EXPOSÉS ORAUX

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au Palais de la Paix, à La Haye, les 4 et 5 octobre et le 15 décembre 1989, sous la présidence de M. Ruda, Président

ORAL STATEMENTS

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, on 4 and 5 October and 15 December 1989, the President, Judge Ruda, presiding

PREMIÈRE AUDIENCE PUBLIQUE (4 X 89, 10 h)

Présents: M. RUDA, *Président*; MM. LACHS, ELIAS, ODA, AGO, SCHWEBEL, sir Robert JENNINGS, MM. BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, PATHAK, *juges*; M. VALENCIA-OSPINA, *Greffier*.

Présents également:

Pour l'Organisation des Nations Unies:

M. Carl-August Fleischhauer, Secrétaire général adjoint aux affaires juridiques, conseiller juridique;
M. Paul C. Szasz, ancien adjoint du Secrétaire général adjoint, consultant;
M. Roy S. Lee, administrateur général, juriste;
Mme Marcia Y. Constable, assistante personnelle du Secrétaire général adjoint.

Pour le Gouvernement des Etats-Unis d'Amérique:

l'honorable Abraham D. Sofaer, conseiller juridique au département d'Etat;
M. Bruce C. Rashkow, bureau du conseiller juridique au département d'Etat.

OUVERTURE DE LA PROCÉDURE ORALE

Le PRÉSIDENT: Avant d'en venir à l'affaire qui nous occupe aujourd'hui, je voudrais signaler que M. Mbaye, Vice-Président, ne pourra, pour des raisons de santé, assister aux audiences.

La Cour est réunie ce jour pour entendre, conformément à l'article 66, paragraphe 2, de son Statut, des exposés oraux relatifs à la requête pour avis consultatif dont le Conseil économique et social l'a saisie par sa résolution 1989/75 en date du 24 mai 1989 (ci-dessus p. 3-7). Je prierai le Greffier de bien vouloir donner lecture du paragraphe 2 de ladite résolution, qui indique la question sur laquelle l'avis de la Cour est demandé.

Le GREFFIER:

«Le Conseil économique et social,

. . . . . .

2. *Demande* à titre prioritaire à la Cour internationale de Justice, en application du paragraphe 2 de l'article 96 de la Charte des Nations Unies et conformément à la résolution 89 (I) de l'Assemblée générale, en date du 11 décembre 1946, un avis consultatif sur la question juridique de l'applicabilité de la section 22 de l'article VI de la convention sur les privilèges et immunités des Nations Unies au cas de M. Dumitru Mazilu en sa qualité de rapporteur spécial de la Sous-Commission.»

Le PRÉSIDENT: Comme le prescrit l'article 66, paragraphe 1, du Statut, le Greffier a immédiatement notifié la requête pour avis consultatif, transmise à la Cour par une lettre du Secrétaire général en date du 1er juin 1989, à tous les Etats admis à ester devant la Cour. En outre, en application de l'article 66, paragraphe 2, du Statut, l'Organisation des Nations Unies et les Etats parties à la convention sur les privilèges et immunités des Nations Unies ont été avisés qu'ils étaient jugés susceptibles de fournir des renseignements sur la question soumise à la Cour pour avis consultatif et que celle-ci était disposée à recevoir des exposés écrits et des observations écrites ainsi qu'il était indiqué dans une ordonnance du 14 juin 1989[1]. Aux termes de cette ordonnance, qui précisait qu'il était nécessaire, pour fixer les délais de procédure, de tenir compte du fait que la requête pour avis consultatif avait été expressément présentée «à titre prioritaire», les délais suivants étaient fixés: le 31 juillet 1989 pour la présentation à la Cour d'exposés écrits conformément à l'article 66, paragraphe 2, du Statut et le 31 août 1989 pour la présentation à la Cour, par les Etats ou organisations qui auraient présenté un exposé écrit, d'observations écrites sur les autres exposés écrits conformément à l'article 66, paragraphe 4, du Statut.

Dans le premier délai, des exposés écrits ont été présentés, outre par le Secrétaire général de l'Organisation des Nations Unies, par les Gouvernements de l'Allemagne (République fédérale d'), du Canada, des Etats-Unis d'Amérique ainsi que de la République socialiste de Roumanie (ci-dessus p. 173-219); dans le second délai, des observations écrites sur ces exposés écrits ont été présentées par le Gouvernement des Etats-Unis d'Amérique (ci-dessus p. 220-227). Le

[1] *C.I.J. Recueil 1989*, p. 9.

Secrétaire général des Nations Unies a par ailleurs adressé à la Cour, en application de l'article 65, paragraphe 2, du Statut, un dossier de documents (ci-dessus p. 11-170) pouvant servir à élucider la question; ce dossier est parvenu à la Cour en plusieurs envois.

Conformément à l'article 106 de son Règlement, la Cour a décidé que les exposés écrits et les observations écrites présentés en l'espèce seraient rendus accessibles au public à l'ouverture de la procédure orale.

L'Organisation des Nations Unies et les Etats parties à la convention sur les privilèges et immunités des Nations Unies ont été informés de la date d'ouverture des audiences, ainsi que de la possibilité de prendre la parole devant la Cour. Seuls le Secrétaire général de l'Organisation des Nations Unies et le Gouvernement des Etats-Unis d'Amérique, dont je constate la présence des représentants à l'audience, ont fait savoir qu'ils entendaient présenter des exposés oraux. Je donne en conséquence la parole à M. Fleischhauer, conseiller juridique de l'Organisation des Nations Unies; la Cour entendra ensuite M. Sofaer, conseiller juridique au département d'Etat des Etats-Unis d'Amérique.

ORAL STATEMENT BY MR. FLEISCHHAUER

LEGAL COUNSEL OF THE UNITED NATIONS

Mr. FLEISCHHAUER: Mr. President, Members of the Court.

