Immunities of United Nations Human Rights Special Rapporteurs: who decides?

Rosemary Rayfuse*

Introduction

The international community has recently found itself engaged in significant debates about the extent to which immunity from legal process should be accorded to certain individuals. Perhaps the most notable case has been that involving former Chilean dictator, Augusto Pinochet, and the efforts directed at bringing him to account for his past conduct. While much energy has been directed towards finding justifications for limitations on Pinochet's immunity from prosecution,[1] a quieter battle has been raging over attempts to limit the immunity from legal process of a UN Human Rights Special Rapporteur. The significant implications for international law of the former case have been extensively canvassed in the literature and commentary.[2] The implications of the latter case are, however, no less significant to the continuing development of and respect for human rights.

---

* Rosemary Rayfuse is a Senior Lecturer in the Faculty of Law at the University of New South Wales. She is also Assistant Professor in the Faculty of Law at Queen's University in Kingston, Canada.

1 See the House of Lords decisions in *R v Bow Street Magistrate, ex parte Pinochet* [1998] 3 WLR 1456 (*Pinochet No 1*) and *R v Bow Street Magistrate, ex parte Pinochet* [1999] 2 WLR 827 (*Pinochet No 3*). The second decision in the Pinochet trilogy, *R v Bow Street Magistrate, ex parte Pinochet* [1999] 2 WLR 272 (*Pinochet No 2*) deals with the issue of bias, not that of immunity.

2 See, Hopkins J 'Former Head of State — extradition — immunity' (1999) 58(3) *Cambridge Law Journal* 461; Bradley C 'The 'Pinochet method' and political accountability' (Autumn 1999) 3(1) *Green Bag* 5; White JG 'Nowhere to run, nowhere to hide: Augusto Pinochet, universal jurisdiction, the ICC and a wake-up call for former heads of state' (1999) 50(1) *Case Western Reserve Law Review* 127; Denza E 'Ex parte Pinochet: lacuna or leap?' (1999) 48(4) *International and Comparative Law Quarterly* 949; Barker C 'The future of former head of state immunity after Ex parte Pinochet' (1999) 48(4) *International and Comparative Law Quarterly* 937; Piotrowicz R 'The governments, the Lords, the ex-president and his victims: limitations to the immunity of former heads of state' (1999) 73(7) *Australian Law Journal* 482; Fox H 'The Pinochet case No 3' (1999) 48(3) *International and Comparative law Quarterly* 687; Bianchi A 'Immunity versus human rights: the Pinochet case' (1999) 10(2) *European Journal of International Law* 237; Fox H 'The first Pinochet case: immunity of a former head of state' (1999) 48(1) *International and Comparative law Quarterly* 207.

From 1996 to 1999 Malaysia and the UN were engaged in a dispute over the question of immunity of a Special Rapporteur of the United Nations Commission on Human Rights. The dispute centered around differing interpretations of the answers to two important questions: who has the power to conclusively determine the issue of immunity from legal process of UN Special Rapporteurs, and when should that determination be made. In its Advisory Opinion in the *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission of Human Rights*,[3] which arose out of this dispute, the International Court of Justice (ICJ) specifically answered the second but not the first of these questions.

This article will examine the question of who has the power to conclusively determine the issue of immunity from legal process of UN experts, including Special Rapporteurs, appointed by the organisation. Part II of this article briefly describes the dispute between the UN and Malaysia and the decision of the ICJ. Part III provides an overview of the bases for immunity in international law and highlights the different rationales underlying state immunity and the immunity of international organisations. Part IV examines the competing arguments that immunity from legal process should be either for the domestic courts of a state or for the Secretary-General of the UN to decide. It will be concluded that the determination belongs properly in the first instance with the Secretary-General. However, in cases of dispute, the ICJ should have the power to make a final and conclusive determination.

Dispute between the United Nations and Malaysia

On 12 December 1996 the first of four defamation suits was filed in the High Court of Malaysia at Kuala Lumpur against Dato' Param Cumaraswamy, a Malaysian national, and the Special Rapporteur of the UN Commission on Human Rights on the Independence of Judges and Lawyers.[4] The suits arose out of the publication of an interview given by the Special Rapporteur in November 1995 to *International*

3 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, 29 April 1999, available from <www.icj-cij.org> (the Cumaraswamy Opinion).

