DISSENTING OPINION OF JUDGE KOROMA

Reasons for dissenting opinion — Unable to justify Advisory Opinion on the face of the Convention, general principles of justice and peculiar circumstances of this case — Dispute not about human rights of Special Rapporteur or whether Government of Malaysia is in breach of its obligations under Human Rights Conventions to which it is a party — Dispute is about whether Special Rapporteur is immune from legal process for words spoken in performance of his mandate and Malaysia's obligations — Circumstances of the case — Interview given to International Commercial Litigation *— Defamation lawsuits — Finding by Secretary-General that Special Rapporteur immune from legal process — Differences between Organization and Government of Malaysia — Matter referred to Economic and Social Council (ECOSOC) by Secretary-General — ECOSOC's formulation of question — ECOSOC entitled to formulate question but real question must be answered by Court — Court should have exercised discretion and declined to answer question because of its role as a judicial organ — For Court to determine applicability of Convention necessary to enquire into the merits — Insufficient for Court to rely on finding of another organ — Court's statement that United Nations experts must take care not to exceed scope of their mandate not without particular import and significance in this case — Obligation of Malaysia one of result and not of means — Convention does not stipulate particular method of implementation — Even in exercising advisory function, Court should not depart from essential rules guiding its activity as a judicial organ.*

1. Much as I would have liked to vote in favour of the Advisory Opinion, as it might assist in settling the differences which had arisen between the United Nations and the Government of Malaysia with regard to the interpretation and application of the General Convention on the Privileges and Immunities of the United Nations (hereinafter "the Convention"), however, in view of the fact that the Opinion is to be regarded as an authoritative legal pronouncement by the Court on the Convention, and is to be accepted as decisive by the Parties, and in view of the peculiar circumstances surrounding the dispute, I find myself unable to support and justify the Opinion, by reason of the terms of the Convention, the general principles of justice, the peculiarities of the dispute and my own legal conscience. I have therefore been constrained to vote largely against the Opinion and my views for doing so are set out in this opinion.

2. At the outset it should be noted that this dispute is not about the

human rights of Mr. Cumaraswamy, Special Rapporteur of the Human Rights Commission, as such. Nor is it about whether Malaysia is in breach of its obligations under the Human Rights Conventions to which it is a party. The dispute is about whether Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable to Mr. Cumaraswamy — that is to say, whether words spoken or written by him were done so in his capacity as Special Rapporteur and *in the course of the performance of his mission* — and about the legal obligations of Malaysia.

3. The circumstances of this case are unusual. According to the material presented to the Court, Mr. Cumaraswamy, in an interview published in the 5 November 1995 issue of the magazine *International Commercial Litigation*, and in which he was referred to as Special Rapporteur on the independence of judges and lawyers, was reported to have said with reference to a specific case (the *Ayer Molek* case), that it looked like "a very obvious, perhaps even glaring example of judge-choosing", while stressing that he had not finished his investigation. Mr. Cumaraswamy was also quoted as having said: "Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice." He added: "But I do not want any of the people involved to think I have made up my mind." He was further reported to have said: "It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending."

4. As a result of that interview a number of lawsuits were filed against Mr. Cumaraswamy by companies and individuals asserting that the published article contained defamatory words that had "brought them into public scandal, odium and contempt", and sued for damages including exemplary damages for slander.

5. The Legal Counsel of the United Nations acting on behalf of the Secretary-General of the United Nations, and later the Secretary-General himself, having considered the circumstances of the interview and the controverted passages of the interview, determined that Mr. Cumaraswamy was interviewed in his official capacity as Special Rapporteur and requested the Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process with respect to the lawsuits.

6. On 12 March 1997 the Minister for Foreign Affairs of Malaysia filed a certificate with the trial court in which that court was invited to determine at its own discretion whether immunity applied, the certificate having stated that this was the case "only in respect of words spoken or written and acts done by him in the course of the performance of his mission".

7. On 28 June 1997 the Judge of the Malaysian High Court concluded

that she was "unable to hold that the Defendant is absolutely protected by the immunity he claims", in part because she considered that the Secretary-General's note was merely "an opinion" with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate "would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation". The Malaysian court ordered that the Special Rapporteur's motion be dismissed with costs; that the costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July the Court of Appeal of Malaysia dismissed Mr. Cumaraswamy's motion for a stay of execution.

8. After efforts to resolve the dispute did not materialize in a negotiated settlement, the Secretary-General's Special Envoy advised that the matter should be referred to the Economic and Social Council (ECOSOC) to request an advisory opinion from the International Court of Justice. The Government of Malaysia acknowledged the Organization's right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General's Special Envoy that the United Nations should proceed to do so, and indicated that, while it would make its own presentation to the International Court of Justice, it did not oppose the submission of the matter to the Court through the Council.

