case is precisely of the kind that the Convention is there to prevent.

72. Also, the Government of Malaysia has maintained that the Secretary-General should have recognized that it takes the concordant practice of all or most of the parties to a convention to establish an agreement regarding its interpretation (I refer to the oral statement para. 74). Since the Secretary-General must have had reason to believe that there was a problem, he should have said so (*ibid.*, para. 72).

73. But, Mr. President, the truth is that these problems have not really presented themselves until now. In other cases, member States have in some way or other been in a position to observe their obligations under the Convention.

74. The statement of the Government of Malaysia also seems to disregard another important fact: the Convention contains a dispute settlement clause over which the International Court of Justice is competent to rule. An advisory opinion of the Court is binding on the parties. Thus, we must not forget that the international Court of Justice is in a position to develop a practice under the Convention in almost the same way as in other cases where it construes treaty law. This is not different from many other situations where an international organ is established to rule on the application of a specific instrument under international law. The different committees and courts that apply international human rights law comes to my mind in this context.

75. Mr. President, having made this particular reference, allow me to state for the record that, today, we celebrate the fiftieth anniversary of the adoption by the General Assembly of the United Nations of the Universal Declaration of Human Rights. I know that we, all of us present in this

room, subscribe to the ideas embodied in this important instrument. Let me, therefore, Mr. President close on this note of unanimity in this important field of international law, and ask the Court to guide us in the specific question where we seem to differ. Thank you.

The PRESIDENT: Thank you so much, Mr. Corell. The Court will now suspend for 15 minutes, and resume at 11.25 a.m.

The Court adjourned from 11.10 to 11.25 a.m.

The PRESIDENT: Please be seated. I now call on the distinguished Ambassador of Costa Rica, Ambassador Conejo.

Mr. CONEJO:

Introduction

1. Mr. President, Mr. Vice-President and distinguished Members of the Court. In the oral presentation two days ago of its "updated position", which fills 50 pages of the Court's verbatim record, Malaysia in fact presented significant new arguments which, at times, contradicted its own earlier written submissions to this Court. Simultaneously, Malaysia submitted 80 pages of written argument which likewise both extended beyond and in part contradicted the 142 pages comprising Malaysia's authorized written statement and comments submitted previously in accordance with this Court's Order of 10 August 1998.

2. It is a matter of concern to Costa Rica that the Court does not lose sight of the core of the matter originally presented to it as a result of the new arguments, which lack relevance for this case and may not even be admissible at this point. Since there is an attempt to introduce these new arguments, however, Costa Rica is compelled to offer a reply in an effort to place them in their proper perspective and thus eliminate any danger that the Court's attention might be diverted from the issues actually before it. Therefore, Mr. President, with your permission, I would respectfully

request that you invite now Mr. Brower to present a reply to Malaysia's oral statement on behalf of the Republic of Costa Rica.

The PRESIDENT: Thank you Mr. Ambassador. Mr. Brower.

Mr. BROWER:

3. Mr. President, Mr. Vice-President and distinguished Members of the Court. In brief reply to Malaysia's "updated position", Costa Rica comments, first, on the scope of ECOSOC's request for an advisory opinion and, second, on Malaysia's legal obligations in this case.

Scope of ECOSOC's request for an advisory opinion

4. Although happily the distinguished Solicitor-General of Malaysia has affirmed "that Malaysia is not an unwilling or reluctant participant in these proceedings"[1], Malaysia's casuistic attempt unilaterally to redefine the scope of ECOSOC's request for an advisory opinion strongly suggests the contrary.

5. Malaysia seems to suggest that the scope of ECOSOC's request for an advisory opinion exceeds the boundaries of the actual "difference" between it and the United Nations that gives rise to the request. That "difference" it finds "was identified in the draft section proposed by the Secretary-General to ECOSOC" in paragraph 21 of his Note, which draft question specifically addressed the issue of the authority of the Secretary-General[2]. Malaysia proceeds to assert, therefore, that

> "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 proceeding.*"[3] (Emphasis added.)

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[1]Statement of Dato' Heliliah Yusof, CR 98/16, para. 2 (8 Dec. 1998).

[2]*Id.*, para. 12.

[3]*Id.*, para. 13.

6. The unspoken conclusion latent in this bold pronouncement is that Malaysia may not regard as decisive under Section 30 of the General Convention, and thus may choose not to abide by, any ruling by this Court on the merits of the Secretary-General's claim of immunity as regards the Special Rapporteur. Costa Rica here would note, however, the forthright statement made the day before yesterday[4] on behalf of Malaysia as follows: "I can assure the Court that Malaysia has no intention of acting in a manner violative of its international duties."

7. Malaysia is wrong, of course, as regards the relationship of the "difference" existing between it and the United Nations to the request for an advisory opinion. The very draft of the request embodied in paragraph 21 of the Secretary-General's Note, on which Malaysia relies, opens by "[c]onsidering *the difference* that has arisen between the United Nations and the Government of Malaysia *with respect to the immunity from legal process of . . . the Special Rapporteur . . .*" (emphasis added). ECOSOC's request of 5 August 1998 uses almost identical language:

> "*Considering* that a difference has arisen between the United Nations and the Government of Malaysia . . . with respect to the immunity from legal process of . . . the Special Rapporteur . . ."

8. Thus the difference has been defined clearly and consistently both in the Secretary-General's Note, on which Malaysia relies, and in ECOSOC's request, which was adopted by consensus (in which Malaysia expressly includes itself). The fact that ECOSOC, by a consensus decision, in which Malaysia clearly joined, rephrased its request for a resolution of this difference alters nothing: not the nature of the difference itself, not the power of this Court to decide it, and definitely not the obligation of Malaysia to accept as decisive of that difference this Court's opinion responding to that request.