4 Cumaraswamy was appointed as Special Rapporteur by the Chairman of the Commission on Human Rights on 21 April 1994 pursuant to Commission resolution 1994/41 of 4 March 1994. His mandate was:

I.(a) To inquire into substantial allegations transmitted to him or her and report his or her conclusions thereon;

II.(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; and

Commercial Litigation, a magazine published in the UK and circulated as well in Malaysia, in which he commented on certain litigation that had been carried out in the Malaysian courts.[5] Upon investigation, the UN Secretary-General determined that Cumaraswamy was entitled to immunity from legal process pursuant to the provisions of the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention)[6] on the basis that the alleged defamatory words were spoken in the course of his duties as Special Rapporteur.[7] That determination was communicated to the Malaysian authorities with the request that the Malaysian courts be apprised of it.[8]

The Malaysian authorities refused to accede to the Secretary-General's request and the Malaysian courts refused to uphold Cumaraswamy's immunity from legal process *in limine litis*, declining to give effect to the various certificates to that effect provided by the Secretary-General. A certificate filed by the Malaysian Minister for Foreign Affairs, despite objections from the Secretary-General that the certificate did not accurately state the position of immunity of Cumaraswamy or the powers of the Secretary-General to determine that immunity, apparently led the courts to decide that the issue of immunity was for them alone to determine. In an order of 28 June 1997, the Malaysian High Court at Kuala Lumpur concluded that it was 'unable to hold the Defendant is absolutely protected by the immunity he claims'. The court considered that the Secretary-General's note was merely an 'opinion and has no more probative value than a document which appears wanting in material particulars' and has no binding force upon the court. The Minister of Foreign Affairs' certificate, the court concluded 'would appear to be no more than a bland statement

---

III.(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.

The Special Rapporteur issued three reports on 6 February 1995, 1 March 1996 and 18 February 1997 respectively. In resolution 1997/23 of 11 April 1997 the Human Rights Commission extended the Special Rapporteur's mandate for a further three years. His Fourth Report was issued on 12 February 1998.

5 The Malaysian companies that commenced the proceedings asserted that the article contained defamatory words that had 'brought them into public scandal, odium and contempt'. The four separate law suits were filed on 12 December 1996, 10 July 1997, 23 October 1997 and 21 November 1997 respectively. Damages claimed were in excess of US $100 million. See *Request for Advisory Opinion, transmitted to the Court pursuant to Economic and Social Council decision 1998/297 of 5 August 1998*, available at <www.icj-cij.org/icjwww/idocket/i...s/inuma_iapplication_980807_request.htm> (the Request).

6 13 February 1946, 1946-1947 UNTS 15.

7 The text of the article referred a number of times to the Special Rapporteur's UN position and indicated that he had been interviewed in his official capacity. See Request, para 6.

8 Above note 7.

as to a state of fact pertaining to the Defendant's status and mandate as Special Rapportuer and appears to have room for interpretation'.[9] In the court's opinion it was for the court, not the Secretary-General, to determine whether the words were spoken in the course of Cumaraswamy's duty as a Special Rapporteur. The Court of Appeal agreed that this was a factual determination to be made at the stage of consideration of the merits.[10] In the event, proceedings continued against Cumaraswamy and he was served with notices of taxation and bills of costs in respect thereof.[11]

Negotiations between Malaysia and the UN, including those through a Special Envoy, failed to bring a stop to the actions in the Malaysian courts. On 10 August 1998 the Economic and Social Council (ECOSOC),[12] pursuant to a request by the Secretary-General, requested an advisory opinion from the International Court of Justice (ICJ) on the legal question of the applicability of art VI, s 22, of the General Convention in the case of Cumaraswamy.[13] Article VI, s 22, reads in relevant parts as follows:

> 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 time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> ...