9. The note by the Secretary-General (E/1998/94), referring the matter to the Council, concluded with a paragraph 21 containing a proposal for two questions to be submitted to the Court for an advisory opinion:

> "21. . . .
>
> 'Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato' Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:
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> 1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention?
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> 2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts

and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?

. . . . . .'"

10. Section 30 of the Convention provides:

"*Section 30:* All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

11. After considering the note by the Secretary-General, ECOSOC, without any explanation, changed the question, as it was entitled to do, and requested the Court to render 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".

Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations provides that

"*Section 22. Experts* (other than officials coming within the scope of Article V) 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, including the time spent on journeys in connection with 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. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations." (Emphasis added.)

In other words, the Convention would be applicable to an expert in respect of words spoken or written and acts done by him in the course of the performance of his mission.

12. The Court in its Advisory Opinion reached the conclusion that Article VI, Section 22, of the Convention is applicable in the case of Mr. Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, and that Mr. Cumaraswamy is entitled to immunity from legal process of any kind for the words spoken by him during an interview as published in an article in the November 1995 issue of *International Commercial Litigation*.

13. In my respectful opinion, for the Court to conclude that the Convention is applicable to Mr. Cumaraswamy *in this case*, that question is intrinsically and inextricably related to a finding whether the controverted words were spoken in the course of the performance of his mission. Furthermore, it would be inappropriate to reach such a conclusion by applying only the first part of the provision. It would also be injudicious as well as insufficient for the Court in making such a determination to rely on the findings of some other organ or institution to reach its conclusion, as the Court would appear to have done in this case. The references (see paragraphs 50 and 51 of the Opinion) to the authority and responsibility of the Secretary-General as chief administrative officer of the Organization and protector of the mission with which an expert is entrusted are, while incontestable, irrelevant to the question posed by ECOSOC. Indeed, the Court itself has stated that it is the Council's question as formulated which is to be answered by the Court. It cannot therefore be both ways. Nor, in my view, is it necessarily conclusive that

> "In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from 'every kind' of legal process."

While such information is to be given due weight and respect, the Convention does not stipulate that it is conclusive, let alone binding. Nor should it be considered adequate in order for the Convention to be applicable, or for the judicial purposes of this case, that it has become standard practice for Special Rapporteurs of the Commission to have contact with the media. It is one thing to have contact with the media to enable a Special Rapporteur to carry out his mandate, but, as the Court implied in paragraph 66 of the Advisory Opinion, special rapporteurs, like all agents of the United Nations, must take care not to exceed the scope of their functions, and must express themselves with requisite prudence so as to remain within their mandate.

14. The question whether the Convention is applicable to Mr. Cumaraswamy is one of mixed law and fact, and would have required the Court not only to undertake an interpretation of the Convention but an enquiry into the facts before arriving at its conclusion. It therefore does not seem sufficient *for this case* for the Court to conclude that the Convention is applicable to Mr. Cumaraswamy based on the formality of his appointment as Special Rapporteur of the Human Rights Commission, or on the fact that he may have been entrusted not only to do research but also with the task of monitoring human rights violations and reporting on them. With respect, notwithstanding his appointment or the fact that he has been entrusted with a mission by the United Nations, this does not of itself allow a special rapporteur to operate outside his mandate, and whether or not the Special Rapporteur was acting within the scope of his mandate, given the facts and circumstances of this case, ought to have been enquired into for the Court to be in a position to conclude that the Convention is applicable to him. It is also my considered view that this requirement is not vitiated or become superfluous by the fact that it has become standard practice for special rapporteurs of the Human Rights Commission to have contact with the media. Having contact with the media cannot be regarded as a licence for a special rapporteur to operate outside his mandate; whether or not the Special Rapporteur did so or not in this particular case and for the purposes of the Convention is a matter to be determined by the Court before it can conclude that the Convention is applicable.

15. It is also my considered opinion that this request for an advisory opinion, because of the peculiar circumstances[1] of the dispute, the issues it involves, and its implication for the judicial character and function of the Court, ought not to have been submitted to the Court. The dispute between the Organization and the Government of Malaysia should rather have been resolved on the basis of Article VIII — Settlement of Disputes — (Section 29) of the Convention which provides as follows

> "*Section 29.* The United Nations shall make provisions for appropriate modes of settlement of:
>
> *(a)* disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."

On the other hand, once the request had been submitted, the Court should have exercised its judicial discretion and declined to answer the question put to it. Nor do I find the argument persuasive that, because no party had argued against giving the advisory opinion, the Court should therefore have rendered an opinion. For the Court itself has emphasized

[1] See *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61.

that it is the guardian of its role as a judicial organ and has made it clear that, although it considers the rendering of an advisory opinion as a duty, at the same time, as a judicial organ, it has certain limits to its duty to reply to a request for an opinion[2]. The Court should not have felt constrained to exercise its discretion of not answering the question as formulated because of the Advisory Opinion it had earlier rendered in the *Mazilu* case[3]. In my view, not only is the instant case not identical with *Mazilu*, but the circumstances are entirely different. Had due account been taken of those differences as well as of the peculiar circumstances, a different conclusion might have been reached.

