

WRITTEN STATEMENT
OF THE
GOVERNMENT OF THE REPUBLIC OF COSTA RICA

I. Introduction

On August 5, 1998, the United Nations Economic and Social Council ("ECOSOC") adopted, by consensus, a decision requesting,

on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations ["Charter"] and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice ["Court"] on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations ["General Convention"] 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 United Nations Secretary-General, and on the legal obligations of Malaysia in this case.¹

Upon receipt of the request, the International Court of Justice, by Order of August 10, 1998, decided "that the United Nations and the States which are parties to the [General] Convention [were] likely to be able to furnish information on the question submitted to the Court," and fixed October 7, 1998 as the time limit within which written statements on that question may be submitted to the Court in accordance with Article 66, paragraph 2, of its Statute. The Republic of Costa Rica submits the present statement pursuant to that Order for the reasons set forth below.

The question submitted to the Court for an advisory opinion is not of a merely technical nature, nor is it important solely to Mr. Cumaraswamy. To the contrary, it is decisive for the effective functioning of the United Nations human rights mechanisms and thus is of crucial importance to the entire United Nations system and to all Member States. The Court's advisory opinion in this case will have a definitive impact on the future of human rights monitoring and implementation throughout the world.

As a party to the General Convention as well as to the Statute of the Court,² the Republic of Costa Rica has a genuine legal interest in the correct interpretation and application of that Convention by the Court. Moreover, the firm and prominent commitment of the Republic of Costa Rica to the cause of human rights internationally, particularly including the establishment of effective mechanisms to protect and implement such rights, has given it unique experience which moves it to express itself in this all-important case. The promotion of human rights constitutes an historical and continuing priority of Costa Rican national policy. As one of the founders of the United Nations, Costa Rica participated enthusiastically in the drafting of the Universal Declaration of Human Rights. The capital of Costa Rica, San José, long has been the seat of the Inter-American Court of Human Rights, the Inter-American Institute for Human Rights, the University for Peace, the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders ("ILANUD"), and a number of well-known non-governmental human rights organizations. Indeed, the American Convention on Human Rights, the human rights convention of the Western Hemisphere, is commonly known as the *Pact of San José*.³ It is of particular note that Costa Rica's former

president, Dr. Oscar Arias Sánchez, was awarded the Nobel Peace Prize in 1987 for his pivotal role in bringing peace to Central America.

More recently, the city of San José in January 1993 hosted a key regional meeting preparatory to the World Conference on Human Rights held in Vienna later that year. That preparatory meeting resulted in the adoption of the San José Declaration in which the Latin American and Caribbean States reaffirmed their commitment to promoting and guaranteeing human rights, as well as their support for United Nations human rights institutions and mechanisms.⁴ Moreover, Costa Rica takes special pride in having proposed, as early as 1965, the establishment of the office of the United Nations High Commissioner for Human Rights, an idea that, many years later, in 1993, received the unanimous support of the World Conference on

Human Rights,⁵ and was promptly implemented by the General Assembly.⁶ Finally, Costa Rica's interest in the present case derives from its long-standing membership in the Commission on Human Rights and from the fact that a number of distinguished nationals of Costa Rica have served the Commission as Chairman and as special rapporteurs.⁷

II. Factual Background

In its decision requesting the Court's advisory opinion, ECOSOC specifically asked the Court to "[take] into account the circumstances set out in paragraphs 1-15 of the Note by the Secretary-General."⁸ The Republic of Costa Rica, therefore, consistent with its support of the adoption by consensus of ECOSOC's decision, refers to paragraphs 1-15 of the Note by the Secretary-General⁹ for the relevant facts of this case. In addition, the Republic of Costa Rica wishes to bring to the Court's attention the text of the article containing statements attributed to Mr. Cumaraswamy which gave rise to the civil suits in the Malaysian courts presenting the issue of immunity on which the Court has been requested to opine.¹⁰

III. The Court's Jurisdiction

Pursuant to Article 96, paragraph 2, of the Charter,

[o]ther organs of the United Nations [than the General Assembly and the Security Council]. . . , which may at any time be so authorized by the General Assembly, may . . . request advisory opinions of the Court on legal questions arising within the scope of their activities.

By Resolution 89 (I) of December 11, 1946, the General Assembly authorized ECOSOC "to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council." The question presented in the instant case is patently a legal one as it involves the interpretation of an international convention in order to determine its applicability and the legal obligations of a State Party to that convention.¹¹ Further, it arises within the scope of the activities of ECOSOC, of which the Commission on Human Rights ("Commission") is a functional component entrusted with preparing recommendations and reports on matters concerning human rights.¹² In fulfilling its task, the Commission regularly appoints special rapporteurs such as Mr. Cumaraswamy to undertake necessary studies on specific subjects and to report their findings to the Commission.¹³ Thus, legal questions relating to the privileges and immunities to which a special rapporteur is entitled while engaged in these activities arise within the scope of the activities of the Commission and its parent body, ECOSOC.

