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# Privileges and immunities of experts in special procedures of the UN Human Rights Council\*

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## 1. Introduction

Special procedures are mechanisms for the protection of human rights established by the UN Commission on Human Rights, whose work was continued by the UN Human Rights Council. The mandates of the procedures are principally to investigate and monitor the human rights situation in a country or the violation of a particular category of rights. As part of the Special Procedures activities, experts are appointed to draw up guidelines and reports on the state of compliance with human rights and, *inter alia*, their responsibilities include investigating complaints and conducting active cooperation with other states also covered by the mandates of the Special Procedures. Importantly, thematic mandates are global in nature.<sup>1</sup>

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\* This article is a fragment of the author's doctoral thesis.

<sup>1</sup> A. Hernandez-Polczyńska, *Wizyty Specjalnych Sprawozdawców ONZ w Polsce*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2018, Vol. 16, p. 132.

To begin the consideration of the privileges and immunities to which the experts of the special procedures of the UN Human Rights Council are entitled, we should first clarify what these privileges and immunities are. This term should be understood to denote all kinds of exemptions, concessions, rights, as well as the special protection enjoyed by diplomatic representatives abroad. Janusz Symonides notes that the doctrine of international law has long attempted to distinguish between the concept of privileges and immunities, as well as to find a single term to replace the combined use of the two.<sup>2</sup>

The paper aims to demonstrate the genesis of the experts' capacity to invoke the legal protection of diplomatic privilege and immunity. The article identifies the problems that experts have faced in their activities over the years, resulting in advisory opinions by the International Court of Justice that allowed for the clarification of the scope of application of diplomatic immunity to persons holding special procedures mandates. At this point, it is important to emphasize the role of the UN Secretary-General, whose tasks include resolving the question of whether the experts, in taking their actions, exceeded their authority or whether they acted in accordance with the mandate entrusted to them. In the case of doubts in this regard, it is possible to turn to the ICJ<sup>3</sup> to determine the extent of the experts' immunity. The author also indicates the procedure to be implemented in instances where experts abuse their privileges and immunities.

## 2. Historical background

Under the provisions of the Charter of the United Nations, the UN General Assembly was mandated to make recommendations to define privileges and immunities for persons holding the mandates of the UN Commission on Human Rights Special Proce-

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<sup>2</sup> R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warszawa 2004, p. 177, <https://doi.org/10.2307/2202096>.

<sup>3</sup> ICJ – International Court of Justice.

dures, currently the UN Human Rights Council. Consequently, on 13 February 1946, the General Assembly adopted the *Convention on the Privileges and Immunities of the United Nations*.<sup>4</sup>

Under the Convention, experts are legally classified as “experts on mission”. In carrying out the tasks associated with their mandates, experts enjoy the privileges and immunities of function, which are set out in Article V § 13 of the Convention. These include:

- Immunity from personal arrest or detention and from seizure of their personal baggage;
- 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 every 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;
- Inviolability for all papers and documents;
- For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
- The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
- The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.<sup>5</sup>

Furthermore, in order to ensure that representatives of members of specialized organizations at meetings convened by these organizations enjoy full freedom of expression and absolute independence in the exercise of their functions, it has been agreed that immunity from legal proceedings in respect of their oral or written statements and acts undertaken by them in the exercise of their functions will continue to exist even beyond the expiry of

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<sup>4</sup> Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (Journal of Laws of 2009 No. 64, item. 535).

<sup>5</sup> Ibidem, Art. VI, Section 22; see also *Manual of Operations of the Special Procedures of the Human Rights Council*, August 2008, § 13, [https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/Manual\\_Operations2008.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/Manual_Operations2008.pdf) (access: 25.03.2024).

their mandate. The entitled person enjoys immunity as soon as he or she enters the territory of the host State and, if in that territory, as soon as his or her appointment is notified to the Ministry of Foreign Affairs. The legal protection afforded to experts continues until they leave the country, even if the end of their mission is as a result of war or the breakdown of diplomatic relations.<sup>6</sup>

### 3. The clarification of the possibility of invoking the legal protection afforded to experts in special procedures on the basis of advisory opinions delivered by the ICJ

The developments in the activities of the Special Procedures have presented the experts acting within them with new opportunities in the field of overseeing the observance of human rights, but have also given rise to problems of interpretation regarding the experts' ability to invoke the protection of international law arising from their ability to invoke their privileges and immunities. Consequently, in 1989 and 1999, these issues were the subject of advisory opinions conducted by the International Court of Justice.<sup>7</sup>

The first of the advisory opinions referred to was issued by the ICJ in the context of the following facts: Dumitru Mazilu, who held the position of Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, found himself in a situation in which the Romanian Government denied him permission to travel to Geneva and to participate in the Sub-Commission's work related to the preparation of its report. In a written statement submitted to the Court, Romania stated that

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<sup>6</sup> R. Bierzanek, J. Symonides, *op.cit.*, p. 180.