9. The desire of ECOSOC that this Court resolve the difference between the United Nations and Malaysia is clearly stated in ECOSOC's request. Malaysia itself has recognized this in various ways at 7.8, 7.11, 9.4 and 9.10 of its written statement, as well as at 1.1 and 4.7 of its written

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[4]Statement of Sir Elihu Lauterpacht, CR 98/16, para. 22 *(f)* (8 Dec. 1998).

comments. Moreover, it has acknowledged the same when, at pages 42 and 43 of its written statement, it chose to quote from Judge Oda's separate opinion in *Mazilu* as follows:

> "It may be contended that the Court has merely been asked to give its opinion 'on the legal question of the *applicability* of Article VI, Section 22, of the Convention' (emphasis added), not to consider the matter of its *application*. . . . [I]t is not . . . possible to determine the *applicability* of [Article VI, Section 22, of the General Convention] to a concrete case without adequate reference to *the way in which it may apply*."[5] (Emphasis added.)

As I mentioned in my statement on Monday[6], ECOSOC's request

> "specifically asks the Court to '*tak[e] into account the circumstances*' of this case, and thus makes it clear that that request was drafted with *Mazilu* in mind and hence with the intention that the Court consider the underlying factual circumstances in opining on whether the Special Rapporteur is immune from legal process of every kind. In short, the Court's jurisdiction to rule on the Special Rapporteur's immunity could not have been more clearly invoked."

10. Malaysia's contrary statement two days ago, that "'[a]pplicability' means . . . not 'how it is to be applied'"[7], diminishes neither the scope of ECOSOC's request nor the force of Malaysia's own previous acknowledgement and acceptance of it.

11. For these reasons, and for the reasons given in its prior submissions, Costa Rica reaffirms its view that ECOSOC's request specifically asks the Court to decide whether the Special Rapporteur is immune from legal process of every kind.

Malaysia's legal obligations in this case

12. Mr. President, Mr. Vice-President and distinguished Members of the Court. I will now turn to the issue of Malaysia's legal obligations in this case. In this regard, we were of course pleased to hear from the learned counsel for Malaysia that immunity should be determined "as a preliminary or threshold question, without entering into the substance of the case more than is necessary for that limited purpose"; that "in the course of that preliminary procedure a certificate

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[5]Statement of the Government of Malaysia, 42-43 (Oct. 1998).

[6]Statement of Mr. Charles N. Brower, CR 98/15, para. 11 (7 Dec. 1998).

[7]Statement of Dato' Heliliah Yusof, CR 98/16, para. 11 (8 Dec. 1998).

from the Secretary-General . . . would naturally be one to which the greatest respect would be paid"; that "[i]t would be of the highest authority in establishing the relevant facts"; and that "[o]nce the national court has been informed of the claim to immunity, it will stay the substantive proceedings while the question of immunity is considered"[8].

13. If only this view had been shared also by the courts of Malaysia, we would not be here today. The fact is, however, that the High Court in Kuala Lumpur decided on 28 June 1997 to delay a final determination of the Special Rapporteur's immunity until after a full trial on the merits, after dismissing the Secretary-General's certificate "as an opinion [that] has no more probative value than a document which appears wanting in material particulars"[9]. That decision was confirmed by the Court of Appeal, and leave to appeal further was denied by Malaysia's highest court, the Federal Court, in an opinion that referred to the Special Rapporteur dismissively as "an unpaid, part-time provider of information"[10].

14. Counsel for Malaysia submits that because the General Convention does not specifically address the Secretary-General's power to determine with conclusive effect the nature of the conduct in question, such power does not exist[11]. In support of his view he refers to "the classic statement by the Permanent Court of International Justice in the *'Lotus'* case that 'restrictions upon the independence of States cannot be presumed'"[12]. As international lawyers we are, of course, all familiar with this phrase, but perhaps forgetful of the context of the paragraph in which it is embedded in the Permanent Court's Judgment. The full quote reads as follows:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in

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[8]Statement of Sir Elihu Lauterpacht, CR 98/16, paras. 5, 8 (8 Dec. 1998).

[9]*MBf Capital Bhd & Anor* v. *Dato' Param Cumaraswamy* (High Ct., Kuala Lumpur, 28 June 1997), 1997 MLJ LEXIS 328, *26, 39.

[10]Aff'd, Ct. App. Malaysia, slip op. W-02-323-1997, Judgment of 20 October 1997, pp. 28-30; leave for appeal den'd, Federal Ct. of Malaysia, decision of 19 February 1998 (Dossier No. 55).

[11]Statement of Sir Elihu Lauterpacht, CR 98/16, para. 13 (8 Dec. 1998).

[12]*Id.*, para. 32.

> conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[13]

15. As stated in its written submissions, it is the view of Costa Rica that, by virtue of its accession to the General Convention, Malaysia freely accepted its obligations under that Convention[14]. In particular, as stated by Judge Shahabuddeen in his separate opinion in *Mazilu*, Malaysia thus has "by necessary implication conceded to the United Nations a right in good faith (not questioned in this case) to determine" whether an expert has acted within the scope of his mandate[15]. Malaysia cannot, therefore, now be heard to argue that an obligation it has expressly accepted must be interpreted narrowly.

