



INTERNATIONAL COURT OF JUSTICE

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**Lawsuits filed in Malaysian courts against the Special Rapporteur
of the UN Commission on Human Rights on the independence
of judges and lawyers**

**The UN Economic and Social Council requests the Court
to give an advisory opinion**

THE HAGUE, 10 August 1998. On 5 August 1998, the Economic and Social Council (ECOSOC), one of the six principal organs of the United Nations, requested the International Court of Justice (ICJ) to give an advisory opinion on a difference which has arisen between the Organization of the United Nations and the Government of Malaysia out of the interpretation or application of the Convention of 13 February 1946 on the Privileges and Immunities of the United Nations.

That convention is *inter alia* designed to protect various categories of persons at the service of the UN, including "Experts on Mission", from all types of interference by national authorities.

The present case relates to Mr. Dato' Param Cumaraswamy, a Malaysian jurist who was appointed Special Rapporteur on the independence of judges and lawyers in 1994 by the Commission on Human Rights, an organ of ECOSOC.

According to a note addressed on 28 July 1998 to ECOSOC by the UN Secretary-General, Mr. Kofi Annan, Mr. Cumaraswamy currently faces four lawsuits filed in Malaysian courts by different plaintiffs for damages in a total amount of 112 million US dollars following an interview that he gave in November 1995 to International Commercial Litigation, a magazine published in the United Kingdom but circulated also in Malaysia. In that interview, he commented on certain litigations that had been carried out in Malaysian courts. The plaintiffs, among which commercial companies and a lawyer mentioned in the interview, assert that they were defamed by the words of Mr. Cumaraswamy.

After the first lawsuit was filed, the UN Legal Counsel, Mr. Hans Corell, acting on behalf of the Secretary-General, considered the circumstances of the interview and of the controverted passages of the article and determined that Mr. Cumaraswamy had spoken in his official capacity as Special Rapporteur. He stated that accordingly, by virtue of Section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations, Mr. Cumaraswamy was immune from legal process. On 15 January 1997, the Legal Counsel sent a note verbale to the Permanent Representative of Malaysia to the United Nations, requesting the competent Malaysian authorities "to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process".

On 7 March 1997, the Secretary-General issued a note confirming that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission" and that he was "immune from legal process with respect thereto". Identical certificates of the Special Rapporteur's immunity were issued later when new lawsuits were

filed. According to the Secretary-General however, these notes did not lead to any appropriate intervention in the Malaysian courts of the Malaysian Government to ensure respect for Mr. Cumaraswamy 's immunity, nor were they taken into account by these courts.

On 7 November 1997, Mr. Annan advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia, and about the possibility of resorting to the International Court of Justice. He then appointed a Special Envoy, Maître Yves Fortier of Canada, who undertook two official visits to Kuala Lumpur to reach either a negotiated settlement or a joint submission to the Court. During his last visit, from 25 to 28 July 1998, Mr. Fortier concluded that the Government of Malaysia was not going to participate in any of these efforts and recommended that the matter should be referred to ECOSOC to request an advisory opinion from the Court.

Section 30 of the Convention on the Privileges and Immunities of the United Nations provides that if a difference arises between the United Nations on the one hand and a Member State on the other hand, a request shall be made for an advisory opinion to the ICJ. The opinion given shall be accepted as decisive by the parties.

Accordingly, ECOSOC adopted on 5 August 1998 a resolution calling for the Court to give, on a priority basis, 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 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, and on the legal obligations of Malaysia in this case".

The request for an advisory opinion was received on 10 August 1998 by telefax from the UN Secretary-General to the Registry of the Court. The Government of Malaysia has already indicated that it did not oppose the submission of the matter to the Court and that it would make its own presentations to the ICJ.

In his note of 28 July 1998, Mr. Annan stated that he considered it "most important" that the principle be accepted that it is for the Secretary-General alone to determine, with conclusive effect, whether an expert on mission has spoken or written words or performed an act in the course of his mission. He contended that if national courts were to determine whether an expert enjoys immunity, this "would be certain to have a negative effect on the independence of officials and experts, who would then have to fear that at any time, whether they are still in office or after they had left it, they could be called to account in national courts, not necessarily their own, civilly or criminally, for their words spoken or written or acts performed as officials or experts".

ECOSOC was authorized in 1946 by the UN General Assembly to request advisory opinions of the Court on legal questions arising within the scope of its activities. It is the second time that the Council makes use of this authorization.

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