WRITTEN COMMENTS

OF THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA

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OF THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA

I. Introduction

The Republic of Costa Rica submits herewith its written comments on the written statements of the United Nations, Germany, Greece, Italy, Malaysia, Sweden, the United Kingdom and the United States of America in the matter of the *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights* in accordance with the Court's Order of August 10, 1998.

To assist in clarifying the pertinent facts, the Republic of Costa Rica also submits (as Annex A) a timeline relating to the appointment and mandate of the Special Rapporteur on the Independence of Judges and Lawyers and (as Annex B) a chart giving an overview of the judicial proceedings pending against him as to which the Secretary-General has issued certificates of immunity, both of which are based on the facts contained in the submissions to the Court thus far.

II. The Court Should Find That The Special Rapporteur Is Entitled To Immunity From Legal Process Of Every Kind As Certified By The Secretary-General

A. The Request For An Advisory Opinion Specifically Asks The Court To Consider The Way In Which Article VI, Section 22, Of The General Convention Applies "In The Circumstances" Of The Special Rapporteur

As recognized by the United States, the "central issue" in ECOSOC's request for an advisory opinion on the "legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations ["General Convention"] *in the case of* . . . [the] Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, *taking into account the circumstances*" recounted in the "note by the Secretary-General," necessarily must be "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 . . ."[1] (Emphasis added.) Of all of the parties participating in this proceeding, only Malaysia demurs from the Court addressing this issue;[2] it "is not inclined to comment at this stage" on this most fundamental question.[3]

As previously set forth in Costa Rica's written statement, the question presented is a patently legal one as it involves the interpretation of an international convention, in order to determine its applicability, and the legal obligations of a State Party to that convention.[4] As Judge Oda

recognized in *Mazilu*, the Court, in rendering an advisory opinion, should focus "upon the essential aspects of the concrete *case*" before it.[5] "[I]t is not . . . possible to determine the *applicability* of [Article VI, Section 22] to a concrete case without adequate reference *to the way in which it may apply*."[6] Notably, the request for an advisory opinion specifically urges the Court to "tak[e] into account the circumstances" of this case. The Court, therefore, should honor ECOSOC's request by considering "the way in which" Article VI, Section 22, of the General Convention applies to the Special Rapporteur to the extent that it may do so "without trenching upon contentious matters of fact."[7]

B. The Facts Of This Case Are Undisputed And Indicate Clearly That The Special Rapporteur Acted In The Course Of The Performance Of His Mission

To justify its reticence to address the issue of the Special Rapporteur's immunity, Malaysia alludes to the presence of facts which must be "duly considered before an opinion is formed."[8] Yet, Malaysia fails to identify any disputed facts that require resolution to enable the Court to render a decision on the "central issue" in this case. To the contrary, the Federal Court of Malaysia has characterized the Special Rapporteur as "a provider of information,"[9] thereby acknowledging that his official duties include the collection and dissemination of information.

The undisputed facts, moreover, demonstrate that the Special Rapporteur was acting within the scope of his mandate when he gave the interview to *International Commercial Litigation*.[10] First, his appointment as Special Rapporteur on the Independence of Judges and Lawyers charged him, *inter alia*, "to inquire into any *substantial allegations transmitted to him* . . . and report his . . . conclusions thereon."[11] Second, in keeping with the accepted practice of special rapporteurs,[12] he frequently has participated in promotional activities associated with his position, including the issuance of public statements to the press, precisely for the purpose of eliciting "transmitt[al] to him" of "substantial allegations" that were relevant to his mission.[13]

Third, the Commission on Human Rights implicitly has endorsed the official nature of the Special Rapporteur's public statements by consistently recognizing such activities and noting "with appreciation" his determination "to achieve as wide a dissemination as possible of information" pertaining to the independence of judges and lawyers.[14] Fourth, the *International Commercial Litigation* article that gave rise to this dispute explicitly refers to the "United Nations Special Rapporteur on the Independence of Judges and Lawyers," describes his "global mandate . . . to investigate complaints such as those circulating in Malaysia at present," and sets forth his observations resulting directly from his position and work as Special Rapporteur.[15]