1. It is a great honour for me to be given the opportunity to address the International Court of Justice in order to assist it in responding to a legal question of particular importance and interest to the United Nations. The question addressed to the Court by the Economic and Social Council, which has for the first time made use of an authorization granted to it by the General Assembly pursuant to paragraph 2 of Article 96 of the United Nations Charter, concerns the status of "experts on missions for the United Nations" within the general régime of the privileges and immunities of the Organization.

2. The Secretary-General is of course keenly aware of the human rights dimension of Mr. Mazilu's situation, which was underlined by a recent decision of the Sub-Commission — to which I will revert — to refer this matter to its Special Rapporteur on the human rights of United Nations staff members, experts and their families. The question posed by the Council concerns solely the related and equally relevant issue of the applicability of the Convention on Privileges and Immunities of the United Nations (the so-called "General Convention") to Mr. Mazilu, and it is in this context that I will address the Court.

3. I do not intend to repeat either the summary of the facts or the legal arguments set out in the written statement of 28 July 1989 submitted on behalf of the Secretary-General of the United Nations. Rather, I would like first to bring the Court up to date on the relevant developments in the present case subsequent to the request for an advisory opinion by the Economic and Social Council. Particular reference will be made to those developments which took place during the forty-first session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities held in Geneva in August. I will then turn to some of the legal issues raised by the request in order to complement the views expressed in the written statement, by addressing in turn the issues pertaining to: the competence of the Court; the concept of "experts on missions" under the General Convention; the privileges and immunities of such experts; the applicability of these privileges and immunities in relation to the country of an expert's nationality; and finally, the status of Mr. Mazilu as a Special Rapporteur of the Sub-Commission.

I. Updating the Factual Background

4. The summary of the facts giving rise to the request for an advisory opinion as contained in the written statement ended with a reference to the intention of the Secretary-General to publish the report prepared by Mr. Mazilu in preliminary form as a document of the forty-first session of the Sub-Commission. In the event, the Secretariat, in issuing the report as document E/CN.4/Sub.2/1989/41, did not characterize it as preliminary. Rather, the Secretary-General stated in an introductory note, on page 144, *supra*, of that document:

> "The Secretary-General again sought unsuccessfully to contact Mr. Mazilu with regard to the presentation and editing of his report. Not being able to discuss with him these matters, the present report is published as received."

As also mentioned in that note, a text received from Mr. Mazilu covering "A Special View on the Romanian Case" was issued as an addendum to the report.

5. The forty-first session of the Sub-Commission extended from 7 August to 1 September 1989. At its first meeting, on 7 August, the temporary Chairman informed members of the Sub-Commission about the latest developments concerning Mr. Mazilu. In particular, he had received a letter from Mr. Mazilu stating that he had been in captivity in 1986 and that his life and that of his wife were in danger. The temporary Chairman also reported that Mr. Mazilu had submitted his study. He suggested that Mr. Mazilu's letter and study be discussed later under the appropriate agenda item.

6. At its second meeting, on 8 August, the Sub-Commission, in accordance with its established practice, invited Mr. Mazilu to participate in the meetings at which his report was to be considered. Mr. Diaconu, the Romanian member of the Sub-Commission, found such an invitation inappropriate.

7. At its tenth meeting, on 14 August, the Secretariat reported to the Sub-Commission its inability to reach Mr. Mazilu either by cable or by telephone or through the United Nations Office in Bucharest.

8. On 15 August, the Permanent Mission of Romania to the United Nations Office at Geneva requested the circulation of a Note Verbale addressed to the Centre for Human Rights as a document of the Sub-Commission. In this note, the Romanian Mission expressed its surprise at the Secretariat's decision to publish the report and, *inter alia*, questioned Mr. Mazilu's "intellectual capacity" to make an "objective analysis". Certain excerpts from Mr. Mazilu's previous publications in Romania were annexed to this note to demonstrate the contrast to Mr. Mazilu's present views.

9. On various occasions, throughout the session of the Sub-Commission, Mr. Mazilu's absence was commented on by members of the Sub-Commission. The principal discussion on Mr. Mazilu's situation took place on 30 August in connection with item 15 *(b)* of the agenda, to which Mr. Mazilu's report pertained. Mr. Diaconu spoke in most critical terms of the nature and content of Mr. Mazilu's report, as well as the manner in which the Secretariat had handled it. A reply was made by the Under-Secretary-General for Human Rights. Several members of the Sub-Commission participated in the debate.

10. At the close of the session, the Sub-Commission, on 1 September, adopted resolution 1989/46, whereby it requested Mr. Mazilu to update his report and to present it in person at its forty-second session in 1990. The Secretary-General was requested to continue to gather and furnish information to Mr. Mazilu for his study, and to provide him with all necessary assistance. The Sub-Commission also expressed its deep concern at the reports of the personal situation of Mr. Mazilu and his family, and requested the Secretary-General to follow the situation closely, and to inform the Sub-Commission's Special Rapporteur on the human rights of United Nations staff members, experts and their families. The latter was requested to report to the Sub-Commission on this matter at its next session, and meanwhile to present a note on the situation of Mr. Mazilu to the Commission on Human Rights at its forty-sixth session in 1990. Finally, the Sub-Commission decided to consider Mr. Mazilu's updated report at its next session.

11. Documents relating to all the events to which I have just referred have been included by the Secretariat in Part V of the Dossier of official documents relating to the question addressed by the Economic and Social Council to the Court. This latest instalment was transmitted to the Registry over this past week-end.

