DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

A. Introduction

THE Advisory Opinion on the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (hereinafter *Cumaraswamy*) rendered on 29 April 1999, though much less dramatic than many of the cases on the Court's docket, is nevertheless replete with interesting legal points and marks some significant developments in the law of international immunities. In procedural terms the case is important because it is the first time that the Court has been asked to render a so-called "binding" Advisory Opinion under section 30 of the General Convention on the Privileges and Immunities of the UN (hereinafter "the General Convention").[1] In substantive terms the Court makes some important findings on the obligations of States Parties to the General Convention. Further whilst it upholds immunity in the instant case, the result it reaches may be interpreted as fitting within a more general trend to subject the scope of all regimes of immunity to increasingly close judicial scrutiny.[2]

B. The facts

The case concerned certain activities of Dato' Param Cumaraswamy, a Malaysian lawyer who was also appointed as the Special Rapporteur on the Independence of Judges and Lawyers to the UN Commission on Human Rights. In November 1995, during the course of an interview with *International Commercial Litigation*, a British-based legal periodical which was also circulated in Malaysia, Cumaraswamy commented on the investigations he was making in Malaysia in the fulfilment of his mandate.[3] He said that complaints were rife that certain well-placed persons were able to manipulate the Malaysian justice system. In particular he referred to a specific case, the *Ayer Molek* case, and said that it looked like "a very obvious, perhaps even glaring example of judge choosing", but stressed that he had not made up his mind.

1. Section 30: "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the court shall be accepted as decisive by the parties." See R. Ago "'Binding' Advisory Opinion of the International Court of Justice" (1991) 85 A.J.I.L. 439.

2. In the contexts of international organisations see the ECHR cases *Beer and Regan* v. *Germany*, *Waite and Kennedy* v. *Germany* (both of 18 February 1999). National Courts have also become increasingly willing to limit the scope of State immunity, head of State and ex-head of State immunity. In relation to other forms of immunity, see the ECHR case *Osman* v. *UK* (28.10.98).

3. His mandate included, *inter alia*:
"(a) to inquire into substantial allegations transmitted to him ...
(b) to identify and record ... attacks on the independence of the judiciary, lawyers and court officials ..."

As a result of the interview a number of Malaysian companies brought suits against Cumaraswamy in defamation, for damages, including exemplary damages, totalling over $100 million. The UN Legal Counsel, on behalf of the Secretary-General, considered that Cumaraswamy had given the interview in the performance of his mission as Special Rapporteur and was protected by immunity by virtue of Section 22, Article VI of the General Convention.[4] The Legal Counsel addressed a *Note Verbale* to the Malaysian Government asking it to advise the Malaysian courts of the Special Rapporteur's immunity.

However when Cumaraswamy sought to strike out the complaints, the Malaysian Government issued a certificate merely to the effect that he was entitled to immunity "*only* in respect of words spoken or written and acts done by him in the course of the performance of his duties" (emphasis added), and making no reference to the determination by the Secretary-General that the interview had been given in the performance of his mission. The Malaysian courts found the Secretary-General's determination to be merely an opinion without binding effect on them and refused to rule on the immunity question *in limine litis*, reserving it to be dealt with alongside the merits.[5] The Special Rapporteur was thus forced to defend himself and was effectively placed in exactly the position which it is the purpose of immunity to avoid.

This finding by the Malaysian courts was quite contrary to the UN view of the obligations of States under the General Convention. UN Legal Counsel had taken the position in its practice that the determination of whether or not an act of a UN official or a UN expert on mission was done in the performance of his official functions was exclusively for the Secretary-General. After unsuccessful attempts at a negotiated settlement, it was this disagreement as to who had the "final say" that the Secretary-General submitted to ECOSOC for referral to the Court, by way of a request for an advisory opinion under Section 30 of the General Convention.[6]

4. "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded: ...
(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of any 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."

5. *MBf Capital Bhd & Anor* v. *Dato' Param Cumaraswamy*, High Court (Kuala Lumpur), 28.6.97, [1997] 3 M.L.J. 300; Court of Appeal, 20.10.97, [1997] 3 M.L.J. 824.

