SEPARATE OPINION OF JUDGE ODA

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1. Introduction

1. I voted in favour of paragraphs (1) *(a)*, (1) *(b)*, (2) *(b)* and (3) of the operative part of the Court's Advisory Opinion, which mainly relate to the application of the 1946 Convention on the Privileges and Immunities of the United Nations (hereinafter called "the Convention") in the case of Mr. Cumaraswamy, Special Rapporteur of the United Nations Commission on Human Rights on the independence of judges and lawyers. However, I voted against paragraph (2) *(a)* and paragraph (4) of the operative part, which involve the legal obligations of Malaysia in this case.

2. Before explaining the reasons behind my voting position on each of the paragraphs of the operative part, I would like to present my general views on the Court's Advisory Opinion as a whole. I am of the view that the Court has not necessarily given an adequate response to the questions set out in decision 1998/297 by the Economic and Social Council (hereinafter called "ECOSOC"), even though the Court's intention in paragraphs (1) *(a)*, (1) *(b)* and (3) of the operative part appears to be to respond to the *first question* put forward by ECOSOC, while the intention of paragraphs (2) *(a)*, (2) *(b)* and (4) of the operative part is to respond to the *second question* put forward by ECOSOC.

2. Modification of the Questions to Be Put to the Court

3. First of all, I must point out the peculiarities of the present case. As correctly stated in paragraphs 20, 35 and 37 of the Advisory Opinion, the original text of the questions to be put before the Court prepared by the United Nations Secretary-General for ECOSOC was different from the text of the questions which were in fact spelled out in ECOSOC's decision 1998/297 dated 5 August 1998.

4. The text which the Secretary-General originally prepared in his note of 28 July 1998 on the "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" was drafted in order to find out whether:

> "the Secretary-General . . . ha[s] the exclusive authority to determine whether words were spoken [by Mr. Cumaraswamy] in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention" (E/1998/94, para. 21).

The form of the questions was changed in a somewhat abrupt manner when, following informal consultations, the draft decision was formulated by the Vice-President of ECOSOC on 5 August 1998 (E/1998/L.49/Rev.1) and was adopted by ECOSOC on the same day, as decision 1998/297. The questions to be put to the Court in ECOSOC's draft decision

thus formulated (as quoted in paragraph 6 below) differed significantly from what the Secretary-General had originally suggested one week before on 28 July 1998, as quoted above.

5. The circumstances in which the change to the draft occurred are not known outside of ECOSOC itself, as the Court explains in paragraph 37 of the Court's Advisory Opinion:

> "Although the Summary Records of [ECOSOC] do not expressly address the matter, it is clear that [ECOSOC], as the organ entitled to put the request to the Court, did not adopt the questions set forth at the conclusion of the note by the Secretary-General, but instead formulated its own question in terms which were not contested at that time."

The Court now has to respond to the questions presented in that final form by ECOSOC, as it correctly goes on to state in that same paragraph: "the Court will now answer the question as formulated by [ECOSOC]".

6. Whatever the reasons were behind the change in the questions, it is the task of the Court to respond to the questions which were actually put forward by ECOSOC, the *first* of which concerned:

> "the legal question of the applicability of Article VI, Section 22, of the [Convention] in the case of [Mr.] 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".

It appears to me, as already stated in paragraph 2 of this opinion, that the Court responds to this question in paragraphs (1) *(a)* and (1) *(b)* of the operative part of the Advisory Opinion; paragraph (3) also appears to be the Court's response to the first question, of which an explanation is given in Section 5 of this opinion (see paragraph 18 below).

3. Irrelevancy of the Secretary-General's "Exclusive Authority"

7. The Court is now requested, under Article VIII, Section 30, of the Convention, to give an advisory opinion on "[a] legal question involved" in "a difference . . . between the United Nations on the one hand and [Malaysia] on the other hand" as spelled out in the *first question* in ECOSOC's decision.

