INTERNATIONAL COURT OF JUSTICE

Difference Relating to Immunity From a Legal Process of A Special Rapporteur of The Commission on Human Rights (Request for Advisory Opinion)

Statement of the Government of Malaysia

October 1998

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1. INTRODUCTION

1.1 *"The proper role for the Court lies in promoting unification in the interpretation and application of the international law, both customary and conventional and contributing thereby to the rule of law and the greater integration of the international society."*.1

1.2 In accordance with section 30 of Article VIII of the General Convention on the Privileges and Immunities of the United Nations as adopted by the General Assembly of the United Nations on 13 February 1946 (hereinafter referred to as "the General Convention"), Malaysia did not oppose the submission by the Secretary-General of the United Nations requesting from the International Court of Justice an Advisory Opinion on the legal question of the applicability of Article VI, section 22, of the General 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 and the legal obligations of Malaysia, primarily on the basis that there appears to be a need for the clarification of certain provisions of the General Convention. The matter as placed before the Court raises questions relating to the application of international conventional law by Malaysia. There has arisen a question of difference of views relating to the application and interpretation of the Convention.

2. THE REFERENCES TO INTERNATIONAL LAW IN THE FEDERAL CONSTITUTION OF MALAYSIA

2.1 In approaching the question before the Court, the Court's attention is drawn to certain factors in the Federal Constitution of Malaysia to show simply the assignments of places and functions of rules of international law in the legal structure for countries like Malaysia being part of the Commonwealth. The Federal Constitution of Malaysia contains provisions which allocate the distribution of responsibilities including the conclusion of treaties. Article 80(1) of the Federal Constitution of Malaysia provides as follows:

"80. (1) Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.".

2.2 The matters with respect to which Parliament may make laws is described in Article 74(1):

> *"74. (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).".*

2.3 The Federal List in the Ninth Schedule to the Federal Constitution includes *inter alia* the following:

"1. External affairs, including -

(a) .....

(b) Implementation of treaties, agreements and conventions with other countries;

(c) .....

(d) International organizations; participation in international bodies and implementation of decisions taken thereat;

(e) .....

(f) .....

(g) .....

(h) .....".

2.4 Reference could also be made to the provision of Article 76(1) the relevant provision of which reads as follows:

"76. (1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organisation of which the Federation is a member; or

(b) .....; or

(c) .....".

2.5 The proceedings during which the question concerning the issuance of the Certificate of the Secretary-General of the United Nations arose was in the High Court in Malaysia. The High Court is established according to the following provision of the Federal Constitution:

"121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely -

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.".

2.6 The jurisdiction of Courts in Malaysia is established in the Courts of Judicature Act 1964 and in respect of the High Court the relevant provision is section 23 which prescribes in respect of the civil jurisdiction in the following section 23 -

"23. (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where -

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts of which the proceedings are based exist or alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the legal jurisdiction of the Court .....".

2.7 Provisions relating to the privileges and immunities of persons employed on mission on behalf of the United Nations are incorporated in the subsidiary legislation intituled the Diplomatic Privileges (United Nations And International Court of Justice) Order, 1949; the provisions of which are as annexed to this statement as Annex 1. The provisions of the legislation pursuant to which the Minister of Foreign Affairs Malaysia had issued a Certificate concerning the status of the Special Rapporteur whose immunity is in question is also appended as Annex 11 to this statement. It is also relevant to clarify that although the Order

was made under a principal legislation that had been repealed the status of the Order remains unaffected.

2.8 In 1926, the Permanent Court of International Justice was presented with an opportunity to consider the relationship between international law and municipal law. The cause of the case was whether certain Polish law was compatible under international law with the terms of a treaty entered into between Poland and Germany. The Court held, *inter alia*, that "the Courts is certainly not called upon to interpret Polish law as such; but there is nothing to prevent the Court giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligation with Germany under the Geneva Convention.".2 The provisions of the Federal Constitution are cited to elucidate how international law could be applied in Malaysia especially with regard to the implementation of the provision of a convention or a treaty. When Malaysia became a party to the Convention on the Settlement of Investments Disputes between States and Nationals of Other States 1965, a specific legislation was enacted to incorporate the various provisions of the Convention and to enable various aspects of the provisions of the Convention to become part of the Laws of Malaysia. This legislation served as a specific illustration as to the manner in which the provisions of a Convention which affects the position of individuals and which would have necessary financial implications on Malaysia are incorporated to become part of the laws of Malaysia.

3. SUMMARY OF THE FACTS LEADING TO THE ISSUE OF A CERTIFICATE BY THE SECRETARY-GENERAL PURSUANT TO THE GENERAL CONVENTION

(a) 22 July 1994

The Commission on Human Rights by its resolution 1994/41 of 4 March 1994 endorsed by the Economic and Social Council in its decision 1994/251 of 22 July 1994 appointed Dato' Param as a Special Rapporteur on the Independence of Judges and Lawyers.

(b) November 1995

Dato' Param gave an interview to the international magazine called "International Commercial Litigation", a magazine published in United Kingdom and Northern Ireland but also circulated in Malaysia. The passage of the interview was published in the magazine under the caption "Malaysian Justice on Trial".

(A copy of the relevant publication is appended as Appendix 111)

(c) 26 February 1996

Upon publication of the said Article, V. Siva & Partners (Plaintiff's Solicitors) on behalf of the two Companies, wrote a letter to the Defendant expressing concern over the alleged defamatory words.

(d) 1 March 1996

The Solicitors for the Defendant informed the Plaintiff's Solicitors regarding the status of the Defendant as a United Nations Special Rapporteur.

(e) 12 December 1996

Two commercial companies (Plaintiffs) filed a civil suit, i.e. defamatory suit against Dato' Param (Defendant)

Date of suit filed : 12.12.1996

Date of certificate of Minister filed : 12.3.1997

(f) 9 December 1996

New Plaintiffs filed a suit against Dato' Param

Date of suit filed : 9.12.1996

Date of application to set aside filed : 4.12.1997

Date of certificate of Minister : 12.3.1998

(g) 9 December 1996

Private lawyer filed a suit against Dato' Param

Date of Suit filed : 9.12.1996

Date of Service : 10.7.1997

Date of application to set aside filed : 18.7.1997

Date of Certificate of Minister : 12.8.1997

(h) 9 December 1996

New Plaintiffs filed a suit

Date of suit filed: 9.12.1996

Date of Service : 25.10.1997

Date of application to set aside filed : 11.11.1997

Date of Certificate of Minister : 6.1.1998

(i) 15 January 1997

Legal Counsel of the United Nations, sent a note verbale addressed to the Permanent Representative of Malaysia in New York, requesting the Competent Authorities to promptly advise the Malaysian Court of the immunity enjoyed by the Defendant as a Special Rapporteur.

(j) 20 January 1997

The Defendant filed an application in the High Court of Kuala Lumpur under Order 12 Rule 7 of the Rules of the High Court to set aside the Plaintiffs's writ on the ground that the Court had no jurisdiction over the Defendant because he was immune from the suit.

(k) 7 March 1997

The Secretary General of the United Nations issued a note confirming that "the words which constitute the basis of Plaintiff's complaint were spoken in the course of the Special Rapporteur's mission.".

(Defendant then filed this note to support his application)

(l) 12 March 1997

The Minister of Foreign Affairs filed the certificate. The Certificate was issued pursuant to Section 7(1) of the International Organizations (Privileges and Immunities) Act 1992. (Act 485).

3.1 It is relevant to mention that the provisions of Order 12 Rule 7 of the Rules of the High Court 1980 which was invoked by the Special Rapporteur to set aside the writs of the Plaintiffs on the ground that the High Court had no jurisdiction because he was immune is as follows:

"Order 12 Rule 7(1)

The Defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering an appearance, apply to the Court for an Order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any action or order to serve the notice on him out of the jurisdiction.".

3.2 At this stage the High Court in Malaysia has yet to consider the merits of the Plaintiffs' case. The cases remain in apparent interlocutory state where the Courts in Malaysia had ruled that there is jurisdiction.