<sup>7</sup> Advisory Opinion of the International Court of Justice of 15 December 1989: Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations and Advisory Opinion of the International Court of Justice of 29 April 1999, on the differences between the immunities of the Special Rapporteurs of the Commission on Human Rights and the practice.

Mazilu, as of 1 December 1987, had been declared unfit to hold the office of Special Rapporteur. In a letter addressed to the Deputy Secretary-General for Human Rights, Mazilu indicated that he had been hospitalized twice, resulting in his being forced to resign from his previous post from 1 December 1987. He stated that the Romanian authorities had refused to allow him to travel. The petitioner described his situation in a series of letters dated 5 April, 19 April, 8 May and 17 May 1988.<sup>8</sup>

On 6 March 1989, the Commission adopted resolution 1989/37,<sup>9</sup> recommending that the UN General Assembly request an advisory opinion from the ICJ on the question of the legal application of Article VI, Section 22, of the Convention in the case of Mazilu as Special Rapporteur. According to the position of the Romanian representatives, since 1987, Mazilu has lost the intellectual capacity necessary to produce an objective, responsible, and impartial analysis which could serve as the content of a report complying with the requirements of the UN.

In view of the legal regulations on immunities and privileges, the Court found that Mazilu continued to have the status of Special Rapporteur and, consequently, had to continue to be regarded as an expert on a mission within the meaning of § 22 of the Convention.<sup>10</sup> The ICJ further indicated that, in order to determine the applicability of Article VI, Section 22 of the Convention to Special Rapporteurs and its applicability in the case of Mazilu, it was necessary to recognise that, according to Article 105, paragraph 1, of the Charter of the United Nations, “the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”. Also, according to Article 105(2) of the Charter, “representatives of the Members of the United Nations and Offi-

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<sup>8</sup> Advisory Opinion of the International Court of Justice of 15 December 1989: Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, § 13.

<sup>9</sup> Resolution of the Commission on Human Rights of 6 March 1989, No. A/HRC/1989/37, <https://www.ohchr.org/en/special-procedures-human-rights-council/communications-reports-special-procedures> (access: 25.03.2024).

<sup>10</sup> Convention on the privileges and immunities of the United Nations, § 22.

cials of the Organization shall enjoy the privileges and immunities necessary for the independent fulfilment of their functions in connection with the Organization". In addition, the above-mentioned provision of law indicates that experts carrying out United Nations missions are granted such privileges and immunities as are necessary to preserve their independence in the exercise of their functions during the mission, including the time spent travelling in connection with the mission.<sup>11</sup>

The Court found that the Convention fails to define the concept of mission experts. However, it is clear from paragraph 22 that they perform missions within the United Nations based on technical expertise in relation to the time and place of their tasks. The ICJ noted that paragraph 22 of the Convention, when referring to experts performing UN missions, employs the word "mission" in a general sense. While some experts are required to travel in order to carry out their tasks, others may be able to carry out their tasks with no such necessity. In both cases, under the cited regulation, autonomy and the necessary privileges and immunities are possible. Nevertheless, in the Court's consideration, the question arose as to whether persons holding office in the special procedures could invoke privileges and immunities in relation to the States of which they are nationals or in whose territory they reside. In this context, the Court noted that Article 15 of the Convention provides that the conditions set out in Article IV, paragraphs 11, 12, and 13 of the Convention relating to representatives "are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative". In contrast, Article V on UN officials and Article VI on experts on mission contain no comparable rule. This difference may be easily explained.

