

SEPARATE OPINION OF JUDGE REZEK

[Translation]

The obligation incumbent upon Malaysia is not merely to notify the Malaysian courts of the finding of the Secretary-General, but to ensure that the immunity is respected — A Government will ensure respect for immunity if it uses all the means at its disposal in relation to the judiciary in order to have that immunity applied, in exactly the same way as it defends its own interests and positions before the courts — Membership of an international organization requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations.

Having established the exact scope of the request for advisory opinion (paras. 32-37), the Court examined the facts in the light of the applicable law and concluded that the Special Rapporteur is entitled to immunity from legal process of every kind before national courts. The Secretary-General was therefore correct in ruling as he did. It accordingly served no purpose for the Court to go into the question of whether or not the Secretary-General's power of determination was exclusive and to decide how the State in question should proceed in the event that it contested the Secretary-General's determination.

I share the views of the majority on these points, but I would wish to emphasize that the obligation incumbent upon Malaysia is not merely to notify the Malaysian courts of the finding of the Secretary-General, but to *ensure that the immunity is respected.*

This is in no way to suggest a course of conduct incompatible with the very notion of the independence of the judiciary (which independence, moreover, constitutes the subject-matter of the Special Rapporteur's mission). The Government will ensure respect for immunity if, having endorsed the finding of the Secretary-General, it uses all the means at its disposal in relation to the judiciary (action by the public prosecutor or the advocate-general in the majority of countries) in order to have that immunity applied, in exactly the same way as it defends its own interests and positions before the courts. Admittedly, where the judiciary is an independent power, it is always possible that, notwithstanding the Government's efforts, immunity may finally be denied by the highest judicial instance. In that hypothetical case, just as in the concrete one of the refusal by the Malaysian courts to deal with the question of immunity *in limine litis*, Malaysia would incur international responsibility vis-à-vis the United Nations by reason of the acts of a power other than the executive. That would not be a situation unknown to international law, or indeed a rare occurrence in the history of international relations.

There is no obligation on sovereign States to found international organizations, or to remain members of them against their will. However,

the fact of membership — even in the case of an organization whose objectives are less essential than those of the United Nations, and in fields less salient than that of human rights — requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations between States.

(Signed) Francisco REZEK.