16. Remarkably, after completing a review of State, diplomatic, consular and foreign armed services immunity, and concluding that the receiving States' courts almost invariably determine claims of immunity, Malaysia made this statement:

> "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 any such grounds are developed . . . Malaysia must, on the basis of the rule of *audi alterem partem*, be entitled to respond to them."[16]

17. Yet, Costa Rica clearly anticipated and disposed of this argument at pages 20 to 21 of its written statement submitted on 7 October 1998:

> "It is precisely to preclude such municipal impairment of immunities that the General Convention provides an exclusive dispute settlement procedure in Article VII, Section 30, requiring that a binding advisory opinion by the Court *'shall'* be sought as to *'[a]ll* differences arising out of the interpretation or application of the' General Convention. (Emphasis added.) By using the words 'all' and 'shall', Section 30 clearly excludes municipal courts from the settlement of disputes arising under the General Convention.

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[13] *"Lotus" Judgment No. 9, 1927,, P.C.I.J., Series A, No. 10.*

[14] Written comments of the Government of Costa Rica 16 (6 Nov. 1998).

[15] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, 216 (sep. op., Judge Shahabuddeen).

[16] Statement of Sir Elihu Lauterpacht, CR 98/16, paras. 58-59 (8 Dec. 1998).

> In this respect, issues of immunity under the General Convention clearly are, and must be, treated differently than for example, issues of immunity of bilaterally accredited diplomatic and consular officers. The latter areas enjoy no exclusive dispute settlement mechanism. There it perforce is the practice of national courts to determine independently whether a party fulfils the requirements of immunity. The consequences of this are, by comparison, tolerable for, as the Court has pointed out, the law of diplomatic and consular immunity is a self-contained régime that derives its effectiveness, and hence its protection, from the inherent principle of reciprocity, which likewise more securely guarantees a uniform application of the law by States. The same is not true as regards officials of the United Nations." (Footnotes omitted.)

Malaysia has had two months already in which to exercise its right to confront this dispositive answer, I respectfully submit, to this "crucial question".

18. Yet it is not only on the conceptual level that Costa Rica disagrees with Malaysia. I am constrained to express the most serious reservations regarding the numerous judicial cases referred to as State practice under the General Convention in support of Malaysia's view. This applies in particular to the English Court of Appeal Judgment in *Zoernsch* v. *Waldock*[17], where a crucial distinction is to be made. The court in that case had no choice but to rely exclusively on its own determination of whether a defendant had acted in his official capacity, since the certificate issued by the Secretary General of the Council of Europe related only to the fact of employment of that defendant.

19. The American cases cited by Malaysia are similarly irrelevant. In *United States* v. *Egorov*[18], the only certificate issued was one by the United States Department of State, not by the United Nations, which related only to the fact that the defendant was not accredited, and hence not to the nature of his activity. In *United States ex rel. Casanova* v. *Fitzpatrick*[19], which involved a member of the Permanent Mission of Cuba to the United Nations, no certificate was issued by anyone. As regards *Menon* v. *Weil*, even Malaysia acknowledges that no certificate was issued by

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[17]Statement of Sir Elihu Lauterpacht, CR 98/16, para. 59 (8 Dec. 1998).

[18]*Id.*, para. 77.

[19]*Id.*, para. 78.

the Secretary-General, and relies instead on *obiter dictum* by a municipal small claims court[20]. Finally, in the Austrian case of *X.* v. *Vienna Federal Police Board* no certificate was issued by the International Atomic Energy Agency[21].

20. Therefore none of these cases supports Malaysia's position. To borrow the words of Malaysia's counsel, "these are hardly the building blocks to support the assertion of a major point of principle"[22].

21. As regards the views of writers who have given special attention to the law of international organizations or the law of immunities, I am confident that the weight of authority is not as Malaysia would have the Court believe. The record is not correctly stated. As an example, when quoting from the Restatement (Third) of the Foreign Relations Law of the United States, it is not sufficient, and in the context of this case it is even misleading, to do so solely in support of the assertion that the domestic courts should decide on the character of the conduct in question. In this context it is essential to point out that it is the practice of United States courts to address the question of entitlement to immunity as a threshold jurisdictional question[23]. Relatedly, it is inaccurate to characterize the position of the United States and the United Kingdom, both of whom presumably believed, as did we all, that Malaysia's positions were required to have been set forth in its written statement and written comments, and doubtless on that basis decided not to participate in these oral proceedings, as being "virtually identical" to that of Malaysia[24].

22. I would remind the Court at this point also of the "deeply reasoned analysis" constituting an entire recent book on the subject of functional immunity which supports the position of the United Nations here and was discussed at length at pages 21 to 22 of Costa Rica's written statement.

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[20]*Id.*, para. 79.

[21]*Id.*, para. 80.

[22]*Id.*, para. 103.

[23]See written statement submitted by the United States of America, 13, para. 20 (7 Oct. 1998); Restatement (Third) of the Foreign Relations Law of the United States, 392-393 (1987).

[24]Statement of Sir Elihu Lauterpacht, CR 98/16, para. 6 (8 Dec. 1998).

I would cite also one of the pre-eminent contemporaneous public authorities on public international law, namely, counsel for Malaysia. In his Hague Academy lectures 22 years ago on "The Development of the Law of International Organizations by the Decisions of International Tribunals" Sir Elihu discoursed on the subject of implied powers of international organizations. He stated:

> "Evidently, the determination that it is essential to imply a power rests initially with the organ which adopts a resolution reflecting the assumption that the claimed power exists. So the question then becomes one of whether, in those situations where a procedure of judicial review is available, there is any substantive limit upon the power of the judiciary to review the initial decision of the organization. In abstract theory there ought not to be. The question of 'essentiality' appears, on its face, as much justiciable as any other issue. However, there is a possibly significant sentence in the Advisory Opinion of the International Court on the *Effect of Awards* which identifies this as an area of uncertainty in which one must move with caution."[25] (Footnotes omitted.)

