

SEPARATE OPINION OF JUDGE ODA

1. I agree with the Court's Opinion that

“Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.” (Para. 61.)

I wonder, however, whether the Court, by simply giving this answer, has adequately responded to what the Economic and Social Council had in mind when formulating resolution 1989/75, in which it requested the Court, “on a priority basis”, to give an opinion

“on the legal question of the applicability of Article VI, Section 22, of the Convention . . . *in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission.*” (Emphasis added.)

To my mind, this question would have been framed more restrictively if all that was desired was an unelaborated “yes” or “no” answer. The way it was actually framed gave scope, I believe, to certain pronouncements on the modalities of the *application* of Section 22 of the Convention to the *case of Mr. Mazilu*.

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2. As is stated in the Preamble to its resolution, the Economic and Social Council made that request after

“[h]aving considered resolution 1988/37 of 1 September 1988 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Commission on Human Rights resolution 1989/37 of 6 March 1989”.

The background to the request for an advisory opinion made to the Court by the Council may be reconstructed in a slightly different manner from that adopted by the Court, as I consider that greater emphasis could have been laid upon some facts which are more directly relevant to the motives of the Council in submitting the request.

3. Mr. Mazilu, then a member of the Sub-Commission whose term was to expire on 31 December 1987, had been requested by the Sub-Commis-

sion to prepare a report on human rights and youth (resolution 1985/12 of 29 August 1985). Relevant information had been regularly despatched to him from the United Nations Centre for Human Rights in Geneva. However, when the 1987 session of the Sub-Commission opened in Geneva on 10 August 1987, Mr. Mazilu had not presented a report and was absent from the meeting. On 12 August 1987, the Sub-Commission was informed that the Secretariat had just received a letter from the Permanent Mission of Romania in Geneva, by which it had been informed that Mr. Mazilu had suffered a heart attack in June and had been told that, as he was still in hospital, he would not be able to travel to Geneva. A telegram bearing the name "D. Mazilu", received on 18 August 1987 by the Secretariat, likewise conveyed a message that he was unable to attend the current session due to heart illness. On 4 September 1987, the Sub-Commission decided to defer until the 1988 session its consideration of the agenda item under which the report to be submitted by Mr. Mazilu was to have been discussed.

4. Subsequently, the Under-Secretary-General for Human Rights in Geneva attempted, by means of a letter of 3 November and a cable of 17 December 1987, to contact Mr. Mazilu and provide him with assistance in the preparation of his report, including arrangements for him to travel to Geneva. The Centre received from Mr. Mazilu two letters postmarked 25 and 29 December 1987 in which he said that he had not received its previous communications, including the invitation to the 1987 session, and that he could not obtain permission from his Government to come to the session in Geneva. In neither of those letters did Mr. Mazilu make any reference to having suffered from an illness. The Under-Secretary-General for Human Rights tried, on 19 January 1988, to make contact with Mr. Mazilu through the United Nations Information Centre in Bucharest and sent a formal invitation asking Mr. Mazilu to come to the Centre in Geneva for consultations during the two-week period from 15 February 1988.

5. In an undated letter addressed to the Under-Secretary-General, that was handed to the Acting Director of the Information Centre in Bucharest on 15 January 1988 and received in Geneva on 1 February 1988, Mr. Mazilu stated that he had been isolated from contacts with the Centre for Human Rights in Geneva and "because of this impossible situation, [he had] suffered very much". He had twice been in hospital and had been forced to retire, as of 1 December 1987, from his post in the Ministry of Foreign Affairs. He went on to say that, despite his willingness to come to Geneva for consultations, the Romanian authorities had refused him a travel permit. He further stated that he was "ready to go to the Centre at 14 February this year". In a series of six letters dated 5 April, 19 April (two of this date), 8 May (two of this date) and 17 May 1988, Mr. Mazilu further described his personal situation: in the first he declared that he had refused to comply with a request addressed to him on 22 February 1988 by a special commission from the Ministry of Foreign Affairs and

asking him to cable the Under-Secretary-General to say that he would not be able to prepare his report and to suggest that the task be handed over to another expert. He consistently complained that various kinds of strong pressure had been exerted on him and his family.

