BEFORE THE

INTERNATIONAL COURT OF JUSTICE

Request by the United Nations Economic and Social Council for an Advisory Opinion on the Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights

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WRITTEN STATEMENT

SUBMITTED BY

THE UNITED STATES OF AMERICA

7 OCTOBER 1998

I. INTRODUCTION

1. By decision 1998/297 of 5 August 1998, the United Nations Economic and Social Council has requested on a priority basis, pursuant to Article 96 of the Charter of the United Nations and in accordance with General Assembly resolution 89(I) of 11 December 1946, an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations (the "General Convention")[1] in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, and on the related legal obligations of Malaysia.

2. Upon receiving this request, the Court decided that the United Nations and the States Parties to the General Convention are likely to be able to furnish information on the question submitted to the Court. By its Order of 10 August, the Court fixed 7 October 1998 as the time limit within which written statements may be submitted to the Court, in accordance with Article 66, paragraph 2, of the Statute of the Court. The present statement will examine the facts and the legal issues raised by this request for an advisory opinion.

3. The General Convention accords various privileges and immunities to the United Nations as an organization, to representatives of Members of the United Nations, to United Nations officials, and to experts on missions for the United Nations. Article VI, Section 22, of the General Convention specifically requires States parties to accord to "experts (other than

officials coming within the scope of Article V) performing missions for the United Nations" such privileges and immunities as are necessary for the independent exercise of their functions, including, *inter alia*, "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."

4. The core issue in this case is whether an interview given by Mr. Cumaraswamy constitutes "words spoken or written" or an "act done" in the course of performing his mission as Special Rapporteur on the Independence of Judges and Lawyers, thus immunizing him from certain law suits alleging libel which were filed in Malaysian courts following publication of a magazine article quoting the interview. The way in which the Court answers this question will have repercussions for not only Mr. Cumaraswamy, but also for his many colleagues acting as "experts on mission" for the United Nations.

5. In this case, the United States believes the Court should conclude that Mr. Cumaraswamy was acting in the course of the performance of his mission when he gave the interview in question, and is therefore entitled to the immunity being asserted in Malaysian courts. The Court should further determine that Malaysia has an obligation under the General Convention, which it has failed to honor to date, to ensure respect for this immunity.

II. FACTUAL BACKGROUND[2]

6. In March 1994, the Chairman of the United Nations Commission on Human Rights appointed Dato' Param Cumaraswamy as Special Rapporteur on the Independence of Judges and Lawyers. Concerned with the correlation between deteriorating safeguards for the judiciary and lawyers and violations of human rights, the Commission charged its Special Rapporteur with, among other duties, the task of investigating, reporting and making recommendations concerning allegations of attacks on the independence of the judiciary, lawyers, and court officials.[3]

7. Pursuant to his mandate, Mr. Cumaraswamy began to investigate alleged cases of compromised independence in the judicial systems in a number of countries, among them Malaysia.[4] In August 1995, Mr. Cumaraswamy issued a press statement announcing his plans to investigate complaints concerning the Malaysian judicial system and seeking the cooperation of the government of Malaysia.[5] Later that same year, in November, the British magazine International Commercial Litigation, published an article entitled "Malaysian Justice on Trial" which quoted Mr. Cumaraswamy on the subject of certain cases that were also the subject of his investigation.[6] Since publication of the article, a total of four suits alleging defamation and claiming damages have been filed in Malaysian courts against Mr. Cumaraswamy. Mr. Cumaraswamy has sought unsuccessfully to have the cases dismissed on the grounds that, as Special Rapporteur, he was an "expert on mission" within the meaning of Article VI, Section 22 of the General Convention, and that, as the quoted interview constituted "words spoken or written" or "acts done . . . in the course of the performance of [his] mission," he is immune from legal process for cases arising from the article.

8. In support of Mr. Cumaraswamy's claim, the Secretary-General of the United Nations issued a statement in March 1997 which said that he had "determined that the words which constitute the basis of plaintiff's complaint . . . were spoken by the Special Rapporteur in the course of his mission," and that "The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto."[7] Mr. Cumaraswamy filed the Secretary-General's statement with the court handling the first of the cases against him.