II. The Competence of the Court

12. Turning now to the legal questions raised by the request for an advisory opinion, I would now like to refer to the questions relating to the competence of the Court to accept the request for an advisory opinion. Here, I first hasten to make clear that the events which have occurred since the request was addressed to the Court do not in any way impair its competence to deal with the request. Throughout the recent session of the Sub-Commission, it was made clear that Mr. Mazilu continues to be the Special Rapporteur on Human Rights and Youth, whose presence is necessary for the presentation and discussion of his report. The view of the Sub-Commission on this matter is further expressed in the resolution adopted at its forty-first session, which I have just cited. It is, therefore, the Secretary-General's position that, notwithstanding the publication of a report submitted by Mr. Mazilu, the question upon which the Court is requested to give its advisory opinion continues to be unresolved and is by no means "moot". The Council's question centres on Mr. Mazilu's status as a Special Rapporteur of the Sub-Commission, which is of continued relevance to that body. Although Mr. Mazilu has now submitted a report, the question whether Article VI of the General Convention is applicable to him is still of interest to the Council and of importance to the Organization.

13. It should also be pointed out that even though Mr. Mazilu did submit a report, this was done two years after it had initially been expected, and of this delay at the utmost one year can be attributed to any medical problems. Moreover, in preparing his report, Mr. Mazilu did not have the benefit of normal collaboration with the secretariat of the Centre for Human Rights, either in Geneva or in Bucharest. Nor does it appear that he received all the materials the Centre had forwarded to assist him in preparing his report.

14. I would next like to make some additional remarks on the objections to the Court's competence in this matter as set out in the written statement submitted by Romania. The Court is naturally aware that at several stages, that is, in the Sub-Commission, in the Commission on Human Rights and in the Economic and Social Council, as well as in its written statement addressed to the Court, the Romanian Government has objected to the right of the Council to address its request to the Court, as well as the Court's competence to respond to it. The Government's objection is based on a reservation that it formulated to Section 30 of the General Convention at the time it acceded to that instrument. That reservation forms in Romania's view, an integral part of the expression of its consent to be bound by the Convention, any disregard of which would disrupt the unity of that instrument.

15. It is the Secretary-General's position that this reservation does not apply to the present request; thus Romania's obligation under the Convention, as well as the Council's right to request an advisory opinion and the Court's competence to respond thereto, remain unaffected. This position is founded on a number of considerations. In the first place, the authority of the Economic and Social Council, a principal organ of the United Nations, to request advisory opinions from the Court, is based solely on paragraph 2 of Article 96 of the Charter and on an authorization, pursuant to that paragraph, that the General Assembly granted to the Council in 1946 by its resolution 89 (I). Section 30 of the General Convention — which foresees recourse to the advisory procedure under certain circumstances and to which the Romanian reservation relates — is in no way the source of the Council's authority to address legal questions to the Court. Section 30 prescribes that if a difference regarding the Convention should arise between a Member State and the Organization, that difference shall be resolved

with *binding effect* by having a duly authorized United Nations organ request and receive an advisory opinion from the Court. In the present instance, ECOSOC, which was of course aware of the Romanian reservation, did not attempt to make use of this provision of the General Convention to settle the difference that it found had arisen between Romania and the United Nations; it merely requested the Court to give a non-binding advisory opinion on a particular legal question.

16. This characterization of the Council's intention is reinforced by the consideration that the Council did not request the Court to determine what the Government's obligations were vis-à-vis Mr. Mazilu under the Convention, and whether or not the Government had violated these obligations. Rather, it posed a legal question concerning the difference it found had arisen, the answer to which is of considerable interest to the Council and to the Organization as a whole. If the non-binding advice expected from the Court helps to resolve the difference, so much the better — but the Council's request was not conditioned on such an expectation.

17. The Romanian Government takes a different view of this matter since it appears to assert that its reservation to the General Convention somehow negates the authority of the Economic and Social Council to exercise its Charter-derived and General Assembly-approved authorization to address the Court. But this assertion is one that cannot be accepted either in logic or in law.

18. In the first place, it would mean that if the General Convention had no disputes-settlement clause at all, then the ECOSOC, or the Assembly itself, would be free, pursuant to Charter Article 96, to address to the Court legal questions concerning that instrument. But as it does contain such a clause and a Government has attempted to neutralize it by a reservation, it is claimed that the Council and the Assembly are thereby paralysed: they can no longer secure from the Court any advice concerning the Convention, as long as that advice might relate to a position that the reserving State has taken. The Court will recall that in its advisory opinion on *Reservations to the Genocide Convention* it disposed of a similar argument by pointing out that the mere fact that an instrument contained a disputes clause did not mean that a competent United Nations organ could not request an advisory opinion on some legal question concerning that instrument.

19. Furthermore, such a conclusion would appear to place the Romanian reservation above the Charter itself, which foresees that authorized organs of the United Nations should be able to secure legal opinions from the Court on matters within the scope of their activities. Not even a solemn treaty could, pursuant to Article 103 of the Charter, negate the effect of Article 96; how then could a mere unilateral reservation to a treaty have such a powerful negative effect?

20. In addition, it should be noted that the very terms of the Romanian reservation do not appear to extend nearly as far as that Government now contends. The first sentence of the reservation seems to refer solely to the first sentence of Section 30 of the General Convention, dealing with disputes that might arise between States parties to the Convention and which, failing another mode of settlement, are to be brought to the Court under Article 36 (1) of its Statute. As to the remaining part of Section 30, namely the one dealing with differences between the Organization and a Member State, the Romanian reservation merely would deprive any advisory opinion obtained of its otherwise decisive or binding quality. In other words, the text of the reservation does not prevent the Organization from requesting an advisory opinion; it merely states that such an opinion cannot, without the consent of Romania, have a binding effect.