He continued, following discussion of this Court's Advisory Opinion in the *Effect of Awards*[26] case, to conclude that

> "the restraint by the Court appears to accord with the idea that the Organization is the best judge of what circumstances require and to this extent, therefore, the Court's restraint is directed towards the more effective fulfilment of the objectives of the Organization"[27] (footnote omitted).

Surely this constitutes acknowledgement of the legal propriety of the Secretary-General's conclusion that by necessary intendment his certificate insulates the person certified by him to be immune from "legal process of every kind," unless, and only when, this Court determines otherwise in a Section 30 proceeding.

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[25] 152 *Recueil des Cours* 377, 428 (1976 IV).

[26] *I.C.J. Reports 1954*, p. 47.

[27] 152 *Recueil des Cours 377*, 430 (1976 IV).

Conclusion

23. Mr. President, Mr. Vice-President and distinguished Members of the Court. Two noteworthy facts must be stressed in conclusion. One belies Malaysia's substantive position; the other underscores the real significance of this case.

24. The first is that in the course of 50 years only twice has a "difference" between the United Nations and a State Party to the General Convention been brought here for resolution under Section 30. That alone is suggestive of a settled interpretation of the General Convention and a practice among States Parties which secures performance of the obligation under Section 22 *(b)* to respect "immunity from legal process of every kind", an obligation that all (including Malaysia) agree is one of result.

25. The second is the fact that each of these two cases, *Mazilu* and the present one, involved a national of the State having a difference with the United Nations. Thus it seems that the difficulty arises when a State party to the General Convention is compelled to accord one of its own nationals what that State may regard as an extraordinary right. It is telling that Malaysia emphasizes that "[n]or, 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*"[28]. The point, however, is precisely that Malaysia, with binding effect on its courts, by virtue of Malaysia's own agreement to the General Convention, has disclaimed any right to make such a legal judgment. This underscores the great significance of upholding here, in this proceeding, the applicability of Section 22 *(b)* to the Special Rapporteur. In short, the immunities granted by the General Convention must be adjudicated, if at all, by this Court, and not by national courts, just as the Convention intended.

26. Mr. President, Mr. Vice-President and distinguished Members of the Court. I thank you again for your kind attention and for your consideration of Costa Rica's legal arguments.

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[28]Statement of Dato' Heliliah Yusof, CR 98/16, para. 18 (8 Dec. 1998).

The PRESIDENT: Thank you, Mr. Brower. I now call on the distinguished Solicitor-General of Malaysia.

DATO' HELILIAH YUSOF: Mr. President and Members of the Court, I thank you once again for giving me this opportunity to say a few words on behalf of the Government of Malaysia. I shall be relatively brief this morning. My statements today will consist of three parts. The first part will be addressed towards certain clarifications which I feel incumbent to make; the second part will relate to the references that there were, in fact, two years of negotiations; and the third part will refer to certain interpretations concerning Section 30 which has been frequently referred to in these oral proceedings.

With reference to the first part, Mr. President and Members of the Court, I wish to place on record the following statement. On Monday, 7 December 1998, Mr. Zacklin had said in the course of his statement that the four cases against the Special Rapporteur in Malaysia "have been fixed for trial between 2 and 9 February 1999". I regret that this is not entirely correct. What is correct is that the hearings on the question of stay in respect of three of the four cases have been deferred until 9 February 1999 when they are due again to be mentioned in court, and when the plaintiff will join in requesting further postponements until this Court's advisory opinion has been rendered, and sufficient time has been given to all concerned to consider its implications.

The position in the first of the four cases is the same, although it is fixed for mention on 16 December. However, it will then be treated in the same way as the other cases. As to cost, the requirement for the payment of costs by the defendant has also been stayed, and that aspect of the case will be deferred and considered in the same way.

On the second part, Mr. President and Members of the Court, there have been references here today about two years of negotiations. I consider it relevant for me to respond to these specific references, since the notes submitted by the United Nations alongside its Dossier have in fact referred to certain negotiations that had transpired but in respect of which the documents were not to be made available to this Court in these oral proceedings. For the reasons that the United

Nations had refrained from submitting this document, Malaysia also thought that in good faith it would not do so as it would not necessarily lend assistance to the Court in the issue that has been emplaced before it. Nevertheless, it would suffice for me to remark that in those two years what was primarily the subject of discussion was the content of the certificate, the manner in which the Malaysian Government intervened and the fact that in the normal procedure the matter was already *sub judice* and Malaysia was not in a position to intervene in respect of proceedings which involved not the actions of the Government of Malaysia but the actions of a plaintiff seeking remedies under its own laws.

However, Mr. President, it would also be necessary for me to express Malaysia's concern since references have been made to such negotiations. Malaysia does not deny, in the words of the United Nations, that the present circumstances seem to the United Nations would set a dangerous precedent for the application of its human rights system. Equally, Sir, Malaysia considers that the decision in this Court is very important as it would enunciate certain principles in respect of which certain proceedings would also be followed, or where member States would be obliged to comply. It is incumbent upon Malaysia, therefore, to indicate certain differences in the facts of this case and that of the much- and oft-quoted *Mazilu* case.