6. The matter was submitted to ECOSOC as the parent organ of the Commission on Human Rights, which, unlike the Secretary-General, is authorised to request advisory opinions within the scope of its activities (see UNGA Res. 89(1) of 11 December 1946).

However the question actually put to the Court by ECOSOC was different to that raised by the Secretary-General.[7] ECOSOC asked the Court to give an advisory opinion on the legal question of the *applicability* of Article VI, section 22 of the General Convention in the case of Cumaraswamy and secondly on the legal obligations of Malaysia in this case.

C. *The arguments presented*

In addition to written statements by the UN and by Malaysia, the Court also received written statements from eight other States. In the light of the *Mazilu* case[8] it was not disputed that a Special Rapporteur of the Commission was an expert on mission entitled to enjoy immunity under Section 22, even when his mission involved him acting within the territory of his own State of nationality or residence. Instead the arguments centred on the question of the scope of his immunity. The UN, arguing that the Secretary-General enjoyed exclusive authority to determine the scope of the immunity of an expert, relied on the broad scheme of the General Convention, claiming that such authority was implicit in the functional nature of the immunity, which was granted not *ratione personae*, but *ratione materiae* in the interests of the organisation.[9] Otherwise, it claimed, the UN would potentially be subject to differing interpretations in each of the countries in which it functioned—a result that would be both impractical and would threaten its independent functioning.

Malaysia rejected this view as "tantamount to a gross attempt to impose limitations not only on the exercise of the executive authority of Malaysia but also

7. The Secretary-General had proposed the following questions.
"1. Subject only to section 30 of the Convention on the Privileges and Immunities of the United Nations does the Secretary-General of the United Nations have the exclusive authority to determine whether words are spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22(b) of the Convention?
2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?"

8. *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Rep. 1989, 177, which established that a Special Rapporteur of the Sub-Commission was an "expert" for the purposes of section 22 even when carrying out his functions between sessions of the Sub-Commission in his State of nationality or residence.

9. Section 23 of the General Convention states:
"Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals 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."
However the difficulty with the argument put forward by the Secretary-General based on this section is that the question of whether or not waiver is appropriate in a particular case only arises once the scope of immunity has been determined, whereas the text is silent on this anterior question.

in respect of the jurisdiction of its Courts".[10] It contended that the scope of immunity was inherently suitable for judicial determination,[11] and urged that its own more limited view of the Secretary-General's determination was supported by both a textual analysis of the General Convention, the practice of national, largely US, courts and by the writings of various authors.[12]

Although all of the other States supported the immunity of the Special Rapporteur in the instant case, only some supported the UN position.[13] Others took a more cautious approach, with Italy, the UK and the US all rejecting the proposition that the Secretary-General's determination was binding. Whilst accepting that the Secretary-General's view was highly important and should be given all due weight, the UK and the US argued that determining the scope of immunity was a matter of legal interpretation and should be determined judicially in each particular case.

D. The Opinion of the Court

1. Issues of substance

The Court's first task was to determine what the question before it required. There was a significant difference between the question which the Secretary-General had asked ECOSOC to refer to the Court and the question which ECOSOC had actually asked. Malaysia urged that the real dispute before the Court concerned the Secretary-General's powers to determine the scope of the Special Rapporteur's immunity. It claimed that in the context of Section 30 of the General Convention, ECOSOC was simply a vehicle through which the legal difference between Malaysia and the Secretary-General could be placed before the Court and it could not take an independent position. The Court, however, found it was for ECOSOC to formulate the terms of the question it wished to ask and could therefore consider the applicability of Section 22 of the General Convention to the case of Mr. Cumaraswamy.[14]

The Court found that, as chief administrative officer of the UN, the Secretary-General had a "pivotal role to play" in the determination of whether an expert is entitled to immunity in the circumstances of a given case. It found the Secretary-General's determination was justified in the case on the grounds that it was common practice for Special Rapporteurs to have contact with the media; that the article in *International Commercial Litigation* had repeatedly referred to Cumaraswamy's official capacity as Special Rapporteur; and that he had the implicit approval of the Commission on Human Rights, since he had kept it informed of his working methods and his mandate had recently been extended.