21. At the very least, the text of the reservation is ambiguous. As it is, in effect, a unilateral instrument, it would seem inappropriate to interpret any ambiguity in favour of its author and against those who had nothing to do with its formulation. Furthermore, in light of the general encouragement in the Charter for the peaceful settlement of disputes, and in particular for the judicial settlement of legal disputes, ambiguities in texts relating to the peaceful settlement of disputes should not be interpreted in a manner that would unnecessarily diminish or constrain provisions that would provide for such a means of settlement.

22. The Romanian written statement also expresses the view that this Court lacks jurisdiction or competence in respect of the instant question because no dispute had arisen between the United Nations and Romania, with regard to the application and interpretation of the Convention, but perhaps only a difference of opinion as to the factual elements regarding Mr. Mazilu's ability to carry out his assignment. If one follows this argument, then of course Section 30 of the General Convention, as well as the Romanian reservation thereto, are entirely irrelevant, which coincides with the position that, albeit on other grounds, the United Nations has consistently taken. If, on the other hand, the argument is that the existence of a dispute is a prerequisite for the Court to be competent to reply to the Council's question, then this of course is not so, for the advisory competence of the Court is in no way tied to the existence of a dispute. Rather, paragraph 1 of Article 65 of the Statute authorizes the Court "to give an advisory opinion on any legal question" requested by a duly authorized body.

III. Experts on Missions under the General Convention

23. I now turn to a point of substance which is of particular interest and importance for the United Nations, namely, the concept of "experts on missions". This concept relates to Article VI of the General Convention, and in particular to Section 22 thereof, which deals with a class of persons called "experts on missions for the United Nations". That is one of three categories of persons related to the United Nations, as well as to other international organizations whose status is provided for specifically in the General Convention, and in the annexes of the companion Specialized Agencies Convention that were formulated by several of the agencies. The other two categories are "representatives of Member States" and "officials of the Organization".

24. In United Nations practice, the terms "experts on missions" comprises persons who, being neither representatives of States nor officials of the Organization, perform specific tasks for the Organization or one of its organs. Such persons may have a direct contractual relationship with the Organization, such as consultants employed on Special Service Agreements; alternatively, they might have an indirect relationship, such as military observers or police monitors whose relationship is defined not by a contract with the Organization, but by an agreement with their Governments, as well as in so-called status of forces agreements, such as the one governing the presence of UNTAG in Namibia. In either case, the particular status is spelled out in a special status agreement or in agreements with the Governments concerned. But in addition, many experts, like Mr. Mazilu, merely have a task assigned to them by competent organs which they have undertaken to carry out. These experts are not specifically identified as such through contracts or Special Service Agreements, but it is their function or assignment that confers their status upon them. They may receive their assignments from the Secretary-General or any other principal or subsidiary organ. Some of these assignments consist of membership in a par-

ticular body, such as the International Law Commission, to which they are elected or appointed, while other tasks are being assigned and accepted on an *ad hoc* basis. Some experts work individually, while others do so collectively in a standing commission or in a special task force. Some tasks are highly political, such as that of a Special Representative of the Secretary-General to deal with a particular international dispute, while others are purely technical, such as making a survey or searching literature. The particular task may be of great importance or it may be entirely routine. Frequently, these tasks involve travel, and some are indeed carried out entirely away from the expert's own country ; others, however, perform their tasks largely or completely in their home countries. But, in any event, their tasks must be carried out on an *ad personam* basis, that is, the expert must, in respect of the particular task or assignment or mission, be responsible solely to the Organization and not be subject to national controls in the execution of his task.

25. It is neither correct nor relevant to distinguish between "rapporteurs", "officials" and "experts on missions" on the sole basis of the "permanent" or "occasional" nature of their assignments, as the Government of Romania attempts to do in its written statement. Whether the task assigned *ad personam* by the United Nations is long- or short-term, continuous or intermittent, important or unimportant, the person who performs it is an "expert" within the meaning of the Convention, whose "mission" is precisely co-extensive with his assignment.

26. It should again be pointed out that the "mission" of an expert does not necessarily include, and certainly is not defined by travel. While travel in connection with an assignment is always part of the mission — this being explicitly specified in Section 22 of the General Convention — the mission is not restricted to such travel or to a stay abroad, but rather consists of carrying out the assigned task, wherever this is done.

27. The United Nations has been entrusted with many important tasks which it has a duty to carry out in the interest of the international community as such. In order to enable the Organization to carry out its mandate, it must be given the necessary tools. One of these tools, born out of sheer necessity, out of sheer functional necessity, is the "expert on mission" who carries out activities for the Organization, which for substantive, administrative or financial reasons cannot be assigned to United Nations officials. It is for the Organization to determine on which occasions experts on missions are to be employed in order to carry out a given task, as well as to choose those experts. The limit of the discretion in this respect is the relevant mandate which has to be executed, the allocated budgetary means, as well as the general obligation encumbent on the Organization to carry out its tasks effectively, efficiently and in good faith. If a State does not agree with the use of experts on missions for a given purpose or if a State objects to a particular expert chosen, then that State can always turn to a responsible organ of the Organization. But the fact remains that the category of "experts on missions" is an essential and necessary tool which must be used as the Organization, through its competent organs, sees fit.

28. Experts on missions, in order to comply with the functional needs of the Organization, must be granted the appropriate privileges and immunities so that they can carry out their tasks for the Organization to the best of their abilities, free from national interference.

IV. Privileges and Immunities of Experts on Missions

29. And this now brings me to the next point on which I wish to make remarks complementing the written statement, and that is the nature of those

privileges and immunities of the experts on missions. The rights to which these experts are entitled in terms of the General Convention and certain annexes to the Specialized Agencies Convention are to be differentiated from those that apply to representatives of States or to officials. The former enjoy diplomatic privileges and immunities while the latter — except for the most senior ranks — enjoy only functional rights. But the scope and content of these, however, necessarily reflect the fact that these officials may be spending many years of their lives and often their entire careers in international service; thus, their privileges and immunities, though basically functional, must to some extent also apply to their persons and even to that of their families.