Consistent with these undisputed facts, the Special Rapporteur previously made similar statements to the press, which resulted in a Malaysian newspaper article[16] that mentioned the *Ayer Molek* case (involving the plaintiffs in the now-pending defamation suits). That article, which cited complaints about manipulation of the Malaysian system of justice that "undermin[ed] the due administration of independent and impartial justice by the courts," closed with an appeal by the Special Rapporteur to the public to supply him with information, even providing his telephone numbers for that purpose:

Cumaraswamy said anyone with information which could help in the investigation should contact him here at [tel.:] (03)-2011788 or in Geneva at [tel.:] (4122)-917 4290.[17]

Like the subsequent piece in *International Commercial Litigation*, this article simply reflects the duty of the Special Rapporteur to establish contacts that may result in the discovery of pertinent information.

In sum, the facts in this case are both straightforward and undisputed. Moreover, they lead inevitably to the conclusion that the "words spoken" by the Special Rapporteur in his *International Commercial Litigation* interview occurred "in the course of the performance of his mission."[18] Accordingly, under Article VI, Section 22(b), of the General Convention, he is entitled to "immunity from legal process of every kind."

C. This Court May Not And Should Not Review The Secretary-General's Action Under Article VI, Section 23, Of The General Convention In Declining To Waive The Special Rapporteur's Immunity

In its submission, Malaysia suggests that the Secretary-General has an obligation under the General Convention to waive the Special Rapporteur's immunity,[19] and more directly asserts that "issues pertaining to liability . . . [are] dependent upon an Advisory Opinion being given on the interpretation of Article [*sic*] 23."[20] For its part, Germany has stated (using the language of Section 23):

. . . [I]t would be desirable if the International Court of Justice could, in its report, also state its position on the question of whether Mr. Cumaraswamy's immunity would impede the course of justice and whether his immunity can be waived without prejudice to the interests of the United Nations.[21]

1. No Question Under Article VI, Section 23, Of The General Convention Is Properly Before The Court

In this proceeding, the Court is limited by the scope of ECOSOC's request for an advisory opinion, which extends exclusively to the "legal question of the applicability of Article VI, *Section 22*, of the [General] Convention . . . and . . . the legal obligations of *Malaysia* in this case."[22] Neither an opinion on Section 23 nor an opinion on the obligations of the Secretary-General thereunder has been requested by ECOSOC. Those questions, therefore, are beyond the scope of the Court's present jurisdiction. Furthermore, Malaysia has not alleged that the Secretary-General has failed to perform his "duty" under Section 23 to consider the possibility of waiving the Special Rapporteur's immunity,[23] and thus no "difference" within the meaning of Article VIII, Section 30, of the General Convention is claimed to have arisen in that regard. For these reasons, no issue under Section 23 is now before the Court.

2. A Decision By The Secretary-General To Waive Or Not To Waive Immunity Is Not Justiciable

Article VI, Section 23, of the General Convention imposes a "duty" on the Secretary-General to waive immunity only where "*in his opinion*" immunity would "impede the course of justice" and it could be waived "without prejudice to the interests of the United Nations." (Emphasis added.) The opinions of the Secretary-General, however, are inherently and by definition non-justiciable.

In other words, the plain language of Section 23 requires the Secretary-General to make subjective determinations about the likely effects of waiver based on his specialized

institutional knowledge and his personal evaluation of facts. The fact that the Secretary-General's "duty" is to act only in accordance with "his opinion" renders the exercise of that duty unreviewable by a third party, and, therefore, non-justiciable. This is in stark contrast to the Secretary-General's decisions under Section 22 as to whether or not immunity exists, which are not similarly authorized to be made "in his opinion," but instead require the application of objective criteria and, thus, may be reviewed by the Court.