10. Written Statement of Malaysia at §7.12.

11. It pointed to other regimes of immunity in international law in which limitations on the scope of immunity are, as a rule, subject to judicial determination. See Oral Pleadings, 8.12.98, at paras.33–59 (Sir Elihu Lauterpacht).

12. *Ibid*, paras60–114.

13. See written statements of Costa Rica, Germany and Sweden.

14. Malaysia, seeking to rely on a distinction which the Court itself had made in *Mazilu*, had suggested that *applicability* raised the question of whether the provision is applicable, rather how it is to be applied. This was rejected, the Court finding that it was required to give its opinion on the applicability of the provision in the factual circumstances of this particular case.

The Court then turned to the obligations of Malaysia. It found that the difference between Malaysia and the UN had originated in the Malaysian authorities' failure to inform the Malaysian courts of the Secretary-General's finding that the Special Rapporteur's words had been spoken in the performance of his mission and were thus immune. The Secretary-General has the responsibility of safeguarding the interests of the Organisation, and, where appropriate, protecting its agents by asserting immunity. When, however, it turned to the obligations of the local courts, the Court implicitly rejected the UN position as to the conclusiveness of the Secretary-General's determination, by finding:

> When national Courts are seised of a case in which immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.[15]

However the Court found the Malaysian courts had violated the General Convention by refusing to rule on the issue of immunity *in limine litis,* thus nullifying the essence of immunity.

Finally the Court found that Malaysia was obliged to hold Mr Cumaraswamy harmless for the costs imposed on him by the Malaysian courts in connection with the proceedings before them.[16]

2. *Issues of procedure*

This was the first case brought before the Court under Section 30 of the General Convention, by which an advisory opinion shall be accepted as decisive by the parties to a dispute. However it found that the decisive effect which the parties may give to an advisory opinion is a separable issue from the power of the Court to give the opinion, this being governed by the usual rules concerning advisory opinions. First there must be a *legal* question, which in the present case was the interpretation of the General Convention. Secondly those authorised to request an advisory opinion under Article 96(2) of the Charter may only do so in respect of legal questions arising "within the scope of their activities",[17] the functioning of the Commission clearly meeting that criterion in the instant case. Thirdly, the Court will only decline to comply with a request where there are "compelling reasons" that it should.[18] It found none here and thus was able to proceed.

However the importance of the decisive effect to be given to an Advisory Opinion under Section 30 was raised by the Court at the end of its Opinion. The Court found that this implicitly required Malaysia to communicate the Court's Opinion to competent Malaysian courts in order that Malaysia's international obligations be given effect and Mr Cumaraswamy's immunity be respected.

15. Advisory Opinion, para.61.

16. The costs of his failed strike out application had already been taxed against him by the Malaysian courts.

17. See *Mazilu* (*op cit* n.6) and the Court's response to the WHO Request for an advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Rep. 1996, 66.

18. See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, I.C.J. Rep. 1950. 65 at p.71.

E. Comment

1. Findings of substance

At the heart of the case lies the problem of ensuring the independent functioning of an international organisation in an international system still dominated by sovereign States among whom jurisdiction is allocated primarily on the bases of territoriality and nationality. By contrast, international organisations may only perform their functions and activities on territory over which a State exercises jurisdiction and through persons who are linked to a State by the bond of nationality. Immunity is thus the primary protection of international organisations from unwarranted assertions of jurisdiction by States.

However the great proliferation in the numbers of international organisations has coincided with the development of more stringent requirements of openness and accountability of persons exercising governmental functions. In particular, values such as the rule of law, access to justice and due process (at both the national level and now, increasingly, at the international level) emphasise the importance of the judicial determination of the proper balance between the individual and the public interest.

The ICJ decision in *Cumaraswamy* may be seen as a careful attempt to find a way through these countervailing values. The Court also provides some guidance to national courts when faced with a dispute over the proper scope of immunity, though this is clearer in relation to the procedural aspects of the question than on the substantive issue.