30. By contrast, the scope and content of the privileges and immunities of experts on missions are more strictly functional — even task-oriented. That is, their rights are not related to their need to maintain a certain international personal status, for the only purpose of granting such rights is to enable them to carry out a particular assignment, without national interference that might inhibit either their ability to perform that task or mission, or their freedom to do so to the best of their abilities and conscience.

31. I would like to add that States are protected by the obligation of the Organization to act in good faith in choosing and in assigning tasks to experts, by the ability of Governments to question contentious assignments in the competent organs of the Organization and, in extreme conditions, by requesting a waiver under Section 23 of the General Convention.

32. From a technical point of view, it is important to note that because of the more strictly task-related privileges and immunities of experts on missions, and also because of the usually temporary nature of their assignments, the conditions under which they become entitled to such privileges and immunities are different from those of representatives of States or international officials. Representatives of States generally require some sort of accreditation, which both defines their authority to act in or vis-à-vis an international organization, as well as the status under which they enjoy rights in the host country concerned. Officials are listed and annually reported to all members of the international organization that employs them.

33. In respect of experts on missions, however, none of these formalities are practical or generally necessary. As the parties to the General Convention have, by Article VI of that instrument, only undertaken not to interfere with these persons in carrying out the tasks assigned to them by the United Nations, it is not necessary that these States have an advance or current list of experts within their territory, nor would it be feasible to provide them with such data. For all practical purposes, it should suffice if an international expert, should he be threatened with a particular national interference in the execution of a task entrusted to him by the Organization, merely points out that fact to the national authorities concerned, and if necessary obtains confirmation from the Organization. Once the national authorities are aware of the international nature of a particular activity, they generally have no difficulty in according the necessary privileges and immunities to enable that activity to be carried out without interference.

34. Only in relation to travel is it sometimes useful if the United Nations-related purpose of a particular journey is documented by the Organization issuing a Certificate of Travel as foreseen under Section 26 of the General Convention.

35. Evidently, different experts need different privileges and immunities to carry out their respective missions. For some, these missions involve considerable danger, while for the most they are of a routine nature. Article VI of

the General Convention is formulated flexibly enough to cover all types of missions, because the basic rule is that each expert receives just what he needs to carry out his tasks — no more and no less.

V. Status of Experts Is Not Related to Nationality

36. The Romanian Government asserts, particularly in its Aide-Mémoire addressed to the United Nations on 6 January 1989, that an expert on mission cannot enjoy privileges and immunities in the country of which he is a national or a permanent resident, but solely in the country in which he is on mission and during such a mission. I will therefore briefly address this point.

37. Article VI of the General Convention does not differentiate in any way between the privileges and immunities enjoyed by an expert on mission in the country of his nationality, in the country of his permanent residence or in any other country. Article V, which relates to officials of the Organization, does not make any distinction either. In this, both Articles differ from Article IV, relating to the representatives of States, in that Article IV contains a clear provision excluding the enjoyment by a national representative of rights vis-à-vis the country that he represents or of which he is a citizen. Thus, when the drafters of the Convention considered it appropriate to exclude rights for citizens, they very clearly did so. When they did not consider such an exception appropriate, as in respect of officials or experts on missions, then they formulated no such exclusion. Certainly, in respect of officials no one doubts that they can and do enjoy rights vis-à-vis their own countries and there is no reason to hold otherwise in respect of experts on missions.

38. As pointed out in the written statement submitted on behalf of the Secretary-General, in the past a few countries have made certain reservations designed to diminish to some extent the rights enjoyed by experts of their nationality in respect of their own Governments, in such matters as taxes and national service. Romania made no such reservation, and therefore cannot claim such exception. On the other hand, as also recalled in the written statement, a few other countries that wished to formulate extensive exclusions in respect of experts of their nationality, were advised by the Secretary-General — in his capacity both as depositary of the Convention and guardian of its provisions — that such wide exclusions would not be compatible with the purpose of the Convention, and therefore could not be accepted.

39. In its written statement, Romania has also put forward that:

> "In the country of which he is a citizen, in the country where he has his permanent residence, or in other countries where he may be for reasons unconnected with the mission in question, the expert is only accorded privileges and immunities in relation to the content of the activities in which he engages during his mission (including his spoken and written communications)."

This argument finds no basis in the General Convention or in any other similar instrument. It implies a limitation on the functions an expert can perform in his own country and is again based on the incorrect assumption that an expert's mission consists principally of travel. In our view, the only question with respect to an expert's rights, in his country or elsewhere, should be whether he is carrying out in that country any aspect of his mission. For if he is, then Section 22 of the General Convention applies.

40. Evidently, where a particular assignment is to be carried out depends largely on objective factors, that is, on the requirements of that assignment.

Some may involve travel in one or more countries foreign to the expert; some may require work in his own country; and some might be performed anywhere and would therefore normally be performed where the expert happens to be located — which will usually be his own country. But wherever and whenever the expert is actually working or attempting to work on his assignment, in his country or abroad, he is entitled to such of the privileges and immunities specified in Section 22 of the General Convention "as are necessary for the independent exercise of [his] functions".

41. It is equally evident that a country cannot, by preventing an expert from performing his international assignment, thereby avoid granting him the *applicable rights specified in Section 22 of the Convention, on the ground that* he is only entitled to such rights while carrying out that assignment. To hold otherwise would be to reward non-compliance with this international obligation, and indeed deprive it of all meaning.

VI. Status of Mr. Mazilu

42. Finally, I will now project the conclusions reached in the remarks I have made to the particular situation of Mr. Mazilu, in respect of whom the Economic and Social Council has posed its question.