D. In Any Event, The Secretary-General Properly Declined To Waive The Special Rapporteur's Immunity

The Secretary-General's repeated invocation of immunity on behalf of the Special Rapporteur also represents his decision, in fulfillment of his duty to consider the issue of waiver, that, "in his opinion," immunity will not "impede the course of justice," and that, in any event, a waiver of immunity would result in "prejudice to the interests of the United Nations."[24] In this the Secretary-General acted correctly and, should the Court review this action (notwithstanding the impediments thereto just recounted), his action should be upheld.

1. Maintaining The Special Rapporteur's Immunity Will Not Impede The Course of Justice

Under Section 23 the Secretary-General must first determine whether, "in his opinion, the immunity would impede the course of justice." If he determines it would not, that is the end of the inquiry and the Secretary-General need not, thereafter, consider the likelihood of prejudice to the interests of the United Nations."

Malaysia has not explained how immunity would impede the course of justice in this case, and no such impediment can be perceived. Apart from the possibility of proceedings against the magazine itself in appropriate national courts, it should be recalled, as the United Nations points out,[25] that Section 29 of the General Convention provides "remedies . . . to private plaintiffs" aggrieved by an "expert [who has] exceeded his mandate . . . if immunity has not been waived by the Secretary-General."

2. Waiver Of The Special Rapporteur's Immunity Would Cause "Prejudice To The Interests Of The United Nations"

Were it established that the Special Rapporteur's immunity, if not waived, would "impede the course of justice," immunity still must be maintained if the Secretary-General, "in his opinion," finds that waiver would result in "prejudice to the interests of the United Nations."

Manifestly, the Secretary-General was correct in finding that such prejudice would result from waiver in this case. In a letter to the Secretary-General, the Chairman of the Fourth Session of the Meeting of Special Rapporteurs stated that the litigation pending against the Special Rapporteur "constitutes an attack on the entire system and institution of the United Nations special procedures and mechanisms."[26] The Government of Sweden echoes this sentiment: ". . . [U]ndermining the immunity of a Special Rapporteur appointed by the Commission on Human Rights would constitute a serious threat to well established UN mechanisms for the monitoring of human rights."[27]

The legitimacy of these concerns becomes most evident upon examination of the actual effect of the Malaysian litigation on the work of the Special Rapporteur. As both the United Nations and the Special Rapporteur himself make clear, the prosecution of lawsuits in Malaysian

courts already has interfered with the Special Rapporteur's work and has caused him to postpone a report on his findings about complaints regarding the Malaysian judiciary.[28] There can be little doubt, therefore, that waiver of his immunity would further prejudice the interests of the United Nations.

III. The Mandate Of Article VI, Section 22, Of The General Convention That States Parties Accord "Immunity From Legal Process of Every Kind" Effectively Withdraws Such Immunity Determinations From The Competence of National Courts

The basic obligation of States Parties under Article VI, Section 22, of the General Convention, as it relates to this proceeding, is to accord "immunity from legal process *of every kind*." (Emphasis added.) As the United States trenchantly points out, this "`is an immunity from trial and the attendant burden of litigation, and not just a defense to liability on the merits,'"[29] which is "`effectively lost if a case is erroneously permitted to go to trial.'"[30] Hence, Section 22 precludes any "trial" on the application of functional immunity to the work of an expert on mission for the United Nations by the national courts of a State Party.

A. By Necessary Implication, Section 22 Requires States Parties To Give Conclusive Effect To The Certificates Of The Secretary-General

Costa Rica agrees with the position of the United Nations,[31] Germany,[32] and Sweden[33] that as the only means of ensuring "immunity from legal process of every kind" States Parties to the General Convention must accord the certificates of the Secretary-General conclusive effect, subject to review only by this Court. Costa Rica disagrees with the notion that such conclusive authority would constitute a "gross attempt to impose limitations" on the sovereign authority of a State Party or manifest a "disrespect" for its internal affairs.[34]

1. The Doctrine Of Functional Necessity Requires That The Secretary-General's Certificates Be Given Conclusive Effect

The doctrine of functional necessity requires that experts of international organizations be accorded immunity from legal process.[35] An international expert's independent and effective performance of his or her mission is predicated upon the international organization's ability to shield the expert from any undue interference by or influence of states. The independence of an expert "would be prejudiced if a government were able to prosecute him for his work for the international organization. . . . [His] activities . . . cannot be allowed to be influenced by fear of prosecution in the country concerned."[36]

The Court long ago affirmed that the United Nations "possesses a right of functional protection in respect of its agents"[37] and explained why the Secretary-General - and not the courts of the numerous Member States - must make such determinations as those affecting the immunity of United Nations experts.