To the Government of Malaysia, the present circumstances are also very important because it has, as Malaysia had stated on the morning of Tuesday, disclosed the following in respect of the application of the human rights system. Firstly, Malaysia was not even aware of the appointment of the Special Rapporteur. Secondly, it would appear that in the application of the system, a national of a member State who is appointed as a Special Rapporteur could be accorded a broad latitude to publicize anything and anywhere about his country's situation, even in a thematic reporting system. I only relate this, Mr. President and Members of the Court, to illustrate that this could be a source of conflict between the United Nations and a member State as has transpired in the present proceeding. It has become somewhat a semi-contentious proceeding, if I may so.

In addition, it is also incumbent upon me to respond to certain remarks that were made earlier this morning with regard to the possibilities of an interpretation and alleged misapplication of a treaty leading to certain pejorative statements being made, which is, of course, again, regrettable.

Amongst others, Mr. President and Members of the Court, I would ask for your indulgence to allow me to refer to certain remarks in the dossier (Dossier No. 38). I quote, *inter alia*, it is stated here:

> "It is the position of the United Nations that to expose one of its Special Rapporteurs to such burdensome proceedings and potentially ruinous expenses and taxed costs, quite aside from any substantive judgment that might be awarded against him, in respect of words uttered in the performance of the Rapporteur's official functions as determined by the United Nations, is calculated to interfere with his independence in performing these functions and is likely to have a negative effect on the autonomy of other such Rapporteurs and similar experts on mission, who may fear that the performance of their functions could result in comparable destructive legal attacks against them."

Again, Mr. President and Members of the Court, it would appear that there are serious doubts expressed about the system of national adjudication which at this stage, in Malaysia, is still at its interlocutory stage. I quote again the following statement which Malaysia considers recriminative of the proceedings that had transpired in Malaysia, this is in reference to statements made (Dossier No. 54bis). It states here *inter alia*:

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

Mr. President and Members of the Court, three consequent reports were lodged by the Special Rapporteur and the Government of Malaysia did not undertake any steps to institute proceedings against the Special Rapporteur. For those reasons alone, Mr. President, I sincerely express the hope that what has been misperceived in the position of the national courts proceedings would perhaps be clarified by my statements today.

Before concluding my remarks, I would like to refer again to Section 30, which has been the subject of much interpretation. In Malaysia's view, in the circumstances of the present matter, Section 30 has not been applied more usefully. Malaysia would like to make references to Dossier No. 67, which reflected that the General Assembly should propose to the member States of the United Nations, a general convention which would determine the detailed application of paragraphs 1 and 2 of Article 105 of the Charter, as well as certain observations made in the Report of the Sixth Committee on the privileges and immunities of the United Nations. The following statement, *inter alia*, was the statement of Sir Hartley Shawcross of the United Kingdom concerning Section 30:

> "The final matter to which I want to refer only in a word is Section 30 of the Convention, which deals with the reference of disputes to the International Court of Justice. Two or three States found it necessary to make some reservation in regard to that matter. I could not help thinking there was some misconception in regard to it, because that provision for reference of disputes under the Convention to the International Court only comes into operation in the event of the parties to a dispute not being able to agree to its settlement by any other means. If parties to a dispute under this Convention cannot agree to a settlement by any other means, then it is, in our view, quite essential that something should be provided in the Convention so as to ensure that disputes, if they unhappily arise, are settled."

It is therefore regretted that whilst Section 30 is intended to incorporate peaceful means of issues, there is so much emphasis on the conflicts arising out of the implementation, not only of the Charter but also the General Convention, that the true nature of the General Convention may now have been misrepresented.

A certain interpretation has been imposed in respect of Malaysia although the internal organs of other member States have been placed in similar positions. With so much emphasis on conflicts, little has been seen to ensure that the differences between the Secretary-General and Malaysia, have not been enlarged. The approach that was taken against Malaysia is therefore, I respectfully submit, to amount to a selective application of Section 30. As a result, her judicial organs have also been the subject of pejorative statements unprecedented in terms. It seems so easy to proclaim breach as against Malaysia. This, recalled the reminder by the judge in the *Certain Expenses* case, I refer here respectfully to Judge Koretsky, "the Court must not shut its eyes to reality, the image of

Themis with her eyes blindfolded is only an image from a fairy tale and from mythology". The Court taking reality into consideration should, at the same time, have in mind a strict observation of the Charter. I am prepared to stress the necessity of the strict observation and proper interpretation of the provisions of the Charter, its rules, without limiting itself by reference to the purposes of the Organization, otherwise one would have come to the long-condemned formula: the end justifies the means.

Mr. President and Members of the Court, may I, in concluding my remarks, also take this opportunity of giving the assurances of the Government of Malaysia. Once again there has been statements expressing doubts of Malaysia's intentions to honour its obligations.

May I conclude, Sir, that in assuring the Court that Malaysia fully recognizes the provisions of Section 30 of the General Convention, which accords binding quality to the advisory opinion of this Court. Thank you Sir, for this opportunity and I respectfully ask you to give Sir Elihu an opportunity to address the Court further on the matter.

The PRESIDENT: Thank you so much Solicitor-General. I call upon Sir Elihu.

Sir Elihu LAUTERPACHT: Mr. President, Members of the Court, at this hour I am sure you will be anxious about the length of any remarks that I make to you, as indeed I am too. I will limit myself, therefore, to two matters. First, the scope of the question and second, the answer to the question of the power of the Secretary-General.

I do not want to weary the Court unnecessarily with further explanation of why Malaysia is so completely opposed to the interpretation of the question in the manner which permits it to go beyond the determination of whether it is the Secretary-General who has an exclusive competence to qualify the act and proceed further to determine whether the acts in question actually fall within the course of the performance of the Special Rapporteur's mission.

