

BEFORE THE
THE INTERNATIONAL COURT OF JUSTICE
The Hague
The Netherlands

Request by the
United Nations Economic and Social Council
for an Advisory Opinion on the Legal Question
of the Applicability of Article VI, Section 22
of the Convention on the Privileges and Immunities
of the United Nations of 13 February 1946,
in the Case of Mr. Dumitru Mazilu,
as Special Rapporteur of the Sub-Commission on the
Prevention of Discrimination and Protection of Minorities

ADDITIONAL COMMENTS
OF THE
GOVERNMENT OF THE UNITED STATES OF AMERICA

Abraham D. Sofaer
Legal Adviser

Bruce C. Rashkow,
David A. Balton
Attorneys

Office of the Legal Adviser
Department of State
Washington, D.C.

AUGUST 31, 1989

BEFORE THE
THE INTERNATIONAL COURT OF JUSTICE
The Hague
The Netherlands

Request by the
United Nations Economic and Social Council
for an Advisory Opinion on the Legal Question
of the Applicability of Article VI, Section 22
of the Convention on the Privileges and Immunities
of the United Nations of 13 February 1946,
in the Case of Mr. Dumitru Mazilu,
as Special Rapporteur of the Sub-Commission on the
Prevention of Discrimination and Protection of Minorities

ADDITIONAL COMMENTS
OF THE
GOVERNMENT OF THE UNITED STATES OF AMERICA

Abraham D. Sofaer
Legal Adviser

Bruce C. Rashkow,
David A. Balton
Attorneys

Office of the Legal Adviser
Department of State
Washington, D.C.

AUGUST 31, 1989

CONTENTS

I.	INTRODUCTION.....	1
II.	JURISDICTION OF THE COURT.....	3
	A. The Court has jurisdiction to render this advisory opinion under Article 96 of the Charter and UN General Assembly Resolution 89(I).....	4
	B. Romania's reservation to section 30 does not affect the jurisdiction of the Court to render this advisory opinion.....	7
	C. The Court has jurisdiction to render this advisory opinion whether or not a dispute exists between the United Nations and Romania....	9
III.	APPLICABILITY OF ARTICLE VI, SECTION 22 OF THE GENERAL CONVENTION TO MR. MAZILU.....	11
	A. The status of Mr. Mazilu as a special rapporteur of the Sub-Commission has not terminated.....	12
	B. Special rapporteurs of the Sub-Commission are experts on missions for the United Nations...	15
	C. As a special rapporteur, Mr. Mazilu is entitled to the privileges and immunities specified in Article VI, section 22.....	16
IV.	CONCLUSION.....	19

INTRODUCTION

On July 31, 1989, in response to an Order of the International Court of Justice ("Court") dated June 14, 1989, the Government of the United States ("United States") submitted a written statement on the subject of this request by the United Nations Economic and Social Council ("ECOSOC") for an advisory opinion from the Court. The Governments of Canada, the Federal Republic of Germany, and Romania, as well as the Secretary-General of the United Nations, also submitted written statements in response to the Order of June 14.

By the same Order, the Court fixed a time limit of August 31, 1989, within which States and organizations having presented written statements may submit comments on other written statements. By this submission, the United States respectfully submits comments on the written statements submitted to the Court on July 31, 1989.

The United States disagrees with the assertions contained in the written statement submitted by the Government of Romania ("Romania") that the Court is without jurisdiction to render the requested advisory opinion as a consequence of the reservation that Romania entered in regard to section 30 of the Convention on the Privileges and Immunities of the United Nations ("General Convention"), and that Article VI, section 22 of the Convention does not apply to Mr. Mazilu because he is not an expert on a mission for the United Nations.

In regard to the Court's jurisdiction, the United States agrees with the arguments presented in the written statement submitted by the Secretary-General of the United Nations ("United Nations") that the Romanian reservation is not applicable to this request for an advisory opinion. ECOSOC did not request this advisory opinion under section 30 of the General Convention, but rather pursuant to its independent authority deriving from the Charter of the United Nations ("Charter") and General Assembly Resolution 89(I). The United States maintains, moreover, that even were this request to have been made under section 30, the Court would have jurisdiction since the Romanian reservation does not address requests for advisory opinions.

