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ANNÉE 1989

Audience publique

tenue le mercredi 4 octobre 1989, à 10 heures, au palais de la Paix,

sous la présidence de M. Ruda, Président

*en l'affaire de l'Applicabilité de la section 22 de
l'article VI de la convention sur les privilèges
et immunités des Nations Unies*

COMPTE RENDU

YEAR 1989

Public sitting

held on Wednesday 4 October 1989, at 10 a.m., at the Peace Palace,

President Ruda presiding

*in the case concerning the Applicability of Article VI,
Section 22, of the Convention on the Privileges
and Immunities of the United Nations*

VERBATIM RECORD

The PRESIDENT: I give the floor to Mr. Sofaer, representative of the United States of America.

INTRODUCTION

Mr. SOFAER: Thank you Mr. President, good morning. Mr. President and Members of the Court, it is an honour to represent the United States in this proceeding, which involves issues of substantial concern to the international community.

The United Nations Economic and Social Council has for the first time exercised its authority to request an advisory opinion from this Court. ECOSOC has not taken this historic step lightly, but rather in response to a serious situation that has developed with respect to its ability and the ability of its subsidiary organs to carry out their important work.

The unfortunate circumstances underlying ECOSOC's request to this Court have been meticulously described by the Un Legal Adviser. The United States has submitted a Written Statement and additional Written Comments. My purpose today will be to present the essentials of our position and to stress the importance of deciding this case without impinging upon the legitimate concerns of member States.

JURISDICTION

The precise question before this Court is a request that it renders its advisory opinion:

"on the legal question of the applicability of Article VI, Section 22, of the Convention of the Privileges and Immunities of the United Nations in the case of Dimitru Mazilu as Special Rapporteur of the Sub-Commission"

of ECOSOC. In general, this question poses no serious doubt. Romania, in its written submission concedes that it is a party to the General

Convention (p. 1), and that it "does not deny the applicability of the provisions of the 1946 Convention" (p. 4) to the extent that Special Rapporteurs such as Mr. Mazilu though not "on the same footing as the experts who carry out missions for the United Nations" (p. 3), are entitled under some circumstances to functional immunity (p. 4). Romania claims, however, that this Court has no jurisdiction whatever to advise on this question or on the scope of the privileges and immunities enjoyed by Mr. Mazilu because of the reservation it entered under Section 30 of the General Convention concerning the settlement of disputes. The United States believes that Romania's position on jurisdiction is untenable, and that this Court should exercise its authority to advise the United Nations on the Convention's applicability in the case of Mr. Mazilu.

Romania argues in its submission that ECOSOC's request for an advisory opinion must be treated as having been made under Section 30 of the General Convention, and that its reservation to that section strips the Court of jurisdiction to render such an opinion. It contends that "Romania has expressly declared that it did not agree that any kind of opinion should be asked of the Court concerning the present case" (p. 3), and that this reservation to Section 30 precludes jurisdiction on any other basis as well.

Romania could not achieve this result, even if it in fact had attempted to do so with the clarity necessary for such an objective. ECOSOC has requested this advisory opinion, not under Section 30 of the General Convention, but as an exercise of its authority under Article 96 of the United Nations Charter and General Assembly resolution 89(I), which authorized ECOSOC to seek advisory opinions on legal questions falling within the scope of its activities. The issue submitted by

ECOSOC concerns the privileges and immunities to which a Special Rapporteur of the United Nations Sub-Commission on the prevention of the Discrimination and Protection of Minorities is entitled. The Sub-Commission is a subsidiary organ of ECOSOC. Accordingly, ECOSOC has requested an advisory opinion on a legal question falling within the scope of its activities and has therefore satisfied the requirements of Article 96 and resolution 89(I).

The jurisprudence of this Court establishes that a reservation to a dispute settlement provision in a multilateral convention, however clearly expressed, cannot deprive the United Nations or any authorized United Nations body of its independent authority to seek, and this Court of its discretion to provide, an advisory opinion concerning appropriate legal questions.

In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, this Court was presented with a request by the General Assembly for an advisory opinion regarding the effect of reservations to the Genocide Convention and objections to those reservations. Article IX of the Genocide Convention, like Section 30 of the General Convention, provides that disputes as to the interpretation and application of the Convention shall be submitted to the Court at the request of any of the parties. States opposing the requested opinion argued that Article IX deprived the Court of any power to give an advisory opinion. The Court held, however, that the existence of a dispute resolution procedure, such as that provided in Article IX of the Genocide Convention, does not deprive the Court of jurisdiction to render an advisory opinion concerning that treaty pursuant to the general authority provided under Article 96 of the Charter (*I.C.J. Reports 1951*, p. 15).

Some years later the Court reaffirmed this principle in *Judgements of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*. While the Court in that case upheld the authority of Unesco to request an advisory opinion under Article XII of the Statute of the Administrative Tribunal, which permits an international organization to challenge a decision of the Tribunal on jurisdictional and procedural grounds, it expressly confirmed that Unesco also had the general power to request advisory opinions on legal questions arising within the scope of its activities under Article 96 of the agreement between Unesco and the United Nations - though it had chosen not to predicate its request on that general power (*I.C.J. Reports 1956*, p. 77).

As the Court's decisions in these cases suggest, dispute settlement provisions in multilateral conventions are not to be construed as displacing, but rather as supplementing the general authority of United Nations bodies to seek legal advice from this Court. Hence, no reservation to such provisions can be effective to deprive those general authorities of their intended force. Any other rule would enable a State to reduce the intended scope of the Court's advisory jurisdiction under Article 96 by refusing to agree to a dispute settlement provision under particular multilateral conventions.

