EXPOSÉS ÉCRITS

WRITTEN STATEMENTS

TABLE DES MATIÈRES — CONTENTS

Page

Exposés écrits — Written Statements

Exposés oraux — Oral Statements

WRITTEN STATEMENT SUBMITTED ON BEHALF OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

INTRODUCTION

1. By resolution 1989/75, adopted on 24 May 1989 and entitled "Status of Special Rapporteurs" (doc. No. 99), the Economic and Social Council (hereinafter sometimes the "Council" or "ECOSOC") requested the International Court of Justice to give 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 Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission [on Prevention of Discrimination and Protection of Minorities]".

2. The circumstances leading to this request for an advisory opinion pertain to a report on "Human Rights and Youth", assigned to Mr. Dumitru Mazilu by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter the "Sub-Commission") of the Commission on Human Rights (hereinafter the "Commission"). At issue is the legal status, under the abovementioned "General Convention", of Mr. Mazilu as a Special Rapporteur of the Sub-Commission whose membership in that body had expired before he had completed the report assigned to him. It should, however, be noted that while the Court has been asked about the applicability of Section 22 of the Convention in the case of Mr. Mazilu, it has not been asked about the consequences of that applicability, that is about what privileges and immunities Mr. Mazilu might enjoy as a result of his status and whether or not these had been violated.

3. The facts summarized in Section I below include both those constituting the background for the question as to which the advisory opinion was requested, as well as an account of the proceedings within the Sub-Commission, the Commission and the Council leading to that request, in so far as these facts appear germane to the question addressed to the Court. The facts set forth are supported by the cited documents contained in the Dossier, which is being transmitted to the Court in accordance with Article 65, paragraph 2, of its Statute.

4. Section II of this statement examines first the general authority of the Council to address its request to the Court, then the effect that the Romanian reservation to the General Convention might have on that authority in this specific case and finally whether there is any reason that the Court might exercise its discretion not to reply to the question that the Council — acting for the first time under Article 96 of the Charter — considered it important to ask.

5. The following Sections III-V discuss in turn various legal aspects of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (the "General Convention") as a whole, then the definition and certain special considerations relevant to the category of "experts on missions" established by Article VI of that instrument and in particular by Section 22 thereof, and lastly whether that category includes the rapporteurs and special rapporteurs of the Sub-Commission. The final part of the statement, Section VI, then relates the conclusions from the above analyses, and especially that concerning those special rapporteurs, to the particular situation of Mr. Mazilu.

I. Summary of the Facts Giving Rise to the Request for an Advisory Opinion

A. Appointment of Mr. Mazilu as Special Rapporteur on "Human Rights and Youth"

6. On 13 March 1984 the Commission, upon nomination of Romania, elected Mr. Dumitru Mazilu, a Romanian citizen, to serve in his personal capacity as a member of the Sub-Commission for a three-year term, due to expire on 31 December 1986 (docs. Nos. 1, 1A).

7. Pursuant to the Commission's resolution 1985/13 calling upon the Sub-Commission to pay due attention to the role of youth in the field of human rights (doc. No. 3), the Sub-Commission at its thirty-eighth session on 29 August 1985 adopted resolution 1985/12 entrusting Mr. Mazilu with the preparation of a report on "human rights and youth" (doc. No. 6). This report was to be submitted under an agenda item entitled: "promotion, protection and restoration of human rights at national, regional and international levels", at the thirty-ninth session of the Sub-Commission scheduled for 1986. Sub-Commission resolution 1985/12 was endorsed by the Commission in its resolution 1987/44 of 10 March 1987, whereby it requested the Secretary-General to provide all necessary assistance to the Sub-Commission's rapporteur on human rights and youth for the completion of his task (doc. No. 15).

B. The Thirty-ninth Session of the Sub-Commission

8. For financial reasons the thirty-ninth session of the Sub-Commission was not convened in 1986 but was rescheduled for 1987. Consequently, the three-year mandate of its members — originally due to expire on 31 December 1986 — was extended by ECOSOC resolution 1987/102 for an additional year (doc. No. 14). The presentation of Mr. Mazilu's report was thus automatically deferred to 1987.

9. When the thirty-ninth session of the Sub-Commission opened in Geneva on 10 August 1987, Mr. Mazilu was not present, nor was his report submitted. At the 5th meeting of that session held on 12 August 1987, the representative of the Secretary-General said that by a letter transmitted to him that very morning, the Permanent Mission of Romania had informed the United Nations Office in Geneva that Mr. Mazilu had suffered a heart-attack and was still being held in a hospital (doc. No. 18, para. 27). Later there was received a telegram signed "D. Mazilu" and dated 18 August 1987, regretfully informing the Sub-Commission of his inability, due to heart illness, to attend the current session (doc. No. 19).

10. In the light of these communications, the Sub-Commission adopted decision 1987/112 on 4 September 1987, whereby it deferred consideration of item 14 of its agenda — under which the human rights and youth report was due to be discussed — to its fortieth session scheduled for 1988 (E/CN.4/1988/37 — E/CN.4/Sub.2/1987/42, p. 54). Notwithstanding the scheduled expiration on 31 December 1987 of Mr. Mazilu's term as a member of the Sub-Commission, the latter included a report on the "Prevention of discrimination and protection of children: human rights and youth", to be submitted by him (identified by name), in the provisional agenda of its fortieth session, as item 15 *(d)*. The Sub-Commission also referred to that report in Chapter II, entitled "Studies which do not imply new financial implications", of the "List of studies and reports under preparation by members of the Sub-Commission in accordance with the

existing legislative authority" (E/CN.4/1988/37 — E/CN.4/Sub.2/1987/42, pp. 120 and 135).

C. Communications between Mr. Mazilu and the Centre from the Thirty-ninth to the Fortieth Session of the Sub-Commission

11. After the thirty-ninth session of the Sub-Commission, the secretariat of the Centre for Human Rights made various attempts to contact Mr. Mazilu and to provide him with assistance in the preparation of his report, including arranging a trip to Geneva. Thus, in a letter dated 3 November 1987, the Under-Secretary-General for Human Rights assured Mr. Mazilu that all relevant information submitted by Governments, intergovernmental organizations and non-governmental organizations would be regularly sent to him, and that financial resources for his mission to Geneva had already been approved (doc. No. 20); indeed, such informations were sent to him on a regular basis (see, e.g., doc. No. 13 and Introduction to the Dossier, para. 9). In a subsequent telegram, dated 17 December 1987, the Under-Secretary-General requested a prompt reply to his 3 November letter, and in particular with respect to Mr. Mazilu's eventual proposals for assistance in the preparation of his report (doc. No. 21). Having received from Mr. Mazilu two letters postmarked 25 and 29 December 1987 (docs. Nos. 22, 23), whereby he indicated that he had not received the previous communications of the Centre, the Under-Secretary-General, in a telegram dated 19 January 1988 and addressed to the Acting Director of the United Nations Information Centre (UNIC) in Bucharest, requested the latter's assistance in facilitating Mr. Mazilu's work on his report by serving as a channel through which a ticket to Geneva would be provided to Mr. Mazilu; the Under-Secretary-General also asked that a formal invitation be communicated to Mr. Mazilu to come to the Centre for Human Rights in Geneva for consultations (doc. No. 24).

12. In an undated letter addressed to the Under-Secretary-General for Human Rights, and transmitted through the Acting Director of UNIC Bucharest (his letter of 20 January 1988), Mr. Mazilu indicated that despite his willingness to come to Geneva for consultations, the Romanian authorities refused him a travel permit (doc. No. 25). He likewise confirmed that he had been twice hospitalized and that he had been forced to retire, as of 1 December 1987, from his various governmental posts. In a series of letters dated 5 April, 19 April, 8 May and 17 May 1988 (docs. Nos. 31, 33, 34, 37, 38, 39), Mr. Mazilu further described his personal situation and the various pressures exerted upon him following his refusal to comply with a request addressed to him on 22 February 1988 by a special commission from the Foreign Office to voluntarily decline to submit his report to the Sub-Commission (doc. No. 31).

D. Expiration of Mr. Mazilu's Term as a Member of the Sub-Commission

13. On 31 December 1987 the terms of all members of the Sub-Commission, including Mr. Mazilu, expired (see para. 8 above). On 29 February 1988 the Commission, upon nomination of their respective Governments, elected new members of the Sub-Commission, among whom was Mr. Ion Diaconu, a Romanian citizen (doc. No. 29). In a letter dated 29 March 1988 and transmitted under cover of a Note Verbale dated 8 April 1988 from the Permanent Mission of Romania in Geneva[1] to the Chairman of the Sub-Commission (doc. No. 32),

[1] Unless otherwise indicated, all references to the Permanent Representative or Mission of Romania are to those in Geneva.

Mr. Diaconu offered to prepare a report on human rights and youth; this offer was repeated in a letter dated 27 June 1988 from the Permanent Mission of Romania to the Under-Secretary-General for Human Rights (doc. No. 42).

14. On 1 July 1988 the Under-Secretary-General for Human Rights informed the Permanent Representative of Romania that since Mr. Mazilu had been mandated by Sub-Commission decision 1985/12 to prepare the human rights and youth report, only the Sub-Commission or a higher policy-making body was competent to change that designation, failing which the Secretary-General was bound by the said resolution "to provide all necessary assistance to Mr. Dumitru Mazilu for the completion of this task" (doc. No. 44).

15. Nonetheless, in a telex received on 24 July 1988 (doc. No. 43), Mr. Diaconu notified the Sub-Commission that he was willing to prepare a report on human rights and youth and that he could send immediately a paper setting out the results of his research on this subject which he had already sent through the Permanent Mission of Romania for circulation to the members of the Sub-Commission.

E. Requests Addressed to the Romanian Government to Enable the Completion of the Human Rights and Youth Report by Mr. Mazilu

16. By letter dated 6 May 1988 (doc. No. 35) the Under-Secretary-General for Human Rights requested the assistance of the Permanent Mission of Romania in transmitting to Mr. Mazilu all relevant information previously submitted by Governments, specialized agencies and non-governmental organizations, and which was necessary for the completion of his report. By a letter of 15 June 1988 (doc. No. 41), the Under-Secretary-General informed the Permanent Representative of Romania that as an exceptional measure, a staff member of the Centre for Human Rights was authorized to travel to Bucharest for the purpose of working with Mr. Mazilu on his report — on the understanding that Mr. Mazilu would be enabled to present his report to the Sub-Commission in Geneva and to participate in the ensuing debate.

F. The Fortieth Session of the Sub-Commission

17. Even though all the rapporteurs and special rapporteurs of the Sub-Commission were invited to attend its fortieth session (8 August to 2 September 1988) and the sessions of its working groups, Mr. Mazilu again did not appear. During the debate on the organization of work of the session, various members expressed their views as to the situation of Mr. Mazilu. At the 9th meeting, held on 9 August 1988, the Chairman stressed the two-fold aim of the Sub-Commission, namely, the satisfactory completion of the human rights and youth report by Mr. Mazilu, and the presentation of the said report by the latter, in person. Mr. Diaconu argued that the Sub-Commission ought to be concerned with the report itself rather than with Mr. Mazilu, whose medical file — Mr. Diaconu asserted — had been communicated to the Sub-Commission in 1987; the attitude of the Sub-Commission amounted, in his view, to questioning the medical opinion upon which the Romanian Government relied; he argued that Mr. Mazilu was unable to complete his report for health reasons, and no other expert should be sent to Bucharest to complete the work for him. Other members of the Sub-Commission expressed their opinion, that at issue was not the competence of the Romanian doctors, but rather the decision of Mr. Mazilu himself as to his ability or will to complete the report. To allow Mr. Mazilu to express his decision freely it was necessary for him to travel to Geneva, failing

which a member of the Secretariat should be allowed to meet with him in Bucharest and learn from him directly of his decision (doc. No. 61, paras. 31-36). The observer for Romania at the meeting of the Sub-Commission, when invited to comment on what had been said, briefly stated that in his Government's view "any measure that might be regarded as a form of inspection or control would not be acceptable" (*ibid.*, para. 53). As a consequence of this discussion a special invitation was cabled to Mr. Mazilu on the same day (doc. No. 45).

18. At its 10th meeting, held on 15 August 1988, the Sub-Commission adopted decision 1988/102, whereby it requested the Secretary-General

> "to establish contact with the Government of Romania and to bring to the Government's attention the Sub-Commission's urgent need to establish personal contact with its Special Rapporteur Mr. Dumitru Mazilu and to convey the request that the Government assist in locating Mr. Mazilu and facilitate a visit to him by a member of the Sub-Commission and the Secretariat to help him in the completion of his study on human rights and youth if he so wished" (doc. No. 54).

19. At the 14th meeting, held on 17 August 1988, the Under-Secretary-General for Human Rights informed the Sub-Commission that in contacts held between the Secretary-General's office and the chargé d'affaires of the Romanian Permanent Mission in New York, the possibility of establishing direct contact with Mr. Mazilu had been raised. The Romanian attitude was that any intervention of the United Nations Secretariat and any form of investigation in Bucharest would be considered intervention in Romania's internal affairs. The case of Mr. Mazilu was an internal matter between a citizen and his own Government and for that reason no visits would be allowed to Mr. Mazilu (doc. No. 64).

G. The Legal Opinions of the Office of Legal Affairs

20. At the request of the Under-Secretary-General for Human Rights, the Office of Legal Affairs on 23 August 1988 gave a legal opinion on the applicability of the General Convention to the situation of Mr. Dumitru Mazilu (doc. No. 71). In summary, the legal opinion concluded that Mr. Mazilu, albeit an ex-member of the Sub-Commission, still had a valid assignment and should therefore be considered an "expert on mission" within the meaning of Article VI of the General Convention. Therefore, in the performance of his assignment, Mr. Mazilu was entitled by virtue of Section 22 of the Convention to those privileges and immunities necessary for the independent exercise of his functions (doc. No. 65).