43. Mr. Mazilu initially became an expert on mission for the United Nations by virtue of his membership in the Sub-Commission — a United Nations subsidiary organ to which he was elected in his personal capacity. The Sub-Commission is a body similar to many others whose members have long been characterized as experts on missions, and indeed Romania does not dispute that status as long as he retained that membership.

44. When his membership on the Sub-Commission ceased by the expiration of his term of office, his task as Special Rapporteur for Human Rights and Youth still continued. Romania contends that at that stage his status as an expert on mission ceased, perhaps because it fell below a certain undefined threshold of significance as an assignment for the United Nations. But the General Convention does not speak of such a threshold and indeed it would be difficult to see how one could be defined or justified. Therefore, Mr. Mazilu continued as an expert, but his sole mission for the United Nations was now the completion of the report. Whether work on that report was more onerous or more time-consuming than his other work as a member of the Sub-Commission is not known and is not relevant. The point is that whenever he was engaged in such work, or related travel or correspondence, he was entitled to be protected from governmental interference with such activities.

45. Romania also argues that Mr. Mazilu was not entitled to be considered as an expert on mission merely by virtue of his task to prepare a report for the Sub-Commission, because he did not start on such work until after his membership in that body ceased, and that even thereafter he did not work on it, at least for some time, for reasons of health or otherwise.

46. Mr. Mazilu's ill health, which allegedly led to his retirement from all his governmental posts, has been advanced as a justification for possible interference with the performance of his assignment for the United Nations. However, the fact that his health may not have permitted him to continue to occupy his governmental posts was not determinative of whether he could carry out his separate United Nations assignment. While the Romanian written statement expresses the view that the work of a rapporteur is strenuous, it is for the United Nations to set any standards of health that it wishes for its experts, and as to some categories it has actually done so. But it is not obliged, nor does it,

as a matter of practice, make either staff appointments or experts assignments dependent on governmental medical clearances. Whether Mr. Mazilu was thus healthy enough to carry our his assignment was a matter to be determined on the one hand by himself, and on the other by the United Nations.

47. Evidently, if an expert does not carry out his mission, for any reason but governmental interference, then he is not entitled to the protection afforded by Section 22 of the General Convention, for that protection relates only to the performance of the mission, that is the carrying out of an assigned task. But if the reason for the non-performance is governmental interference, then that Government cannot claim that the interference was justified by the fact that the lack of performance caused thereby meant that the person in question was never entitled to protection as an expert on mission.

48. While it is not entirely clear when Mr. Mazilu started to work or to try to work on his report, and why there may have been any delay, that is all not relevant to the question addressed to the Court. What is clear is that the Sub-Commission, which might have cancelled the assignment on the ground of Mr. Mazilu's apparent initial inactivity, did not choose to do so. Instead, it explicitly extended the assignment year after year, and thus Mr. Mazilu remained and still remains a Special Rapporteur.

49. What is equally clear is that Mr. Mazilu himself did not give up his assignment. Whenever he was able to communicate with the Centre for Human Rights, or with officers or members of the Sub-Commission, he confirmed his desire to proceed with his work and asked for assistance and protection to enable him to do so. So, if there was lack of performance on his part during any part of this period, it was apparently not due to any wilful neglect on his part.

50. Since thus the Sub-Commission explicitly wished and still wishes Mr. Mazilu to continue as its Special Rapporteur on Human Rights and Youth, and since there is no doubt he is willing to carry out that assignment for the United Nations, it follows that he continues in the status of an expert on mission, within the meaning of Article VI, Section 22, of the General Convention. While working on his report, he is entitled to freedom from inhibition on the independent exercise of this function from any Government, including his own.

51. Thus, the considerations which I have just advanced to complement the written statement, confirm the conclusions reached therein with respect to the applicability of Article VI, Section 22, of the General Convention to Mr. Mazilu as a Special Rapporteur of the Sub-Commission.

Conclusion

52. I do hope, Mr. President, that these remarks will assist the Court in rendering the advisory opinion requested by the Economic and Social Council.

The Court adjourned from 11.05 to 11.40 a.m.

ORAL STATEMENT BY MR. SOFAER

LEGAL ADVISER, UNITED STATES DEPARTMENT OF STATE

Mr. SOFAER:

INTRODUCTION

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 United Nations 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 on the Privileges and Immunities of the United Nations in the case of Dumitru 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. 201, *supra*), and that it "does not deny the applicability of the provisions of the 1946 Convention" (p. 204, *supra*), 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. 203, *supra*), are entitled under some circumstances to functional immunity *(ibid.)*. 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. 202, *supra*), 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 Prevention of 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 *Judgments 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 jurisdiction 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. 203, *supra*). 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. 204, *supra*). 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 excellent brief of the United Nations, p. 188, *supra*), 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 offical 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.

QUESTIONS DE M. GUILLAUME ET DU PRÉSIDENT

Question de M. Guillaume

M. GUILLAUME: 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?[1]

Questions du Président

Le PRÉSIDENT: Je dois 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?[2]

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?[3]

Troisième question: Le représentant du Secrétaire général pourrait-il préciser quelle est, de l'avis du Secrétaire général, l'incidence du «statut juridique de la convention vis-à-vis de l'Organisation», comme vous le dites dans votre exposé écrit (par. 51-53), sur la réponse à donner à la question formulée dans la résolution 1989/75 du Conseil économique et social?[4]

Les trois questions sont posées à vous, M. Fleischhauer, comme représentant du Secrétaire général. Si vous voulez répondre par écrit, vous avez l'opportunité de le faire. Si vous voulez répondre oralement, vous pourrez le faire demain matin lors d'une audience qui sera tenue à cet effet à dix heures. Nous sommes à votre disposition.