4. REFERENCES TO PRACTICES IN THE COMMONWEALTH AND PARTICULARLY THE UNITED KINGDOM WHICH ARE ANALOGOUS IN MALAYSIA

4.1 Being part of the Commonwealth there are certain principles applied by the United Kingdom which are relevant to Malaysia. There is no general adoption or incorporation of international law so as to refer to it as "part of the law". Only particular customary or conventional rules of international law which have been duly established and recognised, are observed and applied. In Malaysia action is taken in the exercise of the executive prerogative in the field of foreign affairs, or where Parliament has authorised executive action applying the rule or has transformed the rule into municipal law so as to create rights and obligations enforceable in the Courts or where judicial decision adopts and applies a recognised rule of

customary international law. The task of observing and applying rules of international law falls primarily upon the executive and all three, that is, the Executive, the Legislature and the Judiciary act within the framework of law established by constitutional provisions, legislative enactments or orders and judicial decisions. The principles are examined as follows:

(a) The opinion of the Privy Council in *Attorney-General for Canada v Attorney-General of Ontario & Ors*.[3]

The following statement although made with regard to the Dominion of Canada is also applicable in the case of Malaysia:

"It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice pointed out, has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfill or not treaty obligations imposed on the State by the executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive has the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures".

(b) The municipal effects of treaties in Malaysia is recollected in the following observation in McNair[4]:

"Whenever a treaty, or anything done in pursuance of it, is likely to come into question in a court of law or require for its enforcement the assistance of a court of law, the question at once will arise whether any action required on the part of the executive or the courts of law to

give effect to the provisions of the treaty is, or is not, already authorized by the existing law of the land.".

(c) Principles regarding conventional international law in Statutes[5]:

"The second kind of international agreement, to be transformed into municipal law, is more complicated. Such an agreement will be an amalgam of provisions of differing legal character. Some will bind the United Kingdom in international law but be capable of implementation by the Crown without need of legislation; others will embody strict rules, intended to be legally binding, and requiring legislation because they involve changes in municipal law or affect the rights of private persons; other provisions again may attempt no more than to establish certain common standards, which may be observed administratively by governments without modifications of the law being necessary; finally, there may be provisions in which the contracting parties have declared their common policy or broad objectives in the field of operation of the convention. It may be doubted whether, in the last case, there is any intention to create legal relations between the parties even under international law.

Typical examples of this second kind of international agreement are certain of the Hague Conventions, 1899-1907, the Peace Treaties, 1919-24 and 1947-51, the Chicago Convention, 1944; the Bretton Woods Agreements, 1944, and the Rome Treaty, 1957, establishing the European Economic Community; and certain aspects of these treaties and conventions must now be examined.

First, there may be provisions for which legislation is not required but which may be implemented by the Crown under the prerogative, and in particular in its exercise of belligerent rights. Such provisions are interpreted and applied directly by the courts, including par excellence the Prize Courts, unless there is a statute which precludes their application.

Legislation Necessary. Where, however, legislation is required to implement the agreement, and may even have been called for by the agreement itself, the statute may directly embody, with or without adaptation of terms, certain provisions; or, where the implementation of the agreement has to depend upon an administrative judgment in future circumstances of the applicability of particular provisions in municipal law, the statute may authorise the Crown to give effect to the provisions of the agreement by Order in Council, which may in future provide penalties for their breach. These methods may in certain cases be to some extent combined. The peace treaties after the world wars were transformed into municipal law in this way, and also the Chicago Convention, 1944, ..."

(d) Further principles on interpretation of treaty provisions by the Courts.[6]

"The practice of the courts in the United Kingdom, from which the courts in other Commonwealth countries do not markedly diverge, in the construction and application of international agreements can be seen to rest on two complementary principles. The first is the constitutional principle of the primacy of the laws enacted by Parliament; the second is the recognition that international agreements have their own special structure and field of operation and must, subject to the first principle, be construed and applied accordingly.

The primacy of statute law shows itself in a number of ways. First there is the overriding rule that, in case of conflict between the statute and treaty, the statute must prevail. Its most recent affirmation was by Lord Simonds, in considering the relation between certain agreements for the avoidance of double taxation between the United Kingdom and the Irish Free State in 1926 and 1928, and a rule in the Finance Act, 1955, concerning `dividend stripping'. He said:

The appellant company has no rights under any agreement. Its rights arise under the Act of Parliament which confirms the agreement and gives it the force of law .... It would not be possible to state in clearer language and with less ambiguity the determination of the legislature to put an end in all and every case to a practice which was a gross misuse of the concession [in the agreements] ... neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse or to save its own citizens from unjust discrimination in favour of foreigners.

The statutory incorporation of the provisions of a treaty into municipal law will not deprive the legislative of its power to amend or repeal such a statute.

The second and complementary principle, which moderates the severity of the first, is that a treaty or agreement is recognised as having its own special status and function as an instrument of international law. Therefore, to the extent that the first principle of the primacy of statute does not operate in a particular case, the agreement will be construed by canons designed to make it as effective as possible in its field of operation.

A classical statement of these canons is to be found in a Privy Council judgment delivered by Lord Sumner. The interpretation of an international agreement must, he said,take note of the fact that it is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in the circumstances to expect of it either nicety of scholarship or exactness of literary idiom ... Where interests conflict much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the Powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions which are expressed without much detail and sometimes only in outline".

(e) Conclusion

"It is a constitutional rule that a statute is supreme law and neither the Executive nor courts can invoke any rule of international law as permitting non-observance of the statute. Conversely, however, the Executive cannot, in an international jurisdiction or towards other countries, invoke a statute as an excuse for failure to perform an international obligation.

It is also a constitutional rule that no treaty or international agreement can, without aid of a statute incorporating its provisions, be applied so as to modify private rights or alter municipal law, save in the exercise of belligerent rights".[7]

4.2 Support for the proposition enunciated in paragraph (e) aforementioned is also found in the judgment of Lord Oliver of Aylmerton[8] as follows:

"On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the royal prerogative, the validity of which cannot be challenged in municipal law: see Blackburn v A-G [1971] 1 All ER 1380, [1971] 1 WLR 1037. The Sovereign acts - throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts'. (See Rusuomjee v R (1876) 2 QBD 69 at 74 per Lord Coleridge CJ.)

That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant".

5. THE CERTIFICATE OF THE SECRETARY-GENERAL

5.1 Paragraph 7 of the Secretary General's Note dated 7th August 1998 (Doc.E/1998/94) states as follows:

"7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed; in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, by stating 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" (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.".

5.2 The Certificate of the Secretary-General issued pursuant to the General Convention relates to the question of the application of the Convention. The Certificate is as follows:

"THE SECRETARY-GENERAL

21 November 1997

To Whom It May Concern

In connection with the Civil Suit (KL High Court Suit No. S1-23-67 of 1996) by Insas Berhad and Megapolitan Nominees SDN BHD against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with section 22 of Article VI of the Convention, "experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions ... ". Section 22(b) of the Convention further provides that "they shall be accorded, 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". As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiff's complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysia authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

Signed:

Kofi A. Annan".

5.3 In response to the Certificate the Minister of Foreign Affairs Malaysia issued the Certificate in the course of the proceedings instituted against Dato' Param Cumaraswamy. This in effect is the practice in relation to the implementation of the treaty provisions and in respect of Malaysia's obligation under the Convention. The Certificate issued by the Minister of Foreign Affairs is as follows:

"INTERNATIONAL ORGANIZATIONS (PRIVILEGES AND

IMMUNITIES) ACT 1992 (ACT 485)

CERTIFICATE UNDER SECTION 7(1)

I, DATO' SERI ABDULLAH BIN HJ. AHMAD BADAWI, Minister of Foreign Affairs, Malaysia by virtue of the power granted to me under section 7(1) of the International Organizations (Privileges and Immunities) Act 1992 (Act 485) hereby certify that Dato' Param Cumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the Independence of Judges and Lawyers, whose mandate is as follows:

a) to inquire into any substantial allegations transmitted to him and report his conclusions;

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, and make concrete recommendations including the provisions of advisory services or technical assistance when they are requested by the State concerned;

c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

2. Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949Dato' Param Cumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Date 12th day of March 1997

(DATO' SERI ABDULLAH BIN HJ. AHMAD BADAWI)

Minister of Foreign Affairs"

5.4 The certificate of the Minister was issued pursuant to section 7(1) of the International Organizations (Privileges and Immunities) Act 1992 which states as follows:

"7. (1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.

(2) In any proceedings, a certificate given under this section is evidence of the facts certified.".