9 Request, para 8.

10 Above note 9.

11 Above note 9.

12 The Commission on Human Rights of which Cumaraswamy was (and is) a Special Rapporteur is an organ of ECOSOC, created, pursuant to art ss 55(c) and 68 of the UN Charter, by resolution 5(I) of 16 February 1946 supplemented on 18 February 1946. Resolution 89(I) of 11 December 1946 authorises 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 Council's 'activities' include those of the Commission and the Special Rapporteurs regularly appointed by it. Legal questions relating to the privileges and immunities of Special Rapporteurs arise within the scope of activities of the Commission and, hence, its parent body, ECOSOC.

13 The precise question asked was as follows:
The Economic and Social Council,
Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

(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 mission for the United Nations ...

The request was made pursuant to s 30 of the General Convention, which provides:

> 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.

Malaysia is a party to the General Convention, having acceded to it without reservation on 28 October 1957.[14] Malaysia is also a member of ECOSOC.

In its Advisory Opinion of 29 April 1999 the ICJ held that Cumaraswamy, as Special Rapporteur, was entitled to immunity under the General Convention and that he was entitled to immunity from legal process of every kind for the words spoken by

---

Considering that a difference has arisen between the United Nations and the Government of Malaysia within the meaning of Section 30 of the *Convention on Privileges and Immunities of the United Nations*, with respect to the immunity from legal process of Dato Param Cumaraswamy, the Special Rapporteur of the Commission of Human Rights on the independence of judges and lawyers,

Recalling General Assembly Resolution 89(I) of 11 December 1946,

1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly Resolution 98(I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations 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 Secretary-General, and on the legal obligations of Malaysia in this case;
2. Calls upon the Government of Malaysia to ensure that all judgments and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.

14 Cumaraswamy Opinion, above note 3, para 40.

him during the interview. In addition, the ICJ held that Malaysia had an obligation to inform its courts of the Secretary-General's finding that the Special Rapporteur was entitled to immunity and that Cumaraswamy must be held financially harmless for costs imposed upon him by the Malaysian Courts. Further, the Court held that Malaysia was under an obligation to communicate the advisory opinion to its courts.

On the issue of the stage at which the determination of immunity should be made, the ICJ stated that this should be done as a preliminary matter:

> Section 22(b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written or acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally-recognised principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur ... thereby nullifying the essence of the immunity rule contained in Section 22(b). Moreover costs were taxed to Mr Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of State. Consequently, Malaysia did not act in accordance with its obligations under international law.[15]

The ICJ did not, however, consider that the terms of ECOSOC's request required it to address what was, perhaps, the fundamental aspect of the dispute between Malaysia and the Secretary-General: who has the power to determine, with conclusive effect, whether a member of the staff of the UN or an expert on mission has spoken or written words or performed an act 'in their official capacity' (in the case of officials) or 'in the performance of their mission' (in the case of experts on mission). The Court did take the opportunity to comment on the issue. However, as it was not specifically addressing the issue, it would appear that the question of which person, organ or entity should be charged with making a conclusive determination of immunity remains unanswered.

Before addressing the arguments on various sides of the issue, a slight digression to briefly examine aspects of the concept of immunity in international law seems warranted.

15 Cumaraswamy Opinion, above note 3, para 63.

Bases for immunity in international law

Several different 'types' of immunity exist in international law.[16] The basis for the granting of each is located along a continuum ranging from the principles of the sovereign equality of states and nonintervention in the internal affairs of other states to a functional analysis of the activities in question.

State immunity

The most complete immunity is that accorded to states. The traditional rationale for the jurisdictional immunity afforded to states is found in the oft quoted judgment of Marshall CJ in the *Schooner Exchange v McFadden*.[17] Noting that the jurisdiction of a state within its own territory was 'necessarily exclusive and absolute' he went on:

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
>
> This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

The rationale for state immunity, and the related immunities that flow from it, thus

16 This article does not purport to present an exhaustive catalogue of the bases of immunity in international law. Certain examples are given here as indicative only, and for comparative purposes. For more thorough coverage see, for example, Sucharitkul S *State Immunities and Trading Activities in International Law* (1959); Jenks CW *International Immunities* (1961); Michaels DB *International Privileges and Immunities* (1971); Denza E *Diplomatic Law* (1976); Badr GM *State Immunity* (1984); McClanahan G *Diplomatic Immunity: Principles, Practices, Problems* (1989); Lewis CJ *State and Diplomatic Immunity* (3rd) (1990) and Frey L and M *The History of Diplomatic Immunity* (1999).