6. By a letter of 6 May 1988, the Under-Secretary-General for Human Rights requested the assistance of the Permanent Representative of Romania in Geneva in transmitting to Mr. Mazilu all the relevant information that he needed for the completion of his report. On the same day, the Under-Secretary-General suggested to Mr. Mazilu that he should travel to Geneva for the period extending from 30 May to 10 June 1988. By a letter dated 15 June 1988, the Under-Secretary-General informed the Permanent Representative of Romania that he had decided, as an exceptional measure, to authorize a staff member of the Centre for Human Rights to travel to Bucharest for the purpose of working with Mr. Mazilu on the draft of his report, on the understanding that Mr. Mazilu would be enabled to travel to Geneva to present his report to the Sub-Commission and participate in the ensuing debate. In a letter of 27 June 1988 the Permanent Representative of Romania, without directly responding on that point, simply referred to an offer to prepare a report on human rights and youth which had been made on 29 March 1988 to the Chairman of the Sub-Commission by a new Romanian member of the Sub-Commission for the term starting 1988, and which his Mission had transmitted to the Centre on 8 April 1988. On 1 July 1988, the Under-Secretary-General re-stated to the Permanent Representative of Romania his previous decision, which would have entailed Mr. Mazilu's paying a short visit to Geneva.

7. Mr. Mazilu, who was no longer a member of the Sub-Commission but remained entrusted with the completion of a report on human rights and youth, was once again absent when the 1988 session of the Sub-Commission opened in Geneva on 8 August 1988. Further to a decision taken at its meeting on 9 August 1988 to discuss the organization of work, a special invitation was cabled to Mr. Mazilu to come to Geneva to present his report. The telegram was not delivered, and the United Nations Information Centre in Bucharest was unable to locate Mr. Mazilu. On 15 August 1988, the Sub-Commission adopted decision 1988/102, whereby it requested the United Nations Secretary-General to establish contact with the Government of Romania. On 17 August 1988, the Under-Secretary-General informed the Sub-Commission that in those contacts the Chargé d'affaires of the Permanent Mission of Romania in New York had stated that Mr. Mazilu had been ill and had retired from the Foreign Office, so that he had been unable to proceed with his study for the report. He also made it clear that any intervention by the United Nations Secretariat and any form of investigation in Bucharest would be seen by his Government as an intervention in Romania's internal affairs. Romania held the view that the case of Mr. Mazilu was an internal

matter between a citizen and his own Government, and for that reason no visit to Mr. Mazilu would be allowed.

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8. It was in these circumstances that, on 1 September 1988, the Sub-Commission adopted resolution 1988/37, in which it asked the Secretary-General to “invoke [to the Government of Romania] the applicability of the Convention” and requested that Government “to co-operate fully in the implementation of the . . . resolution by ensuring that Mr. Mazilu’s report be completed and presented to the Sub-Commission at the earliest possible date”. The Sub-Commission further requested the Secretary-General — “in the event the Government of Romania does not concur in the applicability of the provisions of the said Convention in the present case” — “to bring the difference between the United Nations and Romania immediately to the attention of the Commission on Human Rights at its [1989] session”. The Sub-Commission also requested the Commission on Human Rights, “in the latter event”, “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 . . . to [that] case”.

9. Pursuant to this resolution of the Sub-Commission, the Secretary-General, on 26 October 1988, addressed a Note Verbale to the Permanent Representative of Romania in New York in which, referring to the legal opinion given by the United Nations Legal Counsel on 23 August 1988, he invoked the Convention on the Privileges and Immunities of the United Nations in respect of Mr. Mazilu and requested the Romanian Government to accord the necessary facilities to Mr. Mazilu in order to enable him to complete his assigned task. As no reply was received, the Under-Secretary-General for Human Rights then sent a letter of reminder on 19 December 1988 to the Permanent Representative of Romania in Geneva.

10. On 6 January 1989, the Permanent Representative of Romania in New York handed to the United Nations Legal Counsel an Aide-Mémoire in which the Romanian Government set forth its position. Romania stated that, because of his illness and retirement, Mr. Mazilu was unable to prepare the report and that the question of the application of the Convention would not arise in his case.

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11. On 6 March 1989, the Commission on Human Rights adopted resolution 1989/37 by which the Commission, “[n]oting that the Government of Romania does not concur in the applicability of the provisions of the Convention . . . in the case of Mr. Mazilu”, recommended a draft resolu-

tion to the Economic and Social Council for adoption. On 24 May 1989 that text became the Council's resolution 1989/75 (which is partly quoted in paragraph 1 above), without any substantive change other than the inclusion of the words "on a priority basis".

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12. It is clear from these three resolutions (of the Sub-Commission, the Commission and the Council) that the Sub-Commission on Prevention of Discrimination and Protection of Minorities considered that the Convention on the Privileges and Immunities of the United Nations was applicable in the case of Mr. Mazilu, that the Commission on Human Rights considered that Romania "[did] not concur in the applicability of the provisions of the Convention", and that the Economic and Social Council concluded that "a difference [had] arisen between the United Nations and the Government of Romania as to the applicability of the Convention . . . to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission". What, then, was the "difference [that had] arisen between the United Nations and . . . Romania as to the applicability of the Convention . . . to Mr. Dumitru Mazilu as Special Rapporteur"?