M. FLEISCHHAUER: Monsieur le Président, je voudrais répondre à ces questions oralement, si c'est possible demain matin.

Le PRÉSIDENT: Nous tiendrons donc une audience demain matin à 10 heures pour écouter les réponses de M. Fleischhauer à la question posée par M. Guillaume et aux trois questions posées par moi-même, comme membre de la Cour.

L'audience est levée à 12 h 10

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[1] Voir ci-après p. 249-250.
[2] *Ibid.*, p. 250-251.
[3] *Ibid.*, p. 251.
[4] *Ibid.*, p. 251-252.

SECOND PUBLIC SITTING (5 X 89, 10 a.m.)

Present: [See sitting of 4 X 89.]

REPLY BY MR. FLEISCHHAUER TO QUESTIONS[1] PUT BY JUDGE GUILLAUME AND BY THE PRESIDENT

Mr. FLEISCHHAUER: Mr. President I will answer the questions in the order in which they have been put to me.

Question by Judge Guillaume

The question asked by Judge Guillaume was:

> "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?"

In responding to this question I would first like to say that it of course appears clearly, both from the Secretary-General's written statement and from the oral one that I had the honour to present yesterday, that — in the conventional sense of the word — there are a number of "differences" between the legal position of the United Nations and that of the Romanian Government in respect of the applicability of Section 22 of the General Convention to Mr. Mazilu. We consider that these differences include — and I realize that as to this point the Romanian written statement expresses a different view — the very issue as to which the Economic and Social Council addressed its question to the Court, that is whether Mr. Mazilu, in his capacity as a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, was an "expert on mission for the United Nations" within the meaning of Section 22 of the General Convention. A further question, as to which Romania itself admits that there is a difference, concerns Mr. Mazilu's ability to carry out his assignment from the Sub-Commission.

But, even though there are indeed differences or divergences between the United Nations and the Romanian Government as to several aspects of Mr. Mazilu's status, this does not mean that these "differences" are ones within the meaning of Section 30 of the General Convention and in this connection a number of points are to be noted:

In the first place, even though the Economic and Social Council did indeed note that a "difference" had arisen between the Organization and the Government, it made that observation without any reference to Section 30 of the General Convention — even though in the next following paragraph of its resolution 1989/75 it explicitly cited another Section of that instrument. While its use of that term, the term "difference", may therefore not be entirely clear, it should be noted that the Council is not a juridical body, nor is it composed of legal experts.

However, it is suggestive of the Council's intention in adopting the resolution to note that, having referred to a "difference", it then did not attempt to have that difference as a whole resolved by the question it addressed to the Court.

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[1] See p. 248, *supra*.

Rather, as already commented on in our written and oral statements, the Council merely addressed a preliminary legal question to the Court, which appears designed to clarify at most the general status of Mr. Mazilu in respect of the Convention, without resolving the entire issue that evidently separates the United Nations and the Government.

In the second place it should be noted that at no time has the Secretary-General invoked Section 30 of the General Convention or suggested, vis-à-vis the Romanian Government, that a difference within the meaning of that Section had arisen. Though the Convention does not so specify, it would appear that such an invocation by the Secretary-General, rather than a mere resolution of another principal organ, is an important factor in determining whether a difference or dispute can formally be said to exist between the Organization and a Member State party to the Convention. Members of the Court will no doubt recall that just last year, in its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, it was the Secretary-General's conclusion, communicated formally to the United States Government, that a dispute had arisen in respect of that Agreement, that constituted an important factor in the Court's determination that there was indeed such a dispute.

To summarize my response, it is the United Nations position that while differences have indeed arisen between itself and the Romanian Government in respect of the applicability of the General Convention to Mr. Mazilu, under the circumstances as described, such differences are not ones within the meaning of Section 30 of the Convention.

I now come to the first question posed to me by you yourself, Mr. President.

First question by President Ruda

The first question asked by you was:

> "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?"

In response to this question I would first like to say that the factual elements that eventually led to the question concerning the applicability of Section 22 of the General Convention to Mr. Mazilu started to emerge in the thirty-ninth session of the Sub-Commission in August 1987 when Mr. Mazilu, who at its previous session in 1985 had been assigned the task of preparing a report on human rights and youth and to present it at the 1987 session, failed to appear thereat, even though he was then still a member as well as a Special Rapporteur. However, at that session it was assumed, on the basis of the information then available, that Mr. Mazilu was too ill to attend, and no legal questions were raised at that time about his absence. Instead, his mandate as a Special Rapporteur was routinely extended until the following year, even though the Sub-Commission knew that in the interim his term as member would expire.

By the time the Sub-Commission next met, at its fortieth session in August 1988, Mr. Mazilu was no longer a member of the Sub-Commission, his term having expired on 31 December 1987. Because he was not present at that session either, and it then appeared that his absence might not be entirely due to medical reasons — in particular because the secretariat reported on the difficulties it had had in communicating with him — the question of his legal status vis-à-vis the

Organization was first raised. As reported in the Secretary-General's written statement, it was at that time that it was first recognized that Mr. Mazilu was to be considered as an "expert on mission for the United Nations" within the meaning of Section 22 of the General Convention, and it was immediately thereafter that this position was communicated to the Romanian Government.

Thus, it would appear that Mr. Mazilu's status under the General Convention was first raised after he ceased to be a member of the Sub-Commission.

Second question by President Ruda

The second question put to me by the President reads as follows:

> "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?"

As pointed out in the written statement submitted on behalf of the Secretary-General, the Sub-Commission has a long-established practice of appointing rapporteurs and special rapporteurs normally from among its members but occasionally also non-members, in order to assist it in performing its tasks and I refer in particular to paragraph 72 of the written statement. This practice has been recognized by its parent bodies — the Commission on Human Rights and the Economic and Social Council. This competence to appoint rapporteurs and special rapporteurs necessarily carries with it the competence to extend, reassign and terminate their assignments.