17 (1812), 7 Cranch 116 (United States Supreme Court).

rests 'equally on the dignity of the foreign nation, its organs and representatives, and on the functional need to leave them unencumbered in the pursuit of their mission'.[18] Admittedly, immunity can be waived, either expressly in a particular case, or by treaty in respect of particular types of cases. In each case, however, the waiver itself is considered an exercise of sovereign authority.

Traditional doctrine held state immunity to be absolute. However increasing commercialisation of government activities during the twentieth century has given rise to the doctrine of restrictive immunity. This doctrine, which first appeared in the European civil law jurisdictions,[19] limits immunity to acts performed *in jure imperii* (acts of sovereign authority). Acts performed *in jure gestionis* (acts of a private law character), in other words acts of a commercial nature, even when performed by a state, are not immune. The doctrine was accepted early on by the US as a means of giving effect to the changes wrought by increasing foreign government involvement in the commercial sphere.[20] Although its acceptance was somewhat slower in coming in the UK courts, this acceptance was ultimately made complete by the decision of Lord Denning in *Trendtex Trading Corporation Ltd. v Central Bank of Nigeria*.[21] While some states still adhere to the principle of absolute immunity the majority trend has been towards acceptance of the restrictive doctrine as evidenced, for example, by the incorporation of the doctrine into the US *Foreign Sovereign Immunities Act 1976*, the UK *State Immunity Act 1978*, the Canadian *State Immunity Act 1982*, the Australian *Foreign States Immunities Act 1985*, The South African *Foreign States Immunities Act 1981*, the Singapore *State Immunity Act 1979*, Pakistan *State Immunity Ordinance 1981*, and the legislation of numerous other states.[22]

---

18 Brownlie I *Principles of Public International Law* (5th ed) (Oxford University Press, 1998) p 329.

19 By 1950 the Supreme Court of Austria concluded on the basis of a review of state practice that the doctrine of absolute immunity was no longer a rule of international law. See *Dralle v Republic of Czechoslovakia* (1950) 17 ILR 155. For an overview of the development of the doctrine of restrictive immunity see M Shaw, *International Law* (4th) 496-510 and Brownlie, pp 329-43.

20 See the 1952 'Tate Letter', 26 Department of State Bulletin, 984, adopting the restrictive doctrine as government policy. For judicial adoption of the doctrine in the US courts see *Victory Transport Inc v Comisaria General de Abasteciementos y Transportes* 35 ILR 110.

21 [1977] 2 WLR 356 (CA). Early attempts at reconsideration included that of Lord Denning in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379. A concerted effort was later made in the decision of the Privy Council sitting on appeal from the Supreme Court of Hong Kong in the *Phillipine Admiral* case [1976] 2 WLR 214, which paved the way for the *Trendtex* decision. Adoption of the restrictive doctrine was subsequently reaffirmed in later cases including the *Io Congreso del Partido* case [1981] 2 All ER 1064 and *Alcom Ltd v Republic of Columbia* [1984] 2 All ER 6.

22 See UN Legislative Series, *Materials on Jurisdictional Immunities of Foreign States and Their Property* (1982).

State immunity is a bar to the jurisdiction of national courts.[23] For those who subscribe to the absolute immunity view, impleading a sovereign disposes of the issue. Even if jurisdiction over the subject matter might otherwise exist, the existence of a state as party to the dispute ousts any jurisdiction. Adherence to the doctrine of restrictive immunity, however, means that national courts may be called upon to determine whether the acts performed attract immunity. In the event of a negative answer jurisdiction can be exercised.