Accordingly, the Court has jurisdiction under Article 96, paragraph 2, of the Charter to render the requested advisory opinion.

Although the Court under its Statute has discretion not to entertain a request for an advisory opinion,¹⁴ it consistently has given its opinion in response to such requests unless there are "compelling reasons" for it not to do so.¹⁵ ECOSOC's request here for an advisory opinion presents no such compelling reason. To the contrary, it presents compelling reasons for the Court to act affirmatively on ECOSOC's request and to do so on a priority basis. First, the question presented is decisive for the effective functioning of United Nations human rights mechanisms. Second, the requested advisory opinion is necessary to give effect to Article VIII, Section 30, the dispute settlement provision of the General Convention, according to which:

All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

(Emphasis added.) Failure of the Court to give an advisory opinion as requested would deprive Section 30 of all utility by upsetting its carefully crafted balancing of the necessary privileges and immunities of the United Nations with Member States' sovereignty.

IV. The Applicability Of Article VI, Section 22, Of The General Convention

A. The General Convention Applies To Mr. Cumaraswamy As Special Rapporteur Pursuant To This Court's Advisory Opinion In *Mazilu*

The Court, in its advisory opinion in the so-called *Mazilu* case, already has taken the view that Article VI, Section 22, of the General Convention¹⁶ applies to special rapporteurs of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of ECOSOC's Commission on Human Rights.¹⁷ The Court relied on the "evident" purpose of Section 22 "to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them `such privileges and immunities as are necessary for the independent exercise of their functions'."¹⁸ The Court's determination concerning special rapporteurs of the Sub-Commission of the Commission on Human Rights applies *a fortiori* to special rapporteurs of the Commission on Human Rights as the Sub-Commission's parent body.

Moreover, the Court determined in *Mazilu* that the immunities contained in Article VI of the General Convention apply as regards the State of which the expert is a national, particularly considering that Article IV expressly excludes any immunity for a representative of a Member State in the territory of his State of nationality, whereas Article VI contains no parallel provision.¹⁹ The Court also was persuaded that since certain States had felt it necessary to make reservations to certain provisions of Article VI regarding their own nationals, absent such a reservation, the privileges and immunities conferred by Article VI of the General Convention may be invoked by an expert on mission against the State of his nationality.²⁰ Malaysia acceded to the General Convention in 1957 without entering any reservation to it

whatsoever,²¹ and hence Mr. Cumaraswamy's Malaysian nationality does not affect his immunity from legal process in the Malaysian courts.

B. The "Words" And "Acts" Of Mr. Cumaraswamy As To Which Article VI, Section 22, Of The General Convention Is Invoked Were "Spoken" And "Done" By Him "In The Course Of The Performance Of [His] Mission"

Mr. Cumaraswamy was appointed as the Commission's Special Rapporteur on the Independence of Judges and Lawyers in 1994.²² His mandate was extended for a further period of three years in 1997.²³ That mandate (framed prior to his appointment) is:

- (a) To inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;
- (b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;
- (c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.²⁴

For the reasons set forth below, the granting of interviews to the media on the subject of his mandate, such as occurred in this case, was "in the course of the performance of [Mr. Cumaraswamy's] mission" as Special Rapporteur, and hence was covered by Article VI, Section 22, of the General Convention.

1. It Is A Long-Standing And Accepted Practice Of Special Rapporteurs To Disseminate Information As One Of The Means Of Carrying Out Their Mandate To Promote Increased Compliance With Human Rights Standards

Special rapporteurs regularly publish reports on their findings and issue public statements.²⁵ No special rapporteur (including Mr. Cumaraswamy) has ever been regarded by the United Nations as thereby acting outside his or her mandate, and no special rapporteur other than Mr. Cumaraswamy ever has been subjected to municipal judicial process for thus diligently pursuing it.²⁶ Pursuant to Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, which codifies customary international law on the subject,²⁷ this well-established "subsequent practice" in the application of the Charter and the General Convention is relevant for the interpretation of Section 22. A practice thus deeply embedded in the performance of their mission by special rapporteurs of the Commission, and which previously has encountered no objection, cannot now be found to lie outside the proper bounds of "the course of the performance of their mission."