16. Furthermore, and as noted earlier, the note of the Secretary-General referring this matter to ECOSOC concluded with a paragraph 21 in which he proposed two questions to be submitted to the Court for an advisory opinion.

17. The Council, after considering the note at the forty-seventh and forty-eighth meetings of its substantive session held on 31 July 1998 and pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I) authorizing the Council to request an advisory opinion from the Court, adopted decision 1998/297, in which it requested the Court to give an opinion, on a priority basis, on

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case".

18. As indicated in paragraph 33 of the Advisory Opinion, following submission of the request to the Court, the Legal Counsel of the United Nations presented a written statement on behalf of the Secretary-General, in which he requested the Court:

> "to establish that, subject to Article VIII, Sections 29 and 30 of the Convention, the Secretary-General has exclusive authority to determine whether or not words or acts are spoken, written or done in the course of the performance of a mission for the United Nations and whether such words or acts fall within the scope of the mandate entrusted to a United Nations expert on mission".

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[2] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71.

[3] *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*, p. 177.

19. Similarly, States participating in the proceedings expressed varying views as to whether the General Convention requires dispositive legal effect to be given to the Secretary-General's determination. According to the United States, *"the views of the Secretary-General in a given case are highly relevant"* (emphasis added); the United Kingdom takes the position that it is *"essential that all due weight is given to [the views of the Secretary-General] by the national courts"* (emphasis added). Italy had expressed the following viewpoint on the issue:

> "once . . . a decision has been adopted, both the government and the judicial authorities of the State where the issue of immunity has been raised are nonetheless obliged to give immediate and careful consideration to the delicate problems of immunity, and they must take due account of the weight to be accorded to the determination made in this regard by the Secretary-General of the United Nations.
>
> *It would be going too far to say that this imposes a legal duty on the courts of the State where the issue of immunity has been raised to stay all proceedings until the issue of immunity has been settled at the international level.* But, at the very least, it is to be expected that those courts would display caution by avoiding hasty decisions which might entail responsibility on the part of that State." (Emphasis added.)

20. Malaysia, for its part, as stated in the Advisory Opinion, contended that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia, which in its view consists of the question, as formulated by the Secretary-General himself, whether the Secretary-General of the United Nations has the exclusive authority to determine whether words or acts of an expert on mission are spoken, written or done in the course of the performance of his or her mission and if, in consequence, the expert is entitled to immunity from legal process pursuant to Section 22 *(b)* of the General Convention. In its written statement Malaysia maintains that it

> "considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 *(b)* of the Convention".

In its oral pleadings, Malaysia maintained that

> "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 in the operation of Section 30.* ECOSOC . . . is no more than an instrument of reference, it cannot

change the nature of the difference or alter the content of the question." (Emphasis added.)

21. In the light of the foregoing, it is to be observed that the question asked by ECOSOC corresponds neither with the questions proposed by the Secretary-General in his note to ECOSOC nor with those same issues as were raised and discussed by the participating States in their written statements or at the oral proceedings. A difference exists between the legal question posed by ECOSOC relating to the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, and the one recommended by the Secretary-General and understood and addressed by Malaysia and a number of participating States, which concerns the issue of whether the Secretary-General of the United Nations is vested with exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations and whether such words fall within the meaning of Section 22 *(b)* of the Convention.

22. Where a request to the Court for an advisory opinion involving the interpretation and application of the Convention is in conformity with Article 65, paragraph 2, of the Statute of the Court, that is to say it contains an exact statement of the question upon which an opinion is required, and is also in conformity with Article 96 of the Charter, then it would appear, as in this case, formally to meet all the required criteria for the Court to perform its advisory function. However, notwithstanding the fulfilment of such procedural criteria, the Court has in the past taken the position that, while it is in principle under a duty to give an answer to a request, it need not give the opinion requested. In other words, the Court will answer the real question as it sees it, even though it is bound by the request[4]. Accordingly, the Court has stated that, in answering a question, it must have full liberty to consider all the relevant data and circumstances available to enable it to form an opinion on the question submitted to it for an advisory opinion.

23. As pointed out above, in this instant matter not only is the question posed by ECOSOC not identical with that which had been proposed to it by the Secretary-General of the United Nations for submission to the Court, and which had constituted the difference between the Secretary-General and Malaysia and was also the question which the majority of the States that participated in the proceedings had addressed, but there is in fact no dispute between Malaysia and the United Nations whether

[4] *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65, and *ibid., Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

the Convention applies to the Special Rapporteur as such, which as we have seen is not the real question.