5.5 The certificate contains a statement of fact that the Special Rapporteur shall be accorded immunity from the legal process of every kind only in respect of words spoken or written and acts done by him in the performance of his duties. This statement reflects Malaysia's understanding of the scope of section 22 as well as its view in relation to the exercise of the right of the Secretary-General under section 23 of the General Convention. The Certificate issued by the Minister for Foreign Affairs Malaysia has been disputed on the ground that Malaysia has not acted in conformity with its obligations under the General Convention. This raises the issue whether the Secretary-General of the United Nations has the right under the

General Convention to make a conclusive determination that Dato' Param Cumaraswamy enjoys immunity and that the determination of the question of immunity is within the exclusive purview of the Secretary-General. Although the Secretary-General is the executive head of the Secretariat, being the principle administrative organ of the United Nations, the right sought to be invoked is enumerated in the General Convention which prescribed various types of immunities for various categories of persons. It is the General Convention which prescribed the terms of privileges and immunities of experts and the Secretary-General has to exercise his right in terms which are accepted by a state party only in accordance with the terms of the Convention itself. In 1922 the Permanent Court, in giving its advisory opinion on the question whether the competent of the International Labour Organization extended to the international regulations of persons employed in agriculture remarked that; "In considering the question before the Court upon the language of the treaty, it is obvious that the treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense." 9

6. EXPERTS - STATUS AND IMMUNITY

Status

6.1 It is proposed to examine the status of experts generally and more specifically under the General Convention. The following are descriptions relating to experts.

(a) "326. Some international organs are composed of experts serving in their personal capacity. The position of such delegates comes close to that of staff members. The main difference is the temporary nature of their engagement which often leads to restrictions of their fiscal privileges.

*The 1946 General Convention on the Privileges and Immunities of the United Nations distinguishes between the privileges and immunities of the UN as such, of the representatives of UN members, of UN officials, and of experts on mission. In practice, on a number of occasions the UN has appointed persons not having the status of UN official (for example, to prepare reports or studies, to participate in peace-keeping forces; members of the International Law Commission, the Human Rights Committee). All these persons have been regarded as "experts on mission" within the meaning of Section 22 of the 1946 Convention. The International Court of Justice has accepted this view. It has concluded that Section 22 "is applicable to persons (other then 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. During the whole period of such missions, experts enjoy these functional privileges and immunities whether or not they travel.*10

*(b) Paragraph 2 Experts and Consultants*11

A. General notions

There are certain categories of persons employed by international organizations who are not their "officials" in the accepted sense. Experts and consultants belong to them.

According to the definition formulated by P. Cahier the experts of international organizations

"sont des personnes techniquement competentes appelees temporairement par une organisation pour lui donner des avis ou pour travailler en son nom et pour son compte dans le territoire d'Etats qui ont besoin de leurs conseils".

("are people technically competent (and) called up temporarily by an organization to give advice or to work on their behalf in countries the territory of states which need their advice")

The designation "expert" has been relatively infrequently used in the practice of the United Nations organizations. One of the specialized agencies has summarized its practice, which may be taken as representative, as being to include in the category of experts "generally speaking, all persons appointed in an advisory or consultative capacity to the organization or to a government for temporary periods, and who are not considered as staff members.

Thus, international experts are persons corresponding to the following criteria: (1) particularly competent in some fields (not only technical); (2) called by an international organization to work for it or for its member States; and (3) their work is to be done on a temporary basis and in their own name and on their own account. There are two basic differences between experts and international officials belonging to the staff of an organization: (1) their work for an organization or its Members has a sporadic character - they are employed permanently in their own countries; (2) they get their salaries from national institutions where they work permanently; however, they are paid an expense allowance by international organizations, and sometimes also additional compensation for financial losses incurred in connection with the absence from their native country, or a honorarium for the accomplished work.

Experts are usually appointed by the Secretary-General of an organization from among persons proposed by the governments of member States. Of course, the principle of adequate geographical distribution applies to the recruitment of experts and consultants as well. It has been constantly stressed that experts and consultants should be appointed from a wider and more representative number of countries and that those should include a larger number from the developing countries. The staff members of an international organization may also become experts in the matters that the organization deals with. Their expert knowledge is often used for the benefit of the member States.

Experts and consultants are engaged for the performance of specific tasks (e.g. research, advice, technical assistance, field study, military observance, etc.) or for participation in the work of various (in principle subsidiary) organs - e.g. the ILC, the Advisory Committee on Administrative and Budgetary Questions, the Administrative Tribunal, the Permanent Central Narcotics Body, etc.

It is rather difficult to ascertain the number of experts and consultants employed by various international organizations. In general, most of them employ from more than a dozen to several dozens, and the largest ones several hundreds of international experts.

B. Legal position

International experts and consultants are appointed by the Secretary-General of an organization and during the exercise of their functions their legal status is basically similar to

that of staff members. They enjoy an independent position vis-a-vis the member States and are not accountable to anyone but the organization. Although they may be chosen from national civil services, they act in a private capacity. They base their decisions entirely on the interests of the organization. Member States may neither instruct them nor dismiss them from their functions. They are engaged by international organizations and the organizations concerned, not individual States, give them instructions on how to exercise a specific function or accomplish a particular work.

However, the very fact that the experts are permanently employed in their native countries, makes them, in comparison with international officials who are permanently employed by international organizations, more susceptible to the influence of their governments.

C. Privileges and immunities

In order to ensure unimpeded exercise of functions by the experts and consultants, it is of utmost importance that they should be accorded certain privileges and immunities. In the opinion of some authors the need for such privileges and immunities is in no sense less pressing than in the case of permanent officials of international organizations. However, from this point of view the situation of international experts and consultants may be considerably different. Namely, specialized personnel serving as consultants in the Secretariat and technical assistance experts are accorded the same privileges and immunities as those granted to international officials. (Emphasis added).

In reply to the question posed by some governments the Secretary-General explained that an overwhelming proportion of the individuals engaged as technical assistance experts are "engaged on substantially similar terms and serve under the same conditions as other members of the staff". Such individuals are designated by him as being in the category of officials. Thus, they are entitled to the privileges and immunities of officials of the United Nations provided for by Articles V and VII of the Convention on Privileges and Immunities of the United Nations. The same view was expressed on behalf of the specialized agencies that their technical assistance experts are within the categories of officials to which the provisions of Articles VI and VIII of the Convention on Privileges and Immunities of the Specialized Agencies apply. In light of this statement, it is understood that only short-term experts engaged under such conditions as would differentiate them from members of the staff may qualify, not as officials of any of the organizations, but either as "experts on mission for the United Nations" or as"experts travelling on the business" of the specialized agencies. (Emphasis added)

Experts on mission are to be so identified in an appropriate certificate and their privileges and immunities are provided for by Article VI of the Convention of the United Nations. Article VI is entitled "Experts on mission for the United Nations". It means experts other than officials falling within the scope of Articles V and VII of that Convention. United Nations action at the time of appointment is conclusive in determining whether or not a given person has been appointed as a staff member, so as to be subject to the United Nations staff rules and regulations and enjoy the benefits of Article V of the Convention on Privileges and Immunities of the United Nations; or as an expert subject to different contractual conditions and falling under Article VI of that Convention as regards privileges and immunities. Therefore whether a person is in the status of an "official" or in that of an "expert on mission" depends on the nature of his contractual relations and his terms of service with the organization concerned. An example of such "experts on missions" may be members who serve in their individual

capacities on certain commissions, committees and other bodies, such as members of the Administrative Tribunal, ILC, some consultants, military observers, etc. (Emphasis added)

The United Nations Convention on Privileges and Immunities provides that "experts 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 mission" (Art. VI, sec. 22). The privileges and immunities accorded to them are of a functional character and, as in the case of officials, the Secretary-General "shall have the right and duty to waive the immunity" (sec. 23). (Emphasis added).

The Convention on Privileges and Immunities of the Specialized Agencies does not include any provisions corresponding to Article VI of the United Nations Convention pertaining to privileges and immunities of experts sent on missions for the specialized agencies. The main reason for this exclusion is that the expert functions of specialized agencies vary enormously in their nature, political and practical needs. Any standard and general provisions would not correspond adequately to the varied situations. (Emphasis added). For this reason, the matter has not been dealt with in the Convention itself but in the special annexes added to it by individual specialized agencies, such as FAO, ICAO, WHO, IMCO, ILO, UNESCO.

Some authors arrive at the conclusion that the question of privileges and immunities of international experts has not gained much attention so far. It is still at an experimental stage and some international organizations consider that this matter can be dealt with on an ad hoc basis. (Emphasis added).

Immunity

6.2 It is necessary to examine aspects of the question of immunity of experts. The general principle as outlined in Article 105 of the United Nations Charter is considered for the purpose of the matter before the Court and references are made to certain commentaries regarding Article 105 in general and the position of experts in particular. The following is a commentary with regard to the implementation of Article 105 of the Charter and the General Convention.