The Court will forgive me for making, at this stage of the proceeding, a series of rather staccato supplementary submissions on the matter of the scope of the question. I regret that it is

necessary to make them, for that necessity arises out of the clear failure by ECOSOC to comply with the requirement in Article 65, paragraph 2, of the Statute of this Court, that the written request shall contain an *exact* statement of the question. The Secretary-General's original draft of 28 July 1998 contained an exact statement of the kind required. Moreover, it was a full and fair reflection of the only dispute that existed at that date between the United Nations and Malaysia, namely, the issue of the legal effect of the Secretary-General's determination. The reformulation of the question by ECOSOC, for reasons not known, has only served to make the question inexact.

The first point: the procedure now before the Court is in essence a contentious procedure. The procedure only takes advisory opinion form because there is no other way in which the Court can be seised of a dispute to which an international organization is a party.

Point 2: the request must be for an opinion on a legal question. That is what is prescribed in the second sentence of Section 30 of the 1946 Convention. It is also what is laid down in clear terms in the first paragraph of Article 65 of the Statute of the Court.

Point 3: the Secretary-General's original draft question of 28 July 1998 was clearly a legal question relating to the powers of the Secretary-General. As such, it was properly limited to the issue which had been discussed between the Parties prior to that date. Contrary to what was suggested a few moments ago on behalf of Costa Rica, the question was not about whether the Special Rapporteur satisfied the conditions of limited immunity.

Point 4: the circumstances in which the question came to be revised and the participants in, and the content of, consultations which were referred to in the heading of the document placed before ECOSOC for its adoption, which you will find in Dossier No. 61, have not been made known to the Court. Malaysia is not a member of ECOSOC, its term of membership having ended on 31 December 1997 and was, therefore, not a party to the consensus adoption of the resolution. Malaysia's participation in the debate was limited to that of an observer, not a member of ECOSOC. Malaysia did not join in the consensus. The indications of its assent to a request for an advisory opinion were all given at an earlier time when the sole issue contemplated was seen to be the

question of whether the Secretary-General's power to characterize the conduct of the Special Rapporteur was or was not conclusive. The principle of the equality of parties in litigation before this Court precludes the Court accepting a change of the question at the instance of one party alone.

Point 5: the revised form of words in the question submitted to the Court did not change the substance of the original question. In particular the use of the words "taking into account the circumstances set out in paragraphs 1 to 15 of the Note of the Secretary-General did not and could not extend the question to invite or to enable the Court to consider whether the actions of the Special Rapporteur fell within the course of the performance of his mission". I would respectfully invite the Court to re-examine those paragraphs in Document E/1998/94 which are also printed in the text of the question as it was conveyed to the Court in the document headed "Request for Advisory Opinion", with a view to ascertaining whether they contain any sufficient indication of "circumstances" that deal with the substantive issue of the scope of the Special Rapporteur's mission, sufficient to support recourse to those words as a justification for enlarging the issue. I suggest that when the Court looks at that document closely it will find that those paragraphs 1 to 15 contain nothing of the sort. It had been my intention, Mr. President, to perform the excruciatingly and boring task of taking the Court paragraph by paragraph through those paragraphs 1 to 15, but I hope you will forgive me if I do not follow that intention, but rely upon your own reading of the matter. But in the most summary form, Mr. President, if you look at each paragraph of those paragraphs 1 to 15 separately, you will find that there is nothing in them that extends the scope of the problem. Apart from one summary reference in paragraph 6 to the terms of the initial determination by the Legal Counsel, there is not a word about the substance of the question of whether Mr. Cumaraswamy's conduct fell within the course of the performance of his mission. The paragraph contains no statement of the considerations that led to the Legal Counsel's conclusions, apart from a statement that he had considered the circumstances of the interview and the controverted passages before making his determination. I will just read that one sentence:

> "Acting on behalf of the Secretary-General the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the independence of judges and lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations."

That is a partial, but by no means a complete, statement of the considerations that should have been examined if I was to reach a substantive conclusion on what fell within the scope of the Rapporteur's mission.

And I would suggest that given that the Court is invited to present an opinion on a legal question, the examination of the factual aspect of the performance of the Special Rapporteur's mission is not within the Court's remit.

I should add that there is nothing to indicate that the question now before the Court — as is argued on one side of the Court — had ever been discussed between Malaysia and the United Nations. It was said in the course of the speech of the representative of the Secretary-General that the matters had been repeatedly discussed. Not so, Mr. President, at any rate on the instructions that I have been given. My understanding is — and the Solicitor-General indeed said so a few moments ago — that the discussions between Malaysia and the United Nations were limited to the question of the certificate, whether the Secretary-General's certificate was to be conclusive, whether the Government of Malaysia's certificate was the appropriate reflection of the Secretary-General's certificate, and in due course of the question as to how, if at all, the matter was to be submitted to an impartial determination. The sole difference between the two sides was the point of principle: who has the power in the first instance of qualify the character of the conduct?

Point 6: consequently, it is not possible to hang upon the questions referenced to paragraphs 1 to 15 of the Secretary-General's Note. Any justification for the belief that ECOSOC in referring to those paragraphs was intending to extend the scope of the question before the Court. There is no sufficient evidence of discussion in those paragraphs to enable the Court to decide the question of fact, which some of the participants are asking it to do. In any case, if it had been the

intention of ECOSOC to extend the scope of the question in the manner which has been argued, why then did it not say so, clearly, and unequivocally? Why did the question refer in such broad terms to paragraphs 1 to 15, instead of focusing on paragraph 6 alone, and developing the factual aspect of that paragraph?