The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices . . . .

. . .

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. . . .

Having regard to its purposes and functions . . . the Organization . . . has . . . found it necessary[] to entrust its agents with important missions . . . . Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, *the Organization* must provide them with adequate protection. . . .

. . .

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him *by the Organization*, and that he may count on it. . . . To ensure the independence of the agent, and, consequently, the independent action of the organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of *the Organization* . . . . In particular, he should not have to rely on the protection of his home State . . .

Upon examination . . . of the nature of the missions of its agents, it becomes clear that the capacity of *the Organization* to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.[38]

In short, the *Organization* must have the capacity to protect its own agents without reliance on the judicial authorities of its diverse membership.

The United Nations' authority to exercise such protection becomes all the more vital for experts like the Special Rapporteur here who are resident in their home States and, therefore, are more susceptible to the influence of their governments. As rightly set forth in Malaysia's written statement, "`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.'"[39]

In order for the United Nations to operate effectively, the Secretary-General must be able to guarantee to United Nations experts the fullest possible measure of protection. The Secretary-General therefore must be conceded the authority to determine, with conclusive effect in municipal courts of States Parties to the General Convention, whether words spoken by an expert were, in fact, spoken in the course of performing a mission. The facts of this case illustrate most graphically why the Secretary-General's certificates must be accorded conclusive effect. Simply put, it is inconceivable that municipal courts should have authority to determine the immunities of a United Nations expert appointed to investigate their independence.

2. Giving Conclusive Effect To The Secretary-General's Certificates Does Not Infringe On A State Party's Sovereignty

In *Mazilu*, the Court recognized that the States Parties to the General Convention had conceded to the United Nations the authority to make determinations regarding its relationship to its own experts.[40] As Judge Shahabuddeen explained, States Parties to the General Convention do not enjoy a sovereign right to make such determinations, and an

expert's State of nationality is a "stranger in law" to the expert's relationship with the United Nations.[41] Thus, a State Party has "no juridical basis for intervening to impose its own opinion on the point. . . . [T]he settled jurisprudence of the Court makes it clear that a matter which would normally be within a State's domestic jurisdiction ceases to be exclusively so to the extent to which it has come to be also governed by any international obligations undertaken by the State."[42] This applies, moreover, to the competence of municipal courts, which cannot invoke their own independence as an excuse for refusing to comply with international obligations.[43]

In other words, the Secretary-General's conclusive authority reflects neither a "gross" imposition on, nor a sign of "disrespect" for, a State Party's sovereignty, but rather a recognition that it has "by necessary implication conceded to the United Nations a right in good faith (not questioned in this case) to determine" whether one of its own experts has acted within the scope of his mandate.[44]

B. Alternatively, Section 22 Mandates A Strong Presumption That The Secretary-General's Determinations On Immunity Are Correct

Alternatively, were the Court not to conclude that the General Convention, by necessary intendment, requires a State Party to give conclusive effect to the Secretary-General's certificates, a State Party's implementation of the General Convention nonetheless must comport with its duties under both the Charter of the United Nations ("Charter") and the General Convention. At a minimum, therefore, the Secretary-General's determinations must be given great weight and accepted in the absence of compelling circumstances or powerful contrary evidence.