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13. Firstly, it should be asked whether or not a special rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities falls within the category of "Experts on Missions for the United Nations", within the meaning of Article VI, Section 22, of the Convention. The United Nations affirmed the positive view but Romania was of the view, as expressed in its Aide-Mémoire of 6 January 1989, that "the Convention does not provide for rapporteurs, whose activities are only occasional, to be treated as experts on mission for the United Nations". The Court has concluded that a person exercising that function does fall within the category of "experts on missions" (para. 55).

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14. Secondly, in order to reply to the question on the applicability of Section 22 of the Convention in the case of Mr. Mazilu as a special rapporteur of the Sub-Commission, the Court must determine whether or not Mr. Mazilu was a special rapporteur at the time of adoption of the Council's resolution asking the Court to give an opinion (i.e., 24 May 1989), and whether he still continues to have that status. In this connection, it would also have been relevant to ask whether his mission was considered to have been completed by the organ which had entrusted it to him. Apart from the description of the background to the request for an advisory opinion

and of the ensuing events (paras. 9-26), the Court's Opinion makes scarcely any reference to Romania's position on this aspect of the question, except by recording its allegation that Mr. Mazilu was incapable of "carry[ing] out his mandate as special rapporteur" (para. 58).

15. In its Aide-Mémoire of 6 January 1989, Romania stated that

"In 1987, Mr. Mazilu became gravely ill with a serious heart ailment and was repeatedly hospitalized over a period of several months. In November 1987, as a result of this illness, he personally applied for disability pension and furnished the necessary medical certificates. In accordance with Romanian law, he was examined by a medical commission which decided that he should be pensioned off on grounds of ill health for an initial period of one year.

.....
 [Q]uite recently, at the end of his first year on a disability pension, he was subjected to a further examination by a similar medical commission, which decided to extend his retirement on grounds of ill health."

While it did not exactly say as much, the Government of Romania undoubtedly considered that Mr. Mazilu was no longer a special rapporteur towards the end of 1987. One may take it that its holding this position was confirmed by the transmission by the Permanent Mission of Romania, on 8 April 1988, of an offer by a newly elected member from Romania to undertake the preparation of the report (see para. 5, above). Romania's position was reiterated in its written statement presented to the Court on 24 July 1989, in which the Court was told that

"During the month of May 1987 [Mr. Mazilu] fell seriously ill and, for that reason and at his request he was, from 1 December 1987, withdrawn from office as being unfit for service. In 1988, a medical commission, acting in accordance with current Romanian legislation, proceeded to re-examine Mr. Dumitru Mazilu's state of health and decided to extend his retirement for a further one-year period on the grounds of continued unfitness for service.

.....
 At the time of his retirement he had not even begun to draw up the report in question." (Written statement of Romania, p. 7.)

16. The United Nations adopted a different position. On 1 July 1988, the Under-Secretary-General for Human Rights stated in a letter to the Permanent Representative of Romania (which referred to the offer of assistance made by the new Romanian member) that

"Professor Mazilu's mandate comes from a decision by the Sub-Commission in its resolution 1985/12 [to prepare the report on the

subject] and it would be within the competence only of the Sub-Commission, or a higher policy-making body, to change that designation”.

17. Here, the essential question examined by the Court was whether Mr. Mazilu, in spite of his desire to maintain his status as a special rapporteur of the Sub-Commission, had lost that status owing to a decision made by the Romanian Government — or, in other words, whether the Romanian Government could have deprived him of the status of a special rapporteur of the Sub-Commission for whatever reasons. I share the view of the Court that “Mr. Mazilu continues to have the status of special rapporteur” — a conclusion that it reaches at the very end of its Opinion, that is, in paragraph 60.

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18. Thirdly, while the Court has not been asked to give a general opinion on the range of privileges and immunities enjoyed by a special rapporteur of the Sub-Commission or an expert on a mission for the United Nations (or, in other words, to say what kind of privileges he is entitled to receive, and to specify when, where and whether he is entitled to judicial immunities before the courts or other immunities elsewhere, at home or abroad), the question put by the Economic and Social Council does imply some requirement of attention to the material consequences of Mr. Mazilu’s entitlement to the benefit of Article VI, Section 22, of the Convention.

19. The Government of Romania adverted to these matters in its Aide-Mémoire of 6 January 1989, and its position therein may best be expressed by quoting from its written statement:

“Even if rapporteurs are to some extent seen as having the status of experts of the United Nations, . . . Section 22, of the Convention . . . make[s] it clearly apparent that an expert is not accorded such privileges and immunities anywhere and everywhere, but only in the country to which he is sent on mission and during the time spent on the mission, and also in the countries through which he must transit when travelling to meet the requirements of the mission. In the same way, the privileges and immunities only come into existence from the expert’s time of departure, when he travels to accomplish the mission. 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, regardless of whether he is in his country of residence or in another country, in a capacity other than that of an expert.