Shortly thereafter, the Malaysian Minister of Foreign Affairs also filed a "certificate" with the court. The Malaysian Government's certificate set forth Mr. Cumaraswamy's status as a Special Rapporteur and his mandate, but failed to mention the Secretary-General's statement concerning Mr. Cumaraswamy's immunity from legal process and stated simply that, under the General Convention, Mr. Cumaraswamy "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."[8] The Malaysian High Court and the Court of Appeal both rejected Mr. Cumaraswamy's assertion of immunity as a bar to proceeding with the case. *Mbf Capital Berhard v. Dato' Param Cumaraswamy*, No. S3-23-68-1996, slip op. (H.C. Malaya, Kuala Lumpur) (June 28, 1997); *aff'd*, No. W-02-323-1997, slip op. (Ct of App., Malaysia) (20 October 1997). The High Court refused to dismiss the case on the grounds that insufficient evidence had been presented to demonstrate Mr. Cumaraswamy's immunity from legal process, but noted:

That does not mean however, that the Defendant is estopped from adducing further evidence at trial to support his claim. If at the end of the trial of the Plaintiffs' action, after taking all evidence from the parties, I come to the conclusion that immunity attaches to the Defendant, the Defendant may succeed at that stage. *Mbf Capital Berhard* (H.C. Malaya, Kuala Lumpur), at 39.

The Court of Appeal found that the lower court had acted properly within its discretion and stated that the issue of whether Mr. Cumaraswamy had acted in his official capacity "is a serious question" and that "it would be patently unsafe to determine in a summary fashion the capacity in which the defendant uttered the impugned words." *Mbf Capital Berhard* (Ct of App., Malaysia), at 20.

9. Attempts in 1997 and particularly during the first half of 1998 by the United Nations and Malaysia to resolve the dispute over Mr. Cumaraswamy's immunity failed, prompting ECOSOC to seek an advisory opinion from the International Court of Justice on:

the legal question of the applicability of Article VI, Section 22 of the [General Convention] in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General,[9] and on the legal obligations of Malaysia in this case.[10]

The ECOSOC request also called upon the Government of Malaysia "to ensure that all judgments and proceedings in this matter in the Malaysian Courts are stayed pending receipt of the advisory opinion, which shall be accepted as decisive by the parties."[11] However, we have been informed that in the months following this request, the Malaysian courts have moved forward with cost assessments and hearings in a number of the proceedings against Mr. Cumaraswamy.

III. JURISDICTION OF THE COURT

A. The Court has Jurisdiction to Give the Requested Advisory Opinion

10. The Court has jurisdiction to give the advisory opinion requested by ECOSOC. Article 65, paragraph 1, of the Statute of the International Court of Justice authorizes the Court to give an advisory opinion:

"on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

The United Nations General Assembly, pursuant to Article 96, paragraph 2, of the Charter, authorized ECOSOC "to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council."[12]

11. The requested opinion does arise within the scope of ECOSOC's activities. The Commission on Human Rights is a functional commission established in 1946 by ECOSOC.[13] In fulfilling its functions, the Commission regularly appoints Special Rapporteurs to carry out activities requested by the Commission. Legal questions relating to the privileges and immunities to which such a Special Rapporteur is entitled while engaging in these activities are accordingly legal questions within the scope of the Commission's activities and those of its parent body, ECOSOC.

12. Article VIII, Section 30 of the General Convention makes this quite clear. It states:

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

The Secretary-General's Note accompanying the ECOSOC request for an advisory opinion specifically invokes the provisions of Section 30. It further indicates that the Government of Malaysia had acknowledged the United Nations' right to refer the matter to ECOSOC to request an advisory opinion in accordance with Section 30 of the General Convention, and that Malaysia had indicated that it does not oppose submission of the matter to the Court through ECOSOC.[14]

13. For these reasons, the Court has jurisdiction under Article 65, paragraph 1, of its Statute to render an advisory opinion on the question presented to it by ECOSOC.

B. There is No Compelling Reason for the Court to Decline to Give an Advisory Opinion

14. The Court has several times stated that, although its power to give advisory opinions under Article 65 of its Statute is discretionary, only compelling reasons would justify refusal of such a request. This request presents the Court with no such reason. To the contrary, the need to ensure that the United Nations' experts on mission receive the privileges and immunities to which they are entitled provides the Court with strong grounds to render the requested advisory opinion, as it has previously in the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p.* 177 (the "*Mazilu* Advisory Opinion"), which likewise stemmed from an ECOSOC request involving an expert's privileges and immunities.

IV. APPLICATION OF THE GENERAL CONVENTION TO SPECIAL RAPPORTEUR DATO' PARAM CUMARASWAMY

A. Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations Applies to Persons in the Position of Special Rapporteur Cumaraswamy

1. As a Special Rapporteur of the Commission on Human Rights, Dato' Param Cumaraswamy is an Expert on a Mission for the United Nations within the Meaning of Article VI

15. The first issue arising in regard to the applicability of Article VI, Section 22 in the case of Mr. Cumaraswamy is whether he is an "expert on mission for the United Nations" within the meaning of Article VI of the General Convention. Article VI, Section 22 states in relevant part:

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. In particular they shall be accorded:

(a) . . .