24. Accordingly, either the dispute should have been properly presented to the Court or the Court's judicial character should have been observed. While it is for ECOSOC to formulate the question to be submitted to the Court for an advisory opinion, the Court is, however, not obliged to answer such a question, if it would have a negative implication for its judicial character and function. The Court is enjoined by its Statute to observe the principles of judicial integrity, even in exercising its advisory jurisdiction, and not to lose sight of its judicial character. Its role as a judicial organ would come under a cloud, not to say be impaired, where a question submitted to it was formulated in such a way as to appear tendentious or ambiguous or have as its underlying purpose to support or promote a particular point of view, or merely to obtain a judicial affirmation of that viewpoint. If a question submitted to the Court were to appear to suffer from any of these defects, I consider it the Court's duty and an exercise of the judicial function as well as in the interest of justice that it should decline to answer the question as submitted and not give a judgment which cannot be obtained by the proper procedure. In other words, where it would appear that the object of a request to the Court is simply to obtain a formal endorsement of the requesting party's position, the Court, as a judicial body, should decline to answer the question. The Court cannot dissociate itself from the effect to which its decision is going to be put. This is all the more so in the instant case, whose specific facts and circumstances are so very different from the *Mazilu* case, where the Court had held that

> "Section 22 of the General Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view *to the independent exercise of their functions.*"[5] (Emphasis added.)

25. It is also worth recalling that, under Section 30 of the Convention, the advisory opinion given in this case is to be regarded as decisive and binding and would have effect for the State concerned. Indeed, in paragraph 39 of the Advisory Opinion the Court stated that the request of the Council does not only pertain to the threshold question but also to the consequences of the answer thereto. In my view, for a judicial determination of the consequences to be reached, the Court would have to enter

[5] *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*, pp. 195-196.

into the merits of the dispute, as the question whether words spoken were done in performance of a mission is one of mixed law and fact. The Court, in determining whether words spoken by the Special Rapporteur were spoken in the performance of his mission and whether he is therefore entitled to immunity, must do so in the light of all the circumstances of the case.

26. The question whether, in this case, the Convention is applicable to Mr. Cumaraswamy and the obligations of Malaysia thereunder is not an abstract one. Nor did the question require clarification as in the *Peace Treaties* case. Viewed from this perspective, the Convention would be applicable to Mr. Cumaraswamy as Special Rapporteur of the Human Rights Commission and therefore an expert under the Convention, if the words spoken were *done in the performance of his mandate*. Malaysia, as a party to the Convention, would be under obligation to afford Mr. Cumaraswamy such immunities. The request asked to take into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General. What the Court had to determine was whether the Convention should be applicable to the Special Rapporteur and whether he should therefore be immune from legal process of every kind, in respect of words spoken in the performance of his mission, a matter, which in my view, is one for assessment by the Court.

27. The Court's statement in paragraph 56 of the Advisory Opinion that it is not called upon in the present case to pass upon, to adjudge, the aptness of the terms used by a Special Rapporteur, or his assessment of the situation, but that in any event, and in view of all the circumstances of this case, it is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article, was acting in the course of the performance of his mission as Special Rapporteur of the Commission is not without import and significance in terms of this case. The Court also found it necessary to warn that

> "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".

I fully concur with these statements of the Court.

28. I have voted against operative paragraph 2, as I consider it is not the proper response to the question posed to the Court. I also voted against that paragraph because Malaysia's obligation under the Convention is one of result and not one of method of implementation of the obligation. In this regard the Court stated in paragraph 60 of the Advisory Opinion that the Secretary-General has the authority to *request* (emphasis added) the Government of a member State to bring his finding to the knowledge of the local courts if acts of an agent have given rise to court proceedings. In my view, whereas the Secretary-General is authorized to

make such request, how a party implements its obligations under the Convention is a matter for that State. The Court was not asked to pass on the means or methods of implementation. Once the Court has responded that the Convention is applicable to the matter, Malaysia would assume its obligations, including making Mr. Cumaraswamy financially harmless for any taxed costs imposed upon him. To have included this as an operative paragraph was unnecessary. Nor does the Convention stipulate any particular method of implementation, or for that matter a uniform method of implementation. Therefore, to hold a State in breach of its obligation for not adopting a particular method or means of implementing or achieving the object appears to find no justification on the face of the Convention.

29. Finally, I share the Court's position as reflected in its jurisprudence that its response to a request for an advisory opinion should be seen as participation in the work of the Organization with a view to the achievement of its aims and objectives, and that only compelling reasons should restrain the Court from answering a request. I, however, consider it more important that this Court, as a judicial organ, cannot and should not, even in giving an advisory opinion, depart from the essential rules guiding its activity as a court[6].

(Signed) Abdul G. KOROMA.

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[6] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27.