Point 7: there is no precedent, Mr. President, for the Court dealing, in an advisory opinion, with a controverted question of fact or of mixed fact and law. The Court is not entitled to assume that such facts as are revealed in the Dossier are agreed facts. Nor can Malaysia's silence on the facts be taken as amounting to agreement thereon. The substance of issue is not before the Court.

Point 8: finally, I am bound to recall what I may not have said with sufficient precision on Tuesday, namely that even if the Court were to consider that ECOSOC had intended to broaden the scope of the question, it does not possess the power to do so. Its action is *ultra vires*. To the extent that the resolution exceeds its proper bound, it must be disregarded. Now why do I submit that it is *ultra vires*? Because in implementing Section 30, ECOSOC is merely a vehicle for placing a difference between the Secretary-General and Malaysia before the Court. ECOSOC does not have an independent position to assert as it might have had were it seeking an opinion on some legal question other than in the context of the operation of Article 30. ECOSOC, as I suggest, Mr. President, is no more than an instrument of reference, it cannot change the nature of the difference or alter the content of the question. With your leave, Mr. President, I would venture to remind the Court of the Advisory Opinion that it gave in 1956 on Judgements of the Administrative Tribunal of the International Labour Organisation, which is reported in the *I.C.J. Reports 1956,* at page 77. As the Court will recall, that was an Advisory Opinion that was requested by the Executive Board of UNESCO pursuant to Article XII of the Statute of the Administrative Tribunal of the ILO, the Administrative Tribunal to which UNESCO problems were referred, and that provided that in any case in which the Executive Board of international organization which has made the declarations specified in the Statute, challenges a decision of the Tribunal confirming its jurisdiction or considers that the decision of the Tribunal is vitiated by a fundamental fault in the

procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned for an advisory opinion of the International Court of Justice; the opinion given by the Court shall be binding. Now the Court made some interesting remarks about that power, and I read now, Mr. President, from page 99: "Undoubtedly, UNESCO has the general power to ask for an Advisory Opinion of the Court on questions within the scope of its activity." But the question put to the Court has not been put in reliance upon the general power of UNESCO to ask for an advisory opinion, it has been expressly linked with Article XII, which I have just read to you. In its terms and by virtue of the place which it occupies in the resolution requesting the advisory opinion, question two, as put to the Court refers to the judgments which the Executive Board has challenged in relation to the jurisdiction of the Tribunal which render these judgments. It is on that basis, that the question must be considered by the Court. The Court has found that the object of that question is outside the matter which, in the judgments which have been challenged, is germane to the jurisdiction of the Administrative Tribunal. In the request for an advisory opinion, question 2 has been placed within the orbits of Article XII. Actually it is outside that Article, accordingly it cannot be considered by the Court for the purpose of acting upon the request made to it. And, Mr. President, I suggest by apparently reasoning that the extension of the question as contended for by my friends on my right, is not acceptable because it is not within the scope of the dispute that actually existed between the parties on a legal question. As the Secretary-General said in paragraph 15 of his Note of 27 July 1998, "the submission of the request for an opinion was to be made through the counsel", it was not open to the counsel to expand the question at all, and certainly not to change it from a question of law to a question of fact. And if I may respectfully so submit, Mr. President, the Court should not allow itself to be drawn into giving a response to an expanded question that should not have been asked.

And now I would like to turn to the second part of my observations which relate to the question of the power of the Secretary-General. The Court has heard a very powerful plea, on behalf of the United Nations, for recognition of the conclusive power of the Secretary-General. But,

Mr. President, there is an invariant contradiction in the argument presented on behalf of the Secretary-General. On the one hand, the important maxim *pacta sunt servanda* was invoked; treaties must be observed. And then, towards the end of the same argument, the Court was invited to take note of the fact that since the adoption of the Convention in 1946, circumstances had changed. The Court was asked to take note that there was really no problem until now, that there are a number of new situations which warrant the possession by the Secretary-General of the extended power now claimed by him. I would not quarrel, Mr. President, with the identification by the learned representative of the Secretary-General of the interests of the United Nations as they now exist, but, in relation to the case now before the Court, the Secretary-General cannot have it both ways. The Court, if I may so submit, should not condemn conduct — conduct of Malaysia — that is in accordance with the treaty provisions as they have been understood until the epoc, when the changed circumstances to which the Secretary-General's representative referred, came about. It is, I think, to be observed that the Secretary-General's representative hardly crossed swords with Malaysia on the interpretation of the treaty by reference to the standard treaty interpretation considerations. There was no discussion of the literal meaning of the words, there was no answer to what was said on Tuesday about the *travaux préparatoires*. As regards practice, there was no answer on the cases. My friend Mr. Brower, speaking on behalf of Costa Rica, sought to distinguish the cases in a rather summary, but if I may say, without disrespect to him, somewhat superficial manner, the fact that certificates were not issued in the cases, does not meet my point, which is that the courts felt free to examine in those cases whether the official concerned had been acting in accordance with his functions.

No reference — this is most interesting — no reference whatsoever was made to the legislation of the parties to the 1946 Convention, legislation in most respects parallel to that which Malaysia adopted and which, as I suggested on Tuesday, was indicative of their understanding of what was expected of them. Not one of those statutes contained any suggestion that the duty lay upon the government first of all, to seek a determination by the Secretary-General, then to

communicate that to the Court in a binding manner and see what happened. And as regards the other aspects of practice, again my learned friend acting for the Secretary-General, repeated that the measures of practice to which he points, really did not become identifiable until 1976 and he referred to a supplementary statement of 1983 which I must admit I overlooked, but I would be glad to look at it later and see what it says, but he did not really grapple with the evidence of the United Nations acceptance of the system established by the 1946 Convention, and understood by States in the manner that I have already described.