The arguments presented by Romania that Mr. Mazilu is not an expert on a mission for the United Nations for purposes of Article VI, section 22 of the Convention are supported neither by the terms of that Article as they have been construed in the practice of the United Nations, nor by the facts of this case. Moreover, the information submitted to the Court by the United Nations pursuant to Article 65 of the Statute of the Court indicates that Romania has prevented Mr. Mazilu from traveling to Geneva to perform his mission for the United Nations by detaining him in Romania and suggests that Romania has prevented Mr. Mazilu and the United Nations from communicating regarding his mission.

For these reasons, the United States maintains that the Court has jurisdiction to render the requested advisory opinion and that the provisions of Article VI, section 22 of the General Convention apply in the case of Mr. Mazilu.

I. JURISDICTION OF THE COURT

In its previous written statement, the United States demonstrated that the Court has jurisdiction under Article 65, paragraph 1 of its Statute to render an advisory opinion on the question presented, based upon the express authorization granted by the General Assembly to ECOSOC under Article 96, paragraph 2 of the Charter to request such advisory opinions.¹ The statement of Romania argues that section 30 requires that all requests for advisory opinions pertaining to the General Convention be made under the authority of section 30 and that, as a result of Romania's reservation, no request for an opinion in this matter could be made without Romania's consent. Romania is incorrect both as to the authority of ECOSOC to request an advisory opinion independent of the

1. Written Statement of the Government of the United States ("Statement of the United States"), pp. 4-5. In that statement, the United States also noted that the reservation of Romania to section 30 of the General Convention does not deprive the Court of jurisdiction to render this advisory opinion. Statement of the United States, p. 5, fn. 3.

requirements of section 30 of the General Convention and as to the legal effect of Romania's reservation in regard to section 30.

A. The Court has jurisdiction to render this advisory opinion under Article 96 of the Charter and UN General Assembly Resolution 89(I)

Romania asserts that its reservation strips the Court of jurisdiction to render the advisory opinion in question without the consent of Romania, and that Romania has not granted such consent. In this respect, Romania argues that, were the Court to render the advisory opinion, it would "disturb the unity" of the General Convention by circumventing the dispute settlement provisions of that Convention.²

Section 30 of the General Convention provides that:

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.

2. Memorandum of the Government of Romania Relating to the Request for an Advisory Opinion transmitted to the International Court of Justice by Virtue of Resolution 1989/75 of the Economic and Social Council, dated May 24, 1989 ("Statement of Romania"), pp. 2-3.

Resolution 1989/75, by which ECOSOC requested this advisory opinion, does not rely upon section 30 as the authority for its request, but relies entirely on Article 96, paragraph 2 of the Charter. Article 96, paragraph 2 provides that:

Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

The General Assembly, pursuant to that Article, authorized ECOSOC to request advisory opinions of the Court on legal questions arising within the scope of the activities of the Council.³ Section 30 of the General Convention, which also provides authority to request advisory opinions of the Court, does not render inoperative this independent authorization to request advisory opinions pursuant to Article 96 of the Charter.⁴

The advisory opinion issued by the Court with respect to Reservations to the Genocide Convention fully supports this conclusion. In that case, the General Assembly of the United Nations requested the Court to respond to several questions concerning the effect of reservations to that Convention and of

3. G.A. Res. 89(I)(1946).

4. Statement of the United States, pp. 19-22.

objections to those reservations. As a preliminary matter, the Court first considered whether Article IX of that Convention -- which also calls for submission of disputes to the Court -- prevented the Court from rendering the advisory opinion sought by the General Assembly:

The existence of a procedure for the settlement of disputes, such as that provided by Article IX, does not in itself exclude the Court's advisory jurisdiction, for Article 96 of the Charter confers upon the General Assembly and the Security Council in general terms the right to request this Court to give an Advisory Opinion "on any legal question."⁵