2. The Actual Practice As Relates To Mr. Cumaraswamy's Specific Mission Makes Clear That In His Particular Case Statements To The Media Have Been Repeatedly Approved As A Practice Appropriate To Such Mandate

In keeping with the United Nations practice just discussed, Mr. Cumaraswamy consistently has interpreted his mandate as encompassing promotional activities,²⁸ including acceptance of

invitations to speak publicly about his work at numerous fora around the world.²⁹ The Commission in turn consistently has taken note, without any objection or complaint, of Mr. Cumaraswamy's annual reports on, *inter alia*, his methods of work and, in particular, specific promotional activities.³⁰ In particular, the Commission has reacted to each of Mr. Cumaraswamy's four annual reports by *noting with appreciation* his determination

to achieve as wide a dissemination as possible of information about existing standards relating to the independence and impartiality of the judiciary and the independence of the legal profession in conjunction with the publications and promotional activities of the Centre for Human Rights.³¹

The Court should note in particular that, consistent with this practice,³² Mr. Cumaraswamy on August 23, 1995, more than two months before the publication in November 1995 of the article in *International Commercial Litigation* which gave rise to this case, issued the following press statement on the same subject:

Complaints are rife that certain highly placed personalities in Malaysia including those in the business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.³³

The press statement further made clear that it was given in the context of Mr. Cumaraswamy's mission:

Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible, at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance.³⁴

The Commission subsequently *took note* of Mr. Cumaraswamy's report to it reciting this statement, and *noted with appreciation* his determination "to achieve as wide a dissemination as possible of information." Such approval can only be taken as specific confirmation that, in making such statement (and the subsequent similar one to *International Commercial Litigation*), Mr. Cumaraswamy acted "in the course of the performance of [his] mission." The Commission gave similar approval to Mr. Cumaraswamy's further report, which specifically explained that the statements attributed to him in *International Commercial Litigation* had been made in his capacity as Special Rapporteur.³⁵ Again, the Commission's response amounts at least to an implicit endorsement of the Special Rapporteur's position. This is further, and emphatically, confirmed by the fact, as is recounted in paragraph 4 of the Note by the Secretary-General, that following Mr. Cumaraswamy's third Report to the Commission, in which he described the civil litigation against him in Malaysian courts to which the instant issue of immunity relates,³⁶ the Commission renewed his mandate for a further three years.³⁷ The Commission thus has established a specific record of practice in Mr. Cumaraswamy's case that is consistent with and confirmatory of the general practice of United Nations special rapporteurs to issue statements to the press in the course of performing their missions.³⁸ Pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, this unchallenged and consistent practice is authoritative, if not absolutely determinative.

3. The Special Rapporteur's Statements To The Press Were Necessary For The "Establishment Of . . . Contacts Which May Be Useful For The Preparation . . . Of [His] Report[] To The [Commission]"

As this Court recognized in *Mazilu*, the mandate of a special rapporteur constitutes a "research mission," which requires the compilation of materials and cannot be accomplished in isolation from the outside world.³⁹ This Court held, therefore, that the immunities of Article VI, Section 22, of the General Convention apply to special rapporteurs such as Mr. Cumaraswamy, "in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the [Commission]."⁴⁰ It is, moreover, plain common sense that Mr. Cumaraswamy's statements to the media, on the subject of his mandate, were objectively necessary for the establishment of such contacts. Members of the public cannot seriously be expected to "transmit[]" any "substantial allegations"⁴¹ to Mr. Cumaraswamy until they have been made aware of his activities, including the information he is receiving. Only then will they know to whom they may address complaints and to whom they may safely volunteer further information regarding attacks on the independence of judges and lawyers. Simply put, these steps were necessary for "the establishment of . . . contacts which [were] useful for the preparation" of Mr. Cumaraswamy's reports and, therefore, fall within the immunities created by Article VI, Section 22, of the General Convention and recognized by this Court in *Mazilu*.

V. The Legal Obligations Of Malaysia In This Case

A. Municipal Courts Of States Parties To The General Convention Are Legally Obligated To Give The Secretary-General's Certificates Conclusive Effect

The position of the Secretary-General⁴² that it is for him alone to determine, with conclusive effect in municipal courts of States Parties to the General Convention, whether an expert on mission has acted in the course of the performance of his or her mission, is supported by the terms of the General Convention, particularly considering its object and purpose, as well as the accepted consistent practice of the United Nations.⁴³

Article 105 of the Charter contemplates that the immunities to be granted by the General Convention to United Nations officials (and by extension to experts on mission) are to be such as are necessary for the independent exercise of their functions in connection with the United Nations.⁴⁴ Thus, it is for the United Nations, and not for individual States Parties, to determine whether experts are in fact acting "in the course of the performance of their mission" in any given circumstance.⁴⁵ In fact, by "agreeing to accord privileges and immunities to their own nationals for the purpose of enabling them to carry out their functions when appointed as experts on missions . . . Member States by necessary implication conceded to the United Nations a right in good faith" to determine whether or not they have acted in performance of their missions at any given point.⁴⁶