2. Issues of procedure

The "binding" advisory opinion may be a useful technique for dispute settlement, but the *Cumaraswamy* Opinion illuminates some potential difficulties with this. In particular the Court's insistence on applying its usual criteria in determining whether or not to comply with the request for an opinion might require some more detailed consideration in the future. Among the criteria is the question as to whether or not it is in keeping with the Court's judicial character to give the opinion requested. Clearly the concern underlying the *Eastern Carelia*[19] principle, i.e. that in a dispute between two States the requirement of consent to the Court's jurisdiction can not be circumvented by resort to an advisory opinion, is distinguishable from a case under the General Convention where States Parties have consented to the Court's jurisdiction by becoming parties to the Convention.[20] However the Court must maintain its judicial character. The *Cumaraswamy* case shows this may be complex in advisory proceedings of this kind for the four following reasons:

First, dispute settlement proceedings under Section 30 may differ from the classic bilateral model of disputes under the Court's jurisdiction in contentious cases. In advisory proceedings the Court often invites the participation of a wide

19. *Status of Eastern Carelia*, Advisory Opinion, 1923, P.C.I.J. Ser.B. No.5

20. Unless the State in question has made a reservation to Section 30 (see *Mazilu, op. cit.* n.6). Rosenne suggests that the *Eastern Carelia* principle is not applicable to disputes between a State and an international organisation (see *The Law and Practice of the International Court 1920–96* (Kluwer, The Hague, 1997) at pp.1019–1020).

variety of States,[21] in stark contrast to the rather more restrictive approach the Court takes to intervention in its contentious cases.

Secondly, the technical means of seisin of the Court in advisory cases differs from that in contentious cases and in the present case this meant that the question posed by ECOSOC differed from that which would have been put by either of the disputant parties themselves.

Thirdly, the proper extent of both the adversarial and investigative aspects of the Court's procedure may be raised. The Court is very much in the hands of the parties which choose which information to put before it, and in this case the pleadings of the primary disputants largely addressed the issue of principle as to the powers of the Secretary-General, rather than the correctness of his findings in the circumstances of the case. In his dissenting opinion Judge Koroma found the case involved a mixed question of fact and law and considered the Court unable to make the factual findings whilst maintaining its judicial character.[22]

Fourthly, though not a contentious issue in the present case, the Court considers the giving of an advisory opinion as its participation in the activities of the UN. Clearly its role in disputes to which the UN is a party requires a somewhat different rationale, stressing its independence from, rather than its participation in, the work of other UN organs.

A final difficulty raised by the case concerns the place to be given to the advisory opinion within the national legal system. Where the Court's findings differ from those of the municipal court, complex and delicate questions may arise as to how to give the advisory opinion effect, without undermining the municipal court's independence and authority. Although Malaysia specifically accepted the decisive nature of the Court's findings,[23] it remains to be seen how it will live up to this commitment given that the local court of first instance has subsequently held that the Opinion had no binding effect upon it.[24]

CHANAKA WICKREMASINGHE

LEGALITY OF USE OF FORCE (*YUGOSLAVIA* v. *BELGIUM*) (*YUGOSLAVIA* v. *CANADA*) (*YUGOSLAVIA* v. *FRANCE*) (*YUGOSLAVIA* v. *GERMANY*) (*YUGOSLAVIA* v. *ITALY*) (*YUGOSLAVIA* v. *NETHERLANDS*) (*YUGOSLAVIA* v. *PORTUGAL*) (*YUGOSLAVIA* v. *SPAIN*) (*YUGOSLAVIA* v. *UNITED KINGDOM*) (*YUGOSLAVIA* v. *UNITED STATES OF AMERICA*): PROVISIONAL MEASURES[1]

A. Introduction

In April 1999 the Federal Republic of Yugoslavia (hereafter Yugoslavia) brought cases before the ICJ against ten NATO member States for illegal use of force.

21. In the *Cumaraswamy* case all States Parties to the General Convention (over 130 States) were invited to furnish information.

22. Dissenting Opinion of Judge Koroma at §14.

23. Statement of the Malaysian Solicitor General, Oral Pleadings, 10.12.98.

24. See UN Human Rights Centre press release of 19.10.99.

1. I.C.J. Rep. 1999. For convenience references will be made to the judgment in *Belgium* v. *Yugoslavia* where there are no significant differences between the judgments.