8. The authority of the Secretary-General is in fact not directly at issue, even though the arguments of both the Parties to the difference, namely the United Nations and Malaysia, in the written and oral plead-

ings, as well as the arguments of those States which participated in the proceedings, were largely concentrated on that very issue. While the Advisory Opinion discussed the arguments of the Parties on this matter (cf. paras. 32, 33 and 34), the Court's conclusions in paragraphs (1) *(a)* and (1) *(b)* of the operative part of the Advisory Opinion were not in fact founded on the United Nations Secretary-General's allegedly authoritative determination with regard to the applicability of the Convention in the case of Mr. Cumaraswamy or to Mr. Cumaraswamy's entitlement to immunity from Malaysian legal process.

9. The Secretary-General's alleged primary responsibility and definitive authority are irrelevant in this respect in relation to the question put to the Court by ECOSOC. I find it difficult to see why the Court is so very much concerned with the authority purported to be vested in the United Nations Secretary-General. The Court states in paragraph 49 that: "[ECOSOC] wishes to be informed of the Court's opinion as to whether . . . the Secretary-General's finding that the Special Rapporteur acted in the course of the performance of his mission is correct"; in paragraph 50, that: "[t]he Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required"; in paragraph 51, that: "the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission"; in paragraph 52, that: "the Secretary-General . . . has on numerous occasions informed the Government of Malaysia of his finding"; and, in paragraph 56, that: "the Court is of the opinion that the Secretary-General correctly found [in this matter]".

10. I do not contest the substance of what the Court thus stated in its Advisory Opinion in connection with the authority of the Secretary-General. However, it is not for the Secretary-General *but for the Court* to exercise the authority vested in it to make a determination, at the request of ECOSOC, on the applicability of the Convention, and on Mr. Cumaraswamy's entitlement to immunity.

4. Mr. Cumaraswamy's Legal Immunity — Difference between the United Nations and Malaysia on the Interpretation and Application of the Convention

11. The statement in paragraph (1) *(a)* of the operative part of the Advisory Opinion that "[the Convention] is applicable in the case of [Mr.] Cumaraswamy as Special Rapporteur of the Commission on Human Rights" is self-evident, since Mr. Cumaraswamy was duly appointed as a "Special Rapporteur" of the Commission, and "experts" under that Convention are interpreted to include "special rapporteurs" appointed by the United Nations.

12. The essential question concerns whether Mr. Cumaraswamy is entitled to "immunity from legal process of every kind" (Convention, Art. VI, Sec. 22 *(b)*) in spite of his "[comments] on certain litigations that had been carried out in Malaysian courts", comments which allegedly contained defamatory words and published in an article in the November 1995 issue of *International Commercial Litigation*. The Convention provides that:

> "[e]xperts . . . performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions . . . In particular they shall be accorded:
>
> . . . . . .
>
> *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind." (Art. VI, Sec. 22 *(b)*.)

13. The issue on which the Court is bound to reply is whether the words allegedly spoken by Mr. Cumaraswamy in the interview published in the November 1995 issue of *International Commercial Litigation* do or do not fall within the meaning of "words spoken . . . in the course of the performance of [his] mission". The Court answers this question in paragraph (1) *(b)* of the operative part in the affirmative, stating that:

> "[Mr.] Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*."

14. What is really at issue in the present case is *not the content of the words* themselves which Mr. Cumaraswamy was alleged to have uttered during the course of his interview as published in the journal *International Commercial Litigation*. The Court properly states in paragraph 56 that "[t]he Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation". What the Court should have discussed in the present case is whether Mr. Cumaraswamy spoke the words *in the course of the performance of his mission* as Special Rapporteur of the United Nations Commission and was therefore entitled to legal immunity granted under the Convention in connection with those words.

15. The words "in the course of the performance of [the] mission", or some similar expression, have often been utilized in the various instruments relating to diplomatic privileges and immunities, and also to the privileges and immunities for the armed forces stationed in foreign countries in pursuance of bilateral agreements. The interpretation of these expressions varies according to each case. No rule appears to have been firmly established in the doctrine or practice of international law in this

respect. It might be considered debatable whether Mr. Cumaraswamy's agreeing to give an interview for a business journal is within "the course of the performance of [his] mission" as a special rapporteur and is therefore within the scope of the immunity granted under the Convention. However, it is in fact standard practice for special rapporteurs of the United Nations commissions to have contact with the media on the subjects essentially connected with the mandates given to them by the United Nations. Mr. Cumaraswamy's mandate consists of the following task:

> "*(a)* to inquire into any substantial allegations transmitted to him . . .;
> *(b)* to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence . . .;
>
> *(c)* to study . . . important topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers" (Advisory Opinion, para. 44).