If, contrary to these authorities, the municipal courts of all 139 States Parties to the General Convention retained the authority to determine the scope of an expert's mission and, thus, his immunity, the United Nations would lose control over its internal affairs and, more importantly, the independence that Article VI seeks to protect. Such an approach is untenable. Indeed, on the facts of this case it becomes virtually inconceivable, for it would contemplate the appointment of a special rapporteur to investigate the independence of the municipal judiciary (and advocates), while allowing the very subjects of the special rapporteur's

investigation to determine the scope of his immunity for statements relating to their independence. Such a role for municipal courts could not possibly guarantee the "independent exercise" of functions by the Commission's special rapporteurs. To the contrary, as the Commission's special rapporteurs themselves already have remarked, such interference would constitute "an attack on the entire system of the human rights mechanisms."⁴⁷

It is precisely to preclude such municipal impairment of immunities that the General Convention provides an exclusive dispute settlement procedure in Article VIII, Section 30, requiring that a binding advisory opinion by the Court "*shall*" be sought as to "[a]ll differences arising out of the interpretation or application of the" General Convention. (Emphasis added.) By using the words "all" and "shall," Section 30 clearly excludes municipal courts from the settlement of disputes arising under the General Convention.

In this respect, issues of immunity under the General Convention clearly are, and must be, treated differently than, for example, issues of immunity of bilaterally accredited diplomatic and consular officers. The latter areas enjoy no exclusive dispute settlement mechanism.⁴⁸ There it perforce is the practice of national courts to determine independently whether a party fulfills the requirements of immunity. The consequences of this are, by comparison, tolerable for, as the Court has pointed out,⁴⁹ the law of diplomatic and consular immunity is a self-contained regime that derives its effectiveness, and hence its protection, from the inherent principle of reciprocity, which likewise more securely guarantees a uniform application of the law by States. The same is not true as regards officials of the United Nations. One commentator⁵⁰ has made this point quite trenchantly against the background of the Court's statement in the *Asylum* case,⁵¹ in which it denied Colombia the right unilaterally and definitively to determine whether a certain offense by a refugee qualified for asylum:

When we apply the Court's statements to the issue of whether an organization can make a unilateral and definitive qualification of the nature of its activities, it must be pointed out that the Court in its conclusion relied heavily on the principle of the territorial sovereignty of States and the equal rights enjoyed by these particular subjects of international law. But international organizations lack sovereignty and have no territory of their own. Because their rights can hardly be said to equal those enjoyed by States, international organizations need special protection. One element of protection should be the organization's right of unilateral and definitive qualification of its activities. This consideration applies also in case the organization has a direct dispute with a private individual instead of with a State, because it will still be the courts, as (independent) organs of States, which would be given the right to ultimately qualify organizational immunities, thereby opening themselves up to frivolous suits against international organizations.

Contrary to what the Court stated with regard to States, the absence of an explicit provision should not be interpreted to deny an organization's inherent right of unilateral and definitive qualification of its activities. The argument of prevention of abuse does not weigh as heavily in the case of international organizations as it does in that of States, because the former remain under the collective control of the member States and internal mechanisms exist, particularly in the plenary organ of the organization, for Members who want a review, on their own initiative or on behalf of their citizens, of a certain practice of the organization.⁵²

Finally, the position of the Secretary-General is consistent with the holding of the Court that "when the Organization takes action which warrants the assertion that it was appropriate for

the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."⁵³

B. Alternatively, The Municipal Courts of States Parties To The General Convention Are Legally Obligated To Treat The Issue of Immunity Exeditiously And As A Preliminary Matter

Should the Court find that municipal courts of States Parties to the General Convention are not obligated to accept the Secretary-General's certificates as conclusive, then such courts are obligated at a minimum to deal with the issue of immunity expeditiously and as a preliminary matter. Article VI, Section 22, of the General Convention provides "immunity from legal process of every kind" and not merely from liability. As such, it necessarily contemplates that an expert on mission should not be subjected to *any* legal process, except upon a final determination (including by advisory opinion of this Court) that he or she is not, under the circumstances, entitled to immunity. Thus, resolution of such an issue, where it is legitimately disputed, may not be made to await conclusion of a municipal trial on the merits of the very matter to which the plea of immunity is addressed. To give immunity any meaning, it must be dealt with fully and definitively at the outset of the litigation in respect of which it is invoked.

C. The Government Of Malaysia Was Legally Obligated To Respect The Exclusivity Of The Dispute Resolution Procedures Of Article VIII, Section 30, Of The General Convention

The Malaysian Government's obligation to comply with the dispute resolution procedures of Article VIII, Section 30, of the General Convention required it, upon determining not to honor the claim of immunity in respect of the Special Rapporteur, expeditiously to inform the Secretary-General that a difference had arisen within the meaning of Article VIII, Section 30. An advisory opinion from this Court, in accordance with Article VIII, Section 30, could, then, promptly have been requested (and proceedings stayed, *see* D. below, pending the conclusion of this Court's advisory proceeding). The Malaysian Government's failure to do so, compounded by its submission to its municipal courts of statements inconsistent with the certificates of the Secretary-General and the continuation of proceedings against the Special Rapporteur, was in conflict with Malaysia's obligations under the General Convention.