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations; . . . .

As set forth clearly in the Secretary-General's Note concerning Mr. Cumaraswamy's privileges and immunities,[15] Mr. Cumaraswamy was appointed a Special Rapporteur for the Commission on Human Rights in 1994, and, with one renewal of his mandate in 1997, has served continuously in that capacity until the present time. In the *Mazilu* Advisory Opinion, the Court determined that a Romanian national, Dumitru Mazilu, who held a comparable position -- namely, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (hereinafter the "Sub-Commission") -- was an "expert on mission" within the meaning of Article VI of the General Convention.

16. In reaching this conclusion, the Court opined that the "experts" contemplated under Article VI "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." *Mazilu*, at 194. The Court also considered the meaning of the term "mission" as it is used in Article VI, Section 22. The Court determined that both the English word "mission" and its French equivalent "embrace in general the tasks entrusted to a person, whether or not those tasks involve travel." *Mazilu*, at 195.

17. Looking specifically at the case of rapporteurs and special rapporteurs for the Sub-Commission, the Court stated:

Their functions are diverse, since they have to compile, analyze and check the existing documentation on the problem to be studied, prepare a report making appropriate

recommendations, and present the report to the Sub-Commission. Since their status is neither that of a representative of a member State nor that of a United Nations official, and since they carry out such research independently for the United Nations, they must be regarded as experts on missions within the meaning of Section 22. . . . *Mazilu*, at 197.

There is no relevant difference between the operation of the Commission on Human Rights and the Sub-Commission in this regard.

2. The Provisions of Article VI Apply as Between Malaysia and Mr. Cumaraswamy, a Malaysian Resident National

18. The Court in the *Mazilu* Advisory Opinion also considered the question of whether experts on missions can invoke privileges and immunities under Article VI against the States of which they are nationals or where they reside. The Court noted the existence of a qualification based on nationality in the text of Article IV, Section 15 of the General Convention (relating to representatives of member States), and the absence thereof in Articles V and VI (concerning officials of and experts on mission for the United Nations). Relying in particular on the decision of several States parties to take specific reservations in order to avoid application of certain provisions of Articles V and VI to their nationals or persons habitually resident on their territory,[16] the Court concluded that "in the absence of such reservations, experts on missions enjoy the privileges and immunities provided for under the [General] Convention in their relations with the States of which they are nationals or on the territory of which they reside." *Mazilu*, at 195. Romania had made no such reservation, and neither has Malaysia. Once again, there is no appreciable difference between the facts of the *Mazilu* Advisory Opinion in this respect and those of the case at hand. Mr. Cumaraswamy's nationality, therefore, does not suggest any basis why he should not be accorded the privileges and immunities provided for under Article VI.

B. The Interview Which Has Given Rise to Civil Litigation Against Mr. Cumaraswamy in Malaysia Was an Act Done in Performance of His Mission Within the Meaning of Section 22 (b)

1. In General, Official Acts Immunity for Experts on Mission Should Be Broadly Construed, Giving Great Deference to the Views of the U.N. Secretary-General

19. As noted above, Article VI, Section 22(b), of the Convention on the Privileges and Immunities of the United Nations provides that experts on missions for the United Nations shall be accorded immunity from legal process of every kind "in respect of words spoken or written and acts done by them in the course of the performance of their mission." Immunity on this basis is commonly referred to as immunity for "official acts." The central issue in this request for an advisory opinion is whether the interview which forms the basis for legal proceedings against Mr. Cumaraswamy in Malaysia constitutes an official act undertaken in the performance of his mission as Special Rapporteur on the Independence of Judges and Lawyers.

20. In applying the General Convention to Mr. Cumaraswamy's case, it is important to bear in mind that the provisions of the General Convention are constructed to require a particular result -- that immunity be accorded when required under its terms -- without dictating the manner by which States Parties are to meet these obligations. In the United States, the long-standing practice is to address questions of entitlement to immunity from legal process, at

least in the first instance, in our national courts as a preliminary jurisdictional question. Historically, the United States judiciary has handled these questions in a manner consistent with United States obligations under the General Convention and other treaties which grant such immunity, to the general satisfaction of those concerned. In a particular case, the United States will generally consult closely with the organization involved, and take vigorous action, as appropriate, to ensure that the matter is properly presented to its courts. The means for domestic implementation of an obligation, however, are not an excuse for failure to implement the obligation. Whatever domestic means are chosen, each country remains obligated to reach the correct result and to grant immunity as required by the General Convention. The United States thus recognizes that any failure by its courts to accord immunity where it is due under the Convention would be a breach of the Convention.