Although the consistent and accepted practice of the United Nations, and the practice adopted by a number of States Parties to the General Convention, is to give conclusive effect to the Secretary-General's certificates,[45] others, specifically the United Kingdom and the United States in this proceeding, take the position that their courts may exercise a narrow authority to review independently the scope of an expert's immunity.[46]

If the Court finds that the General Convention supports this interpretation, States Parties nevertheless are required to exercise that authority in accordance with their duty under Article 2, Paragraph 5, of the Charter to render "every assistance" to the Organization. Reading Article VI, Section 22, of the General Convention in conjunction with Article 2, Paragraph 5, of the Charter, the views of the Secretary-General, as the United Kingdom has stated, remain of "crucial" importance, are entitled to "all due weight," and may be questioned only "for the most compelling reasons."[47] Or, as the United States has stated, the certificate of the Secretary-General must be "accorded great deference" and "great weight;"[48] it creates "a presumption in favor of immunity" that may be overcome "only if there is powerful contrary evidence."[49] The practical result is that the Secretary-General's certificates are nearly - if not absolutely - conclusive. The States Parties, through whatever means of municipal implementation, almost invariably must give effect to the views of the Secretary-General.[50]

Under this alternative a State Party may not, as the Malaysian Government did here, fail to submit to its courts the Secretary-General's determination that words and acts at issue were spoken and done in the course the performance of a special rapporteur's mission and that the United Nations maintained his immunity. Similarly, a State Party, under this alternative, must

afford the Secretary-General's certificates great deference and may not treat them as mere "opinions" entitled to "no" binding force.

C. The General Convention Requires States Parties To Make A Final Determination Of Immunity At The Earliest Possible Stage

The General Convention requires that a State Party deal with the issue of immunity as a preliminary matter. In the clearest terms, Article VI, Section 22, of the General Convention requires that an expert on mission receive immunity from "legal process of *every* kind." (Emphasis added.) Regardless of whether the Secretary-General's certificate is conclusive or the States Parties retain some narrow power to review the expert's immunity, such immunity must be resolved at the earliest possible stage of the dispute.

Malaysia asserts, however, that it enjoys complete freedom to select the means by which it gives effect to the Special Rapporteur's immunity under the General Convention,[51] extending so far as to include the authority to delay a final determination of immunity until after a full trial on the merits.[52]

This position is untenable. Even if the Court finds that a State Party enjoys some limited latitude under Article VIII, Section 34, of the General Convention in giving effect under its own laws to the Special Rapporteur's immunity where it is required under the General Convention, implementation still must comply with Article VI, Section 22(b), of the General Convention. In order to give full effect to the plain language of Section 22(b), whereby special rapporteurs must be afforded immunity from "legal process of *every* kind," immunity must be dealt with before any inquiry into their liability. (Emphasis added.) Following Malaysia's approach, which contradicts the generally accepted practice among States Parties to the Convention,[53] would have the absurd result of subjecting an immune expert to legal process to determine liability from which he is immune, thereby eviscerating the very immunity in issue.

D. The Lack Of Direct Access To The Court For States Parties Under Article VIII, Section 30, Of The General Convention Is Irrelevant

Malaysia argues, in effect, that its inability to request an advisory opinion directly from the Court under Article VIII, Section 30, results in a "lacuna" that supposedly implies a broad latitude for its national courts to review, and disagree with, the Secretary-General's immunity determinations.[54] The substantive content of legal rights is never determined, however, by the comparative availability of remedies to vindicate them. This is at least as true for international law as it is for municipal law. Moreover, as indicated in Costa Rica's written statement,[55] it is the Organization that requires special powers to protect its experts vis-à-vis States Parties rather than vice versa.

In any event, the dispute resolution procedures under Article VIII, Section 30, of the General Convention place States Parties and the Commission on Human Rights in the same position to seek an advisory opinion from the International Court of Justice in the event of disagreement over an immunity determination of the Secretary-General. Article VIII, Section 30, of the General Convention provides that "[i]f 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." Under Article 96, paragraph 2, of the Charter,

[o]ther organs of the United Nations [than the General Assembly and the Security Council] . . . , which may at any time be so authorized by the General Assembly, may . . . request advisory opinions of the Court on legal questions arising within the scope of their activities.