D. Malaysia Is Legally Obligated To Ensure That All Judgments, Orders and Proceedings Before The Malaysian Courts In This Matter Are Stayed Pending Receipt Of The Court's Advisory Opinion

Under Article VIII, Section 30, of the General Convention, the parties to a "difference" must respect this Court's exclusive jurisdiction. Therefore, from the moment that a "difference" arises until this Court renders its advisory opinion, the parties must suspend any municipal legal proceedings that raise an issue falling within this Court's exclusive competence. This follows from the object and purpose of Section 30, which seeks to prevent inconsistent applications of the General Convention by the municipal courts of its 139 States Parties, and to ensure its uniform implementation.

E. Malaysia Was Under A Legal Obligation To Ensure That The Presiding Judge Of The Malaysian Court of Appeal Recused Himself

The judge presiding over the decision of the Court of Appeal in Kuala Lumpur on Mr. Cumaraswamy's substantive appeal on August 20 to 21, 1997, Justice Gopal Sri Ram, earlier

sat in a case that was a subject of Mr. Cumaraswamy's investigation.⁵⁴ For that reason, his recusal was sought by Mr. Cumaraswamy and, in fact, demanded by the most fundamental principles of procedural fairness. As a consequence of Malaysia's obligation to respect Mr. Cumaraswamy's immunity under the General Convention, Malaysia was obligated, at the very least, to ensure that any determinations be made by an undeniably disinterested jurist, and not by a putative subject of Mr. Cumaraswamy's investigation. To most fully ensure achievement of that end, the requested recusal should have been granted.

F. The Malaysian Government Is Legally Obligated To Pay Damages For All Costs Incurred By Mr. Cumaraswamy In The Course Of The Legal Proceedings Before The Malaysian Courts

Malaysia is internationally responsible for the breach of international legal obligations by its organs, which includes both the Government and its courts. As a result of Malaysia's violations of its international obligations under the General Convention, Mr. Cumaraswamy has incurred substantial liabilities in court-ordered costs and legal fees. Malaysia, therefore, is obligated to compensate him for these financial losses. Should the United Nations, in the meantime, have assumed this financial burden for Mr. Cumaraswamy, Malaysia's obligations would be toward the United Nations instead.⁵⁵

G. Malaysia Is Legally Obligated To Adjust Its Legislation To Conform To The General Convention Insofar As It Presently Deviates From That Convention

Under the Final Article, Section 34, of the General Convention, Malaysia is obligated to "be in a position under its own law to give effect to the terms of this convention." If the Malaysian courts interpret Malaysia's municipal implementing legislation to be different in scope than the General Convention, as they already have done in the case of Mr. Cumaraswamy,⁵⁶ then Section 34 obligates Malaysia to take the action necessary to bring that legislation into line with the General Convention.

VI. Conclusion

Article VI, Section 22, of the General Convention applies in the case of Mr. Cumaraswamy as Special Rapporteur of the Commission on Human Rights to the words and acts attributed to him in the article entitled *Malaysian Justice on Trial* that appeared in the November 1995 issue of *International Commercial Litigation*. As a result, Mr. Cumaraswamy is immune from legal process in regard to those words and acts. Malaysia's legal obligations in this case are to accept the conclusive effect of the Secretary-General's certificates; alternatively, to treat the issue of immunity expeditiously and as a preliminary matter; to respect the exclusivity of the dispute resolution procedures of Article VIII, Section 30, of the General Convention; to ensure that all judgments, orders and proceedings in its courts are stayed pending the Court's advisory opinion; to have ensured that the presiding judge of the Malaysian Court of Appeal recused himself in the matter giving rise to this case; to pay Mr. Cumaraswamy (or the United Nations, as the case may be) damages, including all court-ordered costs and legal fees, incurred as a result of having to defend himself in Malaysian courts; and to conform its legislation to the General Convention insofar as it presently deviates from it.

Respectfully submitted,

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October 7, 1998

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1 ECOSOC Decision 1998/297 of Aug. 5, 1998, *as available on* <<http://www.un.org>>.

2 Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1946-1947 U.N.T.S. 15. The Republic of Costa Rica acceded to the General Convention on October 26, 1949. *Multilateral Treaties Deposited with the Secretary-General*, U.N. Doc. ST/LEG/SER.E, *as available on* <<http://www.un.org/Depts/Treaty>>. Additionally, the Republic of Costa Rica has been a party to the Statute of the International Court of Justice since November 2, 1945. *Id.*

3 American Convention on Human Rights, signed at San José, Costa Rica, Nov. 22, 1969, *reprinted in* 9 I.L.M. 673 (1970).

4 *See Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, U.N. Doc. A/CONF.157/LACRM/15 - A/CONF.157/PC/58 (Feb. 11, 1993), *as available on* <<http://www.unhchr.ch>>.