21. Because of the role played by United States courts in such matters, a body of relevant judicial decisions has developed in the United States, both in the context of the United Nations and other international organizations, and with respect to the functional immunities of consular officers and others. These are referred to throughout this statement in they hope they may assist the Court in its consideration of the applicable international law under Article 38 of its Statute.

22. In making determinations of entitlement to immunity for individuals affiliated with international organizations, the United States considers that the views of the head of the organization concerned should be accorded great deference. When the criteria for deciding immunities are not precisely articulated, as is the case of immunity for official acts, the views of the organization are particularly important and persuasive. This is especially true in the case of an expert on mission, whose duties often do not fall into a single mold, but rather are typically more *ad hoc* and fluid in nature. The head of the organization concerned may thus be uniquely qualified to indicate the actual scope and nature of the relevant mission and responsibilities, and to indicate the organization's own acceptance of the relevant conduct as official acts. While the United States legal system does not accord the views of the Secretary-General automatic conclusive effect, clearly those views are entitled to and receive great weight.

23. Authorization or ratification of an act by the organization in question has long been recognized as a particularly relevant factor. In United States practice, significant weight is given to whether the activity involved is "authorized or ratified" by the relevant authority. If the sending State or international organization declines to ratify the official's conduct, this indicates the activity is perceived by the State or organization itself as outside legitimate organization functions. For example, several cases have involved United Nations officials where the organization has not ratified the activity or argued that it was authorized. *See United States v. Enger*, 472 F.Supp. 490 (D.C.N.J. 1978) (UN officials placed on leave with pay pending outcome of espionage charges); *People v. Coumatos*, 224 N.Y.S. 2d 507 (1962) (UN official charged with theft from co-workers). A recent case confirms the significance attached to ratification by the organization. *See Corrinet v. Ginns*, LEXIS 7295, *11-12 (N.D.Cal. 1997) (citing United Nations position "that defendant acted in his position as a United Nations officer at all times relevant to this action" to counter assertion that officer was not protected by official acts immunity because he had acted outside United Nations instructions).

24. As a practical and legal matter, it is critical to ensure that immunity is broad enough to accomplish the purposes for which it is created. When faced with cases involving Special

Rapporteurs, who are often called upon to address human rights abuses in difficult or hostile situations, the scope of "words spoken or written" or "acts done by them in the course of the performance of their mission" must be viewed in this spirit, so that immunity would be denied only in the clearest of cases. Moreover, where the Secretary-General provides a certification in support of immunity, that may provide grounds for a presumption in favor of immunity rebuttable only if there is powerful contrary evidence. If the case involves a close question, the matter should be settled in favor of immunity.

2. Immunity for Words Spoken or Written and Acts Done In the Course of Performance of Their Mission Should Cover All Conduct Which Bears a Reasonable Relationship To Their Official Mission or Furthers the Functions or Purposes of the Organization

25. We have located nothing in the negotiating history to the General Convention that provides insight on the scope of official acts or on the criteria for determining whether particular activity qualifies as official.[17] However, United States domestic courts have broadly construed official acts in such cases in accordance with several criteria. These criteria, which generally concern the existence of some sort of reasonable relationship between the conduct in question and the official functions of the individual or, more generally, the functions of the organization in question, are described here in the hope the Court may find them helpful.

26. The criteria to be applied in addressing this issue are most squarely spoken to in *Gerritsen v. Escobar Y Cordova*, 721 F. Supp. 253 (C.D.Cal. 1988). *Gerritsen* involved the jurisdictional immunities of officials and employees of the Mexican Consulate in Los Angeles. Under article 43 of the Vienna Convention on Consular Relations,[18] such persons are immune from the jurisdiction of local courts "in respect of acts performed in the exercise of consular functions." Thus, like experts on missions for the UN, consular personnel effectively have immunity for their official acts. After noting the paucity of legal precedent and international practice to guide decision-making in this area, the *Gerritsen* court enumerated five criteria as follows:

Some of the relevant criteria in determining these issues are: (1) the subjective intent of the consular official, based on objective evidence, in performing a particular act, *Boyer and Another v. Aldrete*, 23 I.L.R. 445 (Tribunal Civil de Marseilles); *Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E. 2d 1105, 1108-9 (1983); (2) whether the act furthered some function of the consulate, *Joseph v. Office of the Consulate General of Nigeria*, 830 F. 2d 1018 (9th Cir. 1987); (3) whether the act is of a "personal character," *Bigelow v. Princess Zizianoff*, 4 I.L.R. 384 (Tribunal Correctional of the Seine 1928); (4) the seriousness of the act, *Id.*; and (5) the absence or presence of a malicious motive in the performance of a particular act, *Maas v. Seelheim*, 8 I.L.R. 404 (Manitoba King's Bench 1936).