(a) "*Article 105*

(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

(2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization.

(3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Under the Covenant of the League of Nations, representatives of states and all League officials enjoyed unrestricted diplomatic privileges and immunities (Art. 7). The possibility of conflict between international privileges and the legitimate interests of host countries, together with practical considerations, led the League and Switzerland to specify staff categories in accordance with functional criteria and to agree on a restricted implementation of Art. 7 of the Covenant.

In order to create a reasonable balance of conflicting interests, Art. 105 of the Charter established the principle of the functional necessity of privileges and immunities, which was later introduced into all major status conventions and has since become a fundamental rule of the whole system of international privileges and immunities. It accounts for the diversity of the contents of host nation and multilateral agreements. As a guideline for negotiating new agreements and interpreting existing legal instruments, the principle of functional necessity together with the principle of consultation should lead the way out of conflict.[12]

The 1946 and 1947[13] *Conventions established two main categories of individuals who are entitled to a regime provided for in those Conventions, namely `officials' and `experts on mission'.*

In determining the scope ratione personae of privileges and immunities to be accorded to `officials' of the United Nations, the General Assembly approved by resolution 76(1) of 7 December 1946 the granting of the privileges and immunities under the 1946 Convention `to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates'. The specialized agencies have adopted similar decisions. It is important to underline that this definition of `officials' of the United Nations system clearly provides for no distinction among staff members on the basis of nationality, rank, residence or place of recruitment.

With the exception of a relatively small number of senior officials, the privileges and immunities accorded to international organizations officials are functional rather than diplomatic. This means that officials of organizations of the United Nations enjoy privileges and immunities only during the performance by them of their official functions. Consequently, they do not have immunities outside of the performance of their official duties.

The second category of individuals established under the Conventions are experts performing missions for the United Nations. According to Article VI of the 1946 Convention, experts on mission are accorded, only during the period of their missions including the time spent in journeys, a number of privileges and immunities necessary for the independent exercise of their functions. However, unlike officials of the United Nations, experts on mission, among their privileges and immunities, enjoy and express immunity from personal arrest or detention and from seizure of personal baggage.

The detailed privileges and immunities of United Nations officials are outlined in Section 18 of the 1946 United Nations Convention. While independence of United Nations staff members is guaranteed by the privileges and immunities and other prerogatives in their entirety - the immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity represents the most important element in the exclusively international character of United Nations officials. (Emphasis added).

It should be mentioned that complete diplomatic immunity from jurisdiction of the receiving state is accorded by the Convention only to the senior officials - the Secretary-General and all Assistant Secretaries-General (an expression which in practice encompasses all Assistant and Under-Secretaries General). All other officials enjoy functional immunity from legal process only in connection with acts performed by them in their official capacity".

The Advisory Opinion In Mazilu's Case

6.3 In Mazilu's case the Secretary-General had submitted, *inter alia,* the following written statement

"It should ... be noted that while the Court has been asked about the applicability of section 22 of the Convention in the case of Mr. Mazilu, it has not been asked about the consequences of that applicability, that is about what privileges and immunities Mr. Mazilu might enjoy as a result of his status and whether or not these had been violated."

During the oral proceedings the representative of the Secretary-General then replying to a question put by a Member of the Court, observed that:

"It is suggestive of the Council's intention in adopting the resolution to note that, having referred to a `difference', it then did not attempt to have that difference as a whole resolved by the question it addressed to the Court, Rather ... the Council merely addressed a preliminary legal question to the Court, which appears designed to clarify at most the general status of Mr. Mazilu in respect of the Convention, without resolving the entire issue that evidently separates the United Nations and the Government.". 14

6.4 Reference could also be made to certain parts of the Opinion of the Court relating to Article VII Section 26 which is relevant to the present matter.

"44. The Court will examine the applicability of Section 22 ratione personae, ratione temporis and ratione loci, that is to say it will consider first what is meant by "experts on missions" for the purposes of Section 22, and then the meaning to be attached to the expression "period of [the] missions", before considering the position of experts in their relations with the States of which they are nationals or on the territory of which they reside.

45. The General Convention gives no definition of "experts on missions". All it does is to clarify two points, one negative and the other positive. From Section 22 it is clear, first that the officials of the Organization, even if chosen in consideration of their technical expertise in a particular field, are not included in the category of experts within the meaning of that provision; and secondly that only experts performing missions for the United Nations are covered by Section 22. The Section does not, however, furnish any indication of the nature, duration or place of these missions.

46. Nor is there really any guidance in this respect to be found in the travaux preparatoires of the General Convention. The Convention was initially drafted and submitted to the General Assembly by the Preparatory Commission set up at San Francisco in June 1945; that initial draft did not contain anything corresponding to the present Article VI. That article was added by the Sub-Commission on Privileges and Immunities established by the Sixth Committee to examine the draft, but the contemporary official records do not make it possible to ascertain the reasons for the addition."

6.5 In considering Section 22 the Court has opined -

"47. The purpose of Section 22 is nevertheless evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them "such privileges and immunities as are necessary for the independent exercise of their functions". The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission.

48. In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions - increasingly varied in nature - to persons not having the status of United Nations officials. Such persons have been entrusted with mediation, with preparing reports, preparing studies, conducting investigations or finding and establishing facts. They have participated in certain peace-keeping force, technical assistance work, and a multitude of other activities. In addition, many committees, commissions or similar bodies whose members serve, not as representatives of States, but in a personal capacity, have been set up within the organization, for example the International Law Commission, the Advisory Committee on Administrative and Budgetary Questions, the International Civil Service Commission, the Human Rights Committee established for the implementation of the International Covenant on Civil and Political Rights, and various other committees of the same nature, such as the Committee on the Elimination of Racial Discrimination or the Committee on the Elimination of All Forms of Discrimination Against Women. In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.

49. According to that Section, experts enjoy the privileges and immunities therein provided for "during the period of their missions, including the time spent on journeys". The question thus arises whether experts are covered by Section 22 only during missions requiring travel or whether they are also covered when there is no such travel or apart from such travel. To answer this question, it is necessary to determine the meaning of the word "mission" in French and "mission" in English, the two languages in which the General Convention was adopted. Initially, in keeping with its Latin derivation, the word referred to a task entrusted to a person only if that person was sent somewhere to perform it. It implied a journey. The same connotation is apparent in the words, of the same derivation, "emissary", missionary" and "missive". The French word "mission", and the English word "mission" have however long since acquired a broader meaning and nowadays embrace in general the tasks entrusted to a person, whether or not those tasks involve travel.

50. The Court considers that Section 22, in its reference to experts performing missions for the United Nations, uses the word "mission" in a general sense. While some experts have necessarily to travel in order to perform their tasks, others can perform them without having to travel. In either case, the intent of Section 22 is to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. In some cases these privileges and immunities are designed to facilitate the travel of experts and their stay abroad, for instance those concerning seizure or searching of personal baggage. In other cases, however, they are of a far more general nature, particularly with respect to communications with the United Nations or the

inviolability of papers and documents. Accordingly, Section 22 is applicable to every expert on mission, whether or not he travels".

6.6 However, it is also relevant to note certain parts of the Separate Opinion of Judge Oda15 -

"22. 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 am conscious of the Secretary-General's written statement, referred to in the opinion of the Court, to the effect that :

"The Court ... has not been asked about the consequences of [the] applicability [of Section 22 of the Convention], that is about what privileges and immunities Mr. Mazilu might enjoy as a result of his status and whether or not these had been violated" (written statement of the United Nations Secretary-General, para 2),

and appreciate that the Legal Counsel, as the representative of the Secretary-General, stated during the oral proceedings that:

"The [Economic and Social] Council merely addressed a preliminary legal question to the Court, which appears designed to clarify at most the general status of Mr. Mazilu in respect of the Convention without resolving the entire issue that evidently separates the United Nations and the Government".

While this may theoretically justify contenting oneself with a mere statement that Article VI, Section 22, is applicable to Mr. Mazilu as a special rapporteur falling within the category of "experts on missions for the United Nations", it is not, in my view, possible to determine the applicability of a provision to a concrete case without adequate reference to the way in which it may apply. In this respect, the Court simply states, in very general terms, that:

"[rapporteurs and special rapporteurs] enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission" (para. 55)."

6.7 In a separate opinion Judge Shahabuddeen 16made the following remarks "I accept as accurate Romania's statement "that an expert is not accorded such privileges and immunities anywhere and everywhere": their functional character clearly excludes so wholesale and undiscriminating an application."