21. At its 32nd meeting, on 30 August 1988, the Sub-Commission considered draft resolution E/CN.4/Sub.2/1988/L.25, whereby it was foreseen that an advisory opinion on the applicability of the General Convention to the Mazilu case might be sought from the International Court of Justice. Being aware, however, of a Romanian reservation to Section 30 of the General Convention, the Under-Secretary-General for Human Rights requested a second legal opinion from the Office of Legal Affairs on the question of whether the Romanian reservation could prevent a recourse to the Court for an advisory opinion and, in case of a negative answer, what would then be the legal implication of the reservation made by Romania (doc. No. 68, para. 46).

22. In his memorandum entitled: "Request for a legal opinion on the reservation made by Romania with respect to Section 30 of the Convention on the

Privileges and Immunities of the United Nations of 13 February 1946", the Legal Counsel of the United Nations answered that *(a)* the Romanian reservation to Section 30 of the General Convention did not prevent a competent United Nations organ from requesting an advisory opinion, under Article 96 of the Charter, concerning the applicability of Article VI, Section 22, of the General Convention on the situation of Mr. Mazilu but that *(b)* such an advisory opinion would not be binding upon the parties (doc. No. 72).

H. Sub-Commission Resolution 1988/37 on the Prevention of Discrimination and Protection of Children: Human Rights and Youth

23. The Sub-Commission on 1 September 1988 adopted by a roll-call vote of 16 to 4, with 3 abstentions resolution 1988/37 (doc. No. 55), containing a threefold request:

(a) It requested the Secretary-General to approach once again the Romanian Government and invoke the applicability of the General Convention in the case of Mr. Mazilu.

(b) Should Romania refuse to apply to Mr. Mazilu the relevant provisions of the General Convention, the Secretary-General was requested

> "to bring the difference between the United Nations and Romania immediately to the attention of the Commission on Human Rights at its forthcoming forty-fifth session in 1989".

(c) If no acceptable solution was found, the Commission would then be requested

> "to urge the Economic and Social Council to request . . . from the International Court of Justice an advisory opinion on the applicability of the relevant provisions of the Convention on the Privileges and Immunities of the United Nations to the present case . . .".

I. Exchange of Correspondence between the Secretary-General and the Permanent Representative of Romania

24. Pursuant to the foregoing resolution the Secretary-General on 26 October 1988 addressed a Note Verbale to the Permanent Representative of Romania to the United Nations in New York, in which he invoked the General Convention in respect of Mr. Mazilu and requested the Romanian Government to accord Mr. Mazilu the necessary facilities, including travel to Geneva, in order to enable him to complete his assigned task (doc. No. 73). As no reply had been received to that Note Verbale, the Under-Secretary-General for Human Rights on 19 December wrote a letter of reminder to the Permanent Representative of Romania in Geneva (doc. No. 74). Furthermore, during all this period, the Secretary-General had several conversations with the Permanent Representative of Romania in New York, in which he emphasized that Mr. Mazilu was to be considered as an expert on mission for the Organization, and requested the cooperation of the Romanian Government in facilitating the preparation of this report, including any necessary travel to Geneva.

25. On 6 January 1989 the Permanent Representative of Romania handed to the Legal Counsel of the United Nations an Aide-Mémoire (doc. No. 78) in which the Government's position concerning Mr. Mazilu was set forth as follows: Mr. Mazilu, being seriously ill, had retired from all his professional activities. The Romanian Government consequently presented the candidacy of

another expert to replace the ailing member, whose term of office had in any case expired on 31 December 1987. From then on all requests made, on behalf of the Sub-Commission, by the Under-Secretary-General for Human Rights and the Secretary-General, for the Government to enable Mr. Mazilu to complete his assigned task, were politically motivated and had nothing to do with the completion of the report on human rights and youth. This was all the more so in view of the refusal of the Sub-Commission to accept the draft report on that subject submitted to it by the newly elected Romanian member, for distribution as a document of the Sub-Commission. As to the General Convention, the Government rejected its applicability to Mr. Mazilu, whose mission was occasional, whose mandate had long before expired and who in any case would not have been entitled to any privileges and immunities while in his own country. In conclusion, the Romanian Government recalled that in view of its reservation to Section 30 of the General Convention regarding settlement of disputes, no recourse could be had to the International Court of Justice without the express consent of both parties.

J. The Secretary-General's Report to the Fifth Committee of the General Assembly at Its Forty-third Session

26. In his report to the Fifth (Administrative and Budgetary) Committee of the General Assembly, entitled : "Personal Questions : Respect for the Privileges and Immunities of Officials of the United Nations and the Specialized Agencies and Related Organizations", the Secretary-General also referred to the Mazilu case, although Mr. Mazilu was not an official of the Organization, and indicated that he

> "was not permitted by the Romanian authorities to travel to Geneva in order to present his report at the recent fortieth session of the Sub-Commission. Although no longer a member of the Sub-Commission, Mr. Mazilu had a valid assignment from the Sub-Commission and is, therefore, to be considered as having in that capacity the status of an expert on mission for the United Nations within the meaning of Article VI of the Convention on the Privileges and Immunities of the United Nations" (doc. No. 79).

27. At its 35th meeting on 18 November 1988, the Fifth Committee discussed the Mazilu case under agenda item 121 *(c)*, entitled : "Other Personal Questions". The representative of Denmark, speaking on behalf of the Nordic countries, expressed their concern as to the fate of Mr. Mazilu and appealed to the Romanian authorities to allow Mr. Mazilu to come to Geneva and complete his task. Mr. Mazilu's detention, it was argued, constituted a violation of applicable immunities and a hindrance to the Organization's work in the promotion of human rights. The Romanian representative at this meeting rejected any reference to Romanian nationals in the context of agenda item 121 *(c)*. He reminded the Committee that his Government's position with respect to that former member of the Sub-Commission had already been communicated to United Nations officials, and it had been demonstrated that the Convention on Privileges and Immunities was not applicable to the said former member (doc. No. 79A, paras. 45 and 62).

K. The Request for an Advisory Opinion

28. At the forty-fifth session of the Commission in 1989, the Secretary-General presented a Note "pursuant to paragraph 2 of resolution 1988/37 of the

Sub-Commission on Prevention of Discrimination and Protection of Minorities" (see para. 23 *(b)* above), to which were attached his Note Verbale to the Romanian Government of 26 October 1988, and the Romanian Aide-Mémoire of 6 January 1989 (doc. No. 81). The Commission, concluding that a difference has arisen between the United Nations and Romania as to the applicability of the General Convention, adopted by a roll-call vote of 26 to 5, with 12 abstentions its resolution 1989/37 (doc. No. 88) recommending that the Council request an advisory opinion from the International Court of Justice as to the applicability of the Convention to the Mazilu case.

29. As recommended in Commission resolution 1989/37, the Economic and Social Council on 24 May 1989 adopted by a recorded vote of 24 to 8, with 19 abstentions its resolution 1989/75 requesting an advisory opinion of the Court on the question of the applicability of Article VI, Section 22, of the General Convention in respect of Mr. Mazilu as Special Rapporteur of the Sub-Commission (see para. 1 above).

L. Further Communications from Mr. Mazilu

30. During the month of May 1989, Mr. Mazilu addressed to the Secretary-General, to the President of the General Assembly, to the Chairmen of the Commission and of the Sub-Commission, and to the Under-Secretary-General for Human Rights, a series of letters in which he expressed his continuing fears for his physical safety and the safety of his family, and urged the publication of his draft report on human rights and youth, which he had in the meantime submitted to the Centre in several instalments through various channels (docs. Nos. 93-96). The report is to be published in preliminary form as a document for the forty-first session of the Sub-Commission.

II. The Propriety of the Economic and Social Council Addressing Its Question to the International Court of Justice and of the Court Responding Thereto

31. Before entering on the substantive issues raised by the question addressed by the Economic and Social Council to the Court, it may be useful to consider first whether the Council was under the circumstances actually authorized to do so and, if so, whether the Court should exercise its discretion to respond to the question. These questions are adverted to since the Romanian Government has indicated, in its Aide-Mémoire transmitted to the United Nations Legal Counsel on 6 January 1989 (doc. No. 78), as well as in its statements to the Sub-Commission (docs. Nos. 68, para. 49, and 69, paras. 21-22) to the Commission (doc. No. 87, paras. 149-150) and to ECOSOC (docs. Nos. 89, para. 525, and 98), that it considered that because of the reservation it had entered to Section 30 of the General Convention "no advisory opinion can be requested on this case, or consequently, on the interpretation and application of the Convention on any other grounds".

A. The Authority of the Economic and Social Council

32. In the resolution by which the Council addressed its question to the Court it referred solely to two legal provisions as the bases for making its request: Article 96, paragraph 2, of the Charter of the United Nations and General Assembly resolution 89 (I) of 11 December 1946 (doc. No. 158).

33. The Charter provision empowers the General Assembly to authorize, *inter alia*, "[o]ther organs of the United Nations" to "request advisory opinions of the Court on legal questions arising within the scope of their activities". By means of the cited resolution the Assembly exercised this power in respect of the Economic and Social Council, authorizing it to "request advisory opinions . . . on legal questions arising within the scope of the activities of the Council" (doc. No. 158).

34. The question that the Economic and Social Council asked in the instant case is evidently a legal one, as it concerns "the applicability" of a specified section of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, which is a treaty in force, in respect of a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. Whether it is necessary in responding to the Council's question to interpret the treaty or merely to decide as to its applicability under the indicated circumstances, it is clear that the question is entirely and solely a "legal" one within the meaning of the Charter and of the General Assembly's resolution. It should be noted that the Council itself specifically characterized its question as a "legal" one, and although that characterization is evidently neither binding on the Court nor capable of altering the essential nature of the question, it indicates the nature of the Council's interest in addressing its request to the Court.

35. The question by the Economic and Social Council is also one that arose within the scope of its activities. This is so because, as appears from the factual background summarized above, the applicability or not of Section 22 of the General Convention may determine whether a Government party to the Convention may interfere with a task assigned by the Sub-Commission to one of its special rapporteurs, i.e., the preparation of a report that the Sub-Commission had commissioned in response to an earlier resolution of the Commission on Human Rights (resolution 1985/13 of 11 March 1985 (doc. No. 3)). The Sub-Commission is a subsidiary organ of the Commission on Human Rights, established by the latter's resolution adopted in its first session held from 27 January to 10 February 1947 pursuant to Council resolution 9 II of 21 June 1946 (doc. No. 146); the Commission in turn is a subsidiary organ of the Council, established by the latter's resolution 5 I of 16 February 1946 (doc. No. 145), pursuant to Article 68 of the United Nations Charter. That Article emphasizes that the commissions that the Council is to set up under that authority are such as may be required for the performance of its (i.e., the Council's) functions.

36. The question formulated by the Economic and Social Council in its resolution 1989/75 is therefore a legal one that arose within the scope of the Council's activities, as required by paragraph 2 of Article 96 of the Charter and by General Assembly resolution 89 (I).

B. The Effect of the Romanian Reservation to the General Convention

37. The Romanian Government has, nevertheless, asserted that the reservation it entered to Section 30 of the General Convention prevents the request of an advisory opinion "on this case" and, even more generally, "on the interpretation and application of the Convention on any other grounds".

38. The two relevant texts read as follows:

(a) *Section 30 of the General Convention*:

> "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."

(b) *Romanian reservation in respect of the General Convention:*

"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 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 takes 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 is to be accepted as decisive." [Original French.]

39. First of all it should be noted that the only part of the reservation that relates to advisory opinions of the Court merely refers to the last sentence of Section 30 of the Convention, which provides that an advisory opinion given under the circumstances specified in the previous sentence is to be accepted as decisive by the parties. Thus, even the very terms of the reservation would not prevent a request for an advisory opinion or a reply to such a request, but merely may affect its decisive character.

40. In any event, the Economic and Social Council did not make its request pursuant to or in accordance with Section 30 of the General Convention, to which it nowhere refers in its resolution 1989/75, which otherwise specifically cites every text that the Council considered relevant to its request. The mere fact that the Council concluded that a difference had arisen between the United Nations and the Government of Romania in respect of the applicability of the General Convention does not mean that it intended to have that difference resolved in accordance with Section 30.

41. That the Economic and Social Council did not intend to have the difference that it perceived settled pursuant to Section 30 of the General Convention is not surprising, since it acted on a draft text presented to it by the Commission on Human Rights (see doc. No. 97). The latter was aware of the Romanian reservation to the Convention, since the text of the Romanian Aide-Mémoire of 6 January 1989 had been submitted to the Commission (doc. No. 81, Ann. II). Furthermore, the effect of the Romanian reservation on the powers of the Council to request an advisory opinion had been explicitly explored in the Sub-Commission, which received a legal opinion (see para. 22 above) explaining that in light of the Romanian reservation no advisory opinion to which a decisive effect would be attributed, could be requested under Section 30 of the General Convention, but that a request could always be made under the general powers of the Council under Article 96 of the Charter and the consequent General Assembly resolution (see doc. No. 72). The Council's subsequent action evidently followed that advice.

42. As the Council did not attempt to request an advisory opinion within the framework of Section 30 of the General Convention, but rather specifically relied solely on its authorization by the General Assembly in accordance with

the Charter, the Romanian reservation to that Section could not restrict that general authorization. Thus this situation differs clearly from that which motivated the Court to decline to respond to Question II of the Executive Board of the United Nations Educational Scientific and Cultural Organization, in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956,* p. 77, at p. 99.

43. Indeed to suggest, as does the Romanian Aide-Mémoire, that the Government's reservation to Section 30 of the General Convention can prevent the request for any advisory opinion relating to a position taken by the Government in respect to the Convention, would raise serious questions under Article 103 of the United Nations Charter, which assures the primacy of that instrument over all other international agreements. And if even the General Convention, which is such an agreement, could not itself limit the Charter-derived power of certain United Nations organs to request advisory opinions on legal questions, then a single Government's reservation to that Convention could certainly not have such an effect.

44. Finally, the Court may recall that in its advisory opinion of 28 May 1951 in respect of *Reservations to the Genocide Convention* it held that the Court's advisory jurisdiction cannot be excluded by the mere existence of a procedure for the settlement of disputes in an instrument in respect of which an advisory opinion has been requested, because the right to request advisory opinions derives directly from Article 96 of the Charter (*I.C.J. Reports 1951*, p. 15, at p. 20). This consideration must apply *a fortiori* in respect of an instrument whose disputes settlement procedure had been rendered ineffective in respect of a particular situation by a reservation.