Diplomatic immunity

Diplomatic immunity is related to state immunity. Broadly speaking, it is through the medium of diplomatic agents that states carry out their political or legal transactions and establish or maintain communications and relations with each other. As Brownlie puts it:

> The essence of diplomatic relations is the exercise by the sending government of state functions on the territory of the receiving state by licence of the latter. Having agreed to the establishment of diplomatic relations, the receiving state must take steps to enable the sending state to benefit from the content of the licence. The process of giving 'full faith and credit' to the licence results in a body of 'privileges and immunities'.[24]

The rational for diplomatic immunity[25] rests on both the representative and the functional theories. The former reflects the role of a diplomat as an agent of a sovereign state while the latter basically recognises the practical realities of diplomatic life, including the need for inviolability of diplomatic premises, their staff and facilities. It is designed to ensure protection of representatives of foreign governments abroad and to promote peaceful and civilised international relations. In respect of official acts, immunity is absolute and, because it is that of the sending state, it is permanent. Of course what constitutes an 'official act' may be

---

23 Although lack of jurisdiction may also appear as either the doctrine of non-justiciability or that of Act of State. While the two doctrines overlap they are distinct. The former, broader doctrine, applies in respect of matters that cannot be tried according to law, such as the exercise of discretion by the executive branch of government in respect of matters falling within its competence. The latter doctrine denies admissibility on the basis that the courts of a territorial state have no competence to assert jurisdiction over the subject matter of a case which involves the sovereign acts of another state. For judicial discussion of these concepts see, for example, *Buttes Gas and Oil Co v Hammer (No 3); Ocidental Petroleum Corp v Buttes Gas and Oil Co (No 2)* [1982] AC 888.

24 Brownlie, above note 18, p 351.

25 The main rules of which are largely codified in the 1961 Vienna Convention on Diplomatic Relations (in force 24 April 1964), 500 UNTS 95.

open to interpretation. Nevertheless, as long as the diplomatic post is held immunity applies. Private acts also attract immunity which, however, ceases upon termination of the posting.[26] National courts may therefore be called upon to determine whether acts carried out during a diplomatic tenure were private or official in nature.

Head of state immunity

Like diplomatic immunity, head of state immunity has certain affinities with state immunity. As far as international law is concerned the head of a state is competent to represent and act for it in all its international dealings and all legally relevant international acts of heads of state are attributable to their state. Heads of state therefore act on behalf of and as representatives of their states and it is the internal law of the state that determines the extent of their competence.[27]

As the ultimate representative of their state, heads of state enjoy immunity from the criminal and civil jurisdiction of other states for both official and private acts during their tenure. Again, the rationale for this is based on the representative theory. Aspects of the functional theory of immunity are also present, however, in that it is now considered possible that the immunity will be limited by the restrictive theory of state immunity. In other words, heads of state may not be immune in respect of commercial transactions entered into even as an 'official' act. Additionally, in respect of private acts the immunity ceases when the position of head of state is relinquished, although immunity for official acts continues. Importantly, in the 'post Pinochet' era, certain acts other than commercial transactions — such as torture — may now also be considered 'non-official'.[28] National courts may, therefore, also be called upon to determine the immunity issues in respect of former heads of state.

Immunity of the UN and its representatives

All of the above 'traditional' bases of immunity in international law share, as at least part of their rationale, the notion of connectivity with a state and its territory. However, international organisations, of which the UN is the pre-eminent example,

---

26 See Vienna Convention on Diplomatic Relations, art 39.

27 See, for example, Watts AD 'The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours* 1994-III.

28 As occurred in the Pinochet cases. See *Pinochet No 1* and *Pinochet No 3*, above note 1.

are in a different position. They possess neither territories nor sovereigns. Yet many of the functions attributed to them are analogous to those of sovereign states and their effective exercise requires the concession of privileges and immunities. Accordingly, a body of law conferring privileges and immunities on international organisations has arisen.

Reinisch identifies a number of bases or justifications for the immunity of international organisations, paramount amongst which is the need to '[secure] their independence and [guarantee] their functioning'.[29] Other justifications include the need to protect international organisations from a 'hostile domestic environment' which might give rise to 'unilateral and sometimes irresponsible interference by individual governments' or from general bias on the part of domestic judges.[30] Possible adverse influence on the conduct and modes of operation of international organisations by member states, the principle of equality of member states, the threat of inconsistent judgments by various national courts, transfer of portions of state sovereignty or functions, and the notion of immunity as inherent in the international character of international organisations as subjects of international law are also identified as bases for immunity. Finally, the 'lack of territory' rationale is examined and Reinisch concludes:

> It might be the true, but unexpressed, reason for granting immunity to international organisations as a consequence of their lack of territory is in fact 'compensatory' in nature. Since international organisations have the disadvantage of lacking territory they should benefit from immunity. While states could protect themselves against unwarranted legal recourse against them under foreign laws by simply avoiding contacts with foreign countries, international organisations by definition can only operate on the territory of a state. To compensate for this structural weakness immunity from suit might be justified.[31]

In other words, the principle of reciprocity means that states can take retaliatory action such as expulsion, withdrawal of aid, or termination of relations, if they are unhappy about a denial of immunity; international organisations cannot. The assurance of immunity is thus all the more important in the case of an international organisation charged, by its member states, with an international mandate.

