

**DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS
OF A SPECIAL RAPPOREUR OF THE COMMISSION ON HUMAN
RIGHTS: COMMENTS BY THE GOVERNMENT OF MALAYSIA ON
THE ANSWERS ON BEHALF OF THE SECRETARY-GENERAL OF
THE UNITED NATIONS TO THE QUESTIONS ASKED BY JUDGES
GUILLAUME AND KAROMA**

I. With respect to the answer to the question asked by Judge
Guillaume:

1. The Government of Malaysia observes that in the summary record of Mr. Zacklin's statement on 5 August 1998 (E/1998/SR.49, p.3) there appears the following: "Mr. Zacklin stressed the importance of retaining the reference to the circumstances of the case in operative paragraph 1, since the phrasing was not binding on the other party, which had in any case approved the text" (emphasis supplied).

2. The Government of Malaysia foresees the possibility that the words underlined in the above-cited extract may be read as indicating that the Government of Malaysia had approved the amended text of the question as presented to the ECOSOC in E/1998/L.49. Such a reading would not correspond with the facts. The Government of

Malaysia at no time approved the text of the question that appeared in E/1998/L.49 or as eventually adopted by ECOSOC and submitted to the Court. Malaysia never did more than "take note" of the question as originally formulated by the Secretary-General and submitted to the ECOSOC in document E/1998/94 (see summary record of the statement made by Dato' Hasmi, Observer for Malaysia, on 31 July 1998 (E/1998/SR.48, p. 2). At that same meeting Mr. Hasmi was reported as saying: "..... the Government of Malaysia was not going to participate in preparing a joint submission to the current session of the Council" (ibid, p. 3).

3. The Government of Malaysia thus finds in the Summary Records of the relevant ECOSOC meetings¹ full confirmation of the statement made to the Court on its behalf that only the draft question originally submitted by the Secretary-General to ECOSOC in document E/1998/94 was appropriate for submission to the Court as being limited to the difference which had actually arisen between the Secretary-General and Malaysia. Correspondingly, Malaysia never consented to the amended form of question which was ultimately

¹ These documents are dated 18 and 15 December 1998 respectively. The Government had never seen them before they were communicated to it by the Registrar of the Court on 23 December 1998.

submitted by ECOSOC to the Court and which, so the Secretary-General has argued, extended the question beyond that of the degree of authority to be accorded to the Secretary-General's certificate to that of whether the Special Rapporteur had been acting in the course of the performance of his mission.

4. The Government of Malaysia affirms its submission that ECOSOC did not have the power to expand the question put to the Court from a "legal question", as foreseen in Article 65 of the Court's Statute to a question which, as identified by the Secretary-General, was "a question of fact which depends upon the circumstances of each particular case". (See paragraph 6 of the answer to the question by Judge Koroma).

II. With respect to the answer to the question by Judge Koroma

5. The Government of Malaysia respectfully submits that the honourable Judge's question is not relevant to the only question that it is within the power of the Court to answer, namely, the question of the degree of authority to be attached to the Secretary-General's

certificate. The Government of Malaysia will, therefore, refrain from commenting on the substance of the Secretary-General's response.

6. Nonetheless, without departing from this position, the Government of Malaysia draws attention to certain statements made in paragraphs 6 and 7 of the Answer.

7. In the last sentence of paragraph 6 there appear the words: "...the Secretary-General noted that". Similarly, in the first sentence of paragraph 7 there appear the words: "... the Secretary-General then determined that"; in the second sentence the words: "..... the Secretary-General noted that ..."; and in the third sentence the words "..... the Secretary-General also considered and concluded".

8. In each of these expression the past tense of the verb has been used, as if these actions - "noted", "determined", "considered" and "concluded" - had actually taken place. However, the Government of Malaysia is unable to find in the documents before the Court any record of these processes having taken place. At most, the processes here described are ones that either went on in

an unstated manner in the mind of the Secretary-General at some unspecified date or they are processes which are retrospectively being attributed to the Secretary-General in order to bolster the argument advanced on his behalf that the acts of the Special Rapporteur occurred in the course of the performance of his mission. Either way, the absence of any such explanations from the certificate actually issued at the relevant times by the Secretary-General taints them with a degree of arbitrariness and deprives them of such persuasive effect as perhaps they might otherwise have had.