C. The Discretion of the Court to Give an Advisory Opinion

45. This Court has repeatedly held that although its power to give advisory opinions is a discretionary one, its reply to a request for such an opinion from an authorized United Nations organ represents the Court's participation in the activities of the Organization and, in principle, should not be refused; indeed, the Court has held that only compelling reasons would justify such a refusal. (*Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950,* p. 65, at p. 71; *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 15, at p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956,* p. 77, at p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962,* p. 151, at p. 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971,* p. 16, at p. 41.)

46. Suffice it to say, this Court has never found, in considering any request for an advisory opinion, reasons sufficiently compelling to cause it to refuse to respond. With reference to the present request, there would appear to be no reasons, and certainly no compelling ones, for the Court to decline to play the role foreseen for it in the United Nations Charter and its own Statute.

47. The issue in respect to which the Economic and Social Council posed its question is a serious one, with far-reaching consequences. Although that question arose within the context of restrictions apparently imposed on the activities of a particular special rapporteur of a particular subsidiary organ, the Council

did not request the Court to address specifically these restrictions, but merely to determine whether a specified provision of the General Convention, a treaty of great importance to the United Nations and directly derived from the Charter (Art. 105, para. 3), is applicable to that special rapporteur — and thus by implication to other similar officials charged with carrying out tasks assigned to them by organs of the United Nations.

III. The Convention on the Privileges and Immunities of the United Nations (the "General Convention")

A. History of and Participation in the Convention

48. Paragraph 3 of Article 105 of the Charter of the United Nations provides that the General Assembly may propose conventions to the Members of the United Nations for the purpose of determining the details of the application of paragraphs 1 and 2 of that Article, relating to the privileges and immunities necessary to the Organization, as well as to representatives of its Members and to its officials. The Preparatory Commission of the United Nations consequently recommended that the General Assembly should at its first session propose such a convention, and the Commission included the draft of such an instrument in its Report to the Assembly (doc. No. 100). This draft was referred to the Sixth (Legal) Committee of the Assembly, which in turn referred it to a Sub-Committee on Privileges and Immunities. On the basis of the report of the Sub-Committee (doc. No. 101) and the consequent recommendation of the Sixth Committee (doc. No. 105), the Assembly on 13 February 1946 adopted its resolution 22 (I) by which it approved the text of the Convention on the Privileges and Immunities of the United Nations and proposed it for accession to each Member of the Organization (doc. No. 106).

49. Pursuant to Section 32 of the Convention, Member States of the United Nations may become parties to it by depositing an instrument of accession with the Secretary-General. Up to now, 124 States have done so (doc. No. 107). In addition, the Convention is routinely incorporated by reference into many types of agreements concluded between the Organization and States, including such as have not become parties to it, and thus even States that have not acceded to it may be bound for certain purposes by its provisions. The Convention has thus become the principal instrument through which the privileges and immunities of the Organization, and of persons associated with it, are defined and assured.

50. Although the General Convention contains no provision regarding the making of reservations, 22 of the States parties to it have acceded subject to one or more reservations (doc. No. 107). Even though some of these reservations were objected to by other parties to the Convention, the reserving States have always been considered as parties to the Convention. However, from time to time some draft reservations have been submitted for comment to the Secretary-General or to the Office of Legal Affairs, on which the advice has been that these would be incompatible with the Convention or even the Charter, or that they were on other grounds undesirable (docs. Nos. 110, 111).

B. The Legal Status of the Convention vis-à-vis the Organization

51. In its report recommending the adoption of the General Convention, the Sub-Committee on Privileges and Immunities of the Sixth Committee (see para. 48 above) stated (doc. No. 101, para. 5):

"5. The General Convention on immunities and privileges of the United Nations is, in a sense, a Convention between the United Nations as an Organization, on the one part, and each of its Members individually on the other part. The adoption of a Convention by the General Assembly would therefore at one and the same time fix the text of the Convention and also imply the acceptance of that text by the United Nations as a body."

This conclusion is reflected in Section 35 of the Convention, which specifies that the "Convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession", thereby implying that the Organization itself is a party.

52. It was largely, though not entirely, on the basis of the latter consideration that the Legal Counsel of the United Nations concluded, in an opinion he delivered to the Sixth Committee on 6 December 1967, that although the Convention is a *sui generis* instrument, it was clear that the Organization was a party to it (doc. No. 112).

53. Nevertheless, even if the Organization should not be considered as a "party" *strictu sensu* to the General Convention, it is clearly a "third organization" that can derive obligations and rights under that instrument pursuant to the principles codified in Articles 35 and 36 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The acceptance or assent of the Organization to such obligations and rights is evidently that given by the General Assembly in adopting the Convention and proposing it to Member States, an action taken pursuant to the explicit authorization of paragraph 3 of Article 105 of the Charter.

C. Interpretation of the Convention

54. As a treaty, the interpretation of the General Convention is subject to the rules codified in Section 3 of Part III of both the 1969 Vienna Convention on the Law of Treaties and of the 1986 Convention cited in the paragraph above. In particular, in interpreting the General Convention, account is to be taken, in addition to its context, of *inter alia* "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (1969 and 1986 Vienna Conventions, corresponding Articles 31, paragraph 3 *(b)*). To the extent that the ordinary meaning of any terms of the Convention, as well as any indications derived from subsequent practice, still leave the meaning of the General Convention obscure, recourse may be had to its preparatory work and to the circumstances of its conclusion (*ibid.*, corresponding Articles 32).

IV. The Concept of "Experts on Missions" under the General Convention

A. The Text and the Formulation of the Convention

55. The title of Article VI of the General Convention reads: "Experts on Missions for the United Nations." Section 22 in that Article refers to: "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations." Finally, Section 23 in the same Article refers merely to "experts". It should also be noted that Section 26 in Article VII refers to "experts and other persons . . . travelling on the business of the United Nations". None of these provisions give any further indication of the scope of

the terms "expert" or "mission", except that it is clear from Section 22 that officials of the United Nations (even if they are "experts") are not meant to be included in the former term.

56. In view of the consequent potential uncertainty about the meaning of the phrase "expert on mission", it may be instructive to look to the negotiating history to see if this might help provide clarity. Unfortunately, this is not so. The draft of the General Convention submitted by the Preparatory Commission to the General Assembly, while containing articles relating to the representatives of Member States and to officials of the Organization (the two categories of persons explicitly mentioned in paragraph 2 of Article 105 of the Charter), had none corresponding to the present Article VI; the only reference to "experts" was in paragraph 3 of Article 7 of the draft, which became Section 26 of the Convention (relating to the issue of travel certificates). The *Official Records* of the General Assembly only show that the text of present Article VI was added by the Sub-Committee on Privileges and Immunities, in its report to the Sixth Committee, and that that report contains no explanation of the addition. Nor was any reference to the new text made during the debates in the Sixth Committee, or in its report to the Plenary, or in the latter's consideration of the Convention before the adoption of General Assembly resolution 22 (I) (docs. Nos. 101-105).

57. In a study by Martin Hill, a former high official of the League of Nations and subsequently of the United Nations, the manuscript of which was made available to members of the Committee of the San Francisco Conference dealing with legal problems, the fact that the League Covenant had only referred to "representatives of Members of the League" and to "Officials of the League" had raised problems in regard to "other persons working for the League not as government representatives"; these problems concerned "members of the great majority of permanent and temporary commissions and committees and other agencies set up by the League", which were "composed of persons whose functions vary widely as to their nature, the places where they are performed, and their duration; above all, it is a group very difficult to delimit". One can only speculate that Article VI was added to fill this gap (doc. No. 113).

58. It might also be noted that the Convention on the Privileges and Immunities of the Specialized Agencies, which the General Assembly adopted a year later by resolution 179 (II) of 21 November 1947, and whose provisions are largely based on those of the General Convention, does not contain a provision corresponding to Article VI of that instrument (doc. No. 108). However, in the Annexes to the Specialized Agencies Convention that each of these agencies adopted in order to adapt the general provisions of that treaty to their particular needs (see Sec. 33 of the Specialized Agencies Convention) (doc. No. 108), 9 of them included provisions relating to "experts on missions" largely corresponding to those of Sections 22 and 23 of the General Convention. This suggests that even in those early days these agencies considered that they too would need to employ such experts to carry out their technical tasks — and thus that the phrase in question was meant to cover all kinds of ancillary personnel, political as well as technical, performing functions for these organizations rather than for their Governments.

B. Relevant Practice under the Convention

59. The consistent practice of the Organization from the time immediately following the adoption and entry into force of the General Convention has, indeed, been to classify and consider as "experts on missions" within the mean-

ing of Article VI of the Convention, various types of persons who are charged with performing a function or a task for the United Nations, as long as these persons were neither the representatives of a State nor staff members (i.e., officials) of the Organization. In respect of certain categories of persons that practice was reflected in agreements (e.g., technical assistance or conference agreements) entered into with Member States ; in respect of other categories, their status was not specified in any agreements but appears from practice as evidenced, *inter alia*, from explanatory correspondence with States, from internal legal opinions and from administrative issuances. It should also be noted that the practice of the specialized agencies, in implementing the provisions of their respective Annexes to the Convention on Privileges and Immunities of the Specialized Agencies (see para. 58 above) relating to experts on missions, has been similar to that of the United Nations.

60. The above-mentioned practice reflects the need of the United Nations and its specialized agencies, which in order to carry out their many and varied activities, rely heavily on the services of experts. A large number of experts from different countries, with various skills and qualifications, are constantly carrying out different missions. The tasks which have been assigned to them include writing reports, preparing studies, conducting investigations, finding and establishing facts, participating in peace-keeping forces, monitoring and observing situations, implementing technical assistance and a multitude of other activities. Many of these tasks can only be fulfilled by highly qualified and specialized experts who cannot always be found among the staffs of these organizations. In other cases, for administrative, financial and other reasons it is often desirable or necessary to appoint persons outside the category of United Nations officials. These include members of permanent or temporary commissions, committees or working groups serving as experts, and government officials on loan to the United Nations in their personal capacity, as well as individuals appointed by the Secretary-General as his representatives to perform specific tasks entrusted to him. The United Nations and the other agencies must, in order to carry out their functions, be able to count on respect for at least a minimum functional status of those persons to enable them to perform their tasks for the organizations, and that is precisely what Section 22 of the General Convention (and the corresponding provisions of the Annexes to the 1947 Convention — see para. 58 above) is designed to provide.

61. Annex I to this Statement sets out examples of categories of persons considered to be "experts on missions for the United Nations". From these examples — which necessarily refer for the most part only to categories in respect of whom a legal question was ever raised — it appears that the phrase "experts on missions" has from the beginning and in particular over the years come to embrace a wide category of persons who, whether as individuals or as members of a particular group (committee, commission, etc.), have been charged with performing some function or with carrying out some task or assignment for the Organization. Some of these individuals have been given that status by the Secretary-General, while others have been appointed or elected by other principal or subsidiary organs of the Organization. Finally it should be noted that while some of these persons have a contractual relationship with the Organization, such as consultants who receive a "special service agreement", others, such as most elected members of committees or commissions, have no such arrangements. Similarly, some experts receive compensation in the form of a fee or an honorarium, while others are not remunerated except by reimbursement of expenditures incurred by them in performing their assignments for the Organization (e.g., in travelling).

62. It is also important to note that there is no provision under the General Convention obliging the Organization to communicate the names of experts on mission to the Governments of Members — as there is in respect of officials (Sec. 17 of the General Convention). Indeed, no such notifications have been made in respect of experts — whose functions (and thus their special status) are, of course, often more ephemeral than those of staff members.

C. The Scope of the Privileges and Immunities Accorded to Experts on Missions

63. The privileges and immunities accorded to experts on missions by Section 22 of the General Convention are, unlike those specified in Section 11 in respect of representatives of Members, strictly functional. This appears first of all from the *chapeau* of Section 22, which refers to "such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions", and to the particular rights listed in the six subparagraphs. Furthermore, the privileges and immunities of experts on missions differ from those of officials covered by Section 18. Experts on missions enjoy no tax exemption on their official emoluments, no immunity from national service obligations, no immunity from immigration restrictions and registration requirements, and no rights of duty-free imports. The limited rights that they are granted are strictly designed to protect the interests of the Organization in the privacy of its papers and communications and in preventing any coercion or threat thereof in respect of the performance of the experts' missions (doc. No. 143).

D. The Status of Experts on Missions vis-à-vis Their Own Governments or in Their Own Countries

64. Neither Section 22 of the General Convention, nor any other provision in Article VI or otherwise in the instrument suggests that the rights of experts on missions are any different vis-à-vis their own Governments or in their own countries than they are vis-à-vis any other Government or in any other country. In this experts are treated like officials under Article V of the Convention — but unlike representatives of Members, who, pursuant to Section 15, enjoy no rights vis-à-vis the authorities of the State of which they are nationals or of which they are or were the representatives.

65. In this connection it should be noted that certain States parties to the General Convention have made particular limited reservations restricting certain immunities in respect of experts who are of the nationality of these States or in respect of all persons (thus presumably also including experts) having such nationality and residence (doc. No. 110). Other States that have inquired whether they could accede to the General Convention subject to broad reservations altogether excluding the privileges and immunities of officials and experts of their nationality, were advised that, depending on their scope, such reservations would be undesirable, or altogether incompatible with the Convention or even the Charter of the Organization (docs. Nos. 110, 111). Consequently any State, such as Romania, party to the Convention that has not made or attempted to make any reservation relating to the nationality or residence of experts on mission cannot later unilaterally impose any such restrictions.

66. It should also be noted that there exist no legal rules preventing the appointment or election of an expert to carry out a mission in his own country. Indeed, frequently special rapporteurs, rapporteurs and other persons assigned to prepare studies or reports perform part of their work in their own countries

(e.g., writing, research, and the analysis of materials, etc.). There are even instances where missions of an investigative nature were assigned to experts to be carried out in their own countries.[1] Though in these cases questions of privileges and immunities are rarely raised, all these persons fall within the category of experts on missions who are entitled to the privileges and immunities referred to in Section 22 of the General Convention.