By Resolution 89(I) of December 11, 1946, the General Assembly 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." Malaysia is a member of ECOSOC. The Commission on Human Rights is a component of ECOSOC which prepares recommendations and reports on matters concerning human rights. The Commission on Human Rights established the office and mandate of the Special Rapporteur on the Independence of Judges and Lawyers, and appointed the Special Rapporteur on April 21, 1994, to which ECOSOC gave its approval on July 22, 1994.[56]

Under Article VIII, Section 30, of the General Convention, Malaysia and the Commission on Human Rights must undergo the same process to obtain an advisory opinion from the International Court of Justice when a dispute arises. Neither Malaysia nor the Commission on Human Rights has a right directly to seek an advisory opinion under Article VIII, Section 30, of the General Convention. It is ECOSOC that requested the advisory opinion, pursuant to Article 96, paragraph 2, of the Charter and in accordance with General Assembly Resolution 89(I).[57] Malaysia itself could have sought the necessary support within ECOSOC to make the request in accordance with Article VIII, Section 30, of the General Convention.

Whatever effect is accorded the Secretary-General's certificates, Section 30 provides adequate recourse if States Parties to the General Convention disagree with the Secretary-General's determination. Indeed, it might be asked whether a "lacuna" would be *created* if the Court were to determine that the Secretary-General's certifications were mere opinions with no binding, or even persuasive, effect.

IV. Conclusion

Having studied the other written statements submitted in this matter, the Republic of Costa Rica remains firm in its conviction, as stated in its own written statement, that Article VI, Section 22, of the General Convention applies in the case of the Special Rapporteur of the Commission on Human Rights to the words and acts attributed to him in the article entitled *Malaysian Justice on Trial* that appeared in the November 1995 issue of *International Commercial Litigation* and that, as a result, he is immune from legal process in regard to those

words and acts. As regards Malaysia's legal obligations in this case, the Republic of Costa Rica reaffirms its conclusions as stated in its previous submission to this Court.

Respectfully submitted,

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ENDNOTES

1 *See* Written Statement Submitted by the United States of America, 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, Before the International Court of Justice, 7 October 1998 ("Statement of the United States"), 13, para. 19.

2 The United Nations, Costa Rica, Greece, Italy and the United States all regard The Special Rapporteur as being immune. Written Statement submitted on behalf of the Secretary-General of the United Nations ("Statement of the United Nations"), 10-13, paras. 32-37; Written Statement of the Government of the Republic of Costa Rica, Before the International Court of Justice, Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights, October 7, 1998 ("Statement of Costa Rica"), 10-17; Statement of the Embassy of Greece ("Statement of Greece"), 1; Statement of the Ministry of Foreign Affairs of Italy ("Statement of Italy"), 2-3; Statement of the United States, 10-24. Sweden and the United Kingdom have not addressed the issue, while Germany solicits a decision on the application of Section 23 (as to which the Court presently is without jurisdiction, and which, moreover, is non-justiciable (*see* II.C.1 and 2., *infra*)). Statement of the Legal Adviser of the German Federal Foreign Office ("Statement of Germany"), 2.

3 Statement of the Government of Malaysia, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Request for an Advisory Opinion), October 1998 ("Statement of Malaysia"), 56, para. 7.14.

4 Statement of Costa Rica, 5.

5 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, I.C.J. Reports 1989, 207, para. 21 (sep. op., Oda, J.) (emphasis in original).

6 *Id.*, 208, para. 22 (emphasis added).

7 *Id.*, 208-09, para. 23 (sep. op., Oda, J.).

8 Statement of Malaysia, 56-57, para. 7.14.

9 Federal Court of Malaysia, Decision of Feb. 19, 1998 (Dossier No. 55).

10 *See Malaysian Justice on Trial*, International Commercial Litigation, Nov. 1995, 10 (Dossier No.14).

