

## COMMENTS OF THE UNITED STATES

Pursuant to the Court's Order of August 10, 1998, the United States offers the following comments on the written statements submitted to the Court concerning the request for an advisory opinion on the question of the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.

The question before the Court, as presented by the Economic and Social Council, is "the legal question of the applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations [the "General Convention"] in the case of Dato' Param Cumaraswamy . . . and on the legal obligations of Malaysia in this case."<sup>1</sup> The United States is pleased to note that the United Nations and all states that made written submissions, excepting Malaysia, are in agreement on the answer to this question: Article VI, Section 22 of the General Convention applies; the words spoken by Dato' Param Cumaraswamy were spoken in the course of performing his mission as Special Rapporteur; and Malaysia is therefore obligated to afford him immunity from legal process.

However, another question is raised in the written statement of the Secretary-General with respect to which the views of states are not in agreement. Specifically, the Secretary-General's written statement contends that the Secretary-General has the exclusive authority under the General Convention to determine whether or not the words spoken by Dato' Param Cumaraswamy were spoken in the course of the performance of his mission as Special Rapporteur. (See Written Statement Submitted on Behalf of the Secretary-General of the United Nations, p. 1.) The United States does not agree with this view. However, the question asked by ECOSOC need not be, and should not be, understood to raise this issue. The Court should not render an advisory opinion on matters that need not be resolved in order to answer the question that ECOSOC asked.

The written statements submitted to the Court make clear that there is no unanimity of views or practice regarding the contention that the General Convention requires dispositive legal effect to be given to the Secretary-General's views. Rather, many states view the question of immunity under the General Convention as a matter for properly informed judicial decisions. Indeed, certain states with a large permanent United Nations presence -- including the United States -- have a well-developed practice under which the judiciary plays a significant role in giving effect to immunities.

On the merits of the additional question raised in the written statement of the Secretary-General, the United States believes that the practice of the many states whose courts play a role in deciding claims of immunity by the United Nations and its representatives is entirely consistent with the General Convention. As indicated in the written statement of the United States, the provisions of the General Convention require a particular result. They do not dictate the manner by which States Parties are to meet their obligations. The General Convention could have specified that the views of the Secretary-General would be conclusive, but it did not do so. Indeed, since conferring such unilateral power to decide questions of limited immunity would be an exceptional procedure -- and one not found in other similar settings -- one would expect such a procedure to be clearly specified if it were in fact intended. Instead, the plain text of the General Convention clearly contemplates that a legitimate difference of opinion between the Secretary-General and a Member State could

arise, and hence provides in Article VIII, Section 30 for reference of such questions to this Court.

Of course, as emphasized in the written statement of the United States, the views of the Secretary-General in a given case are highly relevant. The United States fully subscribes to the view stated by the Government of the United Kingdom and reflected in other submissions that it is "essential that all due weight is given to [the views of the Secretary-General] by the national courts." (Written Statement of the Government of the United Kingdom, p. 2.) Nevertheless, the United States also shares the view of the Government of Italy that the observation in the Secretary-General's Note E/1998/94 "que le Secrétaire général a le pouvoir de renoncer à l'immunité d'un fonctionnaire ou d'un expert est sans importance, car le fait de renoncer à un droit n'implique pas la capacité d'interpréter de façon contraignante à l'égard de tiers, les dispositions créés par ce droit."<sup>2</sup> (Written Statement of the Government of Italy, p. 4.) Authority to waive immunity is relevant only after the right to immunity is established. Such authority has no bearing on the preliminary question of entitlement to immunity.

No other authority has been presented to this Court that supports interpreting the General Convention to give the Secretary-General sole authority unilaterally to determine the contours of official acts immunity. In particular, the Court's Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174, does not do so. The Secretary-General's written statement notes the Court's statement in that case that "In order that [an] agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization and that he may count on it . . . ." (*Id.*, p. 183; *cited* in the Written Statement Submitted on Behalf of the Secretary-General of the United Nations, p. 14.) However, the protection to which the Court refers involves the strict observance by Member States of their obligations, and the ability of the United Nations to seek redress, including reparations as appropriate, if they do not. The *Reparations* Advisory Opinion is highly relevant to the question of damages, but it does not address whether the Secretary-General is empowered to determine authoritatively when Article VI of the General Convention applies. Rather, the Court's opinion shows the need for the United Nations' representatives and staff to be confident that the Organization will take vigorous steps -- as it has here in accordance with Section 30 of the General Convention -- to correct the situation if a difference with a Member State arises.

In conclusion, the United States submits that Dato' Param Cumaraswamy is entitled to immunity from legal process for the statements at issue. The Court should so find in answer to ECOSOC's question. However, the Court need not, and should not, supplement this finding with a decision regarding the Secretary-General's authority to determine with exclusive effect the existence or extent of immunity under the General Convention.

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1 U.N. Doc. ECOSOC Res. 1998/297 of 5 August 1998, at ¶ 1.

2 Informal Translation: "The observation that the Secretary-General has the authority to waive the immunity of an official or expert is of no importance, since the fact of waiving a right does not imply authority to interpret the provisions derived from said right in a way that is binding on third parties."