According to the Code of conduct for mandate holders, the privileges and immunities guaranteed under Articles V and VI are conferred in order to ensure the autonomy of international officials

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<sup>11</sup> Advisory Opinion of the International Court of Justice of 15 December 1989: Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, § 40–43.

and experts.<sup>12</sup> Such autonomy must be respected by all States including the State of which the person concerned is a national and the State of his residence.<sup>13</sup> They also enjoy the privileges and immunities provided by the Convention in relations between them and their States of nationality or their States of residence. To summarize, the Court concluded that Section 22 of the Convention applies to persons entrusted by the United Nations with the performance of a mission and that they are therefore entitled to enjoy the privileges and immunities for the independent exercise of their function.<sup>14</sup>

The International Court of Justice, in its Advisory Opinion of 15 December 1989, confirmed the above position and noted that: "Article VI, Section 22, of the 1946 Convention, applies also to other persons than officials of the United Nations who are entrusted with a mission and who are therefore entitled to the privileges and immunities provided for in the Convention on the Privileges and Immunities of the United Nations, 13.02.1946, for the independent exercise of their functions. Throughout the duration of their mission, experts have the right to enjoy privileges and immunities, whether stationary or while travelling".

An important interpretative problem regarding the experts' capacity to invoke their immunity appeared in relation to the possibility of making evaluations and direct comments, versus defamation. An attempt to systematize this issue was undertaken by the UN Commission on Human Rights on the following facts: Special Rapporteur on the Independence of Judges and Lawyers – Dato Param Kumaraswamy was sued for allegedly using pejorative phrases in an interview published in the journal *International Commercial Litigation*, in which he commented on the conduct of two proceedings taking place before Malaysian courts. Following

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<sup>12</sup> Resolution of the UN Human Rights Council, *Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council*, No. A/HRC/RES/5/2 of 18 June 2007, [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/5/2](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/5/2), Article 4, Section 2.

<sup>13</sup> P. Alston, *Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?*, "Harvard International Law Journal" 2011, Vol. 52, No. 2.

<sup>14</sup> *Ibidem*, Sections 51–52.

the publication of the article, two commercial companies based in Malaysia indicated that the said article contained statements that defamed them. Both companies filed a lawsuit against the Petitioner seeking damages of US\$30 million.<sup>15</sup>

In the present case, it was crucial to determine whether Kumaraswamy was acting as a representative of the United Nations. The Secretary-General informed the Malaysian Government that the Petitioner was a Special Rapporteur acting under the UN and was under the protection of immunity from legal proceedings. At the same time, the Secretary-General indicated that contact with the media is indispensable in the work of Special Rapporteurs. Thus, he confirmed that it is within the remit of the Special Rapporteurs to inform the general public of their activities. Accordingly, Kumaraswamy, in an interview, had outlined his working methods and expressed concern about the question of the independence of the Malaysian justice system.<sup>16</sup>

The Court found that the Malaysian Government had a duty, under Article 105 of the Charter,<sup>17</sup> to inform the courts of the Secretary-General's position. It is a well-established principle of international law that the conduct of any organ of a State is to be regarded as an act of that State. Accordingly, the conduct of an organ of a State is considered to be a manifestation of that State's action under international law, regardless of whether that organ belongs to the constitutional, legislative, executive, judicial, or other authority, whether its functions are international in nature, and regardless of its position in the hierarchy of State organs. As the Government had not communicated the results of the Secretary-General's assessment to the competent courts, the Malaysian authorities were deemed not to have complied with the above condition. Furthermore, Article 22 (b) of the Convention<sup>18</sup> explicitly

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<sup>15</sup> Advisory Opinion of the International Court of Justice of 29 April 1999, on the differences between the immunities of the Special Rapporteurs of the Commission on Human Rights and the practice, § 1–15.

<sup>16</sup> *Ibidem*, § 57–60.

<sup>17</sup> United Nations Charter, San Francisco of 26 June 1945, *Journal of Laws of 1947* No. 23, item 90, Article 105.

<sup>18</sup> Convention on the Privileges and Immunities of the United Nations, § 22 b.



provides that experts participating in the mission obtain immunity from legal proceedings of any kind, including in respect of words spoken or written and acts performed by them in the course of their mission. The Court pointed out that this was a generally recognized principle of procedural law, and Malaysia was obliged to comply with it.<sup>19</sup> The Court ruled by a vote of fourteen to one. In its conclusion, it indicated that Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations applied in the case of Cumaraswamy acting as Special Rapporteur of the Commission on Human Rights.