5 Vienna Declaration and Programme of Action, adopted by consensus by the World Conference on Human Rights on June 25, 1993, U.N. Doc. A/CONF.157/23 (July 12, 1993), at para. 18, *as available on* <<http://www.unhchr.ch>>.

6 *See* GA Resolution 48/141 of Dec. 20, 1993, *as available on* <gopher://gopher.undp.org> (establishing the post of United Nations High Commissioner for Human Rights).

7 Costa Rica's membership in the Commission on Human Rights totals 15 years (1964-67, 1975-77, 1980-1988, 1992-94). United Nations High Commissioner for Human Rights, *United Nations Commission on Human Rights Membership* (1999), as available on <<http://www.unhchr.ch>>. Mr. Fernando Volio Jiménez was elected Chairman of the Commission for its 22nd session in 1966. United Nations High Commissioner for Human Rights, *Bureau of the United Nations Commission on Human Rights (1947-1998)*, as available on <<http://www.unhchr.ch>>. The Second Vice President of the Republic of Costa Rica, Elizabeth Odio Benito, has served as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

8 ECOSOC Decision 1998/297 of August 5, 1998, *supra* n. 1.

9 *Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers*, Note by the Secretary-General, U.N. Doc. E/1998/94 and Add.1, *reprinted in Request for Advisory Opinion of Aug. 7, 1998*.

10 *Malaysian Justice on Trial*, International Commercial Litigation, Nov. 1995, at 10, submitted herewith as Exhibit 1.

11 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, I.C.J. Reports 1989, 177, at 187.

12 ECOSOC created the Commission pursuant to Articles 55 (c) and 68 of the Charter by Resolution 5 (I) of February 16, 1946. U.N. ESCOR, 1st Sess., at 163. The Commission's mandate is contained in ECOSOC Resolution 9 (II) of June 21, 1946. U.N. ESCOR, 2nd Sess., at 400.

13 *See Applicability, supra* n. 11, at 196-97 (on the practice of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights to appoint special rapporteurs).

14 Under Article 65(1) of the Statute the Court "may give" ("peut donner") an advisory opinion.

15 *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, 10, at para. 14; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, I.C.J. Reports 1989, 177, at 191; *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, 25, at paras. 32-33; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, 16, at 27; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion*, I.C.J. Reports 1962, 151, at 155; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO, Advisory Opinion*, I.C.J. Reports 1956, 77, at 85-86.

16 Article VI, Section 22, of the General Convention provides in relevant part:

Section 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:

...

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of any kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.

17 *Applicability . . . , supra* n. 11, at 197, para. 55.

18 *Id.* at 194, para. 47. The Court interpreted Section 22 also in the context of Sections 23 and 26 of the General Convention and Article 105 of the Charter. *Id.* at 192-93, paras. 41-43.

19 *Id.* at 195, para. 51.

20 *Id.*

21 See *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 2.

22 Commission on Human Rights Resolution 1994/41 of Mar. 4, 1994, *reprinted in* 1994 Y.B. Comm'n H.R. 135, *endorsed by* ECOSOC Decision 1994/251 of July 22, 1994, U.N. ESCOR, Subst. Sess., Supp. No. 1, at 80, U.N. Doc. E/1994/94.

23 Commission on Human Rights Resolution 1997/23 of Apr. 11, 1997, *as available on* <<http://www.unhchr.ch>>, *endorsed by* ECOSOC Decision 1997/246 of July 22, 1997, U.N. ESCOR, Subst. Sess., at 256, U.N. Doc. E/1997/23.

24 Commission on Human Rights Resolution 1994/41 of Mar. 4, 1994, *supra* n. 22, at op. para. 3.

25 See, e.g., *Special Rapporteur on Burundi Strongly Condemns "Unspeakable Acts" Near Bujumbura on 1 and 6 January*, U.N. Press Release HR/98/1, Jan. 7, 1998 (reporting on public statements made by the special rapporteur); *Special Rapporteur for Iraq Expresses Concern Over Killings of Shi'a Religious Leaders*, U.N. Press Release HR/98/45, July 2, 1998 (reporting on and quoting from a public statement issued by the special rapporteur *condemning* assassinations by Iraqi officials); *Press Statement by the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Sudan*, U.N. Press Release HR/97/83, Dec. 8, 1997 (quoting a press statement read by special rapporteur at a press conference); *Statement of the Special Rapporteur, Mr. Jiri Dienstbier, of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia*, U.N. Press Release, Aug. 6, 1998 (transcript of special rapporteur's oral statement to the press underlining his concern about serious human rights problems in the countries of his mandate); *all as available on* <<http://www.unhchr.ch>>. All of these press statements were made directly to the press by the special rapporteurs themselves and were later reproduced or reported in U.N. press releases. See also *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, Note by the Secretary-General, U.N. Doc. A/52/507, Oct. 21, 1997, at para. 22 (advocating a more proactive role toward the media of human rights treaty bodies, such as the Human Rights Committee established under Part IV of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171), *as available on* <<http://www.unhchr.ch>>.

