SEPARATE OPINION OF VICE-PRESIDENT WEERAMANTRY

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

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

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

IMPORTANCE OF PROTECTION OF UNITED NATIONS PERSONNEL

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

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

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

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

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

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

Conceptual Antecedents of the System of United Nations Immunities

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

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

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

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

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

United Nations Functionaries Distinguished from State Representatives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE NEED FOR UNIFORMITY IN THE JURISPRUDENCE RELATING TO THIS MATTER

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

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

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

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

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

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

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

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

Conclusiveness of Secretary-General's Determination

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

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

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

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

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

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

Correlative Obligations of Rapporteurs

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

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

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

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

As the Court has observed:

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

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

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

CONCLUSION

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

(Signed) Christopher Gregory WEERAMANTRY.

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[10] Present Advisory Opinion, para. 66.