7. MALAYSIA'S VIEW OF THE CERTIFICATE OF THE SECRETARY-GENERAL

7.1 In the opinion of Malaysia the certificate of the Secretary-General seeks to ensure compliance and not merely to state the status of the expert. As stated above it asserts that "the determination could exclusively be made by the Secretary-General, and that such determination had conclusively effect and therefore had to be accepted as such by the court". It is submitted that this is a strained procedure to ensure compliance. Malaysia does not accept that the determination made by the Secretary-General concerning the immunity of the Special Rapporteur as having conclusive effect and that such a substantial authority is attributed to the

Secretary-General in relation to the exercise of his right under the General Convention. Neither is it exclusive.

7.2 On the role of the Secretary-General, United Nations, Secretary-General Hammerskjold before the Security Council during the Suez Crisis had the occasion to observe *inter alia* -

"As a servant of the Organization, the Secretary-General has the duty to maintain his usefulness by avoiding public stands on conflicts between member nations unless and until such an action might help to resolve the conflict. However the discretion and impartiality thus imposed on the Secretary-General by the character of his immediate may not degenerate into a policy of expediency. He might also be a servant of the principles of the Charter and its aims must ultimately determine what for him is right and wrong. For that he must stand". 17

7.3 It is said that "It is no exaggeration to say that the whole history of the United Nations has been a series of disputes about the interpretation of the Charter"18. The problem could be described as follows:

"1344. *Whoever applies a rule must first also interpret it, which of course requires ascertaining its meaning. He will execute it in the manner in which he thinks it ought to be understood. This is why the member states and the organs of an international organization, to which most of the rules apply, have an extensive power to interpret their rights, their obligations and their competence under the law of the organization. As long as their interpretations remain unchallenged, the members will continue to interpret their obligations in the manner in which they think they ought to be interpreted and the organs will continue to exercise the competences to which they think they are entitled. Sometimes the original interpretation by the applicant is challenged. This challenge creates a dispute between two parties.*

Questions of interpretation are actually disputes, or prospective disputes, on the interpretation of the rule by the applicant. For that reason, it is difficult to separate questions of interpretation from disputes. Conversely, most disputes can be traced back to questions of interpretation. A dispute is, to recall the classic definition of the Permanent Court of International Justice, "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".

7.4 Malaysia does not agree to the assertion that a certificate of the Minister filed in the High Court in Malaysia should have been issued in the terms of the Note of the Secretary-General that was filed by the Special Rapporteur. To assert to the High Court that "in deciding whether particular words or acts of an expert fell within the scope of his mission the determination could exclusively be made by the Secretary-General and that such determination had conclusive effect, and therefore had to be accepted as such by the court" leads to an irreconcilable position between supervision by an organ of the United Nations over the conduct of its experts and that of the jurisdiction of the courts in Malaysia. On the basis of the facts that was before the Court in the interlocutory proceedings that was instituted by the Special Rapporteur to oust the jurisdiction of the Court, for the Government of Malaysia to reiterate the determination made by the Secretary-General in his certificate is tantamount to asking Malaysia to treat her judicial organs with disrespect. It is our opinion that paragraph 19 of the Note also connotes the disrespect encouraged by the Working Groups of the Commission on Human Rights of the internal judicial organ of Malaysia as a member state of the United Nations.

7.5 Both the certificates of the Secretary-General and the Foreign Minister make references "to immunities as are necessary for the independent exercise of their (experts) functions". It is relevant to consider the juridical basis of immunities accorded to experts. The juridical basis of immunities related to international organizations rests on the functional theory only as compared to diplomatic immunity which rests on both the representative character and functional theories. The following have been extracted from materials researched on in relation to the functional immunity of international organisations and their officers :

i) "The preparatory committee responsible for advising on the privileges and immunities provisions of the Charter reported to the Conference that :

*"In order to determine the nature of the privileges and immunities, the Committee has seen fit to avoid the term `diplomatic' and has preferred to substitute a more appropriate standard based, for the purposes of the organisation, on the necessity of realizing its purposes, and, in the case of representatives of its members and officials of the Organisation, on providing for the independent exercise of their functions....".*19

*This view was accepted by the Conference and finds its expression in Article 105 of the Charter of the United Nations...This provision.... firmly establishes the `functional theory' as the basis of international immunities, as distinct from the `extraterritorial' or 'representational' theories which provide the basis for diplomatic immunities.".*20

*ii) "The drafters of the Charter decided against assimilating United Nations officials to diplomatic officials and adopted instead the functional approach.". "The provisions [of Article 105] with their emphasis on the strictly functional basis of privileges and immunities, became almost common form in the constitutions of all international organisations.".*21

iii) "Following the precedent of the Charter of the United Nations it has become a matter of common form for the constitutions of international organisations, including many organisations of a regional character, to adopt as the measure of privileges and immunities to be accorded the functional principle that the organisation is to `enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes' and that representatives of Members and officials of the Organisation shall `enjoy such privileges and immunities as are necessary for the independent exercise of their functions'." 22

iv) Jenks 23 states that the various general conventions and agreements concerning immunities of international organisations and in a number of the headquarters agreements reflect the functional approach and such provisions generally fall into five groups :

"a) provisions of a general character concerning the freedom and independence of international organisations;

b) provisions reciting that immunities conferred upon persons are not designed for their personal benefit and that the competent international officer or authority has a right and duty to waive them if satisfied that the immunity would impede the course of justice and can be waived without prejudice to the interests of the organisation;

c) provisions for co-operation with national authorities to facilitate the proper administration of justice, secure the observance of police regulations and prevent any abuse;

d) provisions for the appropriate modes of settlement of disputes to which immunities are applicable; and

e) provisions concerning the construction of immunities agreements in light of their purpose.".

v) In accordance with the functional approach, the privileges and immunities given in respect of international organisations is generally narrower than those given to diplomatic officials :

"Officials of the United Nations, in general, are accorded a narrow range of privileges and immunities which can easily be justified as essential to enable them to perform their job independently of any control or interference by any member state.". 24.

vi) D.W. Bowett stated :25

"...certain major differences exist between diplomatic and international immunities : first, international immunities may well be most important in the case of relations between an official and his own national State, whereas a national for the receiving State is, for the purposes of diplomatic immunity, accepted as a member of a foreign mission only by express consent and with a minimum of privileges and immunity in respect of official acts only; second, whereas the diplomat who is immune from the jurisdiction of the receiving State is under the jurisdiction of his own sending State, no comparable jurisdiction exists where an official of an international organisation is concerned; and, last, whereas observance of diplomatic privileges and immunities is ensured through the operation of the principle of reciprocity, an international organisation has no effective sanction. These differences, coupled with a trend towards the diminution of privileges and immunities generally, have been reflected in the greater emphasis placed upon the functional basis for international privileges and immunities. Hence, Article, 105(1) of the Charter provides that "The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes"; so, too, in Article 105(2), the representatives of Member States and officials of the Organisations are to enjoy only "such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation". Such provisions, with their emphasis on the functional basis of privileges and immunities, are now almost common form in the constitutions of international organisations. The more detailed provisions of the agreements and national legislation supplementing these basic constitutional texts bring out more forcibly the functional basic of immunities...".

7.6 It is observed that paragraph 6 of the Note of the Secretary-General requesting for an Advisory Opinion reflects that the Legal Counsel had made a general determination on the Special Rapporteur's entitlement to immunity and that the Secretary-General confirmed that "the words which constitute the plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his Mission". Malaysia has not been given a rationale for this determination other than the emphatic Note of the Secretary-General dated 7th March that was filed by the Special Rapporteur in support of his application to set aside the proceedings under the Rules of the High Court in Malaysia. The General Convention in various articles have categorised different classes of privileges and immunities while the United Nations as a juridical personality enjoys certain categories of privileges and immunities. Articles V and VI also provide different categories or privileges and immunities. In Article VI of the General Convention section 22 prescribes the privileges and immunities "as are necessary for the

independent exercise of their (experts') functions.". It is noted that the words "(other than officials coming within the scope of Article V)" in section 22 indicate that there are classes of officials who are also experts but experts are not officials.

7.7 In the view of Malaysia while there may be made available vast materials and commentaries relating to the position of officials including commentaries on internal provisions relating to staff regulations and administrative actions against officials there seems to be a dearth of materials relating to experts. This matter that comes before the Court is therefore of utmost importance as it may set a distinct precedent on the legal results that can flow from the activities of experts. It is also observed that the General Convention categorises different levels of immunities in that while complete diplomatic immunities from the jurisdiction of a receiving State is accorded by the Convention only to senior officials normally the Secretary and all Assistant Secretaries-General, all other officials enjoy functional immunities from legal process only in connection with acts performed by them within their official capacity.

