

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

Advisory Opinion

BACKGROUND

In 1994 Dato Param Cumaraswamy, a Malaysian jurist was appointed Special Rapporteur on the Independence of Judges and Lawyers by the United Nations Commission on Human Rights. Following the publication of an interview that Cumaraswamy had given to a journalist, a number of plaintiffs filed lawsuits for damages against him in Malaysian courts. The plaintiffs claimed that he had used defamatory language against them in a published interview. According to the United Nations Secretary-General, Kofi Annan, Cumaraswamy had spoken in his official capacity of Special Rapporteur and was thus immune from legal process by virtue of the 1946 General Convention on the Privileges and Immunities of the United Nations ("the Convention").¹

This led to a difference of opinion and a dispute arising between Malaysia and the United Nations. As a result, the Economic and Social Council ("ECOSOC") sought an Advisory Opinion from the International Court of Justice on this matter under Article 96(2) of the United Nations Charter and Chapter IV of the Statute of the Court.

HISTORY OF THE DISPUTE

In November 1995 the journal *International Commercial Litigation* published an article that was written by David Samuels entitled "Malaysian Justice on Trial". The publication referred to an interview given by Cumaraswamy that proffered a critical appraisal of the Malaysian judicial system in relation to a number of recent controversial court decisions. As a result, two commercial companies in Malaysia claimed that the article contained defamatory words that had "brought them into public scandal, odium and contempt". The companies separately brought claims against

¹ Approved by the General Assembly on 13 February 1946. For the text see 1 United Nations Treaty Series 15. The General Assembly approved also a separate Convention on the Privileges and Immunities of the Specialised Agencies on 21 November 1947. For the text see 33 United Nations Treaty Series 261.

Cumaraswamy for damages amounting to approximately US\$120 million, “including exemplary damages for slander”.

Acting on behalf of the Secretary-General, the Legal Counsel of the United Nations considered the circumstances of the interview and of the controverted passages of the publication. The Legal Counsel determined that Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers. He determined also that the publication clearly referred to Cumaraswamy’s United Nations capacity and to the Special Rapporteur’s global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations.

On 15 January 1997 the Legal Counsel, in a *note verbale*, “requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur’s immunity from legal process” with respect to that particular complaint. The trial court was the High Court of Malaysia, sitting in Kuala Lumpur. On 20 January 1997, Cumaraswamy filed an application in the High Court to set aside and/or strike out the plaintiffs’ writs on the ground that he had given the interview in the course of performing his mission for the United Nations as Special Rapporteur.

On 7 March 1997 the Secretary-General issued a note which confirmed that “the words which constitute[d] the basis of [the] plaintiffs’ complaint in this case were spoken by the Special Rapporteur in the course of his mission”. The Secretary-General “therefore maintain[ed] that Dato’ Param Cumaraswamy is immune from legal process with respect thereto”, and Cumaraswamy filed this note in support of his application.

In deciding whether particular words or acts of an expert fell within the scope of his or her mission, the Secretary-General could determine the matter exclusively and such determination was conclusive. As a result, the relevant court should have accepted the Secretary-General’s certificate. But despite requests by the Legal Counsel, the Minister for Foreign Affairs did not amend his certificate or supplement it in the manner urged by the United Nations.

Furthermore, despite the representations of the United Nations Office of Legal Affairs, a certificate that was filed by the Minister for Foreign Affairs with the trial court did not refer to the note. In addition, a few days

earlier, the Secretary-General had filed the note with the court but once again, the Certificate of the Minister for Foreign Affairs did not indicate this fact.

On 28 June 1997, the High Court of Malaysia found that it was “unable to hold that the Defendant [was] absolutely protected by the immunity he claims”. Part of the reason given by the judge was that the Secretary-General’s note was merely “an opinion” with scant probative value and no binding force upon the court. She held that the certificate of the Minister for Foreign Affairs “would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant’s status and mandate as a Special Rapporteur and appear[ed] to have room for interpretation”. The High Court therefore ordered that Cumaraswamy’s motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days.

On 8 July 1997, the Court of Appeal dismissed Cumaraswamy’s motion for a stay of execution. At the same time, the Legal Counsel requested Malaysia to do the following:

1. intervene in the proceedings so that the burden of any further defence, including any expenses and taxed costs, could be assumed by the Malaysian Government;
2. hold Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and
3. support a motion to have the High Court proceedings stayed until the United Nations and the Government resolved the issue of immunity definitively, in order to prevent the accumulation of additional expenses and costs and prevent the further need to submit a defence.

The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the Convention that might arise between the United Nations and a member State, as set out in Article VIII(30) of the Convention. He indicated that if Malaysia decided that it could not or did not wish to protect and to hold Cumaraswamy harmless in the indicated manner, it would result in a “difference” arising between the organisation and that State within the meaning of the provisions.