As a consequence of the ruling, the ICJ made a binding interpretation regarding the possibility for experts to express themselves critically on issues related to their activities in the UN Special Procedures. Moreover, given that mandate holders speak in public, including in the context of interviews they give, they are entitled to immunity from legal proceedings in the context of words spoken during public appearances related to their professional activities. Otherwise, their ability to speak out on the difficulties they encounter in their work, and often on issues that can be highly controversial, would be severely restricted.<sup>20</sup>

#### 4. Procedure to be followed in cases of abuse of the protection of privileges and immunities of experts

It is important to emphasize that, unlike diplomatic privileges, the privileges and immunities of international officers are strictly functional in nature, meaning that they are accorded only to protect the exercise of their functions.<sup>21</sup> Privileges and immunities

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<sup>19</sup> Advisory Opinion of the International Court of Justice of 29 April 1999, § 62–64.

<sup>20</sup> A. Hernandez-Polczyńska, *Procedury specjalne Rady Praw Człowieka ONZ*, Warsaw 2020, pp. 78–81.

<sup>21</sup> C.W. Jenks, *International Immunities*, in: *International Law*, ed. M.N. Shaw, London 1961, p. 17, <https://doi.org/10.1017/s0165070x00027832>.

are granted to experts, not for their personal benefit, but with a view to ensuring their absolute independence in the exercise of their functions.<sup>22</sup> In the event of abuse by an expert of privileges relating to his or her residence and activities in a country which are not in connection with the exercise of his or her official functions, the government of that country may require him or her to leave the country, subject to the following:

- representatives of Members or persons entitled to diplomatic immunity in accordance with the provisions of § 21 of the Convention may not be expelled from a country except under the diplomatic procedure applicable to diplomatic agents accredited in that country;
- with regard to an officer to whom the provisions of § 21 of the Convention do not apply, no expulsion decision may be taken without the consent of the Minister for Foreign Affairs of the country concerned, who may grant it only after consulting the Director-General of the specialized organization concerned.

Furthermore, as observed by Julian Sutor, although the Vienna Convention on Diplomatic Relations of 18 April 1961<sup>23</sup> does not regulate the issue of liability for breaches of diplomatic privileges and immunities, leaving this problem to the domestic legislation of states, this does not mean that this issue is not given attention by contemporary international law. The UN International Law Commission has developed principles of state responsibility for internationally unlawful acts.<sup>24</sup> Consequently, in the context of the liability of States for breaches of diplomatic and consular privileges and immunities, these principles reiterate the general rule that any breach of an international obligation gives rise to

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<sup>22</sup> E. Domínguez-Redondo, *Six Politics of "Independence": Position of Special Procedures within the United Nations* Get access Arrow, in: E. Domínguez-Redondo, *In Defense of Politicization of Human Rights*, Oxford 2020, pp. 161–180, <https://doi.org/10.1093/oso/9780197516706.003.0007>.

<sup>23</sup> Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, Journal of Laws of 1965 No. 37, item 232.

<sup>24</sup> Annex to resolution of the International Law Commission of 12 December 2001, No. A/56/49 (Vol. 1).

international liability on the part of the State and, consequently, a duty to make reparation. Such liability arises where the breach of international law is attributable to the state concerned in the light of its international obligations.<sup>25</sup>

Consequently, the liability of states for breaches of diplomatic and consular privileges and immunities may also be actionable under international law. The condition for such an action to be admissible is that the violations can be attributed to the state under international law.

## 5. Conclusion

Experts acting under the Special Procedures initially established by the UN Commission on Human Rights, and then continued by the UN Human Rights Council, have been accorded a number of powers under the regulations contained in Article V, § 18 of the Convention on the Privileges and Immunities of the United Nations to ensure that they are able to discharge their functions more effectively. Despite the existence of the relevant regulations on privileges and immunities, an issue has arisen as to who has the power to adjudicate on interpretive questions concerning their applicability. In this regard, the International Court of Justice has issued advisory opinions that clarify the possibility of invoking immunities and privileges in relation to the activities of experts.

With respect to Special Procedures Experts, the provisions on the status, fundamental rights, and obligations of officials other than officials of the Secretariat are applicable. Experts perform their tasks within their mandates, with full respect for the national legislation and regulations of the country in which they carry out their mission. It should be stressed that the privileges and immunities enjoyed by experts do not constitute a justification for the expert's failure to comply with the internal norms of the country in which he or she is present.

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<sup>25</sup> J. Sutor, *Prawo dyplomatyczne i konsularne*, Warszawa 2010, pp. 217–218, <https://doi.org/10.12775/pbps.2018.021>.