In the country of which he is a citizen, in the country where he has his permanent residence, or in other countries where he may be for reasons unconnected with the mission in question, the expert is only accorded privileges and immunities in relation to the content of the

activity in which he engages during his mission (including his spoken and written communications).” (Written statement of Romania, p. 6.)

20. The United Nations clearly took another view, as can be seen from the Note Verbale of 26 October 1988 from the Secretary-General to the Permanent Representative of Romania, in which the Secretary-General maintained that under Section 22 of the Convention Mr. Mazilu should have been

“enabled to establish personal contact with the Under-Secretary-General for Human Rights in order that the Centre for Human Rights might accord to Mr. Mazilu the assistance he require[d]”.

In his written statement presented to the Court on 31 July 1989, the Secretary-General referred to his Note Verbale of 26 October 1988,

“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” (written statement of the United Nations Secretary-General, para. 24).

21. The Advisory Opinion states, in general terms, that

“the intent of Section 22 is to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. In some cases these privileges and immunities are designed to facilitate the travel of experts and their stay abroad, for instance those concerning seizure or searching of personal baggage. In other cases, however, they are of a far more general nature, particularly with respect to communications with the United Nations or the inviolability of papers and documents. Accordingly, Section 22 is applicable to every expert on mission, whether or not he travels.” (Para. 50.)

“The privileges and immunities of Article . . . VI are conferred with a view to ensuring the independence of international officials and experts in the interests of the Organization. This independence must be respected by all States including the State of nationality and the State of residence.” (Para. 51.)

Though correct, these pronouncements nevertheless do not seem to focus sufficiently upon the essential aspects of the concrete *case* of Mr. Mazilu, including the fact that he was unable to receive documentation from, enter into contact with, or be approached by the United Nations Centre for Human Rights in Geneva and was prevented by his Government from travelling to Geneva for consultations with the Centre or for the purpose of presenting a report to the Sub-Commission. Confirmation of Mr. Mazilu’s possession of a general status conferring privileges and immunities does not, in my view, exhaust the Court’s remit.

22. It may be contended that the Court has merely been asked to give its opinion “on the legal question of the *applicability* of Article VI, Section 22, of the Convention” (emphasis added), not to consider the matter of its *application*. I am conscious of the Secretary-General’s written statement, referred to in the opinion of the Court, to the effect that :

“the Court . . . has not been asked about the consequences of [the] applicability [of Section 22 of the Convention], 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” (written statement of the United Nations Secretary-General, para. 2),

and appreciate that the Legal Counsel, as the representative of the Secretary-General, stated during the oral proceedings that :

“the [Economic and Social] Council merely addressed a preliminary legal question to the Court, which appears designed to clarify at most the general status of Mr. Mazilu in respect of the Convention without resolving the entire issue that evidently separates the United Nations and the Government”.

While this may theoretically justify contenting oneself with a mere statement that Article VI, Section 22, is applicable to Mr. Mazilu as a special rapporteur falling within the category of “experts on missions for the United Nations”, it is not, in my view, possible to determine the *applicability* of a provision to a concrete case without adequate reference to the way in which it may apply. In this respect, the Court simply states, in very general terms, that :

“[rapporteurs and special rapporteurs] enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission” (para. 55).

23. In my view the Court should not have neglected to recount and deal explicitly with the way in which Mr. Mazilu, in Romania, was isolated from contacts with the United Nations Centre for Human Rights in Geneva and prevented from travelling to Geneva for the completion of the task entrusted to him by the United Nations, because these aspects are fundamental to the case of Mr. Mazilu which the Court has been requested to examine.

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24. In conclusion, I believe that, bearing in mind the necessity that the Court’s “participation in the activities of the Organization” (*I.C.J. Reports 1950*, p. 71) should be as useful as possible, the final paragraph of the Opinion could have been slightly expanded, without trenching upon con-

tentious matters of fact. Instead of giving a bald affirmative answer, it should have stated more explicitly: firstly, that a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities falls within the category of "Experts on Missions for the United Nations"; secondly, that Mr. Mazilu was, at the time of the request for the opinion by the Economic and Social Council, a special rapporteur of the Sub-Commission and that he still exercises that function; and, finally, that Mr. Mazilu was, in the interest of the United Nations, entitled to receive from all parties to the Convention on the Privileges and Immunities of the United Nations, including his national State, all facilities within their power for the fulfilment of his mission. If the Court had made such a pronouncement, it would usefully have drawn attention to the necessity of allowing Mr. Mazilu unimpeded communication with and access to the United Nations Centre for Human Rights.

(Signed) Shigeru ODA.