Gerritsen at 259.

27. The first criterion, the intention of the official as demonstrated by objectively observable actions, is understood to mean the view of the official him- or herself that the action in question is performed in an official capacity. This is considered a significant factor in determining whether an action is within official acts. Thus, in the *Boyer v. Aldrete* case cited by the court, the French courts held in a 1956 decision that the Panamanian Consul-General in Marseilles had acted in the performance of his official functions and was immune from suit where he had identified himself as the Consul-General in several places in the letter that was the basis for a libel action. The French court concluded that such references indicated he

intended to act in his capacity as Consul-General, and that the impugned letter was therefore an official act. It should be noted, however, that this criterion does not entail a general consideration of good or bad faith or motive; this is discussed in connection with the fifth criterion below.

28. The second criterion, furthering organizational functions, speaks directly to the relationship which the activity bears to official responsibilities and the purposes of the official's organization. This factor requires a logical nexus between the activity and the official responsibilities of the individual involved; absent such a nexus, the activity is not within official acts. The *Gerritsen* decision discusses several United States cases which address consular immunity based on whether the official was carrying out a legitimate consular function at the time of the incident.

29. On initial impression, the third criterion, whether the act is of a "personal" character, appears simply to restate the problem, i.e., if it can be concluded that the act was "personal" it will not be "official." However, this criterion serves to emphasize that there may be conduct whose very nature generally indicates that it is an unofficial act. For example, conduct of a sexual nature would seem generally excluded on this ground. The fourth criterion, the "seriousness" of the act, is similar to the third. Conceptually, the third and fourth criteria could be combined, such that "type and seriousness" of the conduct is jointly viewed as a relevant factor in determining if the action is within official responsibilities.

30. The fifth criterion in the *Gerritsen* list, presence or absence of malicious motive, does not attract uniform support in United States courts and is somewhat doubtful. There are a number of cases that refuse to inquire into motivation, on the ground that allegations of bad faith or improper motive cannot defeat immunity where the act is by other criteria determined to be official. *See, e.g., De Luca v. United Nations Organization,* 841 F. Supp. 531, 535 (S.D.N.Y. 1994) (assertion of bad faith has no bearing on determination of immunity); *Donald v. Orfila,* 788 F.2d 36, 37 (D.C. Cir. 1986) (same). We would not conclude from these cases that malicious motive may never be relevant, but when there is a clear and sufficient relationship between the act and performance of official functions, bad motive is irrelevant and immunity should not be set aside.

31. Various cases have also emphasized the importance of interpreting broadly the scope of official acts. This approach is intended to ensure that all immunities are accorded which are necessary to the effective functioning of the organization or mission. Thus, a recent case regarding testimonial immunity for official acts, the court adopted a broad view, holding that official acts immunity applied not only to testimony about actions personally undertaken by the individual, but also to "all information that a covered individual possesses solely by virtue of his official position." *TECRO v. U.S. District Court,* 128 F. 3d 712 (9th Cir. 1997). *See also People v. Leo,* 407 N.Y.S. 2d 941, 943 (1978), where the court evaluated the facts "in the most liberal perspective possible," but could find no relationship between defendant's employment as a UN official and charges of assault and resisting arrest. Thus, an act need not fall strictly within the precise confines of an individual job description to be covered by immunity. The responsibilities of each individual employee implicitly also include furthering the functions and purposes of the organization overall, and the individual who construes his responsibilities broadly in service of the organization is still acting in an official capacity.

32. In all of these cases, it appears that no single factor is likely to be determinative. In difficult cases, courts appear to take all the facts together, and to weigh a variety of factors in

determining if the activity is within official acts. As illustrated by these cases, however, courts do not take a narrow view of what, strictly speaking, is within the exact scope of official responsibility. Rather, the overall consideration is whether the act is in some reasonable sense related to official functions, or believed to be.