As also mentioned in our written statement, the Sub-Commission, acting within its terms of reference, on 29 August 1985 appointed Mr. Mazilu, while he was still a member of the Sub-Commission, as its Special Rapporteur on Human Rights and Youth. This decision was then endorsed by the Commission on Human Rights by its resolution 1987/44 of 10 March 1987. When Mr. Mazilu's membership in the Sub-Commission ceased, that body explicitly indicated and decided at its thirty-ninth, fortieth and forty-first sessions in 1987, 1988 and 1989 respectively that it wished Mr. Mazilu to complete and then to update his report. The 1987 and 1988 decisions were again subsequently endorsed by the Commission and by the Economic and Social Council.

As also mentioned in my oral statement yesterday, whenever Mr. Mazilu was able to communicate with the Centre for Human Rights or with officers or members of the Sub-Commission, he confirmed his desire to continue with his work and asked for assistance to enable him to do so. There is thus no doubt of his willingness to carry out that assignment for the United Nations.

In the light of what I have said, it is therefore our view that since the organs which have the competence to appoint special rapporteurs asked Mr. Mazilu to continue to discharge the task assigned to him, irrespective of his membership in the Sub-Commission, and that since he apparently is willing to perform that task, his status as a Special Rapporteur of the Sub-Commission continues until he has completed the assignment or it is otherwise terminated.

Third question by President Ruda

The third question asked by you, Mr. President, reads as follows:

> "Le représentant du Secrétaire général pourrait-il préciser quelle est, de l'avis du Secrétaire général, l'incidence du «statut juridique de la convention vis-à-vis de l'Organisation», comme vous le dites dans votre exposé

écrit (par. 51-53), sur la réponse à donner à la question formulée dans la résolution 1989/75 du Conseil économique et social?"

In response, I would like to point to the fact that ECOSOC resolution 1989/75 speaks in both operative paragraphs of the applicability of the Convention on the Privileges and Immunities of the United Nations to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The applicability of the so-called General Convention is therefore at the centre of the question posed by the Council.

It seemed to us that there were two reasons that made it desirable to clarify, in the written statement presented on behalf of the Secretary-General, the legal status of the General Convention vis-à-vis the Organization.

First: Addressing the Court as the principal legal organ of the Organization on the legal issue submitted to it by ECOSOC, it seemed to us that for the sake of completeness, we should clarify the legal status of the Convention vis-à-vis the Organization. As it appears from the documents cited in paragraphs 51 through 53 of the written statement, that status can be variously interpreted. We therefore felt that we should make it clear that the Organization derives rights and obligations from the General Convention under whichever interpretation of that legal status one adopts.

Second: Although ECOSOC, the parent body of the Commission on Human Rights, and thus of its Sub-Commission, is authorized to ask for an advisory opinion on any legal question concerning their activities, it seemed to us that we should make it clear that the United Nations has a legal interest in the interpretation of the Convention. This is particularly so since, as was pointed out in both our written and oral statements, we are not proceeding under Section 30 of the Convention.

These, Mr. President, are the answers I wanted to give to the questions addressed to me.

CLÔTURE DE LA PROCÉDURE ORALE

Le PRÉSIDENT: Au nom de la Cour, je remercie M. Fleischhauer de ses réponses aux questions qui lui ont été posées à l'audience d'hier.

Ces réponses mettent fin à la procédure orale en la présente espèce. La Cour va maintenant commencer son délibéré.

L'audience est levée à 10 h 25

TROISIÈME AUDIENCE PUBLIQUE (15 XII 89, 10 h)

Présents: M. RUDA, *Président*; MM. ELIAS, ODA, AGO, SCHWEBEL, sir ROBERT JENNINGS, MM. BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, PATHAK, *juges*; M. VALENCIA-OSPINA, *Greffier*.

LECTURE DE L'AVIS CONSULTATIF

Le PRÉSIDENT: La Cour se réunit aujourd'hui pour prononcer en audience publique, conformément à l'article 67 de son Statut, l'avis consultatif, afférent à l'*Applicabilité de la section 22 de l'article VI de la convention sur les privilèges et immunities des Nations Unies*, que le Conseil économique et social de l'Organisation des Nations Unies lui a demandé de donner aux termes de sa résolution 1989/75.

Le paragraphe 2 du dispositif de ladite résolution était ainsi libellé:

[Le Président lit le paragraphe 2 de la résolution 1989/75[1].]

M. Mbaye, Vice-Président, pour des raisons de santé, a été empêché de siéger en la présente affaire. M. Lachs, qui a pris part au délibéré et au scrutin final, a été empêche de siéger aujourd'hui pour un motif dûment justifié.

Les paragaphes 1 à 8 de l'avis rappellent les étapes de la procédure depuis que la Cour a été saisie de la demande. Selon l'usage, je ne donnerai pas lecture de ces paragraphes. J'entame donc maintenant la lecture du texte de l'avis, en commençant par le paragraphe 9, qui introduit l'exposé des faits.

[Le Président lit les paragraphes 9 à 61 de l'avis consultatif[2].]

Je prie maintenant le Greffier de bien vouloir lire le dispositif de l'avis en anglais.

[The Registrar reads paragraph 61 of the Opinion[3].]

MM. Oda, Evensen et Shahabuddeen joignent à l'avis consultatif les exposés de leur opinion individuelle.

Conformément à la pratique, le texte de l'avis consultatif est disponible dès aujourd'hui sous forme multicopiée; le texte imprimé sera disponible très prochainement.

L'audience est levée

Le Président,
(Signé) José María RUDA.

Le Greffier,
(Signé) Eduardo VALENCIA-OSPINA.

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[1] Voir ci-dessus p. 5.
[2] *C.I.J. Recueil 1989*, p. 179-198.
[3] *I.C.J. Reports 1989*, p. 198.