67. It also appears from the foregoing analysis, that the assertion of these merely functional privileges and immunities in respect of persons (who are neither national representatives nor organization officials) charged with carrying out defined tasks for the United Nations, in no way constitutes any type of intervention by the Organization within the domestic jurisdiction of any State, in violation of Article 2, paragraph 7, of the Charter.

V. The Status of Rapporteurs of the Sub-Commission under the General Convention

A. The Status of Members of the Sub-Commission

68. The members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, though nominated by Governments, are elected by the Commission on Human Rights "as experts in their individual capacity". This is stated explicitly in Council resolution 1983/32 of 27 May 1983 (doc. No. 154), which has been reproduced in the Commission documents on the basis of which it conducts its elections to the Sub-Commission (e.g., doc. No. 1).

69. Even before the adoption of the above-cited Council resolution, the status of the Sub-Commission members was that indicated above. Though not specified in the original resolution establishing the Sub-Commission, this status has been recognized and reiterated since early days:

(a) During the third, fourth and fifth sessions of the Sub-Commission, objections were raised to the membership of one expert for alleged lack of representativeness. At its fourth session, the Sub-Commission, by a vote of 9 to 2, decided that it was not competent to discuss "a proposal for the expulsion" of one of its members on that ground (doc. No. 148). That decision was again confirmed at its fifth session (doc. No. 149). The Chairman of the meeting explained that the Sub-Commission had "based its decisions on the fact that its members were experts, not representatives of governments" *(ibid.)*.

(b) At its thirtieth session, in 1977, the Sub-Commission adopted a public statement reiterating that the members of the "Sub-Commission are elected in

[1] For example, in the practice of the Sub-Commission, in 1987 it requested that its Chairman, in response to an invitation from the Traditional Hopi Elders, delegate one or more members of the Sub-Commission to attend and observe United States Congressional hearings scheduled, both on site and in Washington, D.C., to consider further implementation of laws providing for the relocation of Hopi and Navajo families (Sub-Commission decision 1987/110). In 1988 the Sub-Commission decided to invite Ms Erica-Irene Daes (Greek nationality, member of the Sub-Commission) and Mr. John Carey (USA nationality, alternate member of the Sub-Commission) to prepare a summary of the information which might be available to them regarding the relocation of Hopi and Navajo families, for the use of the Sub-Commission at its next (1989) session. Ms Daes attended the Congressional hearings and visited Arizona and Mr. Carey made a field trip to Arizona for the purpose of collecting information.

their personal capacity and are acting in this capacity with complete independence and impartiality" (docs. Nos. 151-152).

(c) The Office of Legal Affairs has confirmed that the status of the Sub-Commission on Prevention of Discrimination and Protection of Minorities is that of a subsidiary organ of the Commission on Human Rights whose members are experts nominated by Governments serving in their individual capacity (E/CN.4/Sub.2/1982/3, para. 18).

70. In any event, in respect of Mr. Mazilu, the Romanian Government has explicitly acknowledged that he was appointed by the Sub-Commission in his personal capacity to prepare a report on human rights and youth (doc. No. 78, para. 1).

71. The members of the Sub-Commission, who are thus neither governmental representatives nor members of the staff (i.e., officials) of the United Nations, and yet are charged with carrying out an important function of the Organization, thus clearly fall within the category of experts on missions discussed above (Sec. IV, B). Indeed, they are very similar to the members of the *Ad Hoc* Working Group of Experts on Human Rights (see item A.8 in Annex I)[1].

B. Rapporteurs and Special Rapporteurs of the Sub-Commission

72. The Sub-Commission has a long-established practice of appointing rapporteurs and special rapporteurs, usually from among its members, to assist it in performing its tasks. This practice was regularized by a set of guidelines that the Sub-Commission adopted at its twenty-seventh session, in 1974, which in relevant part provide as follows: (i) the appointment of special rapporteurs to study specific items is a desirable one and should be continued; (ii) there should be a time-limit for the preparation of studies and presentation of reports to "be extended as and when necessary"; (iii) the number of special rapporteurs to be appointed must take into account the needs of the Sub-Commission and the ability of the Secretariat to provide the necessary services. According to the guidelines, the Sub-Commission may also appoint one of its members "to make a study of an item and to make proposals for future work", the authors of which have been referred to as "rapporteurs" (doc. No. 150). It appears that in the practice of the Sub-Commission there is no essential distinction between "rapporteurs" and "special rapporteurs", though often persons designated to undertake studies or reports with financial implications and which therefore must be endorsed by the parent bodies (the Commission or the ECOSOC) are designated as "special rapporteurs" while those who prepare reports that have no financial implications are called "rapporteurs".

73. The rapporteurs and special rapporteurs are normally appointed from among the members of the Sub-Commission, though there have been some exceptions. In the past ten years, for example some 50 special rapporteurs or rapporteurs have been entrusted with studies or reports on various subjects. About 13 of them completed their assignments well after they ceased to be members of the Sub-Commission (see Ann. II.A hereto); another four rapporteurs or special rapporteurs have never been members of the Sub-Com-

[1] The fact that since 1983, by reason of ECOSOC resolution 1983/32 (doc. No. 154), members of the Sub-Commission are elected paired with an alternate, who also functions in an individual capacity, in no way changes the status of these members and alternates under the General Convention.

mission (Ann. II.B). The conferral or termination of the assignment or the status of rapporteur is not necessarily linked to a term of office as a member of the Sub-Commission.

74. When a member of the Sub-Commission is appointed as one of its rapporteurs, then that appointment gives an additional basis for his status as an expert on mission. And if that assignment should continue beyond the term of the membership — as occurs from time to time — then, although the original basis of his expert status has fallen away, that status continues, albeit on a more limited basis, until the special task is completed, or abandoned or reassigned to another person by a competent organ.

75. As a purely functional arrangement, i.e., one that applies only "during the period of their missions, including the time spent on journeys in connection with their missions" (see Sec. 22 of the General Convention), the rapporteurs can only receive any benefits from their status while carrying out or attempting to carry out their assignments.

VI. The Situation of Mr. Mazilu

A. Mr. Mazilu's Appointment as Special Rapporteur

76. The regularity of Mr. Mazilu's appointment as Special Rapporteur to prepare a report for the Sub-Commission on human rights and youth has never been challenged. In this connection it should be noted that, in spite of its formal title as the "Sub-Commission on the Prevention of Discrimination and Protection of Minorities", its actual functions have long been expanded by reason of specific decisions of the Commission and the Council, as well as through its own practice.

77. One of the basic terms of reference of the Sub-Commission is "to perform any other functions entrusted to it by the Economic and Social Council and the Commission on Human Rights" [1]. In respect of the report assigned to Mr. Mazilu, noted earlier, the Commission had in 1985 requested the Sub-Commission to pay attention to the role of youth in the field of human rights (doc. No. 3). On the basis of that request, the Sub-Commission charged Mr. Mazilu with preparing a report on human rights and youth (doc. No. 6), which assignment was then endorsed by the Commission by its resolution 1987/44 (doc. No. 15). It is clear therefore that the assignment of Mr. Mazilu is properly authorized and falls within the Sub-Commission's terms of reference.

78. It should be noted that even though initially Mr. Mazilu was not referred to as a special rapporteur in Sub-Commission resolution 1985/12, both the Commission and the Council, which are the parent organs of the Sub-Commission, later referred to him, on the basis of his functions (see para. 72 above) as a "Special Rapporteur" (docs. Nos. 88, 99).

B. The Continuation of Mr. Mazilu's Appointment as Special Rapporteur

79. According to its established practice, the Sub-Commission could extend Mr. Mazilu's assignment as Special Rapporteur past the term of his membership on the Sub-Commission, provided that he continued to be willing to carry it out. Indeed, in the absence of any clear indication on the part of either the Sub-

[1] Report of the Commission on its fifth session, *Official Records of the Economic and Social Council, Ninth Session, Supplement No. 10,* E/1371, Chap. IV, para. 13.

Commission or of Mr. Mazilu that the assignment should be considered terminated before its completion, there would be a presumption that it continued.

80. In fact, the Sub-Commission explicitly indicated and decided, at its thirty-ninth and fortieth sessions, that it wished Mr. Mazilu to continue and to complete his report on human rights and youth, even though he was by then no longer a member of the Sub-Commission. These decisions were subsequently endorsed by the Commission and by the Council (see paras. 10, 18 and 23 above).

81. Mr. Mazilu in turn, whenever he was in a position to communicate with the Sub-Commission, clearly indicated that he wished to continue to carry out his assignment, if possible by means of visits to Geneva but, if necessary, working in Romania (see paras. 12 and 30 above).

82. The mere fact that Mr. Mazilu delayed the start of his report, for medical or for other reasons, could not deprive him of his assignment or of his status as a Special Rapporteur of the Sub-Commission, unless that body itself decided that for reasons of his health or because of the delays it wished to make a change. It did not so decide.

83. The fact that Mr. Mazilu had resigned or been terminated from all his governmental posts makes no difference to his status as Special Rapporteur of the Sub-Commission. This is so because the assignment he received from the Sub-Commission in no way related to or was derived from any such posts. Indeed, he received his assignment as a member of the Sub-Commission, to which he had been elected "in his personal capacity".

84. Finally, the mere fact that when Mr. Mazilu's term expired, his Government nominated another citizen for membership on the Sub-Commission whom the Commission thereupon elected thereto (see para. 13 above), and the new member then indicated his willingness and intention to complete the report that had been assigned to Mr. Mazilu, could not deprive the latter of the assignment that he, personally, had received from the Sub-Commission. This is so because his Government, aside from having nominated him in 1983/4 as a member of the Sub-Commission, had thereafter no further responsibility for the tasks he assumed in that capacity or even otherwise. Nowhere is it provided that the Sub-Commission, or other United Nations organs, may only give assignments to persons with the approval of their Governments.

C. Mr. Mazilu's Status as an Expert on Mission

85. In the present case, Mr. Mazilu was entrusted by the Sub-Commission with preparing a report on human rights and youth. While Sub-Commission resolution 1985/12 did lay down some general guidelines for the preparation of the report, i.e., to analyse the efforts and measures for securing the implementation and enjoyment of human rights by youth, particularly the rights to life, education and work, the resolution did not specify where he should prepare the report. Although it appeared to be assumed that he would do so largely in Romania, administrative arrangements were also made to enable him, during his preparation, to come to Geneva for consultations and to present his report to the Sub-Commission upon its completion. It was also assumed that he would receive the customary assistance from the United Nations Secretariat in preparing his report, including, as a minimum, the dispatch and the receipt, to and from Romania, of materials relevant to the report and that he would be communicating with the United Nations Secretariat concerning the report. Consequently, Mr. Mazilu was in effect on mission in Romania in so far as his preparation of the report is concerned. He would also have been on mission

from Bucharest to Geneva had he been permitted to travel for consultations with the Human Rights Centre and to present his report in Geneva.

86. According to Article VI, Section 22, in the place where an expert is on mission, he should be accorded "such privileges and immunities as are necessary for the independent exercise of his functions during the period of his mission". The events of this case show that: (i) Mr. Mazilu was willing and eager to communicate with the Centre regarding his report, but he had for at least some time been prevented from doing so; (ii) he was willing and prepared to travel to Geneva for the purpose of consultations on his report, for which permission was, however, denied by the competent authorities; (iii) he was willing and prepared to come to Geneva to present his report, but he was not allowed to make the trip; (iv) the Centre for Human Rights, the UNIC office in Bucharest, and the UNDP office in Bucharest tried repeatedly to contact him, but for a considerable period his whereabouts were unknown; (v) the Centre and the Sub-Commission, as well as the Secretary-General himself requested co-operation from the Romanian Government to send someone to visit Mr. Mazilu with a view to assisting him in preparing his report, but such requests were rejected by the Romanian authorities.

87. The purpose of Section 22 of the General Convention is to ensure that "experts performing missions for the United Nations", i.e., persons who have a function or task to perform for the Organization, are enabled to do so without interference from (and indeed with certain indicated facilitation by) those Governments parties to the Convention which are in a position to do so. As indicated in paragraph 63 above, that also applies in respect of the Government of which the expert is a national. Even if it could be argued that the special status should normally only apply when the expert is journeying outside his own country (and there is no indication in the Convention that such a limitation was intended) the Government concerned cannot then be permitted to nullify the conventional status entirely by arbitrarily preventing precisely such a journey in connection with the expert's mission.

CONCLUSION

88. This statement has in the first instance endeavoured to establish that the Economic and Social Council was fully authorized to address its question to the Court, as that query is purely legal and arose within the scope of the Council's activities, concerning as it does the work of one of its subsidiary bodies. As the Council did not pose its question within the framework of Section 30 of the General Convention, the Romanian reservation to that provision, even if interpreted most broadly, cannot prevent the Council from exercising a power derived from the United Nations Charter. Finally it is indicated, and it also appears from this statement as a whole, that the Council's question is an important one, both because of the particular circumstances from which it arose and of the wider implications it has for the effective work of a significant group of persons performing unique and in part vital functions for the United Nations.

89. With reference to the substance of the Council's question, this statement has demonstrated that the category of "experts on missions", established and regulated by Section 22 in Article VI of the General Convention, an instrument directly derived from the Charter and essential to the smooth functioning of the Organization, is, according to well-established and consistent practice, applied to many different categories of persons who — not being either representatives of Governments or officials of the Organization — are assigned to assume functions or to perform specific tasks for the latter. These categories include both

the members and any rapporteurs or similar functionaries of bodies such as the Sub-Commission on Prevention of Discrimination and Protection of Minorities, who function in their individual capacity and to so function require the protection of the functional immunities derived from Section 22 of the General Convention, if necessary even vis-à-vis their own Governments and in their own countries.