The fact is, moreover, that Romania's reservation to Section 30 is insufficiently clear even to permit the contention that it successfully displaced ECOSOC's more general authority. The reservation's language, read in conjunction with Section 30, demonstrates that it does not even purport to bar the Court from rendering an advisory opinion. Romania's reservation contains two sentences. The first sentence addresses that part of Section 30 that provides for resort to the Court for decisions in regard to differences between parties over the interpretation and

application of the Convention; Romania refused to accept that compulsory jurisdiction without its express consent. The second sentence of the reservation addresses that part of Section 30 providing that advisory opinions will be accepted by the parties as "decisive". It is this consequence that Romania sought in its reservations to reject, and successfully, as the United Nations recognizes. The reservation, therefore, fails to strip the Court of jurisdiction to render advisory opinions, and concerns only the legal effect of such opinions. Any doubt as to this construction should be resolved in a manner that avoids the implication that Romania in fact intended a result - a reservation against any advisory jurisdiction - that would be inconsistent with the Charter's design.

Romania's final argument is that, even if the Court has jurisdiction, the problem of applying the General Convention "does not even arise in this instance" (p. 3). Romania's position in this regard is that it does not dispute the application of the Convention, but that its application in this case must lead the Court to conclude that Mr. Mazilu has no immunity because he has not left Romania; or he has been determined in accordance with Romanian law to be too sick to travel or perform the task assigned him; or his job as rapporteur has expired.

In fact, however, Romania concedes the Convention's applicability to Mr. Mazilu only, in its words, "as described above" (p. 4). Romania's description of the Convention's application to Mr. Mazilu is at odds with that of the United Nations and with the high value that must be placed on the independence of rapporteurs and other experts. The limitations proposed by Romania cannot be applied consistently with the preservation of this value because: the privileges and immunities accorded to Mr. Mazilu, though limited to the needs of his function, cannot

arbitrarily be denied within the territory of any State, even that of his own nationality; because Romania cannot be recognized to possess absolute, unverifiable discretion in determining his capacity to perform, particularly in the light of substantial and credible evidence to the contrary; and because the United Nations body that appointed Mr. Mazilu, not Romania, must decide when his job expires.

The United States recognizes, of course, that this Court has the discretion to refuse to issue an advisory opinion if the circumstances warranted such restraint. Nothing in the present case supports such abstention, however. The question posed is not hypothetical, but concerns a real and ongoing controversy between the United Nations and Romania, over a matter of fundamental importance to the United Nations system, and involving a human dimension that the Secretary-General was specifically requested by the Sub-Commission "to follow closely ... ". That Mr. Mazilu's report has recently been published in a preliminary form in no respect reduces the propriety of judicial action. Publication of the report was followed by Sub-Commission action inviting Mr. Mazilu to attend its 1990 session to present an updated report at that time. The controversy over Mr. Mazilu's status therefore continues.

But even if Mr. Mazilu had no further function to perform, the legal issues posed by his case would nonetheless be real and not purely hypothetical, and their determination would be within the discretion of the Court. Unlike the United States system, and others which require a current "case or controversy" to justify a judicial determination, the United Nations system explicitly contemplates advisory opinions which provide non-binding guidance to the United Nations and its membership.

MERITS

Finally, I would like to make only one comment addressing the merits of the question presented to the Court. The United Nations has avoided any suggestion that the scope of Mr. Mazilu's privileges and immunities extend beyond the needs of his function (I refer specifically to paragraph 63 of the UN's excellent brief), and nothing in the record requires any restriction in this case on the legitimate scope of national control over United Nations experts by their home States. This case does not involve, for example, any assertion by the Government of Romania that its national, though a United Nations expert, has been convicted of a crime, or is serving a prison sentence, or must for some other legitimate reason be detained against his will. The United States would be greatly concerned with any claim that an individual could use his immunity as a United Nations expert to evade the legitimate domestic laws of his State, fairly applied. The United Nations in this respect has pointed out its obligation under the Convention in such circumstances to waive immunity.

Here, the only reason given to justify Romania's refusal to permit its citizen from carrying out his official United Nations mission is that he is too sick to perform that mission, while the record reflects that the individual concerned claims he is well enough to perform the mission. At a minimum, this Court should advise ECOSOC that a State is obliged, in these circumstances, to accept an independent evaluation of the physical fitness of its citizen. Though not binding, the United States would hope that Romania would be able to end this unfortunate dispute by accepting the Court's opinion.

CONCLUSION

Mr. President, Members of the Court, for the foregoing reasons and those set out in our Written Submissions, the United States supports this Court's assumption of jurisdiction in this matter, and its determination of the question presented. Thank you.

The PRESIDENT: I thank you Mr. Sofaer for your intervention. Je donne la parole à M. Guillaume, qui souhaite poser une question.

M. GUILLAUME : Je vous remercie Monsieur le Président. J'aimerais poser une question au représentant du Secrétaire général. Cette question est la suivante : Selon le Secrétaire général existe-il entre l'Organisation des Nations Unies et la Roumanie un différend au sens de la section 30 de la convention générale. Je vous remercie Monsieur le Président.

Le PRESIDENT : Je vous remercie et je vais poser trois questions comme membre de la Cour.

Première question : La question de l'applicabilité à M. Dumitru Mazilu de l'article VI, section 22, de la convention sur les privilèges et immunités des Nations Unies s'est-elle déjà posée, à la connaissance du Secrétaire général, lorsque M. Mazilu était encore membre de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités ?

Deuxième question : Le représentant du Secrétaire général pourrait-il indiquer le cadre juridique précis dans lequel s'inscrit la prorogation alléguée, au-delà du 31 décembre 1987, du mandat de M. Mazilu en sa qualité de rapporteur spécial de la Sous-Commission ?