The immunity granted to the UN is strictly functional in character as is evident from art 105 of the UN Charter, which provides:

---

29 Reinisch A *International Organisations Before National Courts* (1999) pp 233-5.

30 Reinisch, above note 29, p 235.

31 Reinisch, above note 29, p 250.

(1) The Organisation 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 UN and officials of the Organisation shall similarly enjoy privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

(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 UN for this purpose.

Central to the concept of functional immunity is the distinction between acts performed in an official capacity and those performed in a private capacity. The centrality of this distinction is reflected in the provisions of the General Convention, which was drafted in response to para 3. The General Convention confirms the functional limitation on immunity in respect of experts performing missions for the UN in the chapeau to s 22 which refers to 'such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions'.

Experts on mission' to whom s 22 applies have been held by the ICJ to include Special Rapporteurs of the Human Rights Commission[32] and its various Sub-Commissions.[33] These experts 'may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission,'[34] which 'embrace[s] in general the tasks entrusted to a person, whether or not those tasks involve travel'.[35] In addition, in the absence of reservations to the General Convention, some of which have been made by states parties specifically seeking to avoid application of certain provisions of art V and VI to their nationals or persons habitually in their territory, 'experts on mission enjoy the privileges and immunities provided for under the [General] Convention in their relations with the States of which they are nationals or on the territory of which they reside.[36]

32 Cumaraswamy Opinion, above note 18.

33 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (the Mazilu Opinion), 1989 ICJ Reports 177 at 198.

34 Mazilu Opinion, above note 33 at 194.

35 Mazilu Opinion, above note 33 at 195.

36 Mazilu Opinion, above note 33 at 195.

Who should make the final determination regarding immunity?

States

Turning to the question of who should have the authority to determine issues of immunity of UN Special Rapporteurs and other experts on mission, two extreme positions exist. One end of the spectrum holds that it should be exclusively a matter for the domestic courts of a state to determine. This was the position taken by Malaysia in the Cumaraswamy case.

> 7.9 Malaysia does not subscribe to the view that the terms of the General Convention had indeed endowed the Secretary-General with the right to issue statements on immunity carte blanc ...
>
> 7.12 Malaysia rejects *per se* the notion of exclusivity of the determination of the question by the Secretary-General on the ground that such a construction on the right of the Secretary-General is tantamount to a gross attempt to impose limitations not only on the exercise of the executive authority of Malaysia but also in respect of the jurisdiction of its Courts particularly so in the circumstances of the case where the issue arose out of interlocutory proceedings in private law.
>
> 9.7 ... The invitation to invoke the provisions of s 30 is an expression of utter and complete disregard to the position not only of a private individual but also to the Courts in Malaysia.[37]

This view posits the determination as an exercise of the exclusive domestic sovereignty of a state, intervention in which is prohibited under art 2(7) of the UN Charter. It is argued that nothing in the General Convention explicitly gives any authority to the Secretary-General to make the determination. Accordingly, on this view, no basis exists for the assertion of such a derogation from state sovereignty.

The Secretary-General

The other end of the spectrum holds that the determination of immunity should be solely within the power of the Secretary-General. Proponents of this argument[38] point to art VI s 23 of the General Convention which provides that the immunities

---

37 Written Statement submitted by the Government of Malaysia, available at <www.icj-cij.org/icjwww/idocket/i...ng_981008_writtenstatement_Malaysia.htm>.