7.8 The Secretary-General has chosen to maintain immunity and not to waive it. There is here displayed a recalcitrance to exercise waiver. Perhaps it emanates from the view proffered by the UN Office of Legal Affairs:

"It is not necessary for international organizations to claim the immunities to which they are entitled since such immunity exists as a matter of law and is a fact of which judicial notice must be taken. In practice, a suggestion of immunity is normally made to a court on behalf of an international organization by the competent executive authorities of the states concerned. It goes without saying that in such cases the international organization is not submitting to the jurisdiction of the court."[26]

7.9 The principle in Mazilu's case does not throw any further assistance in the matter presently before this Court. The question in that case was whether Mr. Mazilu fell within the category of expert as envisaged under section 22 of the General Convention and the facts of that case concern the submission of reports. The issues before this Court have gone beyond the facts in Mazilu's case. In the Note of the Secretary-General requesting for this Advisory Opinion two aspects have been made highly emphatic, that is, firstly, in deciding whether the words or acts of an expert fell within the scope of the submission the determination could exclusively be made by the Secretary-General, and secondly, that such determination had conclusive effect and had therefore to be accepted by a Court. Malaysia finds itself constrained to accept this. In the opinion of Malaysia the matter of immunity has been summarily reiterated as though the right of the Secretary-General allows general statements to be made without permitting Malaysia to consider whether the words uttered in the course of the interview were indeed done in the performance of his mission. Malaysia does not subscribe to the view that the terms of the General Convention had indeed endowed the Secretary-General with the right to issue statements on immunity carte blanc and for Malaysia to accept it conclusive an immunity is not a privilege. Immunity is defined in the Oxford Companion to Law as "a state of freedom from certain legal consequences or operation of certain legal rules. In Roman law immunity meant exemption from *Manus*, that is, from any obligation arising from law, custom, or authority.".[27]

7.10 In the opinion of Malaysia the General Convention in sections 22 to 25 identifies the criteria for the characterisation of the immunity of an expert as follows:

(a) 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. Section 22(a) to (f) particularises certain immunities;

(b) immunities are granted in the interests of the United Nations and not for the personal benefits of the individuals themselves;

(c) where an immunity would impede the course of justice it can be waived without prejudice to the interests of the United Nations.

7.11 While the characterisation of the conduct of officials other than experts may be categorised as official or non-official or public or private act, in the case of experts heavy reliance has been made on the words "in the performance of his mission". These words have not been defined. The Oxford Companion to Law defines "performance" as follows:

*"The doing of what is required by an undertaking of contract or statute. This is always a question of the interpretation of the undertaking, contract or statute to determine what is required for due performance of the obligation, and a question of fact whether due performance has been made or not. Formerly the tendency was to require strict and literal performance but in modern times, the tendency is to require satisfaction of the real substance and intent of the obligation. If performance is not made, the default may give rise in civil cases to a claim for specific performance (q. v.) or damages (q. v.) in compensation and in statutory cases for prosecution for neglect of duty.".*28

7.12 Malaysia rejects *per se* the motion of exclusivity of the determination of the question by the Secretary-General on the ground that such a construction on the right of the Secretary-General is tantamount to a gross attempt to impose limitations not only on the exercise of the executive authority of Malaysia but also in respect of the jurisdiction of its Courts particularly so in the circumstances of this case where the issue arose out of interlocutory proceedings in private law.

7.13 The words "in the opinion of the Secretary-General" which appear in section 23 refer to the right and duty of the Secretary-General to waive the immunity although it is conditioned on the basis that there is to be waiver where immunity would impede the course of justice and that it can be waived without prejudice to the interests of the United Nations. There have to be facts to enable the Secretary-General to form an opinion that immunity is to be accorded. If he decides that immunity is to be accorded he has the duty to decide whether there are facts to enable him to consider waiver. There have to be facts upon which an opinion is to be formed and in the matter relating to the course of justice the exercise of that duty will have to be executed judiciously. There are therefore facts which are bound to be determined at least to satisfy that whatever is performed is duly performed in accordance with the mandate given.

7.14 Malaysia is not inclined to comment at this stage on the question of acts which constitute an excess or abuse of mandate but rather to stress at this stage that facts are to be duly considered before an opinion is formed. It is on this premise that the Certificate of the Minister of Foreign Affairs is phrased to express that the immunity is available provided that the words spoken or written and acts are actually done in the course of the performance of his mission. It is also Malaysia's view that the text of the provision of section 22 does not preclude the Minister of Foreign Affairs Malaysia to consider facts.

7.15 As stated in Mazilu's case above section 22 of the General Convention does not furnish any indication of the nature, duration or place of missions to be performed by experts. While the immunity enables an expert to undertake the performance of his mission anywhere without hindrance, it cannot be intended that the performance of it could be extended to acts words, written or spoken which are beyond the purposes of his mission. Section 23 of the General Convention has indicated that even while performing his mission the immunity is not to be used for his own personal benefit even in respect of words spoken or written and the acts done. The performance of his mission is related to the interests of the United Nations and therefore what he performs has to have a nexus to be established with his mandate. These are facts to be verified The immunity to be accorded is therefore not a bottomless pit, unrestricted in character where an expert is enabled to have words spoken or written indiscriminately and acts improperly done contrary to the real objects and purposes of the mandate and trusted to his mission. There are also limits as to how he attains the objects and purposes of the mission.

7.16 In the case of the Special Rapporteur even assuming that there are facts to justify that the words uttered in the interview were done only in the performance of his mission, no facts are disclosed that if the Secretary-General were to exercise the right and duty to waive the immunity the waiver would operate against the interests of the United Nations.

8. IMMUNITY AND JURISDICTION

8.1 The immunity asserted by the Secretary-General in respect of the Special Rapporteur seeks to impose limitation on the jurisdiction of the Courts in Malaysia. As explained earlier the Government of Malaysia finds itself unable to file a certificate in the interlocutory proceedings along the terms of the Note of the Secretary-General. The approach adopted by the High Court in Malaysia as well as the Court in the proceedings on appeal against the decision of the High Court is described in several cases. Before mentioning the cases however the principle underlying the approach is first considered. This approach which has been described as "judicial self limitation" is described as the manner *"in which the courts usually deal with so-called `facts of state.' These are matter on which the courts seek and accept guidance by the Executive. Thus they apply to the Executive when they desire to know whether a state of war exists between this and any other country, whether certain territory is recognized to be within the boundaries of a particular State, who is recognized as the head or government of an independent State, whether a party to an action enjoys diplomatic privilege so as to be entitled to immunity. This practice is of comparatively recent origin and is in many respects still in an immature stage. In particular its legal character and its ambit require elucidation.*

It is frequently said that facts of the type indicated above are capable of being ascertained by means of what is known as judicial knowledge. This would mean that, if the court knows them, the question of evidence would not arise and the court could act on its own knowledge. On the other hand, if the court does not know them, the proper course is to apply to the Executive for information, and if it is given, it will have to be acted upon according to the best evidence rule, but if no information is given, the court would be free to hear evidence in the usual way. In no event would the court be precluded from amplifying or testing its knowledge by its own investigations. This view which may perhaps be described as the `rule of best evidence' is supported by a considerable body of authority. But it seems as if the practice is slowly acquiring a radically different complexion and as if a rule has come or is about to be

*established, which has no trace of the doctrine of best evidence and may be described as the `rule of obligatory certification'. It would mean that in all cases involving facts of state the court must apply to the Executive, irrespective of what its own knowledge is, and that it must accept the Executive's answer not only as conclusive but also as exhaustive and therefore as precluding any independent investigation by the court".*29

It is said that "the first report of a case where any enquiry was addressed by the Court to the Executive is dated 1828 and the second seems to be the decision of Sir Robert Phillimore in The Charkeih. In order to decide whether ships owned by the Khedive of Egypt were entitled to immunity, the learned judge had regard to four matters, viz. the general history of the Government of Egypt, the public law of the Ottoman Empire, the European treaties concerning the relations between Egypt and the Ottoman Empire, and lastly `the answer which the Foreign Office has furnished to an inquiry which I thought it my duty to make'. This answer was that `the Khedive has not been and is not now recognized by Her Majesty as reigning sovereign of the State of Egypt', but that he `is recognized .... the hereditary ruler of the province of Egypt under the supremacy of the Sultan of Egypt'. But this answer did not deter Sir Robert Phillimore from investigating whether the status of the Khedive was such as to make his property immune from legal process, and after a careful review of all relevant facts, he gave an answer in the negative. This method was strongly disapproved by Lord Esher in Mighell v. Sultan of Johore where he said that the answer given by the Foreign Office was conclusive and precluded any further inquiry.