It seems clear to me that what Mr. Cumaraswamy said in his interview with the journal did in truth constitute words spoken "in the course of the performance of [his] mission".

16. The following fact may also be pertinent in this respect. Previous to the interview by the journal published in its November 1995 issue, Mr. Cumaraswamy, apparently acting in his capacity as Special Rapporteur of the Commission on Human Rights issued, on 23 August 1995, a press statement reading in part:

> "Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts."

Several days later, on 29 August 1995, Mr. Cumaraswamy set out his concerns about the Malaysian judicial system in a letter to the Chairman of the Commission on Human Rights. Mr. Cumaraswamy's press statement was later referred to in his second report submitted on 1 March 1996 to the Commission on Human Rights. Mr. Cumaraswamy is quoted in the November 1995 issue of *International Commercial Litigation* as stating that: "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice" — words quite similar to those he had previously used in his capacity as Special Rapporteur in his press statement of 23 August 1995, as referred to above. Thus, while the commercial companies in Malaysia claimed that they were bringing defamation suits

against Mr. Cumaraswamy on account of words spoken during the interview with *International Commercial Litigation*, he had in fact already, some three months earlier, made an almost identical statement to the press at his own initiative in his capacity as Special Rapporteur.

17. In sum, I totally agree with the Court when it states in paragraph (1) *(b)* of the operative part, which I reiterate here, that:

> "[Mr.] Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*".

5. Exemption from Taxed Costs

18. Paragraph (3) of the operative part: "[Mr.] Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs", is included in the Advisory Opinion because the Court was informed by means of the Addendum to the Secretary-General's Note (E/1998/94/Add.1) that Mr. Cumaraswamy had been served with a Notice of Taxation and Bill of Costs dated 28 July 1998. As suggested in paragraph 6 above, paragraph (3) of the operative part is made in response to ECOSOC's *first question.*

19. In spite of my full agreement with what the Court stated in this respect, I believe that this paragraph need not have been specifically included in the operative part of the Advisory Opinion, once the first question put forward by ECOSOC had been answered in the affirmative, since the matter of "costs imposed upon [Mr. Cumaraswamy] by the Malaysian courts, in particular taxed costs", is certainly one included in immunity from legal process. If a person is immune from legal process before the national courts, he must also be entitled to immunity from any costs imposed upon him, as the Court correctly states in paragraph 64 of the Advisory Opinion:

> "the immunity . . . to which the Court finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs".

In this respect, paragraph (3) simply states the obvious and, if this matter is to be mentioned in the operative part of the Advisory Opinion, then it should have been stated immediately after paragraphs (1) *(a)* and (1) *(b)* rather than after paragraphs (2) *(a)* and (2) *(b)*, which deal with the legal obligations of Malaysia.

6. Decision on Immunity by the Malaysian Courts *In Limine Litis*

20. I agree entirely with the Court in its finding in paragraph (2) *(b)* of the operative part that the Malaysian national courts should have decided the issue of immunity at the outset: "the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*". Assuming that Mr. Cumaraswamy was entitled to immunity under the Convention, at which stage did Malaysia begin to fail to ensure that immunity? When did the responsibility of Malaysia as a State in this respect begin? Certain Malaysian commercial companies initiated defamation suits against Mr. Cumaraswamy before the Malaysian national courts. The matter of whether the Malaysian courts should have dismissed the suits before issuing Mr. Cumaraswamy with the Order of Summons on 12 December 1996, or after having heard his views in writing or in his presence at the formal proceedings, is a matter relating to diplomatic privileges and immunities and constitutes a controversial issue — and, in fact, the practice and jurisprudence of States in this respect varies.

