



INTERNATIONAL COURT OF JUSTICE

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Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights

Court says that Mr. Kumaraswamy is entitled to immunity from legal process for the words spoken by him during an interview

THE HAGUE, 29 April 1999. The International Court of Justice (ICJ) today handed down its Advisory Opinion on the request of the Economic and Social Council (ECOSOC), one of the six principal organs of the United Nations, in the case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.

The Court was of the opinion, by fourteen votes to one, that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations was "applicable" in the case of Dato' Param Kumaraswamy, a Malaysian jurist who was appointed Special Rapporteur on the Independence of Judges and Lawyers by the United Nations Commission on Human Rights in 1994, and that he 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".

Mr. Kumaraswamy currently faces several lawsuits filed in Malaysian courts by plaintiffs who assert that he used defamatory language in the interview and seek damages in a total amount of US\$ 112 million. However, according to the United Nations Secretary-General, Mr. Kofi Annan, Mr. Kumaraswamy spoke in his official capacity of Special Rapporteur and was thus immune from legal process by virtue of the above-mentioned Convention.

ECOSOC, of which the Commission on Human Rights is a subsidiary organ, requested an advisory opinion on the issue from the Court in August 1998, after efforts by the Secretary-General to ensure respect for Mr. Kumaraswamy's immunity had not, in his view, achieved the desired result.

In its Advisory Opinion, the Court held that the Government of Malaysia should have informed the Malaysian courts of the finding of the Secretary-General and that these courts should have dealt with the question of immunity as a preliminary issue to be expeditiously decided. It unanimously stated that Mr. Kumaraswamy should be "held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs".

The Court also found, by thirteen votes to two, that the Government of 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 [Mr.] Kumaraswamy's immunity be respected".

Although advisory opinions given by the Court are not generally binding, Article VIII, Section 30, of the above-mentioned Convention provides that those rendered in the event of a difference between the United Nations and a member State "shall be accepted as decisive by the parties". All proceedings in the Malaysian courts have been stayed pending receipt of the opinion.

Reasoning of the Court

The Court first states that ECOSOC's request for an advisory opinion meets the conditions set out in the Statute. The question asked is a legal one and it falls within the scope of the activities of ECOSOC. The Court thus has jurisdiction to answer it.

The Court then recalls that a special rapporteur who is entrusted with a mission for the United Nations must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations. It observes that Malaysia has acknowledged that Mr. Kumaraswamy is an expert on mission and that such experts enjoy the privileges and immunities provided for under the Convention in their relations with States parties, including those of which they are nationals.

The Court goes on to consider whether the immunity applies to Mr. Kumaraswamy in the specific circumstances of the case. It points out that the Secretary-General, as the chief administrative officer of the United Nations, has the primary responsibility and authority to assess whether its agents, including experts on mission, acted within the scope of their functions and, where he so concludes, to protect these agents by asserting their immunity. In doing so, the Secretary-General, in accordance with the provisions of the above-mentioned Convention, protects the mission with which the expert is entrusted. The Court observes that, in the present case, the Secretary-General was reinforced in his view that Mr. Kumaraswamy had spoken in his official capacity by the fact that he was referred to several times in the article in International Commercial Litigation in his capacity as Special Rapporteur and that, in 1997, the Commission on Human Rights had extended his mandate for another three years, thereby acknowledging that he had not gone beyond his functions by giving the interview.

Turning to Malaysia's legal obligations, the Court states that, when national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General and give that finding the greatest weight. Questions of immunity are preliminary issues which must be expeditiously decided by national courts in limine litis (at the very outset of the proceedings). Since the conduct of any organ of a State, including its courts, must be regarded as an act of that State, the Court concludes that the Government of Malaysia did not act in accordance with its obligations under international law in the present case.

Composition of the Court

The Court was composed as follows: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek; Registrar Valencia-Ospina.

Vice-President Weeramantry, Judges Oda and Rezek appended separate opinions to the Advisory Opinion. Judge Koroma appended a dissenting opinion.

A summary of the Advisory Opinion is given in Press Communiqué No. 99/16bis to which a summary of the opinions is annexed. The full text of the Advisory Opinion, the opinions and the Press Communiqués are available on the Court's website (<http://www.icj-cij.org>).

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