The conclusiveness of the Executive's certificate is now established beyond doubt. But the conflict between the best-evidence-rule and the rule of obligatory certification still remains. Lord Sumner, it is true, emphatically expressed himself in favour of the former doctrine, and it is very remarkable that recently a Divisional Court felt itself entitled to investigate the status of Eire and to hold, without guidance by the Executive, that it formed part of the British Empire. On the other hand, Lord Atkin has said of an inquiry of the Government that not only is this the correct procedure but it is the only procedure by which the Court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign state. This, I think, is made clear by the opinions in this House in the Kelantan case. With great respect, I do not accept the opinion, implied in the decision of Lord Sumner in that case that recourse to His Majesty's Government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of states, and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone.

*Although, perhaps, some may still prefer the doctrine which was propounded by Lord Sumner and which, as has been shown, falls into line with the practice originally adopted in the early nineteenth century, there is probably no substantial reason to question the soundness of Lord Atkin's view. It is much more important however, to define clearly the extent to which the Executive has power of giving binding information to the Court: the principle seems to be that the certificate is binding upon the courts if it concerns facts the creation or recognition of which falls within the limits of the Crown's prerogative of conducting foreign affairs".*30

8.2 The reference to the opinion of Lord Sumner in the above mentioned observations was in relation to His Lordship's decision in the oft cited case of Mighell v. the Sultan of Johore31 . The practice is basically reflected in the questions posed by Viscount Simon32 as follows:

"*VISCOUNT SIMON: ...*

There are thus three main questions which have been raised in this litigation, the answers to which may be material in deciding it.

First, is the appellant in this litigation to be regarded as a foreign sovereign? Secondly, if so, has he waived his immunity so as to disentitle him to a stay of proceedings on the respondent' Originating Summons? And thirdly, if both the above questions are answered in the appellant's favour, does this sovereign immunity extend to exclude the jurisdiction of the Court in a case where proceedings are connected with his claim to be entitled to immovable property situate within the jurisdiction of the Court?"

8.3 Brownlie states the matter as follows:

". Issues of International Law before Municipal Courts

In general. English courts take judicial notice of international law: once a court has ascertained that there are no bars within the internal system of law to applying the rules of international law of provisions of a treaty, the rules are accepted as rules of law and are not required to be established by formal proof, as in the case of matters of fact and foreign law. However, in the case of international law and treaties, the taking of judicial notice has a special character. In the first place, there is in fact a serious problem involved in finding reliable evidence on points of international law in the absence of formal proof and resort to the expert witness. Secondly, issues of public policy and difficulties of obtaining evidence on the larger issues of state relations combine to produce the procedure whereby the executive is consulted on questions of mixed law and fact, for example, the existence of a state of war or the status of an entity claiming sovereign immunities. The special considerations involved in this procedure do not effect the general character of rules of international law before the courts.". 33

The very same approach was adopted by the High Court in Malaysia when the Special Rapporteur involved in the procedure under O.12 R 7(1) of the High Court Rules to set aside the civil proceeding instituted against him. The High Court referred to the certificate of the Minister of Foreign Affairs and in the course of the proceedings sought to interpret the provisions of the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949. The practice adopted by the High Court and the Court of Appeal in Malaysia is *mutatis mutandis* similar to the practice undertaken in the case Re International Tin Council34 . Millet J. in the course of delivering judgment stated *inter alia* -

The making of a treaty is an act of the executive, not of the legislature, and it is therefore a fundamental principle of our constitution that the terms of a treaty do not, by virtue of the treaty alone, have the force of law in the United Kingdom. This does not mean that they are to be disregarded. Our courts take notice of the acts of the executive, and the terms of a treaty entered into by the United Kingdom may fall to be considered by them, either because Parliament has expressly or impliedly required them to be considered (as, for example, for the purposes of s 1(6) of the 1968 Act) or to enable domestic legislation to be construed wherever possible in conformity with, rather than in breach of, pre-existing international obligations undertaken by the United Kingdom. But it does mean that the terms of a treaty cannot effect any alteration in our domestic law, or deprive the subject of existing legal rights, unless and until enacted into domestic law by or under the authority of Parliament.

*When so enacted, the court gives effect to the English legislation, not to the terms of the treaty. For authoritative statements of these well-recognised principles, reference can be made to A-G for Canada v A-G for Ontario [1937] AC 326 at 347-348, Blackburn v A-G [1971] 2 All ER 1380 at 1381-1382, [1971] 1 WLR 1037 at 1039-1041 and Pan-American World Airways Inc v Dept of Trade [1976] 1 Lloyd's Rep 257 at 26.".*35

8.4 Ordinarily, courts of law require proof of facts which are (a) not admitted, or (b) not covered by the doctrine of judicial notice. Several decisions have indicated further evidence could be adduced to determine the fact of immunity. It is also in this sense that the certificate of the Secretary-General cannot be binding and more evidence could be introduced in the proceedings. Appended as Annex IV to this submission are identified decisions which reflect this approach to claims on immunity.

9. GENERAL REMARKS AND CONCLUSION

9.1 In the Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations the Court said:

*"The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they appear".*36

9.2 The general rule of interpretation laid down in Article 31 of the Vienna Convention on The Law of Treaties 1969 adopts the textual approach: a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. This textual approach is an accepted part of customary international law as suggested by the International Court of Justice itself.37

9.3 Immunity from jurisdiction is also discussed as follows:

"1612. Immunity from jurisdiction is not a privilege. It does not free the organization from any obligation. The laws remain applicable; it is only their adjudication in the courts which is prevented. This may frustrate the enforcement of the law. When courts cannot settle disputes, organizations may choose to comply only with laws they are willing to accept. This would unduly prejudice other subjects of the law. Mainly for this reason, the UN Office of Legal Affairs has, in a number of cases, advised against participation by UN bodies in commercial affairs. UN activities of a commercial nature, such as publication of books and magazines or film production have been undertakings in which the main function was to publicize UN causes and objectives, not commercial aims.

The injurious effects of immunity from jurisdiction are mitigated in two ways:

All treaties on the immunity of international organizations require an express waiver, as the Vienna Convention on Diplomatic Relations requires for diplomats. But the Convention adds: "The initiation of proceedings by a diplomatic agent .... Shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim. It seems reasonable to accept this addition as a general refinement of the law of international immunities which would also be applicable to international organizations.

Authority to waive the immunity of the UN is vested exclusively in the Secretary-General. Executive directors of semi-independent programmes have no such power.

*".... international organizations are liable if their acts cause injury to others. The fact that they have immunity before national courts does not affect that liability. If the organization is unwilling to waive its immunity in specific cases and if it has no competent judiciary of its own, it will have to look for a friendly settlement or for arbitration."*38

9.4 Several provisions of the General Convention refer to the right and duty of waiver namely -

(a) Article IV section 14 - "A member not only has the right but is under the duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.".

(b) Article V section 20 - "The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.".

(c) Article VI section 23 - "The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations. ".

9.5 However while section 23 of the General Convention refers to the right and duty of waiver less convincing reasons are instead given in favour of immunity. Another aspect of this issue has been expressed well in advance in 1961. The observation is that *"except in Switzerland, the current practice now is that complete jurisdictional immunity is accorded not to `all senior officers' but only to the most senior officers who are limitatively defined in respect of each organisation, normally so as to include only the executive head and, in the case of the larger organisations, assistant executive heads, of the organisation concerned. The difficulty that, by reason of the right of a national court to assume jurisdiction over private acts without a waiver of immunity, the determination of the official or private character of a particular act may pass from international to national control therefore remains. While cases in which there is any room for controversy in the matter may be rare, they may, when they occur, be important. There appears to be three possible ways of avoiding difficulty in the matter. The first would be for a municipal court before which a question of the official or private character of a particular act arose to accept as conclusive in the matter any claim by the international organisation that the act was official in character, such a claim being regarded as equivalent to a governmental claim that a particular act is an act of State; such a claim would be in effect a claim by the organisation that the proceedings against the official was a violation of the jurisdictional immunity of the organisation itself which is unqualified and therefore not subject to delimitation in the discretion of a municipal court. The second would be for a court to accept as conclusive in the matter a statement by the executive government of the country where the matter arises certifying the official character of the act. The third would be to have recourse to the procedure of international arbitration some variant of which is provided for in virtually all the general conventions, agreements and protocols on*

immunities and headquarters and host agreements; the suspension, pending the outcome of the arbitration, of any national proceedings, wherever practicable, and in all cases of the execution of any decision reached if such proceedings have not been suspended, would appear to be an essential element in this third solution. It may well be that none of these three solutions would be applicable in all cases; the first might be readily acceptable only in the clearest cases and the second is available only if the executive government of the country where the matter arises concurs in the view of the international organisation concerning the official character of the act; but taken in combination these various possibilities may afford the elements of a solution of the problem". 39 Again it is noted that this refers to "Officials".