ECOSOC therefore has the authority to request an advisory opinion under both the General Convention and under the Charter, although only under the Convention could the resulting advisory opinion be "decisive." Accordingly, the mere existence of section 30 does not deprive the Court of jurisdiction to render this advisory opinion pursuant to Article 96 of the Charter and General Assembly resolution 89(I). It necessarily follows that Romania by its unilateral action in connection with the Convention could not prevent ECOSOC from requesting an advisory opinion in the exercise of

5. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15, at p. 20.

its independent authority to make such a request pursuant to Article 96 of the Charter.

B. Romania's reservation to section 30 does not affect the jurisdiction of the Court to render this advisory opinion

The reservation entered by Romania to section 30 of the General Convention does not address requests for advisory opinions, only the affect to be given such opinions. The reservation provides that:

The Romanian People's Republic does not consider itself bound by the terms of section 30 of the Convention which provide for the compulsory jurisdiction of the International Court of Justice in differences arising out of the interpretation or application of the Convention; with respect to the competence of the International Court in such differences, the Romanian People's Republic take the view that, for the purpose of the submission of any dispute whatsoever to the Court for a ruling, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions contained in the said section which stipulate that the advisory opinion of the International Court of Justice is to be accepted as decisive.

This reservation contains two sentences, neither of which applies to a request for an advisory opinion.

The first sentence of Romania's reservation specifically addresses only "the terms of section 30 which provide for the compulsory jurisdiction of the International Court of Justice in differences arising out of the interpretation or application

of the Convention." (emphasis added.)⁶ It is in regard to the exercise of such compulsory jurisdiction that the first sentence goes on to assert the requirement for "the consent of all parties to the dispute." This is clear not only from the context in which this reservation is asserted, i.e., with reference to requirements of the first sentence of section 30, but from the references in the reservation to "parties to the dispute." A request for an advisory opinion technically does not involve such "parties to the dispute."

The second sentence of the reservation addresses only the legal affect to be given to an advisory opinion rendered by the Court pursuant to that section, specifically addressing the provisions contained in section 30 which stipulate that "the advisory opinion . . . is to be accepted as decisive." Indeed, this aspect of the reservation, contrary to Romania's construction, clearly contemplates requests for advisory opinions under section 30 and simply seeks to prevent the resulting opinions from being "accepted as decisive." While this part of Romania's reservation prevents advisory opinions issued under section 30 from being "decisive" on the legal

6. The compulsory jurisdiction of the Court refers to the jurisdiction of the Court to entertain actions brought by one State Party to the Convention against another State Party. In the absence of a reservation, the Court would have jurisdiction under section 30 to render a binding judgment on the parties.

questions addressed in the opinions, it does not prevent the Court from rendering such advisory opinions in the first instance.⁷

C. The Court has jurisdiction to render this advisory opinion whether or not a dispute exists between the United Nations and Romania

Romania offers an additional challenge to the jurisdiction of the Court. In its written statement, Romania notes that Article VI, section 22 provides experts with only functional privileges and immunities. Romania also notes that the privileges and immunities granted to experts apply only "during the period of their missions, including time spent on journeys in connection with their missions." Romania concludes that, because the "competent organs of the United Nations" have never interpreted Article VI, section 22 differently, there is no basis for determining that a dispute has arisen between Romania

7. See Memorandum from The Legal Counsel, United Nations, cited in Statement of the United States, p. 5, fn. 3. Moreover, were the Romanian reservation incorrectly construed to apply to a request for advisory opinions under Article 96 of the Charter, a possible conflict would arise between the General Convention and the Charter, in which case Article 103 of the Charter would become relevant. Article 103 provides that, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." See Memorandum from the Legal Counsel, id. at 22.

and the United Nations with respect to the interpretation or application of the General Convention. In the absence of a dispute, Romania implies, the Court lacks jurisdiction.⁸

Neither the Charter nor the General Convention, however, establishes the existence of a dispute as a prerequisite to a request for an advisory opinion. Article 96, paragraph 2 of the Charter simply authorizes requests to the Court for advisory opinions on legal questions; Article 65, paragraph 1 of the Statute of the Court gives the Court jurisdiction to render such opinions. As a result, the Court has jurisdiction to render the opinion requested by ECOSOC pursuant to Article 96 of the Charter whether or not a dispute exists.