3. Immunity Should be Accorded At the Earliest Possible Stage

33. Courts in the United States recognize the need to decide immunity issues early on in litigation. This is imperative if the benefits of immunity from legal process are to be fully realized. The purpose of immunity can be frustrated if an individual is required to go through protracted, disruptive and expensive litigation in order to establish that immunity applies. Thus, United States courts consider questions of immunity from suit as a threshold jurisdictional matter. In *De Luca, supra* at 533, the court stated, "[p]roperly invoked immunity shields a defendant `not only from the consequences of litigation's results, but also from the burden of defending themselves (citations omitted)." In *Tuck v. Pan American Health Organization*, 668 F. 2d 547, 549 (D.C.Cir. 1981), the court cited this principle, and added "[t]his shield would be lost if the merits of a complaint were fully tried before the immunity question was addressed." *See also Davis v. Passman*, 442 U.S. 228, 235-36 fn. 11 (1979) (defenses based upon clause granting immunity to federal legislators should ordinarily be given priority).

34. Similarly, United States courts address questions of foreign sovereign immunity in the initial stages. *See Foremost-McKesson v. Islamic Republic of Iran*, 905 F. 2d 438, 443 (D.C.Cir. 1990) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits"); *Compania Mexicana de Aviacion v. U.S. District Court*, 859 F. 2d 1354, 1358 ("[t]he entitlement is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is erroneously permitted to go to trial. ... a foreign government should not be put to the expense of defending what may be a protracted lawsuit without a prior opportunity to obtain an authoritative determination of its amenability to suit").

4. In Light of Such Criteria, the Special Rapporteur's Interview Was Clearly an Official Act

35. The United States believes that Mr. Cumaraswamy's interview was an official act for which he must be accorded immunity under Article VI, Section 22(b). In his March 7, 1997, Statement, the Secretary-General made clear that the United Nations also considers the words spoken by Special Rapporteur Cumaraswamy in the interview to have been stated in the course of his mission, and that he is therefore immune for those actions.[19] The Secretary-General's Statement therefore demonstrates that the actions of the Special Rapporteur are "authorized and ratified" by the United Nations. As the previous section showed, such ratification by the relevant organization is a principal consideration in determinations of immunity. The views of the organization concerned on whether certain activities constitute official acts must be taken into account and given substantial weight by courts making such determinations. *See Corrinet v. Ginns, supra*.

36. The magazine article that is the basis of the actions against Mr. Cumaraswamy provides compelling justification for the Secretary-General's conclusion. On first mention, Mr. Cumaraswamy is immediately identified as "United Nations Special Rapporteur on the Independence of Judges and Lawyers." On second mention, his United Nations connection and mandate are again noted. The majority of the remaining comments attributed to the

Special Rapporteur closely follow this entry, leaving little doubt that those comments were made in connection with his affiliation with the United Nations. By twice identifying Mr. Cumaraswamy as affiliated with the United Nations, the article plainly suggests, as the court reasoned in *Boyer v. Aldrete* (Panamanian Consul-General held to have intended to act in his official capacity), that Mr. Cumaraswamy intended to comment in an official and not in a personal capacity, lending further credence to the Secretary-General's conclusion that he was speaking in his official capacity as Special Rapporteur for the United Nations.

37. Moreover, the issues on which Mr. Cumaraswamy was asked to comment could not fall more squarely within the scope of his mandate. Mr. Cumaraswamy's mandate included inquiring into substantial allegations of attacks on the independence of the judiciary, lawyers and court officials. It was on just such issues that his views were elicited in the interview.

38. The fact that the conduct in issue consists of "words spoken" by the Special Rapporteur is also significant. As has been noted, the nature or type of conduct involved has been found by courts to be relevant to whether particular conduct constitutes official acts. In general, this criterion has been applied to exclude conduct which by its very nature seems not to involve official duties, e.g., serious criminal behavior. However, here the particular conduct -- "words spoken" -- is expressly covered by the immunity conferred by section 22(b). The reason immunity is expressly included for "words spoken" is apparent. Special Rapporteurs must be permitted full discourse and discussion in the course of their investigations, and the ability freely to report their views, in order that they may perform their tasks for the United Nations effectively. In this context, we submit that the conduct here at issue, the spoken word, is of a type which requires special protection, and that immunity for "words spoken" should not lightly be overcome by efforts to characterize those words as outside official acts.

39. There is also no indication that Mr. Cumaraswamy was animated by malicious motives. Here, neither the magazine article nor any other information available to us indicates such motives. Indeed, Mr. Cumaraswamy appears to have been cautious to avoid "naming names" or to discuss other specifics in a way that might suggest malicious motives. To the contrary, the general and circumspect nature of Mr. Cumaraswamy's comments belie any suggestion of malice.