38 See the Written Statements submitted by the Secretary-General and the Government of the Republic of Costa Rica, available at <www.icj-cij.org/icjwww/idocket/i...pleading_981002_written statement_UN.htm> and <www.icj-cij.org/icjwww/idocket/i...g_981007_written statement_CostaRica.htm>.

are granted in the interests of the UN and not for the personal benefit of the individuals and gives the Secretary-General:

> the right and authority to waive the immunity of an expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

It is argued that the right and authority to waive immunity must necessarily imply the right and authority to invoke it, otherwise the right and authority to waive would be meaningless. Further, as one commentator puts it:

> ... international organisations lack sovereignty and have no territory of their own. Because their rights can hardly be said to equal those enjoyed by States, international organisations need special protection. One element of protection should be the organisation's right of unilateral and definitive qualification of its activities. This consideration applies also in case the organisation 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 organisational immunities, thereby opening themselves up to frivolous suits against international organisations.[39]

According to this view, the power of unilateral and definitive determination derives from the inherent powers of the Secretary-General, which are exercised on behalf of the UN, 'to afford experts on mission the functional protection they are entitled to when they are acting in the course of the performance of UN missions'.[40] It also derives from the very words of s 22, which provide for 'immunity from legal process of every kind'. In order to have any meaning, it is argued that this:

> must include immunity from legal proceedings to determine the applicability and scope of that very immunity. Compelling an official or an expert on mission to prove or defend his or her functional immunity in the national courts of a Member State effectively subjects him or her to legal process and thereby violates his or her, as well as the Organisation's, immunity.[41]

---

39 Bekker P *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) p 176.

40 Written Statement submitted by the Secretary-General, para 40. Judicial pronouncement on the entitlement to this protection is found in the decision in the *Reparations* case: *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion* (1949) ICJ Reports 174.

41 Written Statement submitted by the Secretary-General, para 56.

The middle ground

As is so often the case with diametrically opposed positions, neither is entirely unproblematic. On the one hand, national adjudication might lead to a plethora of conflicting decisions arising out of the same facts, a proliferation of claims, intimidation through threat of legal process, and the ultimate frustration of the very purposes the UN human rights mechanisms were established to achieve. Individuals could be deterred from taking on UN mandates out of fear of adverse repercussions for their personal and professional lives. This might be particularly so in the case of Special Rapporteurs who are nationals or resident of the state concerned. Certainly, the adverse consequences for Cumaraswamy were grave. As reported by Bekker, Cumaraswamy had to resign from the law firm at which he had practiced for thirty years and of which he was, at the time of his resignation, the senior partner and chief executive.[42]

On the other hand, unilateral and definitive determination on the part of the Secretary-General might, however, also be open to abuse. It is not beyond the realm of possibility that a group of states might seek to utilise the processes of the UN to harass or otherwise interfere with the domestic activities of one or more of their members. Bekker notes that:

> The argument of prevention of abuse does not weigh as heavily in the case of international organisations 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 organisation, for Members who want a review, on their own initiative or on behalf of their citizens, of a certain practice of the organisation.[43]

The appropriateness of such internal mechanisms may, however, be lost on states who do not agree to follow the majority line.

A middle ground, however, appears to exist which pays respect to the competing principles of state sovereignty, on the one hand, and autonomy and independence of international organisations on the other. A determination of immunity by the Secretary-General might be persuasive but subject to an independent inquiry by a national court at the preliminary stage. In other words, the Secretary-General's determination could give rise to a rebuttable presumption of immunity that can only be rebutted in the clearest of circumstances. Where a dispute exists after the domestic

---

42 Bekker P 'International Decisions: Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights. Advisory Opinion' 93(4) *American Journal of International Law* (1999) 913 at 920 footnote 31.

43 Bekker, above note 39, pp 176-177.

court's inquiry, the s 30 procedure under the General Convention would always be open to either the state or the Secretary-General.

Interestingly, while all the states (except Malaysia) which made submissions to the ICJ in the Cumaraswamy case agreed that the Special Rapporteur should be entitled to immunity in that case, there was no such unanimous support for the argument put forward by the Secretary-General that he should have the power to make a unilateral and definitive determination of immunity. In their written statements to the Court, Italy, the UK and the US, argued that no such definitive power had ever been granted to the Secretary-General. Although being careful not to address the question head on, as it determined this was not the question that had been asked, the ICJ did note, while addressing the issue of Malaysia's obligations, 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 concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.[44]

At least one commentator has criticised the Court for adopting this middle road and for failing to give guidance on what the 'most compelling reasons' might be.[45] That was not, however, the question the Court was asked to answer.