9.6 In the present matter before the Court Malaysia would be precluded from seeking a solution on the basis of combination of "various possibilities" as described above. The Note of the Secretary-General dated 7 August 1998 (document E/1998/94) stated, *inter alia*, at paragraph 17 :

17. *Although the decision of the Secretary-General must thus be considered as not subject to challenge in national courts, it can, of course, be challenged by a Government concerned pursuant to Section 30 of the 1946 Convention (quoted in paragraph 10 above), in which case the matter would be decided with binding effect by the International Court of Justice.*

18. It should be pointed out that Section 23 of the 1946 Convention provides in respect of experts (and similarly Section 20 in respect of officials) that:

Section 23: Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individual themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Thus any abuse of the immunities of an expert (or an official) would be prevented by the right and duty of the Secretary-General to waive such immunity under the circumstances specified in those sections.".

9.7 Malaysia wishes to reiterate again that right from the outset Malaysia itself was not a party to the proceedings in which the Special Rapporteur is a defendant but in exercise of powers under Malaysian law the Minister for Foreign Affairs issued a certificate bearing contents which expressed Malaysia's interpretation of the Convention as well as for the purposes of executing her obligations under the General Convention. There could have been a two-tier approach towards the solution of the question of the jurisdiction of the national court whereby the jurisdiction of the national court is recognised to enable the Court to make a determination whether immunity could be accorded as borne out in the cases mentioned in this submission and Annex IV hereto. Right from the outset the position of the Secretariat was that its determination on immunity was conclusive and combined with a challenge to the judicial competence of a Malaysian Court. At this point it is also futile to refer to any proceeding under section 30. The invitation to invoke the provisions of section 30 is an expression of utter and complete disregard to the position not only of a private individual but also to the Courts in Malaysia. It is the opinion of Malaysia that Article V11 of the General Convention holds a serious *lacuna.* In the first place the first limb of section 30 relates to dispute between States who are parties, since it is only in the second limb that an organ of the United Nations

could invoke the provisions of that section. There is also no possibility to have recourse to another mode of settlement at this stage.

9.8 With regards to section 29 it is clear that paragraph (a) refers to the situation where the United Nations itself as an international organization is involved in disputes arising out of contracts or other disputes of a private law character. In other words this relates to the United Nations as a body responsible for acts giving rise to the disputes. Paragraph (b) relates to disputes involving any "officials" and on the basis of the *maxim expressio unius este excluso alterius* it would appear disputes involving experts have not been envisaged. This is clearly borne out by section 22 where experts are not "officials" unless it is a case of an "official" who is also an expert. This situation also seems to support the view that provisions regarding experts have been hastily inserted as aforementioned. There is yet to be "provisions for appropriate modes of settlement" of the disputes referred to in section 29.

9.9 With regards to Malaysia's position it is also submitted that Malaysia at this stage has not acted in breach of its obligation. The Executive in Malaysia has duly issued a certificate in accordance with its laws. Pending the Advisory Opinion that is to be rendered by this Court. Malaysia is also of the view that paragraph 20 of document E/1998/94 again contains a presumptive conclusion but Malaysia would like to submit the following observations:

"1582. If an international organization is an international person .... and if it is bound by certain international legal obligations .... does this mean that it is also liable vis-a-vis third parties which suffer injury by virtue of the non-fulfilment by the organization of it obligation? Whether this is the case or not, are the member states (also) liable for damage caused by `their' organization? From the outset, a distinction should be made between liability of the organization under domestic law .... and liability of the organization under international law.

*1583. Normally an organization, just as a natural person, is responsible for its own legal acts and therefore liable if such acts cause injury to others. The fact that international organizations have immunity before national courts .... does not affect the existence of liability. Immunity is used to prevent international organizations from being subject to an outside judiciary: it does not affect the rights and obligations of the organization.".*40

9.10 At this stage Malaysia considers issues pertaining to liability should be resolved separately. This issue is dependant upon an Advisory Opinion being given on the interpretation of Article 23. In the event that immunity is maintained it is for the Government of Malaysia to determine the manner in which it is to implement the obligation if any, in order to give effect to that immunity. It does not preclude the Government of Malaysia to determine, within the framework of the Constitution of Malaysia, the manner in which such immunity is to be enforced. There are various stages that have to be undertaken, if immunity is established, before Malaysia has to assume responsibility. For these reasons the Government of Malaysia wishes to reserve the right to make further submissions in relation to this matter at the appropriate time.

10. CONCLUSION

(a) Malaysia 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.

(b) Malaysia has not acted in a manner which constitutes a breach of her obligations under the General Convention.

(c) The claim to immunity does not limit the jurisdiction of courts to ascertain whether there is immunity.

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1 Leo Gross "The Future of the International Court of Justice," (Vol. 1 at page 29)

2 German interest in Polish Upper Silesia (Merits), P.C.I. J. 1926 Series A, No.7

3 [1937] Appeal Cases 326, 347

4 McNair "Law of Treaties" (1961) Pg. 81

5 J.E.S. Fawcett *The British Commonwealth In International Law* p.60 - 61

6 Fawcett op. cit. note at pg. 66, 67-68

7 Fawcett infra at pg. 74

8 Maclaine Watson v. Dept of Trade (1989) 3 All E.R. at pg. 544-545

9 P.C.I.J. Ser.B. Nos 2 and 3 at pg.23

10 Henry G. Shermers and Niels M. Blokker, International Institutional Law at pg.237

11 A Handbook on International Organization 1988 edited by Rene-Jean Dupuy pg.227-231

12 The Charter of the United Nations, A Commentary, Edited by Bruno Sigma, Article 105 Page 1139

13 International Administration, Law and Management Practices in International Organizations - Independence of International Civil Servants, INT.ADMIN.11.1/7

14 1989 ICJ at pg. 187

15 Infra at pg. 208

16 Infra at pg. 219

17 SCOR 31 October 1956, 751st meeting

18 M.Akehurst, A Modern Introduction to International Law 202

19 Report of the Rapporteur of Committee W/2 of the San Francisco Conference, in the United Nations Conference on International Organization, Documents, Vol. 13, pg.704

20 Ralph Zacklin, The Ways and Means of the United Nations - Diplomatic Relations : Status, Privileges and Immunities , in A Handbook on International Organisations, Edited by Frenee-Jean Dupuy, 1988, at page 180

21 Jan Kalosa, The Ways and Means of the United Nations - The Individuals, in A Handbook on International Organisations, infra, at page 221

22 C. Wilfred Jenks, International Immunities, 1961, Steven & Sons Ltd., at page 18

23 Jenks, infra, at page 19

24 Satow's Guide to Diplomatic Practice, Fifth Edition, at page 370.

25 D. W. Bowett (The Law of International Institutions, Second Edition, 1970 at pg. 310)

26 Shermers and Blokker op.cit note ... at pg 1006

27 David M. Walker, The Oxford Companion to Law at pg. 600

28 Infra at pg. 946

29 F.A. Mann, Studies in International Law at pg. 398 - 399

30 F.A. Mann, op. cit. at pg. 401-403

31 [1894] 1 Q.B. 147

32 Sultan of Johore v. Tunku Abu Bakar & Ors. 1952 MLJ 115 ct. Pg.118

33 Ian Brownlie, Principles of Public International Law, Third Edition pg. 44

34 [1987] 1 All ER 890

35 [1987] 1 All ER pg. 896

36 ICJ Rep. (1950) at pg. 8

37 Eg the Second Admissions case, ICJ Rep. (1950) pg. 8 quoted in n. 11

38 Schermers, infra, at pg. 1008-1009

39 C. Wilfred Jenks, International Immunities at pg. 117-118

40 Schermers & Blokker, op, cit. Not 9 at pg. 990-991