90. Finally, it follows from the facts summarized and analysed in the statement, that Mr. Mazilu was a properly appointed special rapporteur of the Sub-Commission, both while he was a member of that body and even after his term of membership expired, because the Sub-Commission, with the specific support of the parent Commission on Human Rights, continued to expect him to prepare and to present in person a report that was assigned to him, and he continued to be willing to do so. It also appears from the circumstances that led the Council to pose its question, that for Mr. Mazilu to be able to carry out the task assigned to him in the way both he himself and the Sub-Commission expected, he required the protection of Section 22 of the General Convention — a protection to which he was entitled by the terms of that instrument as interpreted in accordance with the above-mentioned practice of the United Nations.

(Signed) Carl-August FLEISCHHAUER,
The Legal Counsel
of the United Nations.

28 July 1989.

Annex I

EXAMPLES OF CATEGORIES OF PERSONS CONSIDERED TO BE "EXPERTS ON MISSIONS FOR THE UNITED NATIONS" WITHIN THE MEANING OF ARTICLE VI, SECTION 22, OF THE GENERAL CONVENTION

Categories	*Sources*
A. Members of Commissions, Committees and similar organs	
1. International Law Commission	ILC study[1], paragraph 341; doc. No. 143; memo 29.6.73 from Legal Counsel to USG for Administration and Management.
2. Advisory Committee on Administrative and Budgetary Questions (except full-time Chairman)[2]	As above.
3. International Civil Service Commission (ICSC) (except full-time Chairman and Vice-Chairman)[3]	As above; letter 21.7.88 from ASG for General Services to the Executive Secretary, ICSC.
4. United Nations Administrative Tribunal	As above; letter 1.5.89 Legal Counsel to the President of the Administrative Tribunal; doc. No. 140.
5. International Narcotics Control Board (formerly the Permanent Central Narcotics Board)	As above; letter 7.3.73 Legal Counsel to Office of Financial Services.
6. Joint Inspection Unit[2]	Letter 8.10.73 from the Legal Counsel to a member of JIU; doc. No. 120.
7. Human Rights Committee	Letter 22.8.1983 from the Office of Legal Affairs to the Controller; doc. No. 131.
8. *Ad hoc* Working Group of Experts of the Commission on Human Rights	1974 *United Nations Juridical Yearbook ("UNJYB")*, Chapter VI.A, No. 14; doc. No. 121.

[1] The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: Studies prepared by the Secretariat for the International Law Commission.

[2] The General Assembly decided in its resolution 3188 (XXVIII) of 18 December 1973 that the categories of officials to which the provisions of Articles V and VII of the General Convention apply, should include the Chairman of ACABQ and members of the JIU.

[3] The General Assembly decided in its resolution 3357 (XXIX) of 18 December 1974 that the Chairman and Vice-Chairman of ICSC should be regarded as officials of the United Nations.

9. Committee on the Elimination of Racial Discrimination	Memo 15.9.69 from Office of Legal Affairs to the Division of Human Rights, 1969 *UNJYB*; doc. No. 122.
10. Committee on the Elimination of All Forms of Discrimination Against Women	As above.
11. United Nations University Council	Letter dated 22.5.74 from the Office of Legal Affairs to the USG for Inter-Agency Affairs and Co-ordination.
B. United Nations peace-keeping missions	
1. Military observers of United Nations Truce Supervision Organization (UNTSO)	ILC study; doc. No. 143.
2. Military observers of United Nations Military Observer Group in India and Pakistan (UNMOGIP)	ILC study; doc. No. 143.
3. The Commander's Headquarters Staff of the United Nations Emergency Force (UNEF)	ILC study; doc. No. 143.
4. The Commander's Headquarters Staff of the United Nations Force in Cyprus	ILC study; doc. No. 143.
C. Government officials on loan	
1. US Government civil service on assignment to UNICEF	Letter 24.1.89 from Office of Legal Affairs to UNICEF; doc. No. 138.
2. French language co-ordinators paid directly by the French Government	Memo 1.8.85 from Office of Legal Affairs to the Office of Personnel Services; doc. No. 135.
3. Persons on loan from government servicing for the Office of the United Nations Relief Co-ordinator (UNDRO)	Memo 19.11.81 from Office of Legal Affairs to Office of General Services; doc. No. 128.
4. The Commander and members of the Technical Cadre Unit of the Swedish stand-by force for United Nations service to assist in reconstruction of areas in Peru	UN document E/4994, Annex III, 1971, *UNJYB*, Chapter VI.A, No. 3.
5. French military personnel participating in the multi-national demining missions in Afghanistan	Memo 1.3.89 from Office of Legal Affairs to United Nations Office at Geneva; doc. No. 139.
D. Short-term technical assistance experts on special service agreement (SSA) with the United Nations	Note Verbale 3.5.51 from the Secretary-General to Member States; UN Special Service Agreement; docs. Nos. 141, 141A and 142.

E. Special Representatives of the Secretary-General	
1. Mr. Olof Palme as Special Representative of the Secretary-General on mission to Iran/Iraq, 1982	Contract (Experts) between the UN and Mr. Palme, February 1982; doc. No. 129.
2. Special Representative of the Secretary-General to the United Nations International School	Letter 9.4.81 from Office of Legal Affairs to the Counsel for the General Counsel of (US) National Labor Relations Board; doc. No. 125.
F. Experts to investigate reports of alleged use of chemical weapons in Kampuchea	Memo 15.7.82 from Office of Legal Affairs to Centre for Disarmament; doc. No. 130.
G. Persons who entered into Special Service Agreement with the United Nations as consultants, independent contractors	UN Contract (Consultant); letter 8.3.79 from Office of Legal Affairs to Office of General Services; docs. Nos. 141, 142. Memo 20.6.75 from Office of Legal Affairs to the Controller, 1975 *UNJYB*, Chapter VI.A, No. 21.
H. Participants invited to attend the United Nations seminars or meetings	
1. Experts invited by the United Nations to attend the UN Meeting of Experts on Space Science and Technology in Nigeria, 1987	Agreement between UN and Nigeria dated 27.2.87; doc. No. 137.
2. Participants invited by the United Nations to attend the Interregional Training Programme in Government Budgetary Methods and Procedures in Cyprus, 1985	Letter 28.2.85 from UN Dept. of Technical Co-operation for Development to the Minister of Finance of Cyprus; doc. No. 133.
3. Participants invited by the United Nations to attend the Special Session of the Special Committee of 24 from 13 to 17 May 1985 in Tunisia	Letter 13.5.85 from the USG for Political Affairs, Trusteeship and Decolonization to the Foreign Ministry of Tunisia; doc. No. 134.

Annex II

A. LIST OF RAPPORTEURS OR SPECIAL RAPPORTEURS OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES WHO COMPLETED THEIR ASSIGNMENTS AFTER THE EXPIRATION OF THEIR TERMS OF OFFICE AS MEMBERS OF THE SUB-COMMISSION

Legend: ER : Economic and Social Council resolutions.
CR: Commission on Human Rights resolutions.
SUR: Sub-Commission resolutions.

	Short title of study or report	*Name*	*Mandate and status*	*Date of completion and status*	*Legislative authority*
1.	Development of the right to self-determination E/CN.4/Sub.2/404	Mr. Aureliu Cristecu Special Rapporteur	1974 Member	1978 Not member	CR 4 (XXX) 1974 ER 1865 (LVI) 1974 SUR 3 (XXVII) 1974
2.	Implementation of UN resolutions on right of peoples to self-determination E/CN.4/Sub.2/405	Mr. Hector Gros Espiell Special Rapporteur	1974 Member	1978 Not member	CR 5 (XXX) 1974 ER 1866 (LVI) 1974 SUR 4 (XXVII) 1974
3.	Protection of human rights to non-citizens E/CN.4/Sub.2/392/ Rev. 1	Baroness Elles Special Rapporteur	1974 Member	1978 Not member	SUR 10 (XXVII) 1974
4.	Foreign economic aid impact on respect for human rights E/CN.4/Sub.2/412	Mr. Antonio Cassese Rapporteur	1977 Member	1978, 1980 Not member	SUR 11 (XXX) 1977
5.	Prevention and punishment of crime of genocide E/CN.4/Sub.2/416	Mr. Nicodème Ruhashyankiko Special Rapporteur	1971 Member	1978 Not member	ER 1420 (XLVI) 1969 SUR 7 (XXIV) 1971
6.	Right of everyone to leave and return to his own and other countries E/CN.4/Sub.2/1988/ 35 and Add.1 and Corr.	Mr. C. L. C. Mubanga-Chipoyya Special Rapporteur	1982 Member	1988 Not member	SUR 1982/23 1982
7.	Implications for human rights in state of siege or emergency E/CN.4/Sub.2/1982/ 15	Mrs. Nicole Questiaux Special Rapporteur	1977 Member	1982 Not member	SUR 10 (XXX) 1977 5D (XXXI) 1978

	Short title of study or report	*Name*	*Mandate and status*	*Date of completion and status*	*Legislative authority*
8.	Discrimination against indigenous populations E/CN.4/Sub.2/476 and Adds. E/CN.4/Sub.2/1982/2 and Adds. E/CN.4/Sub.2/1983/21 and Adds.	Mr. José Martinez-Cobo Special Rapporteur	1971 Member	1983 Not member	ER 1589 (L) 1971
9.	Traditional practices affecting the health of women and children E/CN.4/1986/42	Mrs. Halima Embarek Warzazi Special Rapporteur	1982 Member	1986 Not member	SUR 1982/15, 1982 CR 1984/48, 1984 ER 1984/34, 1984
10.	Problems of intolerance and discrimination on grounds of religion or belief E/CN.4/Sub.2/1987/26	Mrs. Elizabeth Odio Benito Special Rapporteur	1983 Member	1987 Not member	CR 1983/40, 1983 SUR 1983/31, 1983
11.	Administration of justice and the human rights of detainees E/CN.4/Sub.2/1987/20	Mr. Marc Bossuyt Special Rapporteur	1984 Member	1987 Not member	SUR 1984/7, 1984 CR 1985/46, 1985 ER 1985/41, 1985
12.	Slavery and slavery-like practices (Report on Mauritania) E/CN.4/Sub.2/1984/23	Mr. Marc Bossuyt Special Rapporteur	1984 Member	1987 Not member	ER 1982/129, 1982 CR 1982/20, 1982 SUR 1984/28, 1984
13.	Exploitation of child labour E/CN.4/Sub.2/479	Mr. A. Bouhdiba Special Rapporteur	1979 Member	1981 Not member	ER 1980/125, 1980 CR 17 (XXXVI), 1980 SUR 7 (XXXII), 1979

B. LIST OF PERSONS APPOINTED BY THE SUB-COMMISSION AS RAPPORTEURS OR SPECIAL RAPPORTEURS WHO WERE NOT MEMBERS OF THE SUB-COMMISSION

Short title of study or report	*Name*	*Mandate and status*	*Date of completion and status*	*Legislative authority*
1. Independence and impartiality of judiciary and jurors, assessors and the independence of lawyers E/CN.4/Sub.2/1985/18, Add.1-6	Mr. L. M. Singhvi Special Rapporteur	1979 Not member	1985 Not member	SUR 5 (XXXII) 1979
2. Achievements and obstacles: first decade for action to combat racism and racial discrimination E/CN.4/Sub.2/1985/7 E/CN.4/Sub.2/1987/6 E/CN.4/Sub.2/1988/5	Mr. Asbjørn Eide Special Rapporteur	1984 Not member	1984 Not member	ER 1984/24, 1984
3. Draft declaration on independence and impartiality of judiciary, jurors and assessors and the independence of lawyers E/CN.4/Sub.2/1988/20	Mr. L. M. Singhvi Special Rapporteur	1987 Not member	1988 Not member	SUR 1987/23, 1987

MÉMORANDUM DU GOUVERNEMENT DE LA RÉPUBLIQUE SOCIALISTE DE ROUMANIE

Mémorandum relatif à la requête pour avis consultatif transmise à la Cour internationale de Justice en vertu de la résolution 1989/75 du Conseil économique et social du 24 mai 1989

Par sa résolution 1989/75 adoptée le 24 mai 1989 le Conseil économique et social de l'Organisation des Nations Unies a demandé, à titre prioritaire, à la Cour internationale de Justice,

> «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 de la lutte contre les mesures discriminatoires et de la protection des minorités».

Dans cette résolution, on affirme

> «qu'une divergence de vues s'est élevée entre l'Organisation des Nations Unies et le Gouvernement roumain quant à l'applicabilité 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...»

Vu cette demande d'avis consultatif, la partie roumaine désire faire savoir à la Cour ce qui suit:

1. La Roumanie est partie à la convention sur les privilèges et immunités des Nations Unies, approuvée par l'Assemblée générale des Nations Unies le 13 février 1946. La Roumanie a adhéré à cette convention par le décret n° 201 du 21 avril 1956 et la convention est entrée en vigueur à son égard à la date du dépôt de son instrument d'adhésion, à savoir le 5 juillet 1956.

A l'occasion de son adhésion à la convention, la Roumanie a formulé la réserve suivante à la section 30 de la convention, relative au règlement des différends:

> «La République populaire roumaine ne se considère pas liée par les stipulations de la section 30 de la convention, en vertu desquelles la juridiction de la Cour internationale de Justice est obligatoire en cas de contestation portant sur l'interprétation ou l'application de la convention; en ce qui concerne la compétence de la Cour internationale de Justice dans les différends surgis dans de tels cas, la position de la République populaire roumaine est que, pour la soumission de quelque différend que ce soit à la réglementation de la Cour, il est nécessaire, chaque fois, d'avoir le consentement de toutes les parties au différend. Cette réserve s'applique également aux stipulations comprises dans la même section, selon lesquelles l'avis consultatif de la Cour internationale doit être accepté comme décisif.»

Cette réserve de la Roumanie a été dûment enregistrée aux Nations Unies et distribuée par le Secrétaire général, en tant que dépositaire de la convention, par la lettre circulaire CN.67.1956.Treaties du 13 juillet 1956 (dont une copie est jointe).

L'effet juridique de la réserve formulée par la Roumanie, tel qu'il est prévu dans la convention de Vienne sur le droit des traités du 23 mai 1969 (art. 21), en est que cette réserve modifie, dans les relations entre l'Etat auteur et les autres Etats parties à la convention, donc à l'egard de l'Organisation des Nations Unies également, les dispositions de la convention sur lesquelles porte la réserve, dans la mesure prévue par cette réserve.