40. Moreover, we note that in general the use of public statements, including statements which call into question or criticize various situations or practices, is a technique commonly used in order to protect or promote human rights. The making of such statements can serve to draw attention to the existence of a Special Rapporteur, to make persons aware of the nature of his or her mandate and of particular investigations and concerns, to increase public awareness of relevant standards and to draw attention to situations warranting attention. The Special Rapporteur for the Independence of Judges and Lawyers made it clear from the outset that he intended to make use of energetic public outreach in pursuing his mandate. In his 1995 report to the U.N. Human Rights Commission, for example, he indicated that he intended to "make himself available on the widest basis to the greatest extent of his abilities" through contacts with and communication to the public and to "encourage dissemination of the relevant standards" and to "respond promptly" to problematic situations, including efforts to draw attention to violations or potential violations.[20] As it happens, the Commission on Human Rights took note of and welcomed these proposed methods of work.[21] However, even absent such endorsement by the Commission, the Special Rapporteur's actions would nonetheless be activity aimed at the accomplishment of an official function, performed in the course of official activity.

41. Accordingly, numerous factors compel the conclusion that the Secretary-General was correct and that the words spoken by Mr. Cumaraswamy in the interview were official acts.

V. OBLIGATIONS OF MALAYSIA

A. As a Party to the General Convention, Malaysia has an Obligation Under International Law to Ensure Respect for Mr. Cumaraswamy's Immunity from Legal Process

42. Article 26 of the Vienna Convention on the Law of Treaties (the "Vienna Convention")[22] articulates the fundamental principle of customary international law, *pacta sunt servanda*, as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." The General Convention is a "treaty in force" and Malaysia is a party thereto. The General Convention was adopted by the General Assembly of the United Nations on 13 February 1946.[23] For Malaysia, the General Convention entered into force on 28 October 1957. Section 35 of the General Convention provides: "This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, . . ." Malaysia remains a member of the United Nations.

43. Thus, all parties to the General Convention are bound by it and must perform under it in good faith. Moreover, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[24] Indeed, Section 34 of the General Convention expressly requires that States have in place domestic legal mechanisms that enable them properly to carry out their obligations under the Convention: "It is understood that, when an instrument of accession is deposited on behalf of any Member [of the United Nations], the Member will be in a position under its own law to give effect to the terms of this Convention." Accordingly, Malaysia, as a party to the General Convention, has a clear legal obligation to give effect to the immunity from legal process provided for in Article VI, Section 22 (b) where the necessary conditions are met, as they have been in the case of Mr. Cumaraswamy.

B. Malaysia's Failure to Honor Its Obligations Under the General Convention Entitles the United Nations to Seek This Advisory Opinion.

44. Notwithstanding Mr. Cumaraswamy's clear entitlement to immunity from legal process pursuant to Article VI, Section 22(b), we understand that Malaysian courts are proceeding to trial with multiple civil suits against him, leaving final consideration of Mr. Cumaraswamy's rights under the General Convention to the *end* of the proceedings. The United Nations has objected strenuously to this approach, and, after repeated attempts to reach a "settlement" with the Government of Malaysia,[25] has sought this advisory opinion. This reflects past practice as described in the comment to Section 469 in the Restatement (Third) of the Foreign Relations Law of the United States, which provides that when there is a "dispute between the organization and the state of the forum [it] is to be resolved by negotiation, by an agreed mode of settlement, or by an advisory opinion of the International Court of Justice.[26] Following this sequence of events, Article VIII, Section 30 provides that "[t]he opinion given by the Court shall be accepted as decisive by the parties."

C. If Malaysia Violates Its Obligations to the United Nations or United Nations Personnel, It Is Internationally Responsible for the Consequences and the United Nations May Lodge an International Claim for Damages Resulting from Such Breach

45. If an agent of the United Nations suffers injuries in the performance of his or her duties caused by a breach of obligations owed the United Nations in circumstances involving the responsibility of a State, the United Nations is entitled to recompense in accordance with the law of State responsibility and can bring an international claim against the responsible government. *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p.*174, at 187-88 (the "*Reparations* Advisory Opinion"). This includes the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims, such as protest, negotiation, and request for submission to the Court. *Reparations* Advisory Opinion, at 177.

46. Although the privileges and immunities of section 22 of the General Convention apply to individuals who are experts on missions, the same article of the General Convention makes clear that these "privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves."[27] The obligation to observe section 22 is, thus, an obligation to the United Nations.