Section 30 of the General Convention does not refer to "disputes" either, but instead provides that, if a "difference" arises between the United Nations and one of its Members, a request shall be made to the Court for an advisory opinion. In this regard, while Romania and the United Nations may share the same general view that the privileges and immunities provided experts under Article VI, section 22 are functional in character, they manifestly disagree over the application of Article VI in the specific case of Mr. Mazilu as a special rapporteur. Romania appears to claim that this is merely "a difference of opinion" with respect to the "factual elements"

8. Statement of Romania, p. 4.

of Mr. Mazilu's situation. However, the question of whether Mr. Mazilu is entitled to the privileges and immunities set forth in Article VI, section 22 is a legal one which turns on an application of that provision to the facts of this case. In any event, because ECOSOC has not requested this advisory opinion under section 30, the question of whether a "dispute" exists does not arise even under Romania's construction of its reservation to that provision of the General Convention.

II. APPLICABILITY OF ARTICLE VI, SECTION 22
OF THE GENERAL CONVENTION TO MR. MAZILU

In its initial statement, the United States demonstrated that: (1) the status of Mr. Mazilu as a special rapporteur of the Sub-Commission has not terminated; (2) in his continuing capacity as a special rapporteur of the Sub-Commission, Mr. Mazilu is an "expert on a mission for the United Nations" within the meaning of Article VI of the General Convention; and (3) Article VI requires all States Parties to the General Convention, including Romania, to accord to Mr. Mazilu, as a special rapporteur, the privileges and immunities specified in Article VI, section 22 of the General Convention.⁹

The written statements of the United Nations, Canada and the Federal Republic of Germany, reach the same general

9. Statement of the United States, pp. 12-21.

conclusions.¹⁰ Romania, however, disputes each of these points, arguing that: (1) Mr. Mazilu is no longer a special rapporteur of the Sub-Commission; (2) that such special rapporteurs are not "experts;" and (3) even if Mr. Mazilu were such an expert, Romania need not accord to him any privileges and immunities due to the fact that he is not actually on any mission in Romania. Romania is incorrect both as a matter of law and in regard to the application of the law to the circumstances of this case.

A. The status of Mr. Mazilu as a special rapporteur of the Sub-Commission has not terminated

Romania asserts that, due to serious health problems, Mr. Mazilu "was withdrawn from office as being unfit for service" at his own request as of December 1, 1987. In support of this assertion, Romania relies on an opinion issued by one of its state medical commissions in 1987, which was reaffirmed in 1988, on which the retirement of Mr. Mazilu is purportedly based. Romania concludes that "Romanian law does not authorize the employer or any other State body to fail to take account of doctors' opinions or to override those opinions."¹¹ This argument fails on two grounds.

10. Statement of the United Nations, pp. 35-43; Statement of Canada, pp. 1-2; Statement of the Federal Republic of Germany, pp. 1-2

11. Statement of Romania, pp. 4-5.

First, the status of Mr. Mazilu as a special rapporteur is wholly unrelated to his status as an employee of the Government of Romania. As a special rapporteur, Mr. Mazilu is required to serve in his personal capacity, not at the discretion of his Government. Hence, even if a Romanian medical commission determined that Mr. Mazilu must resign for health reasons from his position in the Romanian Government,¹² this determination would not directly bear on his appointment as a special rapporteur for the Sub-Commission. Instead, any decision to terminate Mr. Mazilu's appointment as a special rapporteur would have to be made by the competent organs of the United Nations.