In any event, as noted above, states themselves are no longer entitled to absolute, self-determined immunity. The doctrine of restrictive state immunity is widely accepted (even if its content is not wholly agreed) as are its corresponding restrictions on diplomatic and head of state immunity. Head of state immunity, or, more accurately, former head of state immunity is being further restricted in respect of activities that constitute international crimes.[46] Restrictions on diplomatic immunity to discourage its abuse are also periodically discussed.[47] In all these cases it is the domestic courts of a state that determine, as a preliminary matter, whether or not immunity is to be accorded.

---

44 Cumarawamy Opinion, above note 18, para 61.

45 Bekker, above note 42 at 920-923.

46 This is the lesson of the Pinochet cases. See *Pinochet No 1* and *Pinochet No 3*, above note 1.

47 See for example, Ross M 'Rethinking diplomatic immunity: a review of remedial approaches to address the abuses of diplomatic privileges and immunities' (1989) 4 *American University Journal of International Law and Policy* 173 and Lord Denning, *Landmarks in the Law* pp 245-252.

It is recognised that there exists the potential that states could deliberately pursue a policy of ignoring the Secretary-General's findings and forcing s 30 dispute resolution in every case. The counter productivity of this is readily apparent, both in functional and practical terms. In functional terms this could lead, as Costa Rica pointed out in its submissions to the ICJ, to the destruction of human rights monitoring and implementation throughout the world.[48] In practical terms, member states (or at least those who pay their assessed dues) would be called upon to bear increasing litigation costs. It seems likely, therefore, that neither situation would go unchallenged by the majority of interested members of the international community for very long. The institutional constraints noted by Bekker would come into play as would, undoubtedly, other 'extra legal' constraints. By way of further discouragement, any state failing to respect the immunity of a Special Rapporteur would be responsible under international law not just for damages to the Special Rapporteur, but for damages to the UN itself.[49]

Conclusion

The ability of Special Rapporteurs and other UN experts to carry out their 'missions' unhindered is central to the effective functioning of the organisation and the fulfillment of its mandate. However, while the traditional state-centric view of international law is open to serious criticism, it remains the case, for the foreseeable future, that the UN is an organisation established and operated by its member states. Had the member states desired to give a conclusive and non-reviewable power to the Secretary-General to determine issues of immunity, they may well be expected to have done so explicitly in the General Convention. While Bekker argues that 'the absence of an explicit provision should not be interpreted to deny an organisation's inherent right of unilateral and definitive qualification of its activities',[50] in the absence of such a provision it would seem an odd situation, indeed, for states to give more power to the Secretary-General than they arrogate unto themselves.

On balance it seems, therefore, that the 'middle ground' approach is the most responsive to the realities of international affairs. Immunity from legal process of UN

48 Written Statements submitted by the Government of the Republic of Costa Rica, above note 38.

49 In the *Reparations* case, above note 40, it was held that damage to a UN representative was damage to the organisation itself and that the organisation has standing to bring a claim both on its own behalf and on that of the representative.

50 Bekker, above note 39, p 176.

experts must be, first and foremost, an issue for the Secretary-General to determine. The Secretary-General has been entrusted by states with the mandate of running the organisation.[51] The Secretary-General is best placed to determine whether activities have been carried out or engaged in by 'experts' appointed by the organisation during the course of their 'official' duties. Clearly, the Secretary-General is best placed to make the determination of immunity. However, the imperatives of state sovereignty suggest that it remains open to the national courts of states to confirm or rebut the Secretary-General's determination. Nevertheless, the Secretary-General's determination should be set aside by a national court for only the most 'compelling reasons'. In other words, this must be a very rare event. Where it does occur, states have accepted the possibility of recourse to the ICJ for a final, 'decisive', determination of the issue of immunity. Thus, it is the ICJ pursuant to s 30 of the General Convention that has the power to make the final, conclusive determination of immunity. It must be hoped the ICJ is only called upon to exercise this power on the rarest of occasions. ●

51 See UN Charter articles 97, 100 and 101.