11 Commission on Human Rights Resolution 1994/41 of Mar. 4, 1994, *reprinted in* 1994 Y.B. Comm'n H.R. 135 (emphasis added), *endorsed by* ECOSOC Decision 1994/251 of July 22, 1994, U.N. ESCOR, Subst. Sess., Supp. No. 1, at 80, U.N. Doc. E/1994/94 (Dossier Nos. 1, 3).

12 It is a long-standing and accepted practice of special rapporteurs to "provide information" to the public, not only by publishing official reports, but also, in the course of their performance of their missions, by issuing public statements to the media. For examples of such public statements to the press, *see* Statement of Costa Rica, 11 n.25.

13 For examples of the Special Rapporteur's public statements and appearances and the Human Rights Commission's appreciation of these activities, *see* Statement of Costa Rica, 13-14, nn. 28-31 and accompanying text.

14 For examples of the approval of the Special Rapporteur's activities by the Commission on Human Rights, *see* Statement of Costa Rica, 13-15, nn.30-35 and accompanying text.

15 *Malaysian Justice on Trial*, *supra* n.10, at 12, 13.

16 *UN to probe legal grouses*, The Star, Aug. 24, 1995, at 9 (Dossier No. 13); *see [Second] 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, Mar. 1, 1996, para. 160 (Dossier No. 13).

17 *Id*.

18 *See* Statement of Costa Rica, 10-17, for a more detailed discussion.

19 Statement of Malaysia, 56, para. 7.13 ("If the [Secretary-General] decides that immunity is to be accorded, he has the duty to decide whether there are facts to enable him to consider waiver.").

20 *Id*., 72, para. 9.10.

21 Statement of Germany, 2.

22 ECOSOC Decision 1998/297 of Aug. 5, 1998 (Dossier No. 1) (emphasis added).

23 Clearly the Secretary-General has performed that duty. *See* Statement of the United Nations, 19-22, paras. 52-56. *See also* II.D., *infra*.

24 Statement of the United Nations, 19-22, paras. 52-56.

25 *Id*., 19, para. 52.

26 *See Special Rapporteurs Concerned About Malaysia's Disregard of ECOSOC's Decision*, U.N. Press Release HR/98/66, Sept. 4, 1998, *as available on* <http://www.unhchr.ch>.

27 Statement of Sweden, 1.

28 Statement of the United Nations, 21, para. 55; *[Third] Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy*, U.N. Doc. E/CN.4/1997/32, para. 134 (Dossier No. 11).

29 Statement of the United States, 21, para. 34.

30 *Id*.

31 Statement of the United Nations, 16, para. 44 ("Therefore, it is for the Secretary-General alone, and not for Member States or their courts, to determine whether or not an act by an agent of the organization, be it a staff member or an expert on mission, has been performed in an official capacity or in the course of the performance of a mission for the United Nations.").

32 *See* Statement of Germany, 1 ("It is the view of the Government of the Federal Republic of Germany that [] it is the prerogative of the Secretary-General of the United Nations to make a binding decision in the concrete case concerning whether an expert has or does not have immunity pursuant to Art. VI, section 22 of the Convention ....").

33 Statement of Sweden, 3 ("Since the right to determine whether an expert is protected by immunity has been solely and exclusively conferred to the S-G, such a decision must also be considered to be conclusive . . . .").

34 Statement of Malaysia, 46, para. 7.4; 56, para. 7.12.

35 *See* International Institutional Law: Unity Within Diversity 235 (Henry G. Schermers & Niels M. Blokker eds., 3d ed. 1995) ("[T]he *raison d'être* of privileges and immunities of international organizations is their *functional necessity*."). *See also* Statement of Sweden, 1 (The "doctrine [of functional necessity] is generally accepted and has through a number of cases . . . become legal practice.").

36 Schermers & Blokker, *supra* n.35, 358 (discussing immunity for official acts of international officials).

37 *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, 174, 185.

38 *Id.*, 180, 182-84 (emphasis added).