On 10 July 1997, another lawsuit was filed against Cumaraswamy. On 11 July 1997, the Secretary-General issued a note that corresponded to the one issued on 7 March 1997. The Secretary-General also communicated a *note verbale* with essentially the same text to the Permanent Representative of Malaysia to the United Nations. It requested that Malaysia formally present the *note verbale* to the competent Malaysian court. On 23 October and 21 November 1997, new plaintiffs filed third and fourth lawsuits against Cumaraswamy. On 27 October and 22 November 1997, the Secretary-General issued identical certificates indicating Cumaraswamy's immunity.

On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and Malaysia and referred to the possibility of resorting to the Court under Article VIII(30) of the Convention. On 19 February 1998, the Federal Court of Malaysia denied Cumaraswamy's application for leave to appeal, stating that he was neither a sovereign nor a full-fledged diplomat but merely "an unpaid, part-time provider of information".

The Secretary-General then appointed a Special Envoy, Maître Yves Fortier of Canada, to visit Malaysia for negotiations and to reach an out of court settlement. When the negotiations failed after two visits, the Special Envoy advised that the matter be referred to ECOSOC to request an advisory opinion from the Court.

THE COURT'S DECISION

On 29 April 1999 the Court held the following: Article VI(22) of the General Convention on the Privileges and Immunities of the United Nations² was "applicable" to Cumaraswamy. (14 votes to 1)

1. Cumaraswamy was "entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of International Commercial Litigation." (14 votes to 1)
2. The Malaysian government should have informed the Malaysian courts of the finding of the Secretary-General and that these courts

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- should have dealt with the question of immunity as a preliminary issue to be expeditiously decided. (14 votes to 1).
3. Cumaraswamy should be "held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs". (unanimously)
 4. Malaysia now had "the obligation to communicate [the] advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Cumaraswamy's immunity be respected". (13 votes to 2)

Although advisory opinions given by the Court are not generally binding, Article VIII(30) of the Convention provided that those rendered in a dispute between the United Nations and a member State "shall be accepted as decisive by the parties". All proceedings in the Malaysian courts had been stayed pending receipt of the Court's opinion.

THE COURT'S REASONING

The Court stated that ECOSOC's request for an advisory opinion met the conditions set out in the Statute of the Court under Chapter IV because the question asked was a legal one and the matter fell within the scope of ECOSOC's activities.

The Court held that a special rapporteur who was entrusted with a mission for the United Nations must be regarded as an expert on mission within the meaning of Article VI(22) of the Convention. It observed that Malaysia had acknowledged that Cumaraswamy was an expert on mission and that such experts enjoyed the privileges and immunities referred to in the Convention in their relations with States parties, including those of which they were nationals.

The Court considered whether the immunity applied to Cumaraswamy in the specific circumstances of the case. It pointed out that the Secretary-General, as the chief administrative officer of the United Nations, had the primary responsibility and authority to assess whether its agents, including experts on mission, acted within the scope of their functions. Where the Secretary-General so concluded, he had to protect the agents by asserting their immunity. The Court observed that in the present case, the Secretary-General's conclusion was reinforced by the fact that Cumaraswamy had spoken in his official capacity, as shown by the many references in the

publication to his capacity as Special Rapporteur. In addition, in 1997, the Commission on Human Rights had extended Cumaraswamy's mandate for another three years. The Court held:

[I]t need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

On Malaysia's legal obligations, the Court stated that when national courts were seised of a case in which the immunity of a United Nations agent was in issue, they should immediately be notified of any finding by the Secretary-General and give that finding the greatest weight. The Court stated that questions of immunity were preliminary issues that should be expeditiously decided by national courts *in limine litis*, namely, at the very outset of the proceedings. Since the conduct of an organ of a State, including its courts, must be regarded as an act of that State, the Court concluded that Malaysia did not act in accordance with its obligations under international law in the present case.

SEPARATE OPINION OF WEERAMANTRY V-P

Weeramantry V-P agreed with the principles set out in the Court's opinion that national courts should be notified immediately of any finding by the Secretary-General on the immunity of a United Nations agent. The judge found that the Secretary-General's finding carried a presumption of immunity that could only be set aside for the most compelling reasons.

Weeramantry V-P drew attention to the differences between claims to immunity of State functionaries and claims by United Nations functionaries. The reason is that the latter functions in the interests of the community of nations as represented by the United Nations, and not on behalf of any particular State. The jurisprudence that had grown up regarding the rights of domestic courts to determine questions relating to the immunities of the representatives or officials of one State for their actions in another State was therefore not necessarily applicable in its entirety where United Nations personnel were involved. He stated that if a domestic court was free to disregard the determination of the Secretary-General on the immunities of such personnel, many problems would arise in relation to United Nations activity in a number of areas.