He commented on the work of Mr. Jenks. He did not explain why Jenks failed to expressly confirm the validity of the first of the three alternatives which he presented, namely, the Secretary-General's statement should be taken as conclusive. Jenks in 1961, 25 years after the Convention had been adopted, did not commit himself to that position.

Mr. President, the Court has heard a significant plea in relation to the protection of the interests of the United Nations. They are, of course, important and they should be protected. But the way to protect them is by grappling with the problem deliberately and systematically, by treaty. Given that there are all these new situations — Rwanda and so on, and the mission in Iraq — where special requirements are needed, then let us face up to that and let the United Nations propose to the parties to the 1946 Convention, a suitable amendment which would ensure that in the future the problem by which the Court is now confronted does not occur. But so far as this case is concerned, Mr. President, the Court, if I may say so, must take it on the situation as it has been up till now and not what it might be or ought to be in the future. The representative of the Secretary-General attributed to me an argument that the United Nations had not set up the mechanism contemplated in Article 29 and said that that would not have been possible because it would have been too elaborate a task and would have involved a commitment of personnel and money inappropriate in the circumstances.

Mr. President, I may have left myself open to misunderstanding on that matter. I was not arguing for the establishment of any permanent tribunal. It would have been quite sufficient to

meet the needs of Article 29 if the Secretary-General of the United Nations had made a formal, unilateral declaration which of course would be binding in law, saying, that in respect of any of these matters, he would be prepared to go to arbitration initiated by the private party or the government concerned. That would have been an effective mechanism. But it is not an effective mechanism for the Secretary-General to say "ah, but a government that is interested in such a matter may come and ask for an advisory opinion", because as we can see from what happened in ECOSOC, that is not an automatic process. ECOSOC took it upon itself, having received on 28 July the Secretary-General's Note, to consider the matter at various informal consultations until the 5th of August, then to produce a text which was not the sort of text that Malaysia had ever had in mind.

Mr. Brower paid me a great compliment by citing me in this Court; needless to say I appreciate that greatly. It is nice to know that somebody does look at some of the things one has written, but he rather extended the concept of implied powers as I developed it in those Hague lectures. I am a friend of the concept of implied powers, I do not deny it for a moment, when they are properly implied, but there I was talking about implied powers of membership organs of the United Nations, Security Council, General Assembly and so on. But I would not have said, I do not think I did say — but I might be wrong — that the Secretary-General had the power to imply for himself additional powers and that those powers automatically became valid. Now, what I do recall from the recesses of old memory is, that in the past — and I am thinking now of the Congo operation — when the Secretary-General was seeking to interpret the requests made to him by the Security Council to perform certain functions, and he was uncertain as to whether his interpretation of the functions imposed upon him was correct, and was doubtful as to whether in fact he had the necessary powers, he would go back to the Security Council and say to them "This is what you asked me to do, am I correct in understanding that this is what I must do?" In other words, it was not a unilateral, self-implication of powers, it was a possible implication of powers dependent upon ratification by the body that was asking him to act.

Mr. President, I think I have done very well. It is exactly one o'clock and I, with your leave, would respectfully ask to be allowed to terminate at this point. I thank you and Members of the Court for your kind attention.

The PRESIDENT: Thank you so much Sir Elihu for your statement. There are two questions which Members of the Court wish to ask. May I first call on Judge Guillaume?

M. GUILLAUME: Monsieur le président, ma question est la suivante. Je la pose à la lumière des dernières déclarations du conseil pour la Malaisie. Je serais reconnaissant au représentant des Nations Unies de fournir toute information en sa possession sur les travaux préparatoires de la décision 1998/297 par laquelle le Conseil économique et social a saisi la Cour. Je vous remercie, Monsieur le président.

The PRESIDENT: Thank you Judge Guillaume. The Deputy-Registrar will now read out a question prepared by Judge Koroma, who in a spirit of fraternity, also is suffering from rheumatic problems. That question, and the question put a moment ago by Judge Guillaume, may be answered in writing, let us say within ten days.

The DEPUTY-REGISTRAR: Question for the Legal Counsel of the United Nations. Malaysia is invited to comment, if it wishes.

In the present case, what meaning is to be given to the expression "words spoken or written in the course of performance of his mission"?

The PRESIDENT: Thank you. The oral proceedings on the request for an advisory opinion submitted by the Economic and Social Council on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* are thus concluded. At the close of these proceedings I should like to convey the thanks of the Court to the delegations who have addressed the Court in the course of this week, as well as to the United Nations and to all States who have participated in the written proceedings. The Court deeply appreciates the interest

which all concerned have shown and is most grateful for their help. I invite the Legal Counsel of the United Nations and the representatives of all States concerned to remain at the disposal of the Court in case it should require any further information or explanations from them.

May I recall that in paragraph 1 of the operative part of its decision, 1998/297, the Economic and Social Council requested the Court to give its opinion on a priority basis. In accordance with Article 103 of its Rules, the Court has taken the steps open to it to expedite the procedure. Despite its very full List, the Court has arranged to make a determination by this coming spring on the question that has been submitted to it. Pursuant to Article 108 of the Rules of Court, the Registrar will in due course inform the United Nations and the States concerned of the exact date and time when the Court will announce its opinion. As the Court has no other business before it, I declare this sitting closed.

The Court rose at 1.00 p.m.