Second, the information before the Court demonstrates that Mr. Mazilu has not sought termination of his appointment as a special rapporteur. The documents provided to the Court by the United Nations pursuant to Article 65 of the Statute establish that Mr. Mazilu has repeatedly notified the Sub-Commission that

12. Indeed, there is strong evidence to believe that Mr. Mazilu did not request, much less consent to, his retirement from the Romanian Government. Dossier submitted by the United Nations, July 28, 1989 ("United Nations Dossier"), document 96 (letter from Mr. Mazilu to President of the United Nations General Assembly and Chairman of the Sub-Commission states that "since 1 December 1987 I have been forced to retire from my activity as minister-counsellor and Head of Legal Department in the Ministry of Foreign Affairs").

he considers himself in sufficiently good health to perform his duties as a special rapporteur, and that he has every desire to complete his assignment.¹³ In its initial statement, the United States cited two letters written by Mr. Mazilu to the United Nations in August 1988 in which he announced his readiness to complete his assignment as a special rapporteur. In the first of these letters, Mr. Mazilu made clear that the Government of Romania was preventing him from doing so.¹⁴ The Statement of the United Nations cites these and several more letters from Mr. Mazilu to the same general effect.¹⁵

In any event, the question of Mr. Mazilu's fitness to perform these duties is not one for Romania to decide. Mr. Mazilu remains an expert on a mission for the United Nations. In the absence of a clear indication by Mr. Mazilu that he has unilaterally terminated his status as an expert, only the competent organs of the United Nations are legally competent to take such action. They have not done so.

13. United Nations Dossier, documents 23, 31, 33, 34.

14. Statement of the United States, p. 10.

15. Statement of the United Nations, pp. 5, 6, 16; United Nations Dossier, documents 23, 31, 37, 92, 94, 96, inter alia.

B. Special rapporteurs of the Sub-Commission are experts on missions for the United Nations

Romania does not view special rapporteurs as falling within the scope of Article VI of the General Convention. Instead, Romania argues that:

the Convention does not place rapporteurs, whose activities are occasional, on the same footing as the experts who carry out missions for the United Nations. The very term "experts" is employed in the Convention to distinguish those persons from "officials" of the United Nations, who are engaged in an activity of a permanent nature. ¹⁶

The United States agrees that the General Convention distinguishes between "experts on missions for the United Nations" and "officials of the United Nations." The United States also agrees that the relationships of experts with the United Nations tend to be less permanent than those enjoyed by officials of the Organization. These distinctions, however, have no relevance to the question of whether special rapporteurs of the Sub-Commission should be classified as experts. This question must instead be decided on the basis of Article VI. An analysis of Article VI, including the practice of the United

16. Statement of Romania, pp. 3-4.

Nations under that Article,¹⁷ demonstrates that special rapporteurs of the Sub-Commission are experts within the meaning of that Article.¹⁸

The only ground on which Romania disputes this conclusion is that the activities of special rapporteurs are too "occasional." Nothing in the text of Article VI provides a basis for excluding special rapporteurs from the category of experts on this ground. Quite to the contrary, the "occasional" character of the activities of an expert is one of the primary factors for distinguishing experts from officials of the Organization.

C. As a special rapporteur, Mr. Mazilu is entitled to the privileges and immunities specified in Article VI, section 22

In its written statement, Romania does not actually dispute that, if Mr. Mazilu were still a special rapporteur,

17. Under customary international law, reference to the subsequent practice of the parties is pertinent to treaty interpretation. See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Article 31, which codifies customary international law on this point; I. Sinclair, The Vienna Convention on the Law of Treaties 137 (2d ed. 1984).