Weeramantry V-P stated also that there was a need for uniformity in the jurisprudence on this matter, irrespective of where a particular Special Rapporteur functioned. Otherwise, it would not be conducive to the evolution of a uniform system of international administrative law if rapporteurs could have different privileges depending on where they functioned. This, the judge reasoned, provided the basis for the importance of the conclusiveness of the Secretary-General's determination.

SEPARATE OPINION OF ODA J

Oda J pointed out that ECOSOC had requested the Court to reply on the issue relating to the legal immunity of Cumaraswamy as the Special Rapporteur. Oda J pointed out that this differed from the original question, namely, whether the Secretary-General had exclusive authority to determine Cumaraswamy's entitlement to legal immunity. The judge expressed his apprehension that the Court's advisory opinion seemed to be more concerned with the Secretary-General's competence, rather than with the legal immunity to be granted to Cumaraswamy.

Oda J considered that the issue was whether Cumaraswamy should be immune from the legal process of the Malaysian courts in respect of what Cumaraswamy had stated in the interview that resulted in the defamation suits against him by certain private companies. According to Oda J, the essential issue related not to the words spoken by Cumaraswamy but to whether he had spoken the words in the course of the performance of his mission as Special Rapporteur. The judge found that the contact the Special Rapporteur had with the media on his mandate fell within the general mission of a special rapporteur. Oda J therefore agreed with the Court's finding that the Malaysian courts had an obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*.

Oda J did not agree with the Court's findings in relation to the legal obligations of Malaysia. In his view, Malaysia as a State, was responsible for ensuring that Cumaraswamy enjoyed legal immunity. But whether Malaysia should have informed its national courts of the view of the Secretary-General was not a relevant matter in this respect.

Furthermore, Oda J could not see any such obligation for Malaysia to communicate this advisory opinion to the Malaysian national courts, as it

was obvious that Malaysia, as a State, was bound by this advisory opinion under Article VIII(30) of the Convention.

SEPARATE OPINION OF REZEK J

Rezek J agreed with the majority. He emphasised that the obligation incumbent upon Malaysia was not merely to notify the Malaysian courts of the finding of the Secretary-General, but to ensure that the immunity was respected. In his view, a government ensured respect for immunity by using all the means at its disposal to have that immunity applied within the judicial system. A State should do this in exactly the same way it defended its own interests and positions before the courts. This was because membership of an international organisation required every State, in its relations with the organisation and its agents, to display an attitude that was at least as constructive as that characterised in diplomatic relations.

DISSENTING OPINION OF KOROMA J

Koroma J stated that even if he thought it would help settle the difference between the United Nations and Malaysia by voting in favour of the advisory opinion, he was unable to do so. He cited the Convention, general principles of justice and his own legal conscience as reasons for his decision.

Judge Koroma emphasised that the dispute was not about the human rights of the Special Rapporteur or whether Malaysia was in breach of its obligations under the Human Rights Conventions to which it was a party. Rather, the dispute was about the immunity of the Special Rapporteur from legal process in relation to words spoken by him, and whether the words were spoken in the performance of his mission. If so, the Convention would apply.

Judge Koroma pointed to the differences in the question proposed by the Secretary-General to ECOSOC for submission to the Court for an advisory opinion and ECOSOC'S subsequent reformulation of the question without explanation. While Koroma J recognised ECOSOC's right to formulate the question, he maintained that the Court in exercising its judicial discretion need not answer the question if it was tendentious and left the Court with no option but to give its judicial imprimatur to a particular viewpoint. On the other hand, he held that if the Court was disposed to answer the

question, it should have answered the “real question”. In order to determine if the Convention was applicable, the Court should have inquired into the facts of the case and not relied on the finding of another organ.

Koroma J stressed that the question whether the Convention was applicable to the Special Rapporteur was not abstract. He stated that the answer should have been predicated on whether the words were spoken in the performance of the Special Rapporteur’s mission. This was a question of mixed law and fact that should be determined on its merits. It was only after such a determination that the Court would be in a position to say whether the Convention was applicable. Koroma J was therefore of the opinion that while criteria, like Cumaraswamy’s appointment and the Secretary-General’s finding that Cumaraswamy had acted in the course of his mission, had to be given recognition and treated with respect, they were not conclusive. Consequently, they were insufficient to support a conclusion that the Convention was applicable.

However, Koroma J noted the Court’s observation that “[i]t need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations”, was not without particular importance and significance in this case. He noted also that Malaysia’s obligation under the Convention was one of result and not one of means, and that the Convention did not stipulate any particular method or means of implementation. On the other hand, if the Court held that the Convention was applicable, Malaysia should assume its obligations, including holding the Special Rapporteur harmless for any taxed costs imposed upon him.

Finally, Koroma J agreed with the Court that the rendering of an advisory opinion should be seen as the Court’s participation in the work of the United Nations, to achieve its aims and objective. As such, only compelling reasons should restrain it from answering a request. He considered it equally important that when giving an advisory opinion the Court could not and should not depart from the essential rules guiding its activity as a court.