26 The positions expressed officially in support of Mr. Kumaraswamy by the Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Commission on Human Rights and the Advisory Services Programme of the United Nations Commission on Human Rights further evidence both the existence of this practice and its universal acceptance. See *Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers*, Note by the Secretary-General, U.N. Doc. E/1998/94 and Add.1, *annexed to* Request for Advisory Opinion, Aug. 7, 1998, at para. 19; *Special Rapporteurs Concerned About Malaysia's Disregard of ECOSOC's Decision*, U.N. Press Release HR/98/66, Sept. 4, 1998, *as available on* <<http://www.unhchr.ch>>.

27 Article 31(3)(b) of the Vienna Convention on the Law of Treaties, May 3, 1969, U.N. Doc. A/CONF.39/27, *reprinted in* 8 I.L.M. 679, 692 (1969), provides:

There shall be taken into account, together with the context:

...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

This rule is made applicable to international organizations through Article 5 of that Convention. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I.C.J. Reports 1996, 66, at 75, para. 19 (July 8) (applying this rule to determine the scope of activities of the WHO).

28 For other examples of public statements by Mr. Cumaraswamy in his capacity as special rapporteur see *High Commissioner for Human Rights Joins Three Special Rapporteurs in Urging Nigeria Not to Carry Out Death Sentence*, U.N. Press Release HR/98/32, May 1, 1998 (reporting that the High Commissioner joined in the previous appeals of the special rapporteurs, including Mr. Cumaraswamy, to the Government of Nigeria); *Special Rapporteur Concerned About Possible Breakdown of Rule of Law in Pakistan*, U.N. Press Release HR 97/78, Dec. 1, 1997 (reporting on the views previously expressed by Mr. Cumaraswamy to the press); all as available on <<http://www.unhchr.ch>>.

29 In 1996, Mr. Cumaraswamy addressed six legal fora, seminars and conferences in Burkina Faso, Peru, Thailand, Germany and Sri Lanka. [*Third*] *Report of the Special Rapporteur on the independence of judges lawyers, Mr. Param Cumaraswamy*, U.N. Doc. E/CN.4/1997/32, Feb. 18, 1997, at para. 32. In 1997, he spoke at a training project in Cambodia and a conference in the Philippines. [*Fourth*] *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy*, U.N. Doc. E/CN.4/1998/39, at chapter III.F.

30 Commission on Human Rights Resolutions 1995/36 of Mar. 3, 1995, at op. para. 1 (welcoming Mr. Cumaraswamy's first report); 1996/34 of Apr. 19, 1996, at op. para. 1; 1997/23 of Apr. 11, 1997, at op. para. 1; 1998/35 of Apr. 17, 1998, at op. para. 1 ("*tak[ing]* note of the report submitted by the Special Rapporteur on the implementation of his mandate"); all as available on <<http://www.unhchr.ch>>.

31 Commission on Human Rights Resolutions 1995/36 of Mar. 3, 1995, at op. para. 4; 1996/34 of Apr. 19, 1996, at op. para. 4; 1997/23 of Apr. 11, 1997, at op. para. 4; 1998/35 of Apr. 17, 1998, at op. para. 4; all as available on <<http://www.unhchr.ch>>. The Office of the United Nations High Commissioner for Human Rights, with which the Centre for Human Rights is now consolidated, has the responsibility, *inter alia*, to promote and protect the effective enjoyment of all human rights; to coordinate United Nations education and public information programs in the field of human rights; to play an active role in removing current obstacles to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world; and to coordinate human rights promotion and protection activities of the United Nations. GA Resolution 48/141 of Dec. 20, 1993, at op. para. 4, as available on <gopher://gopher.undp.org>.

32 See [*First*] *Report of the Special Rapporteur, Mr. Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 1994/41*, U.N. Doc. E/CN.4/1995/39, Feb. 6, 1995, as available on <<http://www.unhchr.ch>>, at para. 70 (stating that "in his methodology [Mr. Cumaraswamy] . . . will largely follow the established common practice" of the various human rights mechanisms).

33 Quoted in [*Second*] *Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1995/36*, U.N. Doc. E/CN.4/1996/37, Mar. 1, 1996, as available on <<http://www.unhchr.ch>>, at para.160. Also in 1995, Mr. Cumaraswamy issued a press statement about a complaint received in Hong Kong which he had found to address issues lying outside of his mandate. *Id.* at paras. 150-52.

34 *Id.*

35 [*Third*] *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy*, U.N. Doc. E/CN.4/1997/32, as available on <<http://www.unhchr.ch>>, at para. 124.

36 *Id.* at paras. 123-28.