18. Statement of the United States, pp. 12-15; Statement of the United Nations, 37-39; Statement of Canada, p. 1; Statement of the Federal Republic of Germany, p. 1.

and were special rapporteurs experts within the meaning of Article VI, Romania must accord to Mr. Mazilu the privileges and immunities set forth in section 22. Romania nevertheless implies that Mr. Mazilu never acted in his capacity as a special rapporteur while residing in Romania and that, as a result, Romania need never have accorded to him the privileges and immunities in question. ¹⁹

The mission of Mr. Mazilu began with his appointment by the Sub-Commission as Special Rapporteur on Human Rights and Youth in 1985. Although Mr. Mazilu may not have been engaged in his mission continuously from that time, the record demonstrates that: (1) he has spent time in Romania researching and drafting his report; (2) both he and the United Nations have sought to communicate with each other regarding the completion of his mission, and have been prevented from doing so by Romania; and (3) he has been prevented by Romania from traveling to Geneva to complete his mission. ²⁰ Hence, Mr. Mazilu has engaged or sought to engage in activities in Romania pertaining to his mission as a special rapporteur. In

19. Statement of Romania, p. 4 ("In so far as the expert's journey to carry out the mission for the United Nations has not begun, for reasons entirely unconnected with his activity as an expert, there is no legal basis upon which to lay claim to privileges and immunities under the Convention. . . .").

20. United Nations Dossier, documents 23, 31, 34, 37, 38, inter alia.

regard to such activities, Romania must accord Mr. Mazilu the privileges and immunities that are to be accorded to experts of the United Nations under the terms of Article VI, section 22.

As the information provided to the Court by the United Nations demonstrates, Romania refuses to grant Mr. Mazilu the necessary official authorization to travel to Geneva to perform his mission for the United Nations. That information indicates that Romania has physically detained Mr. Mazilu by placing him under house arrest. In particular, document 96 of the United Nations Dossier contains a letter from Mr. Mazilu to the President of the United Nations General Assembly and the Chairman of the Sub-Commission, in which he states that, "My authorities have refused me again the approval to go to Geneva and have placed me under arrest at my home with a policeman in front of my door."²¹ Such action by Romania, in the circumstances of the instant case, would appear to violate Article VI, section 22, subsection (a). The information provided to the Court by the United Nations also suggests that Romania has prevented the United Nations and Mr. Mazilu from communicating regarding his mission for the United Nations in

21. In other letters, Mr. Mazilu refers repeatedly to his "captivity." See, e.g., United Nations Dossier, document 94 ("In spite of my captivity and many repressive measures against me and against my family, I continue to wait and hope").

violation of subsections (c) and (d) of Article VI,
section 22. ²²

CONCLUSION

For these reasons, the United States reaffirms its view that the Court has jurisdiction to render the advisory opinion requested by ECOSOC and that the provisions of Article VI, section 22 of the General Convention apply in the case of Mr. Dumitru Mazilu in his continuing capacity as special rapporteur for the Sub-Commission.

22. The United Nations Dossier contains information that suggests Romania may have violated subsection (c) by seizing official papers and documents sent by the United Nations to Mr. Mazilu. United Nations Dossier, document 96 (letter from Mr. Mazilu to United Nations Secretary-General and Chairman of the Sub-Commission, stating that "all my official correspondence from the UN has been confiscated by the Romanian secret police").

Similarly, the information provided by the United Nations demonstrates that Romania may have acted in violation of subsection (d) by refusing to allow United Nations couriers from Geneva to deliver papers to Mr. Mazilu and by preventing Mr. Mazilu from receiving papers sent specially to him by the United Nations Centre for Human Rights in Geneva through personnel in the United Nations Information Centre in Bucharest. United Nations Dossier, document 64 (summary record of the Sub-Commission meeting of August 17, 1988, in which the Under Secretary General for Human Rights describes the refusal of Romania to allow a member of the United Nations Secretariat in Geneva to visit Mr. Mazilu). See also United Nations Dossier, document 37 (letter from Mr. Mazilu to United Nations Under Secretary General for Human Rights, stating that "my access to the UN Information Centre in Bucharest was blocked by police"); United Nations Dossier, documents 31 and 39 (letters from Mr. Mazilu to the same Under Secretary General stating, respectively, that "my foreign correspondence and foreign calls have been suspended;" and that "for me it is almost impossible to find out a way to send you my new Chapter of my Report").