39 Statement of Malaysia, 31, para. 6.1, quoting A Handbook on International Organization 227-231 (R.-J. Dupuy, ed. 1988). *See also* Statement of Italy, 5 ("[I]l y a lieu de relèver que les obligations en matière d'immunité incombent à tous les Etats membres de l'organisation qui ont adhéré à la Convention générale, même s'il s'agit d'un Etat avec lequel le sujet chargé de mission est lié par un rapport spécifique, comme la nationalité . . . . [C]'est surtout vis-à-vis de ces Etats que les obligations en question sont destinées à fonctionner, pour protéger sp écifiquement l'organisation contre d'éventuelles interférences dans son activité, interférences que l'Etat - du fait de sa liaison avec le chargé de mission envoyé par l'organisation - pourrait plus facilement exercer par rapport à ladite activité.").

40 *Applicability . . . , supra* n.5, 198, para. 59.

41 *Id.*, 216 (sep. op., Shahabuddeen, J.).

42 *Id.* (sep. op., Shahabuddeen, J.).

43 *See* McNair, Law of Treaties 346 (1961) ("[A] State has the right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task or decline to give effect to the treaty or are unable to do so because the necessary change in, or addition to, the national law has not been made, their judgments involve the State in a breach of treaty."). *See also* Art. 27 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). As this Court and its predecessor have reaffirmed, the rule codified in Article 27 of the Vienna Convention is a fundamental principle of customary international law. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of*

26 June 1947, I.C.J. Reports 1988, 12, 34-5, para. 57; *Greco-Bulgarian "Communities,"* P.C.I.J., Series B, No. 17, at 32.

44 *Applicability . . ., supra* n.5, 216 (sep. op., Shahabuddeen, J.).

45 *See* discussion of the Statements of the United Nations, Germany and Sweden, *supra* nn.31-33 and accompanying text.

46 "[I]t 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. . . . 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." Statement of the United States, 14, para. 20. *See also* Statement of the United Kingdom, paras. 6, 7.

47 Statement of the United Kingdom, para 6.

48 Statement of the United States, 14-15, para. 22.

49 *Id.*, 16, para. 24.

50 As the United Kingdom has noted, "the United Kingdom would not expect a national court to take a different view from the Secretary-General except for the most compelling reasons." Statement of the United Kingdom, para. 6.

51 Statement of Malaysia, 72, para. 9.10.

52 *MBf Capital Bhd & Anor v. Dato' Param Cumaraswamy* (High Court, Kuala Lumpur, June 28, 1997), 1997 MLJ LEXIS 328, *39.

53 *See, e.g.*, Statement of the United States, 13, para. 20 ("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.").

54 Statement of Malaysia, 70, para. 9.7.

55 Statement of Costa Rica, 21-22 (quoting P. Bekker, The Legal Position of Intergovernmental Organizations 176-77 (1994)).

56 Commission on Human Rights Resolution 1994/41, *supra* n.11; ECOSOC Decision 1994/251, *ibid.*

57 The history of the Request is documented by the Secretary-General of the United Nations as follows:

On 30 May, 1997, the Chairman of the Fourth Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and of the Advisory Services Programmes wrote to the Secretary-General urging him to invoke Section 30 of the Convention for a request to be made to seek an advisory opinion from the International Court of Justice. (Dossier No. 34)

. . .

On 18 June 1998, the Assistant Secretary-General for Legal Affairs advised the Permanent Representative of Malaysia that unless the Government of Malaysia responded to the draft settlement agreement which had been previously transmitted to him by the Organization, the Secretary-General could not avoid referring the matter

during the upcoming session of the Economic and Social Council and requesting it to seek an advisory opinion from the International Court of Justice. (Dossier No. 58)

. . .

On 30 July 1998, Maître Fortier reported to the Secretary-General indicating Malaysia's agreement that the matter should be referred, although not jointly, to the International Court of Justice.

. . .

On 5 August 1998, at its resumed substantive session, the Economic and Social Council adopted, by consensus, decision 1998/297 referring the matter to the International Court of Justice and calling upon the Government of Malaysia to stay all judgments and proceedings in its national courts pending receipt of the advisory opinion. (Dossier No. 61)

United Nations, Introductory Note, paras. 34, 58, 61, 63.