37 Commission on Human Rights Resolution 1997/23 of Apr. 11, 1997, *supra* n. 23, at op. para. 8.

38 Finally, the magazine article in question in this case clearly indicated every time it attributed a statement to Mr. Cumaraswamy that Mr. Cumaraswamy had made the statement in his capacity as Special Rapporteur, that he had not yet finished his investigations, and that he had not yet made up his mind with regard to any conclusions to be drawn from his investigations. *Malaysian Justice on Trial*, International Commercial Litigation, Nov. 1995, 10, at 13-14, submitted herewith as Exhibit 1.

39 See *Applicability . . .*, *supra* n. 11, at 197, para. 55 (stating that special rapporteurs are entrusted with a "research mission," noting that this task requires the compilation of materials, and recognizing the need for immunities particularly for the establishment of "useful" contacts).

40 *Id.*

41 Mr. Kumaraswamy's mandate included the task "[t]o inquire into any substantial allegations transmitted to him." *See supra* n. 24 and accompanying text.

42 *See Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers*, Note by the Secretary-General, U.N. Doc. E/1998/94 and Add.1, *reprinted in* Request for Advisory Opinion of Aug. 7, 1998, at para. 16.

43 In order to avoid unnecessary duplication of the Written Statement and Dossier to be submitted to the Court by the Secretary-General, the Republic of Costa Rica refrains at this time from referencing *in toto* the numerous documents reproduced in the United Nations Juridical Yearbooks and in other United Nations documents that demonstrate such practice by the United Nations. *See, however, e.g.*, Memorandum to the Assistant Secretary-General for General Services, Apr. 5, 1983, *reprinted in* 1983 U.N. Jur. Y.B. 214, 215 (stating that the United Nations has consistently maintained that it is exclusively within the competence of the Secretary-General to determine when an act is carried out in an official capacity and that this is not a matter which is subject to review by the local authorities). *See also Note Verbale by the Secretary-General to the Permanent Representative of the United States*, Sept. 9, 1985, *reprinted in* 80 Am. J. Int'l L. 440, 441 (1986) (stating that review by the United States Government whether travel designated as official by the Secretary-General is "bona fide official travel of the United Nations" is problematic with regard to the Secretary-General's independent exercise of his responsibilities under the Charter, free from national interference).

44 Art. 105 of the Charter provides:

(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

(2) Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

(3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

45 *Cf. Applicability . . .*, *supra* n. 11, at 198, para. 59 (recognizing that it was for the United Nations, and not for Romania, to decide whether an individual retained his status as a special rapporteur).

46 *Cf. id.* at 216 (separate opinion Shahabuddeen, J., making this point with respect to the United Nations' exclusive authority to determine an individual's continuing status as special rapporteur).

47 *See Special Rapporteurs Concerned About Malaysia's Disregard of ECOSOC's Decision*, U.N. Press Release HR/98/66, Sept. 4, 1998, *as available on* <<http://www.unhcr.ch>>.

48 Only 61 States have ratified the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 500 U.N.T.S. 241. Likewise, the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487, has only 44 Parties. *Multilateral Treaties Deposited with the Secretary-General*, *supra* n. 2.

49 *Case concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, 3, at 40, para. 86 (May 24).

50 Article 38(1)(d) of the Court's Statute provides that the teachings of the most highly qualified publicists are a subsidiary means for the determination of rules of law.

51 *Asylum (Colombia v. Peru)*, I.C.J. Reports 1950, 266 (Nov. 20).

52 P. Bekker, *The Legal Position of Intergovernmental Organizations* 176-77 (1994).

53 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion*, I.C.J. Reports 1962, 151, at 168. The Malaysian Court of Appeal disregarded this presumption when it held that the Secretary-General's certificate appeared *prima facie* to fall outside the scope of the General Convention. *MBf Capital Berhard v. Dato' Param Cumaraswamy*, No. W-02-323-1997 (Ct. of App. Malaysia) at 35.

54 That case involved a libel action by Tan Sri Vincent Tam, a businessman with wide corporate interests, against four journalists over four articles published in the August and October 1993 issues of *Malaysian Industry*, a business magazine. In 1995, Justice Gopal Sri Ram delivered the leading judgment of the Malaysian Court of Appeal affirming a High Court award of RM 10 million (approximately US\$4 million) in favor of Tan Sri Vincent Tam. Observers reportedly viewed both the size of the award and the speed of the proceedings as highly unusual for a libel case. *Malaysian Justice on Trial*, *International Commercial Litigation*, Nov. 1995, 10, at 13-14, submitted herewith as Exhibit 1.

55 *See Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, 174, at 187 (holding "[t]hat in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible . . . government with a view to obtaining the reparation due in respect of the damage caused to the victim").

56 *MBf Capital Berhard v. Dato' Param Cumaraswamy*, No. W-02-323-1997 (Ct. of App. Malaysia) at 34.