La réserve formulée par la Roumanie contient, essentiellement, deux éléments:

a) la Roumanie ne se considère pas liée par les dispositions de la section 30, selon lesquelles la juridiction de la Cour est obligatoire en cas de contestation portant sur l'interprétation ou l'application de la convention;

b) en ce qui concerne la compétence de la Cour, la position de la Roumanie est que, pour la soumission à la Cour de quelque différend que ce soit, il est nécessaire d'avoir, chaque fois, le consentement de toutes les parties au différend.

Cette réserve, avec ses deux éléments, s'applique également à l'égard des dispositions de la même section relatives au déclenchement de la procédure d'avis consultatif de la Cour, en cas de litige entre l'Organisation des Nations Unies et un Etat membre, avis qui, selon la section 30 de la convention, devrait être accepté par les parties comme décisif.

Il en découle:

a) que la Roumanie n'est pas liée par les dispositions de la section 30, relatives à la juridiction obligatoire de la Cour en cas de différends éventuels surgis entre l'Organisation des Nations Unies et la Roumanie portant sur l'interprétation ou l'application de la convention de 1946;

b) qu'en ce qui concerne la compétence d'examiner tout différend surgi entre l'Organisation des Nations Unies et la Roumanie, y compris dans le cadre de la procédure consultative, la Cour ne saurait se déclarer compétente que s'il existe le consentement de toutes les parties au différend, la Roumanie comprise.

2. La Roumanie a déclaré expressément qu'elle n'était pas d'accord à ce que l'on demande quelque avis que ce soit à la Cour concernant le cas présent (voir le mémorandum adressé le 6 janvier 1989 au conseiller juridique de l'Organisation des Nations Unies par le représentant permanent de la Roumanie à l'Organisation des Nations Unies, document E/CN.4/1989/69 du 13 février 1989, annexe II, par. 3).

En conséquence, les conditions nécessaires ne sont pas réunies pour que la Cour internationale de Justice se déclare compétente d'emettre un avis consultatif relatif à l'interprétation et à l'application de la convention sur les privilèges et immunités des Nations Unies, dans les rapports entre la Roumanie et l'Organisation des Nations Unies.

Le fait que la résolution 1989/75 du 24 mai 1989 du Conseil économique et social ne se réfère pas à la section 30 de la convention, en tant que fondement pour sa demande d'avis consultatif, mais à la résolution 89 (I) du 11 décembre 1946 de l'Assemblée générale, n'est nullement à même de changer la situation, étant donné que la demande d'avis consultatif a pour objet «la question juridique de l'applicabilité de la section 22 de l'article VI de la convention» à un cas concret considéré comme un différend entre un Etat partie à la convention et l'Organisation des Nations Unies. C'est pourquoi, la demande d'un pareil avis consultatif, sur l'application d'une disposition de substance de la convention, ne saurait faire abstraction des dispositions de la même convention relatives au

règlement des différends, y compris en ce qui concerne la demande d'avis consultatifs à la Cour sur de tels différends portant sur l'application de la convention, donc la section 30 de ladite convention. S'il en était ainsi, *a fortiori* on ne saurait faire abstraction de la réserve de la Roumanie à la section 30, et cela parce que la Roumanie a adhéré à ladite convention dans sa totalité, et la réserve formulée représente une partie intégrante de l'expression du consentement de la Roumanie d'adhérer à la convention; cette réserve a un poids essentiel pour déterminer l'étendue des obligations qu'elle a assumées envers les autres parties à la convention, de même qu'envers l'Organisation des Nations Unies.

Si l'on acceptait qu'un Etat partie à la convention, ou l'Organisation des Nations Unies, puisse demander que des différends concernant l'application ou l'interprétation de la convention soient portés devant la Cour sur un autre fondement que les dispositions de la section 30 de la convention, ce serait rompre l'unité de la convention, à savoir les dispositions de substance de celles relatives à la solution des différends, ce qui serait à même de modifier le contenu et l'étendue des obligations assumées par les Etats lorsqu'ils ont donné leur consentement d'être liés par la convention.

3. Sans préjudice de sa position, telle qu'elle a été exposée aux points 1 et 2 ci-dessus, notamment que la Cour internationale de Justice n'a pas la compétence à donner un avis consultatif sur cette question, la Roumanie considère que le problème de l'application de la convention de 1946 ne se pose même pas en l'espèce.

En premier lieu, la convention n'assimile pas les rapporteurs, dont les activités sont occasionnelles, aux experts qui accomplissent des missions pour l'Organisation des Nations Unies.

L'expression même «experts» y est employée pour les distinguer des «fonctionnaires» des Nations Unies, lesquels déploient une activité à caractère permanent, alors que celle d'experts n'est qu'occasionnelle.

Même si on reconnaît partiellement aux rapporteurs le statut des experts des Nations Unies, les dispositions de la section 22 de l'article VI de la convention (experts en mission pour l'Organisation des Nations Unies) font ressortir clairement que ceux-ci ne jouissent que de privilèges et immunités fonctionnels, notamment ceux liés à l'activité qu'ils remplissent pour l'Organisation des Nations Unies, pendant la durée de leur mission et seulement dans les pays où la mission est remplie, y compris le temps du voyage lié à cette mission. A cet égard, la section 22 de la convention prevoit que

> «les experts ... lorsqu'ils accomplissent des missions pour l'Organisation des Nations Unies, jouissent, pendant la durée de cette mission, y compris le temps du voyage, des privilèges et immunités nécessaires pour exercer leurs fonctions en toute indépendance».

Ces dispositions font ressortir clairement qu'un expert ne jouit pas de privilèges et immunités n'importe quand, mais uniquement dans le pays où il est envoyé en mission, et seulement pendant la durée de celle-ci, de même que dans les pays de transit, lors des voyages requis par la mission. De même, les privilèges et les immunités ne peuvent courir que du moment du départ de l'expert en voyage pour accomplir la mission. Pour autant que le voyage de l'expert aux fins d'accomplir la mission pour l'Organisation des Nations Unies n'ait pas commencé, et cela pour des raisons qui n'ont aucun lien avec son activité d'expert, il n'y a nul fondement juridique pour prétendre des privilèges et immunités conformément à la convention, sans égard au fait qu'il se trouve dans son pays de résidence ou dans un autre pays, dans une qualité autre que celle d'expert.

Dans le pays dont il possède la citoyenneté, dans le pays où il a sa résidence permanente, ou dans d'autres pays où il pourrait se trouver en dehors de la mission respective, l'expert ne jouit de privilèges et immunités qu'en ce qui concerne le contenu de l'activité déployée au cours de sa mission (y compris ses paroles et écrits).

La Roumanie ne nie pas l'applicabilité des dispositions de la convention de 1946, dans le sens décrit ci-dessus. Elle n'a pas connaissance du fait que les organes compétents de l'Organisation des Nations Unies auraient donné une autre interprétation aux dispositions de cet article de la convention.

Par conséquent, puisque tel est le sens clair des dispositions de la convention, il n'y a aucun fondement juridique pour soutenir qu'un litige aurait surgi entre l'Organisation des Nations Unies et la Roumanie, portant sur l'application et l'interprétation de la convention.

4. En ce qui concerne la situation de l'ancien membre roumain dans la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités :

M. Dumitru Mazilu a reçu le mandat d'élaborer le rapport sur « la jeunesse et les droits de l'homme » en 1985 par la résolution 1985/12 du 29 août 1985 de la Sous-Commission. Pendant le mois de mai 1987 il est tombé gravement malade, raison qui a conduit, sur sa demande, à sa mise à la retraite pour incapacité de travail, à partir du 1er décembre 1987. En 1988, une commission médicale a, conformément aux lois roumaines en vigueur, réexaminé l'état de santé de M. Dumitru Mazilu et a décidé de prolonger pour une nouvelle année sa mise à la retraite pour incapacité de travail.

La partie roumaine a soumis au Secrétariat des Nations Unies le dossier médical complet de M. Dumitru Mazilu.

Depuis 1985 jusqu'à la date de sa mise à la retraite, M. Dumitru Mazilu n'a rien entrepris pour remplir son mandat. Au moment de sa retraite il n'avait même pas commencé à rédiger le rapport en question.

Vu l'état de sa santé, tel que constaté et certifié par les médecins, et sa propre demande d'être mis à la retraite pour incapacité de travail, il était d'autant peu probable que M. Dumitru Mazilu ait pu remplir son mandat de rapporteur spécial. En fait, la tâche d'un rapporteur ne se limite uniquement à une simple rédaction d'un texte, mais bien au contraire (cela suppose toute une série d'activités, telles que : une documentation approfondie et objective, déplacements, contacts, etc.). Selon le dernier examen des médecins, M. Dumitru Mazilu n'était pas en mesure d'assumer et d'effectuer une telle activité. Ni par la suite n'ont apparu des éléments à même de prouver que l'état de sa santé aurait connu une amélioration.

En conséquence, en raison de l'état de sa santé, qui ne permet pas à M. Dumitru Mazilu d'accomplir la mission respective, les éléments de fait, à même de poser le problème de l'application de la convention, ne sont pas réunis.

A cet égard, il semble qu'il existe une différence entre la position de la Roumanie et celle du Secrétariat des Nations Unies. Il s'agit là d'une différence d'opinion portant sur des éléments de fait concernant l'état de santé d'une personne et sa capacité de déployer une certaine activité, à savoir la mesure dans laquelle l'état d'incapacité de travail de M. Dumitru Mazilu le rend inapte pour élaborer le rapport en question. La partie roumaine considère que cette question a déjà été tranchée par l'avis de la commission médicale, rendu en 1987 et reconfirmé en 1988. En effet, ladite commission a décidé de mettre M. Mazilu à la retraite pour incapacité de travail. La loi roumaine n'autorise ni l'employeur, ni nul autre organe de l'Etat à ignorer ou outrepasser l'avis des médecins.

5. En conclusion:

— comme effet des réserves formulées par la Roumanie à la section 30 de la convention sur les privilèges et immunités des Nations Unies, la Cour internationale de Justice ne peut pas se déclarer compétente pour donner un avis consultatif sur l'application de la convention par la Roumanie ou à l'égard de la Roumanie, dans le cas en discussion, vu que la Roumanie n'avait pas donné son consentement pour la demande d'un pareil avis;

— faire abstraction de la section 30 de la convention et solliciter un avis consultatif sur un autre fondement, ce serait rompre l'unité de la Convention et du consentement donné par l'Etat concerné, lorsqu'il a décidé d'adhérer à cet instrument;

— il n'y a aucun fondement juridique pour soutenir qu'un différend aurait surgi entre l'Organisation des Nations Unies et la Roumanie — en ce qui concerne l'application ou l'interprétation de la convention, ou bien l'applicabilité de celle-ci;

— dans le cas en discussion, les éléments de fait à même de poser le problème de l'application de la convention ne sont pas réunis;

— les différences d'opinions et d'appréciation entre la Roumanie et le Secrétariat des Nations Unies portent sur la situation de fait, à savoir l'état de santé de M. Dumitru Mazilu, lequel l'a empêché et l'empêche encore à remplir la tâche qu'il a assumée lorsqu'il a été membre de la Sous-Commission; ces différences de vues ne portent donc guère sur les aspects juridiques concernant l'interprétation, l'application ou l'applicabilité de la convention.

Annexe

CN.67.1956.TREATIES Le 13 juillet 1956.

CONVENTION SUR LES PRIVILÈGES ET IMMUNITÉS DES NATIONS UNIES APPROUVÉE PAR L'ASSEMBLÉE GÉNÉRALE LE 13 FÉVRIER 1946

Adhésion par la République populaire roumaine

Je suis chargé par le Secrétaire général de porter à votre connaissance que, le 5 juillet 1956, l'instrument d'adhésion du Gouvernement de la République populaire roumaine à la convention sur les privilèges et immunités des Nations Unies a été déposé auprès du Secrétaire général, conformément aux dispositions de la section 32 de la convention, aux termes de laquelle la convention entre en vigueur à l'égard de chaque membre à la date du dépôt par ce membre de son instrument d'adhésion.

L'instrument d'adhésion contient la réserve ci-après:

> «La République populaire roumaine ne se considère pas liée par les stipulations de la section 30 de la convention, en vertu desquelles la juridiction de la Cour internationale de Justice est obligatoire en cas de contestation portant sur l'interprétation ou l'application de la convention; en ce qui concerne la compétence de la Cour internationale de Justice dans les différends surgis dans de tels cas, la position de la République populaire roumaine est que, pour la soumission de quelque différend que ce soit à la réglementation de la Cour, il est nécessaire, chaque fois, d'avoir le consentement de toutes les parties au différend. Cette réserve s'applique également aux stipulations comprises dans la même section, selon lesquelles l'avis consultatif de la Cour internationale doit être accepté comme décisif.»

Veuillez agréer, les assurances de ma très haute considération.

Le conseiller juridique p.i.,

YUEN-LI LIANG.

LETTRE DU JURISCONSULTE ET DIRECTEUR GÉNÉRAL DES AFFAIRES JURIDIQUES DU MINISTÈRE FÉDÉRAL DES AFFAIRES ÉTRANGÈRES DE LA RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE AU GREFFIER

Bonn, le 13 juillet 1989.

Monsieur le Greffier,

J'ai bien reçu votre lettre en date du 14 juin 1989 adressée au ministre fédéral des affaires étrangères et par laquelle vous faites connaître au Gouvernement de la République fédérale d'Allemagne qu'il a la possibilité de transmettre à la Cour un exposé au sujet du cas objet de la résolution 1989/75 du Conseil économique et social des Nations Unies demandant à la Cour un avis consultatif sur la question juridique de l'applicabilité de la section 22 de l'article VI de la convention du 13 février 1946 sur les privilèges et immunités des Nations Unies au cas de M. Dumitru Mazilu en sa qualité de rapporteur spécial de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités.

De l'avis du Gouvernement de la République fédérale d'Allemagne, M. Mazilu a continué d'être chargé, au-delà de la durée de ses fonctions en qualité de membre de la Sous-Commission, de l'élaboration en sa qualité d'expert d'un rapport sur le thème des «droits de l'homme et la jeunesse» pour la Sous-Commission.