Fundamental to the concept of functional immunity is the distinction between acts performed within an official capacity and acts performed in a private capacity. The central significance of this distinction is reflected in the provisions of the Convention on Immunities and Privileges, which confirms the functional immunity limitation for persons performing tasks in UN special procedures.

The capacity of UN Special Rapporteurs and other experts to perform their missions seamlessly is critical to the effective functioning of the organization and the fulfillment of their mandate. In conclusion, immunity from legal process of UN experts must, in the first place, be a matter for the Secretary-General to determine. The Secretary-General has been entrusted by Member States with the leadership of the organization. Therefore, he or she is best placed to determine whether actions have been carried out or engaged in by mandate holders in the course of their official duties. However, the imperatives of State sovereignty suggest that national courts remain open to confirm or reject the Secretary-General's decision. Nonetheless, the Secretary-General's order should only be overturned by a national court for the most compelling reasons. In other words, the violation must be of a particularly serious nature. Where this is the case, states have accepted the possibility of appealing to the ICJ for a final, decisive determination of the question of entitlement to immunity. Consequently, the ICJ has the power to make a final, conclusive determination of immunity.<sup>26</sup>

It should also be noted that the privileges and immunities accorded to experts under Article 105 of the Charter provide no excuse for those who, having taken up their mandate, fail to comply with the law of the State where they are present. Whenever a problem arises with regard to the application of privileges and immunities, an official or expert of the mission is to report the matter immediately to the Secretary-General, who alone may

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<sup>26</sup> S.P. Subedi, *The Role of 'Experts' in International and European Decision-Making Processes. Advisors, Decision Makers or Irrelevant Actors?*, Cambridge 2014, pp. 241–262, <https://doi.org/10.1017/cbo9781139871365.016>.

decide whether such privileges and immunities exist and whether they should be waived under the relevant instruments. The Secretary-General should communicate the decision and, in reaching that decision, may take into account the views of the legislative bodies, the State in which the entitled person is located, appointed officials, or experts on mission.<sup>27</sup>

## SUMMARY

### Privileges and immunities of experts in special procedures of the UN Human Rights Council

Special procedures are mechanisms for the protection of human rights established by the UN Commission on Human Rights, later taken over by the UN Human Rights Council, whose task is to investigate and monitor the situation with respect to human rights in a given country or the violation of a specific category of rights. The ability of experts operating under United Nations Special Procedures to exercise their mandates unhindered is crucial to the effective functioning of the organization. The Secretary General has the competence to determine the scope of immunities to which experts are entitled. However, they can only be overturned by national courts for “essential reasons”. Consequently, these are incidental situations. In case of any doubts regarding the scope of immunities, it is possible to ask the International Court of Justice to resolve disputes in this respect.

**Keywords:** special procedures; immunity; privileges; expert; UN Human Rights Council

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<sup>27</sup> Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission, regulation 1, pt. e, <https://hr.un.org/>.

## STRESZCZENIE

### Przywileje i immunitety ekspertów procedur specjalnych Rady Praw Człowieka ONZ

Specjalne procedury to mechanizmy ochrony praw człowieka powołane przez Komisję Praw Człowieka ONZ, przejęte następnie przez Radę Praw Człowieka ONZ, których zadaniem jest badanie i monitorowanie sytuacji z zakresu przestrzegania praw człowieka w danym państwie lub z zakresu naruszenia określonej kategorii praw. Możliwość niczym nieskrępowanego wykonywania mandatów ekspertów działających w ramach procedur specjalnych Organizacji Narodów Zjednoczonych ma kluczowe znaczenie dla skutecznego funkcjonowania organizacji. Sekretarz Generalny posiada kompetencje do ustalania zakresu przysługujących ekspertom immunitetów. Niemniej jednak istnieje możliwość ich uchylecia przez sądy krajowe jedynie z „najważniejszych powodów”. W konsekwencji są to incydentalne sytuacje. W przypadku jakichkolwiek wątpliwości dotyczących zakresu immunitetów istnieje możliwość zwrócenia się do Międzynarodowego Trybunału Sprawiedliwości o rozstrzygnięcie spornych kwestii w tym zakresie.

**Słowa kluczowe:** procedury specjalne; immunitet; przywileje; ekspert; Rada Praw Człowieka ONZ

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