47. Accordingly, should the Court determine in its advisory opinion that section 22 of the General Convention applies to Mr. Cumaraswamy's case, Malaysia is bound by Article VIII, Section 30 to regard the Court's opinion as decisive. However, if there is a failure of Malaysia to comply with its obligations to the United Nations, the stage is set for the United Nations to assert an international claim against Malaysia, which could include reparation for injuries caused to the United Nations or Mr. Cumaraswamy by Malaysia's breach. In the *Reparations* Advisory Opinion, the Court indicated that any reparation should depend on the amount of damage that the United Nations has suffered as the result of the wrongful act or omission of the defendant State and should be calculated in accordance with international law, including the reimbursement of any reasonable compensation that the United Nations had to pay its agent.[28]

VI. CONCLUSION

48. If Special Rapporteurs are to carry out their mandates effectively on behalf of the United Nations, appropriate immunities are essential. Special Rapporteurs must be able to proceed in their area of inquiry free from intimidation or repercussions in municipal courts, including in particular the courts of their own country. If this independence is undermined or lost, the United Nations functions served by the work of Special Rapporteurs will suffer.

49. Recognizing this need, the General Convention operates to confer official acts immunity on experts on missions, including Special Rapporteurs. Clearly, conduct may occur which has no connection to such experts' functions, and for which there would appropriately be no immunity. But when, as here, the activity involves comments by the Special Rapporteur upon precisely the subject of his mandate, the need for immunities, and the chilling effect of their denial, are clear.

50. If Dato' Param Cumaraswamy is to serve the United Nations effectively as Special Rapporteur on the Independence of Judges and Lawyers, he must receive the immunity to which he is entitled under Article VI of the General Convention.

1 Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 U.N.T.S. 15.

2 The events leading up to the request for an advisory opinion from the Court are outlined at some length in a Note by the Secretary-General concerning "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers" (U.N. Doc. E/1998/94) (hereinafter the *Secretary-General's Note*). This section highlights and elaborates upon those events which, in the view of the United States, are most relevant to the Court's consideration of Mr. Cumaraswamy's case.

3 Mr. Cumaraswamy's mandate, which was renewed in 1997, is:

(a) To inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

(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 provision 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;

U.N. Human Rights Commission Res. 1994/41 of 4 March 1994.

4 *See Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1995/36*, U.N. Doc. E/CN.4/1996/37.

5 *Id.* at 42.

6 David Samuels, *Malaysian Justice on Trial*, International Commercial Litigation, November 1995, at 10.

7 Written Statement issued by the Secretary-General of the United Nations, 7 March 1997 (hereinafter the *Secretary-General's Statement*).

8 Certificate under Section 7(1) of the International Organizations (Privileges and Immunities) Act 1992 (Act 485), issued by the Minister of Foreign Affairs of Malaysia, 12 March 1997 (emphasis added).

9 *See Secretary-General's Note*, supra note 2. Paragraphs 1-15 of that Note set forth, from the United Nations' perspective, key developments in its dispute with Malaysia and the reasons why the Secretary-General felt it necessary to seek an opinion from the Court.

10 U.N. Doc. ECOSOC Res. 1998/297 of 5 August 1998, at ¶ 1.

11 *Id*. at ¶ 2.

12 U.N. Doc. G.A. Res. 89 (I) (1946).

13 U.N. Doc. ECOSOC Res. 5 (I) of 16 February 1946.

14 *Secretary General's Note, supra* note 2, at ¶ 15.

15 *Id*. at ¶ 4.

16 The United States entered reservations to Article IV, V and VI of the General Convention with respect to taxation and national service of United States nationals and permanent residents, and with respect to aliens who have abused their privileges of residence in the United States. None of these reservations relates to the privileges and immunities at issue in this case.

17 *See* U.N. Doc. ST/LEG/2 Handbook on the legal status, privileges and immunities of the United Nations (1952), at 335-569.

18 Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261.

19 *Secretary-General's Statement, supra* note 7.

20 U.N. Doc. E/CN.4/1995/39, ¶¶ 67-68 and 78.

21 *See* U.N. Doc. CHR/Res 1995/36, ¶ 3.

22 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. Malaysia became a party to the Vienna Convention on July 27, 1994.

23 U.N. Doc. G.A. Res. 22(A) (I) (1946).

24 Vienna Convention, *supra* note 22, art. 27.

25 *See Secretary-General's Note, supra* note 2, at ¶¶ 14-15.

26 Restatement (Third) of the Foreign Relations Law of the United States, § 469, cmt. c (1987). *See also*, General Convention, art. VIII, § 30.

27 General Convention, art. VI, § 23.

28 *I.C.J. Reports 1949, p. 181.*.