Il jouit par conséquent des privilèges et immunités prévus à la section 22 de l'article VI de la convention du 13 février 1946 sur les privilèges et immunités des Nations Unies.

Veuillez agréer, Monsieur le Greffier, l'expression de ma parfaite considération.

(Signé) Dr. OESTERHELT.

WRITTEN STATEMENT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

INTRODUCTION

By resolution 1989/75 of 24 May 1989, the United Nations Economic and Social Council ("ECOSOC") has requested on a priority basis, pursuant to Article 96 of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I) of 11 December 1946, an advisory opinion from the International Court of Justice ("Court") on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations ("the General Convention") in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities ("Sub-Commission").

Upon receiving this request, the Court decided that the United Nations and the States parties to the General Convention are likely to be able to furnish information on the question submitted to the Court. By its Order of 14 June 1989, the Court has fixed 31 July 1989 as the time limit within which written statements may be submitted to the Court, in accordance with Article 66 of the Statute of the Court, and 31 August 1989 as the time limit within which States and organizations having presented written statements may submit written comments on other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court. The present statement will examine the facts and the legal issues to which this request for an advisory opinion gives rise.

The General Convention accords various privileges and immunities to the United Nations as an organization, to representatives of Members of the United Nations, to United Nations officials and to experts on missions for the United Nations. Article VI, Section 22, of the General Convention specifically requires States parties to accord to "experts (other than officials coming within the scope of Article V) performing missions for the United Nations" such privileges and immunities as are necessary for the independent exercise of their functions, and sets out what those privileges and immunities are "in particular".

The question of the applicability of Article VI, Section 22, of the General Convention to the case of Mr. Mazilu is one that is important not only to ECOSOC and the Sub-Commission, but also to the United Nations, to all of its subsidiary organs and to the Member States of the United Nations. The question arises in the context of the inability of Mr. Mazilu, a Romanian national resident in Romania, to fulfil his functions as an expert performing a mission for the Sub-Commission due to the actions of the Government of Romania, a State party to the General Convention.

The question thus touches upon sensitive issues regarding the limits of a State's authority over its nationals (or residents) who serve as experts for the United Nations or its subsidiary organs. The United States believes that Article VI, Section 22, applies to the case of Mr. Mazilu and obligates Romania to permit communications between Mr. Mazilu and the United Nations and to allow Mr. Mazilu to perform his mission as a special rapporteur for the Sub-Commission which, as the record in this case reflects, requires that he be permitted to travel to Geneva.

The United States believes that circumstances may arise under which a State may justifiably exercise jurisdiction over its nationals serving as experts of the United Nations in a way that may restrict the ability of such individuals to perform their mission[1]. In the circumstances of this case, however, the Court need not address difficult questions relating to the limits of a State's sovereign authority to assert jurisdiction over its resident nationals who are seeking to perform as United Nations experts. The Government of Romania has prevented the United Nations and Mr. Mazilu from even communicating with each other and has prevented Mr. Mazilu from travelling to Geneva to fulfil his mission as Special Rapporteur of the Sub-Commission on a ground that Mr. Mazilu contests — that he is too ill to perform his mission. On this record, the Court need only determine that Mr. Mazilu, as a special rapporteur for the Sub-Commission, is entitled to the privileges and immunities set forth in Article VI, Section 22, and that the Government of Romania must accordingly allow him to communicate with the United Nations and to travel to Geneva to fulfil his mission.

A. The Court's Jurisdiction

Article 65, paragraph 1, of the Statute of the Court authorizes the Court to give an advisory opinion

> "on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations ['Charter'] to make such a request".

The United Nations General Assembly, pursuant to Article 96, paragraph 2, of the Charter, authorized ECOSOC "to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council"[2].

The Sub-Commission is a subsidiary organ of ECOSOC. Pursuant to ECOSOC resolution 9 (II) (1946), the Commission on Human Rights ("Commission"), itself a functional commission of ECOSOC, established the Sub-Commission to undertake certain studies and to make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities, and to carry out any other functions entrusted to it by ECOSOC or by the Commission. Members of the Sub-Commission are nominated by Governments and are elected by the Commission, but serve in their personal capacity.

In fulfilling its task to undertake studies on specific subjects, the Sub-Commission regularly appoints "special rapporteurs" to carry out the necessary research and to report his or her findings to the Sub-Commission. Legal questions relating to the privileges and immunities to which such a special rapporteur is entitled while engaged in these activities are accordingly legal questions arising within the scope of the activities of the Sub-Commission and its parent body, ECOSOC. The Court therefore has jurisdiction under Article 65, paragraph 1,

[1] See p. 217, *infra*.
[2] G.A. res. 89 (I) (1946).

of its Statute to render an advisory opinion on the question presented to it by ECOSOC[3].

B. The Court's Discretion

The Court has repeatedly stated that, although its power to give advisory opinions under Article 65 of its Statute is discretionary, only compelling reasons would justify refusal of such a request[4]. This request for an advisory opinion, the first ever by ECOSOC, presents the Court with no compelling reason to refuse the request. Indeed, the humanitarian concerns underlying the request, as well as the necessity for the United Nations to ensure that its experts receive the privileges and immunities to which they are entitled, provide the Court with strong grounds to render the requested advisory opinion, and to render it on a priority basis in accordance with ECOSOC resolution 1989/75.

FACTUAL BACKGROUND

A. Appointment of Dumitru Mazilu as Special Rapporteur of the Sub-Commission

Dumitru Mazilu was elected in 1984 by the Commission to serve as one of the 26 members of the Sub-Commission until 31 December 1986[5]. During the second year of his term of office, the Sub-Commission adopted a resolution 1985/12 appointing Mr. Mazilu as a special rapporteur on human rights and youth, and requested him

> "to prepare a report on human rights and youth, analysing the efforts and measures for securing the implementation and enjoyment of human rights by youth, particularly the right to life, education and work, and to submit it to the Sub-Commission at its thirty-ninth [1987] session".

The Sub-Commission did not meet in 1986 due to financial constraints. On 6 February 1987, ECOSOC decided at its 1987 Organizational Session to extend

---

[3] Section 30 of the General Convention provides for the referral of disputes between the United Nations and a Member State to the Court for an advisory opinion and that "the opinion of the Court shall be accepted as decisive by the parties". Romania has entered a reservation to the General Convention indicating that it does not consider itself bound by the provisions of Section 30. In the view of the United States, that reservation does not deprive the Court of jurisdiction to give an advisory opinion in response to a request from ECOSOC pursuant to Article 96 of the Charter. See Memorandum from the Legal Counsel, United Nations, to the Under-Secretary General for Human Rights, United Nations, 30 August 1988, entitled "Request for Legal Opinion on the Reservation made by Romania with respect to Section 30 of the Convention on the Privileges and Immunities of the United Nations".

[4] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 27; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 155; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 77, at pp. 85-86.

[5] Commission on Human Rights, Report on the Fortieth Session (6 February-16 March 1984), pp. 24-25, *supra*.

the term of office of the current members of the Sub-Commission, including Mr. Mazilu, for one year[6].

Mr. Mazilu did not appear at the thirty-ninth (1987) Sub-Commission session. The Government of Romania informed the Sub-Commission that Mr. Mazilu had suffered a heart attack and that he would not be able to participate in the proceedings. In the absence of Mr. Mazilu, and with due knowledge of the fact that his term was to expire on 31 December 1987, the Sub-Commission adopted decision 1987/112 on 4 September 1987, by which it deferred until its fortieth (1988) session consideration of the agenda item under which Mr. Mazilu was to have presented his report on human rights and youth. The Sub-Commission also included on its provisional agenda for its fortieth session a reference to Mr. Mazilu's report, and included that report on a list of studies under preparation by members of the Sub-Commission to be submitted at the fortieth session.

B. Actions by the Government of Romania to Prevent Dumitru Mazilu from Fulfilling His Duties as Special Rapporteur

At the February-March 1988 session of the Commission, the Government of Romania did not nominate Mr. Mazilu for re-election to the Sub-Commission, but instead nominated Ion Diaconu, who was elected. Shortly after his election, Mr. Diaconu presented to the Chairman of the Sub-Commission a report on human rights and youth. The United Nations Secretariat refused to circulate this report, however, on grounds that Mr. Diaconu's election to the Sub-Commission had no bearing on the continuing appointment of Mr. Mazilu as the Special Rapporteur charged with preparing and presenting the report on human rights and youth[7].

In April and May 1988, Mr. Mazilu transmitted to the United Nations Secretariat in Geneva a preliminary draft of his report on human rights and youth, and indicated that he wished to come to Geneva in August to present his finalized report at the fortieth session of the Sub-Commission. At the beginning of its fortieth session, the Sub-Commission invited all its special rapporteurs, including Mr. Mazilu, to attend.

In a letter dated 11 August 1988, delivered to the Chairman of the Sub-Commission by a personal intermediary, Mr. Mazilu described his situation as follows:

> "I would like to inform you that I am ready to come to the present session of the Sub-Commission any time. I have no personal problems which can prevent me to come to Geneva in order to finalize and to submit my report to the Sub-Commission.
>
> There is only one official problem: I need the approval of my authorities, which since 5 May '86 persistently have refused me permission to come to Geneva.

---

[6] ECOSOC decision 1987/102.

[7] See Memorandum of 23 August 1988 from the United Nations Office of Legal Affairs to the Director-General, United Nations Office at Geneva entitled, "Question of the applicability of the Convention on the Privileges and Immunities of the United Nations to the situation of Mr. Dumitru Mazilu charged by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its resolution 1985/12 with the preparation of a report on human rights and youth", p. 83, *supra*.

Dear Mr. Chairman, Dear Colleagues and Friends,

Please inform the Romanian authorities and their special expert to the Sub-Commission that to prepare and to submit a report on human rights and youth is an important international task, but in no case a political crime.

In conformity with the provisions of the UN Charter, the pertinent resolutions of the General Assembly, of the Economic and Social Council and the Commission on Human Rights and its Sub-Commission, every Member State has the duty to facilitate the work of a United Nations special rapporteur and not to prevent it.

Consequently, please ask the Romanian authorities to put an end to the repressive measures and police terror against my family.

I am determined to do everything possible to fulfil to the best of my ability my task as a UN special rapporteur on human rights and youth.

It is my firm conviction that this will serve the noble cause of human rights in our complex and contradictory world.

So help me God."

The Government of Romania, however, did not permit Mr. Mazilu to appear at the fortieth session of the Sub-Commission. In light of his absence, the Sub-Commission adopted decision 1988/102 on 15 August 1988, by which it requested the United Nations Secretary-General

> "to establish contact with the Government of Romania and to bring to the Government's attention the Sub-Commission's urgent need to establish personal contact with its Special Rapporteur, Mr. Dumitru Mazilu, and to convey the request that the Government assist in locating Mr. Mazilu and facilitate a visit to him by a member of the Sub-Commission and the Secretariat to help him in the completion of his study on human rights and youth, if he so wishes".

In response to this decision, the Government of Romania transmitted the *following communication to the Sub-Commission on 17 August 1988:*

> "Mr. Mazilu had been ill for some time and had retired from the Foreign Ministry, who had so informed the Commission and Sub-Commission in Geneva. He was thus unable to proceed with the preparation of the report on human rights and youth. The Government had not presented him as a candidate for re-election to the Sub-Commission. The Secretariat had no juridical basis to intervene in a matter between a citizen and his Government. Moreover, there was no basis for any form of investigation in Bucharest, which would constitute interference in internal affairs. The Romanian Government rejected *[sic]* the request to allow a visit to Mr. Mazilu by a member of the Sub-Commission and the Secretariat for the reasons given above."

Two days later, Mr. Mazilu wrote a letter to Jan Martenson, Director-General of the United Nations Office at Geneva, in which he stated, "I would like to inform you that I am ready to come any time to Geneva to submit my report".

In the opinion of 23 August 1988, requested by the Sub-Commission, the United Nations Office of Legal Affairs issued an opinion concerning the privileges and immunities to which Mr. Mazilu is entitled as a special rapporteur of the Sub-Commission. In particular, this opinion concluded that:

"Mazilu appears to have a valid assignment from the Sub-Commission and, when working or attempting to work on that assignment, is therefore performing a task or mission for the United Nations. He should thus be considered an expert on a mission for the United Nations within the meaning of Article VI. Romania became a party to the General Convention on 8 July 1956 without any reservation to Article VI. Accordingly, Romania must accord to Mazilu privileges and immunities necessary for the independent exercise of his functions during the period of his assignment, including time spent on journeys in connection with his mission. He is also to be accorded immunity from legal process even after completion of his assignment."

On 1 September 1988, the Sub-Commission adopted resolution 1988/37 asserting that Mr. Mazilu, "in his continuing capacity of Special Rapporteur", continued to enjoy the privileges and immunities accorded under Article VI, and urging the Government of Romania to allow Mr. Mazilu to complete and present his report on human rights and youth to the Sub-Commission. In the event that the Government of Romania failed to do so, the resolution invited the Commission to urge ECOSOC to request an advisory opinion from the Court on the applicability of the relevant provisions of the General Convention to the present case.

The Government of Romania did not comply with this request of the Sub-Commission. On 6 March 1989, the Commission adopted resolution 1989/37, in which it concurred with the view expressed by the Sub-Commission in its resolution 1988/37 that, in his continuing capacity as a special rapporteur, Mr. Mazilu enjoys privileges and immunities accorded under Article VI of the General Convention necessary for the performance of his duties. The resolution also recommended that ECOSOC adopt a resolution concluding that a difference has arisen between the United Nations and the Government of Romania and requesting an advisory opinion from the Court.

The Government of Romania continued to prevent Mr. Mazilu from fulfilling his functions as a special rapporteur. On 24 May 1989, ECOSOC acted upon this recommendation of the Commission and adopted resolution 1989/75 requesting the advisory opinion presently at issue.

Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations

A. As a Special Rapporteur of the Sub-Commission Dumitru Mazilu is an Expert on a Mission for the United Nations within the Meaning of Article VI

The first issue arising in regard to the applicability of Article VI, Section 22, in the case of Mr. Mazilu is whether Mr. Mazilu is an expert on a mission for the United Nations within the meaning of Article VI of the General Convention. The General Convention without question applies to the Sub-Commission, a subsidiary organ of ECOSOC. ECOSOC, acting under authority granted to it by Article 68 of the Charter[8], created the Commission on Human Rights

[8] Article 68 of the Charter provides that ECOSOC

"shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions".

and authorized the Commission to establish the Sub-Commission[9]. The Sub-Commission is thus a body established by virtue of powers conferred by the Charter.

Article V of the General Convention applies to individuals specified by the United Nations Secretary-General, usually members of the Secretariat who represent the United Nations in their official capacity. Article VI, by contrast, may be read to apply to individuals who have been appointed or elected under the auspices of the United Nations or one of its organs to perform a specific mission, but who serve in their personal capacity and do not officially represent a Member State of the United Nations.

Special rapporteurs appointed by the Sub-Commission are similarly experts on missions for the United Nations. The Sub-Commission appoints individuals to be special rapporteurs to monitor worldwide compliance with human rights standards in that area or to collect data and produce reports on specialized topics within that area. While serving as Sub-Commission special rapporteurs, these individuals must act in their personal capacity, not as representatives of Governments.

As a member of the Sub-Commission, Mr. Mazilu was an "expert on a mission for the United Nations" within the meaning of Article VI of the General Convention by virtue of holding that office[10]. The provisions of Article VI also applied to Mr. Mazilu from the time the Sub-Commission appointed him as a special rapporteur on the topic of human rights and youth in 1985. Although the term of Mr. Mazilu as member of the Sub-Commission expired on 31 December 1987, his appointment as Special Rapporteur continued after that date. The decision of the Sub-Commission in September 1987 extending consideration of Mr. Mazilu's report until the Sub-Commission's 1988 session, with *full knowledge that his term would expire before that time, effectively continued* Mr. Mazilu's appointment as Special Rapporteur, and therefore as an expert on a mission for the United Nations, beyond the expiration of his term as a member of the Sub-Commission.

While some types of missions by their very nature are complete when a term of appointment expires, this is not the case in connection with missions involving the completion and submission of reports. In such cases, the expert involved may need additional time to complete the assignment, and the agency involved may — as in this instance — require the expert's participation in the consideration of the report when it is completed.

In short, Mr. Mazilu became an expert on a mission for the United Nations within the meaning of Article VI from the beginning of his term of office as a member of the Sub-Commission in 1984. His status as an expert on a mission for the United Nations continues by virtue of his ongoing assignment as Special Rapporteur for the Sub-Commission on human rights and youth, which the Sub-Commission concluded was necessary in order to permit him to complete and present the report he was assigned.

---

[9] ECOSOC resolution 9 (II) (1946).

[10] Memorandum of 23 August 1988 from the United Nations Office of Legal Affairs to Director-General, United Nations Office at Geneva, *supra* note 7, at p. 82, *supra* ("members of the Sub-Commission, during their terms of office, are accorded the legal status of experts on mission for the United Nations within the meaning of Article VI of the 1946 Convention").

B. The Provisions of Article VI Apply as between Romania and Mr. Mazilu, a Romanian Resident National

Traditionally, the subjects of international law are States. The relationship between a State and its nationals has been viewed as an incident of the sovereignty of States, and accordingly outside the scope of international law. Certain exceptions, however, have been recognized, for example, in the area of human rights. An exception of particular relevance to this case has developed exclusively on the basis of the consent of States and relates to the relationship between a State and its nationals employed by international organizations. In the view of the United States, derogations of the sovereignty of the State over such nationals must be construed with appropriate respect for the sovereign rights of the State concerned as well as the objective of the fulfilment of the purposes of international organizations.

An analysis of the terms of Article VI, Section 22, of its history and the practice under the General Convention demonstrate that its provisions specifically obligate Romania, in the circumstances of this case, to permit the United Nations and Mr. Mazilu to communicate regarding Mr. Mazilu's mission for the Sub-Commission and to allow Mr. Mazilu to travel to Geneva to complete that mission.

The General Convention was intended to implement Article 105 of the Charter, which provides that officials of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization[11]. Article VI, Section 22, adds to those individuals who enjoy privileges and immunities necessary for the independent exercise of their functions

> "experts (other than officials coming within the scope of Article V) . . . during the period of their missions, including time spent on journeys in connection with their missions".

Section 22 enumerates the following specific privileges and immunities to which such experts are entitled:

> "*(a)* immunity from personal arrest or detention and from seizure of their personal baggage;
> *(b)* in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall con-

[11] While the drafters of Article 105 intended to ensure the free functioning of the organs of the United Nations and the independent exercise of the functions and duties of their officials, they intended that the General Assembly would clarify and define the privileges and immunities necessary to achieve that purpose. Article 105 specifically provides that the General Assembly

> "may make recommendations with a view to determining the details of the application of . . . this Article or may propose a convention to the Members of the United Nations for this purpose".

The Preparatory Commission, in approving Article 105, recommended that the General Assembly take such action at its first session and provided in its Report not only its study on privileges and immunities, but also a draft convention for the consideration of the General Assembly. That draft served as the basis of the General Convention. *Report of the Preparatory Commission of the United Nations*, London, 1945, Chap. VIII.

tinue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) inviolability for all papers and documents;

(d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions; and

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys."

The obligation to accord the specified privileges and immunities is unqualified. Section 22 makes no distinction between the privileges and immunities to be accorded experts who are nationals of a State party and those to be accorded to other experts. Moreover, it is clear that where the drafters of the General Convention intended to make such a distinction, they did so. Section 15 of the General Convention makes inapplicable "as between a representative and the authorities of the State of which he is a national" the privileges and immunities according to representatives of Members. Section 22 contains no comparable provision.

A textual analysis of the General Convention therefore demonstrates that the obligation of States parties to the Convention to accord the privileges and immunities under Article VI, Section 22, applies to their nationals who are experts on missions for the United Nations. The intention to make such privileges and immunities applicable in that situation is also reflected in the history of the Convention. With respect to the immunity of officials of the United Nations from suit or legal process, the United Nations Preparatory Commission stated in its study of privileges and immunities:

> "While it will clearly be necessary that all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties, *whether in the country of which they are nationals or elsewhere*, it is by no means necessary that all officials should have diplomatic immunity . . .[12]"

The subsequent practice of the parties to the General Convention also supports this view. At least eight States, including the United States, have become parties to the General Convention subject to reservations restricting or precluding the application of certain privileges and immunities as between those States and their nationals[13]. The reservation of the United States, for example, provides that,

> "Paragraph *(b)* of section 18 regarding immunity from taxation and paragraph *(c)* of section 18 regarding immunity from national service obligations shall not apply with respect to United States nationals and aliens admitted to permanent residence."

---

[12] *Report of the Preparatory Commission of the United Nations, supra* note 11, p. 62.

[13] One of those States subsequently withdrew that reservation. Romania, a State party to the General Convention, has entered no comparable reservation.

The United Nations and at least one State party to the General Convention informally expressed disagreement with the United States reservation and others like it. In their view, the obligation of States parties to accord all privileges and immunities to qualified persons, including their own nationals, was so central to the proper functioning of the United Nations as to make those reservations inconsistent with the object and purposes of the General Convention[14]. Both the reservations and the resulting responses, however, demonstrate the view that, in the absence of a reservation, the privileges and immunities accorded by the General Convention under Section 18 to officials apply as between a State party and its nationals. The same conclusion applies equally to experts under Section 22 of the General Convention.

It is clear from this analysis of the terms of Article VI, Section 22, and of its history and the practice that has evolved over the past 40 years, that States parties must accord the privileges and immunities set forth in that provision to its nationals who are experts on missions for the United Nations. The privileges and immunities a State party must accord to experts who are its nationals are, of course, qualified in accordance with the general principles which informed the drafting of the General Convention. One such principle was that "no official can have, in the country of which he is a national, immunity from being sued in respect of his non-official acts and from criminal prosecution"[15].

Thus, for example, if an individual serving as an expert were convicted of a serious non-political crime unrelated to the United Nations mission in the State of which he was a national, that State would retain a sovereign right to imprison him even if this restricted his ability to perform his mission for the United Nations. In such a case, the State of nationality would be obliged to afford the expert as full an opportunity to perform his mission as the circumstances reasonably would allow, but travel outside the State's jurisdiction and custody would not necessarily be required.

Mr. Mazilu has not been prosecuted for, or even accused of, any crime. Therefore, in the view of the United States, the refusal of the Government of Romania to allow Mr. Mazilu to travel to Geneva, in the circumstances of the instant case, violates subsection *(a)* of Section 22, which obligates Romania to accord Mr. Mazilu immunity from detention for the purpose of performing his official acts, i.e., the preparation and presentation of his report. The Government of Romania refuses to grant Mr. Mazilu the necessary official authorization to travel to Geneva to perform his mission for the United Nations. In that respect, the Government of Romania continues to detain Mr. Mazilu in Romania. In addition, the refusal of the Government of Romania to allow the United Nations and Mr. Mazilu to communicate, in the circumstances of the instant case, violates subsection *(d)* of Article VI, Section 22, obligating the Government of Romania to accord Mr. Mazilu the right to communicate with the United Nations.

CONCLUSION

Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations applies in the case of Dumitru Mazilu, as Special Rap-

---

[14] See, e.g., Note No. 3822 from the Permanent Representative of the Kingdom of the Netherlands to the United Nations to the Secretary-General of the United Nations, date 13 October 1970.

[15] *Report of the Preparatory Commission of the United Nations, supra* note 11, p. 62.

porteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Pursuant to Article VI, Section 22, the Government of Romania is obligated to permit communications between Mr. Mazilu and the United Nations and to allow Mr. Mazilu to travel to Geneva to perform his mission for the Sub-Commission.

WRITTEN STATEMENT OF THE GOVERNMENT OF CANADA

Pursuant to the provisions of Article 66 (2) of the Statute of the International Court of Justice, and in response to the invitation addressed to the Government of Canada by the Registrar of the International Court of Justice in his letter of 14 June 1989, the Government of Canada wishes to submit certain general comments 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 Mr. Dumitru Mazilu, as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The Government of Canada considers a determination of this legal question by the Court, in response to a request for an advisory opinion by the United Nations Economic and Social Council, to be clearly within the jurisdiction of the Court, and an appropriate exercise of that jurisdiction, notwithstanding the Romanian reservation to the Convention on the Privileges and Immunities of the United Nations, or statements of the Government of the Socialist Republic of Romania to the effect that the Convention is not applicable.

The Government of the Socialist Republic of Romania, as a party to the Convention on the Privileges and Immunities of the United Nations, is under an obligation to respect the privileges and immunities of experts performing missions for the United Nations. The United Nations Economic and Social Council, in its resolution 1989/75, accepted the view that Mr. Mazilu was an expert acting on behalf of the United Nations and entitled to the immunities in Article VI, Section 22, of the above Convention. Such an expert acts for the United Nations in an individual capacity and is in no way a representative of any State. In order to properly fulfil his function, an expert must be able to act with independence and impartiality. The immunities listed in Article VI, Section 22, exist in order to ensure that an expert can fulfil his function in this manner. It is inappropriate for a State to purport to determine the expert status of an individual under the above Convention by means of an arbitrary and unilateral decision. Furthermore, without access to Mr. Mazilu, the United Nations is incapable of determining whether the privileges and immunities of Mr. Mazilu have been, or are being, breached.

Noting that Article VI, Section 23, of the Convention on the Privileges and Immunities of the United Nations states that the privileges and immunities of experts described in Article VI, Section 22, "are granted to experts in the interest of the United Nations", the Government of Canada considers it fundamental to the effective functioning of the United Nations that the Organization, through its Secretariat not be arbitrarily denied access to experts performing missions on its behalf. By denying such access, a State frustrates the object and purpose of the Convention by withholding information necessary to determine the existence of a breach of that Convention.

ADDITIONAL COMMENTS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

INTRODUCTION

On 31 July 1989, in response to an Order of the International Court of Justice ("Court") dated 14 June 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 14 June.

By the same Order, the Court fixed a time-limit of 31 August 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 31 July 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 travelling 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 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 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 United Nations 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."

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."

---

[1] Written Statements of the Government of the United States of America ("Statement of the United States"), pp. 209-210, *supra*. 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. 210, fn. 3, *supra*.

[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 24 May 1989 ("Statement of Romania"), pp. 202-203, *supra*.

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 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 questions' "[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 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 effect 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 takes 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."

---

[3] G.A. res. 89 (I) (1946).

[4] Statement of the United States, pp. 216-217, *supra*.

[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.

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 effect 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 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 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].

---

[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.

[7] See Memorandum from the Legal Counsel, United Nations, cited in Statement of the United States, p. 210, footnote 3, *supra*. 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 pp. 85-86, *supra*.

[8] Statement of Romania, pp. 203-204, *supra*.

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" 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 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

[9] Statement of the United States, pp. 213-218, *supra*.

[10] Statement of the United Nations, pp. 189-193, *supra*; Statement of Canada, p. 219, *supra*; Statement of the Federal Republic of Germany, p. 207, *supra*.

1 December 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.

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 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.

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.

---

[11] Statement of Romania, p. 204, *supra*.

[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, 28 July 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").

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

[14] Statement of the United States, pp. 211-214, *supra*.

[15] Statement of the United Nations, pp. 175, 180, *supra*; United Nations Dossier, documents 23, 31, 37, 92, 94, 96, *inter alia*.

> 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 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, 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 travelling to Geneva to complete his mission [20].

---

[16] Statement of Romania, p. 203, *supra*.

[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 (2nd ed., 1984).

[18] Statement of the United States, pp. 213-214, *supra*; Statement of the United Nations, pp. 190-191, *supra*; Statement of Canada, p. 219, *supra*; Statement of the Federal Republic of Germany, p. 207, *supra*.

[19] Statement of Romania, p. 203, *supra* ("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*.

Hence, Mr. Mazilu has engaged or sought to engage in activities in Romania pertaining to his mission as a special rapporteur. In 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 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.

---

[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").

[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 17 August 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").