21. In fact, the national courts of any State cannot reach a decision concerning the immunity of a special rapporteur until they are aware of his or her status as a person entitled to claim legal immunity. The writ of summons issued by the Malaysian national courts may well have been justifiably issued against Mr. Cumaraswamy. However, upon being informed of the mission entrusted to Mr. Cumaraswamy by the United Nations — whether directly by Mr. Cumaraswamy himself upon his being summoned to appear before the relevant court, or by the Malaysian Foreign Office, or even by receiving directly a note or certificate issued by the United Nations Secretary-General — the Malaysian national courts should at that point have determined the preliminary issue, namely, whether Mr. Cumaraswamy was immune in respect of words spoken by him in the course of an interview with a business journal.

22. The Malaysian High Court of Kuala Lumpur failed to rule on this matter and instead, on 28 June 1997, ordered the Special Rapporteur to join his plea for immunity to his defence on the merits. Mr. Cumaraswamy could have claimed — and actually did claim, with the support of the certificate issued by the Secretary-General — his privileges and immunities before the Malaysian domestic courts. In this particular case, the Malaysian domestic courts should, at the jurisdictional phase, have then disposed *in limine litis* of the suits brought by the Malaysian commercial firms against Mr. Cumaraswamy.

7. Legal Obligation of Malaysia

23. *(In general.)* I would have some doubts as to whether paragraph (2) *(a)* and paragraph (4) of the operative part really answer the *second question* put by ECOSOC, namely, "[ECOSOC] . . . [r]equests . . . an advisory opinion from the International Court of Justice . . . on the legal obligations of Malaysia in this case". Putting aside the issue of whether ECOSOC's *second question* was itself adequately formulated by that organization, the Court's answer to the *second question* should be simply that Malaysia is legally obliged to ensure that Mr. Cumaraswamy, Special Rapporteur of the Commission on Human Rights, enjoys in this case the immunities granted under Article VI, Section 22, of the Convention.

24. *(Paragraph (2)* (a) *of the operative part.)* The Malaysian national courts decided to examine Mr. Cumaraswamy's plea in the merits phase of the proceedings against him. Malaysia, as a State, is responsible for the actions of its national courts in allowing the proceedings against Mr. Cumaraswamy to be pursued, rather than dismissing them. In other words, it is Malaysia, as a State, that is responsible for the failure of its organs — the judicial power in this case — to ensure Mr. Cumaraswamy's legal immunity. The matter of whether or not an executive department of the Malaysian Government informed its courts of the position taken by the Secretary-General is not a relevant issue in this case. I cannot agree with the conclusion reached by the Court in paragraph 62 of its Advisory Opinion that:

> "the *Government* of Malaysia had an obligation, under Article 105 of the Charter and under the [Convention], to inform its courts of the position taken by the Secretary-General" (emphasis added).

Thus, I do not support what the Court has stated in paragraph (2) *(a)* of the operative part:

> "the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-General that [Mr.] Cumaraswamy was entitled to immunity from legal process".

25. *(Paragraph (4) of the operative part.)* The Malaysian Government is obliged by Article VIII, Section 30, of the Convention to accept this Advisory Opinion *as decisive* and it is therefore not necessary for the Court to make any explicit statement such as that in paragraph (4):

> "the Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and [Mr.] Cumaraswamy's immunity be respected".

Paragraph (4) is superfluous. It would be desirable that the views of the International Court of Justice should be communicated to the relevant Malaysian courts through the channel of the Foreign Office, but I do not agree that the Government of Malaysia is *obliged* to do so.

26. *(Summary.)* I thus voted against paragraph (2) *(a)* and against paragraph (4) of the operative part for the reasons stated above. In responding to the *second question* concerning the matter of Malaysia's legal obligations, the Court should, instead of making unnecessary statements concerning the responsibility to be borne by the United Nations for any damage arising from acts performed by the United Nations or by its agents acting in their official capacity, or concerning the scope of the agents' functions which they "must take care not to exceed" (Advisory Opinion, para. 66), have indicated whether the Government of Malaysia should make reparation to the United Nations as well as to Mr. Cumaraswamy for its non-compliance with the responsibility which it has to bear and how that reparation for the damages caused to the United Nations and/or to its Special Rapporteur, Mr. Cumaraswamy (if any is due), should be effected.

(Signed) Shigeru ODA.