

PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS: ADVISORY OPINION OF ICJ*

Introduction:

This case is relating to the applicability of Article VI, Section 22¹ of the United Nations Convention on the Privileges and Immunities of the United Nations. In this case ICJ has given advisory opinion on the request made by United Nations Economic and Social Council under its Resolution 1989/75 of 24th May 1989.² The factual background of the case, the legal issues and the advisory opinion of the case are as follows-

Facts of the Case:

The Economic and Social Council of United Nations had created a Commission on Human Rights by the Resolution 5 (1) of 16th February 1946 and under Articles 55(c)³ and Article 68⁴ of the Charter of United Nations. In 1947 the Human Rights Commission had created a Sub-

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¹ Convention on the Privileges and Immunities of the United Nations (1946), Adopted by the General Assembly of the United Nations on 13 February 1946,

Article VI, Section 22, EXPERTS ON MISSIONS FOR THE UNITED NATIONS, "Experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded :

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

² Advisory opinion of ICJ, [Online: web] accessed 21 October 2015, URL: <file:///E:/international%20environment%20law/I.O/projects/case%20review/index.php.htm>

³ The Charter of United Nations (1945), Article 55 (c), "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

⁴ Ibid, Article 68, "The Economic and Social Council 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".

Commission on Prevention of Discrimination and Protection of Minorities in 1947.⁵In 1949 the Sub- Commission got mandates to make recommendations to the Human Rights 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 by studying the Universal Declaration of Human Rights and to perform any other functions this may be entrusted by the United Nations Economic and Social Council.

Mr. Dumitru Mazilu appointed as Special Rapporteur during the period of 1984 to 1986. He was appointed as a member of the Sub-Commission On 13th march 1984. The Sub-Commission requested Mr. Dumitru Mazilu to prepare a report on 'human rights and youth analyzing the efforts and measures for securing the implementation and enjoyment by youth of human rights particularly the right to life, education and work' at its thirty eight sessions in 1985.

The Secretary General was requested to provide all the assistance to complete his work. It was said that the report was to be submitted as an agenda under the nomenclature of "promotion, protection and restoration of human rights at national, regional and international levels". The report was to be presented by Mr. Mazilu in the thirty ninth session of the Sub-Commission in 1986but the submission was rescheduled for 1987.

In the meantime the service term of Mr. Mazilu had expired in 1986 but it was extended up to 1987 by the Council. In 1987 Mr. Mazilu was not present to submit his report and it was informed to the Secretary General that Mr. Mazilu had suffered a heart attack and was still in hospital. So, decision was taken that the report would be discussed in the fortieth session in 1988. Though the service term of Mr. Mazilu had expired on 31st December 1987 but still he was treated as member of the Commission and it was mentioned that in the fortieth session he would be going to submit and present his report.

After thirty-ninth session of the Sub- Commission, the Centre for Human Rights of the United Nations Secretariat (Geneva) tried to contact Mr. Mazilu for providing him assistances to prepare his report. The assistances were included arranging a visit to Geneva, sending reports of Governments, intergovernmental organizations and non-governmental organizations regularly.

Mr. Mazilu sent information to Secretary General of Human Rights for not getting any information from the Secretary General of Human Rights on 25th and 29th December 1987 and 19th January 1988 respectively. In that letter he requested for assistances.

○ Statements of Romania:

In a written statement Romania stated that Mr. Mazilu has put on the retired list from December 1, 1987 because of becoming unfit for the service. One medical commission was set up in 1988 by the Romanian legislation that gave unfitness report about Mr. Mazilu for the service and advised for further extension of retired period for one year.

○ Statements of Mr. Mazilu regarding Romanian Government:

Mr. Mazilu sent a letter to the Under- Secretary General for Human Rights which was handed to the Acting Director of the United Nations Information Centre in Bucharest on 15th January 1988. In that said letter Mr. Mazilu informed about his state of health specifically hospitalization and he also informed about his forced retirement from 1st December 1987. He informed in the letter that the Romanian authorities did not permit him to travel for Geneva for consultations. Mr. Mazilu had sent a series of letters dated 5, 9 the April; 8th and 17th May 1988 with stating his health conditions. He alleged that he was refused to comply with the request of assistance sent

⁵*Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, (1989), I.C.J. Reports, p. 177.

to him by the letter on February 22, 1988. He was prohibited to decline to submit his report to the Sub- Commission by a special commission from the Romanian Ministry of Foreign Affairs. He also alleged that there were strong political pressure on him and his family by the Romania Government.

The term of all the members of the Sub- Commission including Mr. Mazilu were expired in 1987 (31st December). One Romanian national Mr. Ion Diaconu was appointed as a member of Sub- Commission on 29th February 1988. Even in the fortieth meeting Mr. Mazilu was absent due to none delivered of invitation telegram to him. United Nations Information Centre failed to locate Mr. Mazilu in Bucharest.

- Request of Under-Secretary General of Human Rights to Romania to assist Mr. Mazilu:
The Under- Secretary General for Human Rights requested to the Permanent Representative of Romania of United Nations Office at Geneva and sent a staff member to Bucharest to help Mr. Mazilu to complete his report On 6th May and 5th June 1988 respectively. The Government of Romania was asked to assist the Sub-Commission to locate Mr. Mazilu in its tenth meeting held on 15th August 1988. The Under-Secretary for Human Rights informed the Sub-Commission that there may be chance to contact with Mr. Mazilu by setting up contact between the Secretary- General's Office and *Charge d' affaires*, the Romanian Permanent Mission to the United Nations in New York.

- Romania's anti reactions:

But problem started at that time and *Charge d' affaires* was stated that any intervention by the United Nations Secretariat and any form of investigation in Bucharest would be considered as interference in the Romania's internal affairs. It was also stated that the case of Mr. Mazilu was an internal matter between a citizen and his Government. So, visit to Mr. Mazilu would not be allowed by the Government of Romania.

- The Sub Commission passed a Resolution 1988/37 and decided-
 - To help Mr. Mazilu in Romania
 - Request the Secretary General to approach again to Romania and invoke the applicability of the United Nations Convention on the Privileges and Immunities of United Nations.
 - Request the government to co-operate in implementing the Resolution 1988/37 to complete the said report.
 - To bring the matter before the Commission of Human Rights if the Government of Romania did not follow the resolution 1988/37 and the United nations Convention on the Privileges and Immunities of United Nations 1946.
 - The Commission of Human Rights urged before the Economic and Social Council to request ICJ for an advisory opinion relating to Majilu's case in accordance with the General assembly resolution 89(1) of 11th December 1946.
 - Advisory opinion also regarding applicability of the immunity Convention

- Noncooperation by Romania

Romania government was requested to assist Mr. Mazilu to complete the report in 1988 but the government was silent in that matter. Even then also a reminder letter was sent to the permanent mission of Romania in Geneva.

In 1989, Permanent representative of Romania sent a report to the Legal Counsel of United Nations and opined that Mr. Mazilu was unfit to complete his report. It was also claimed that Mr. Mazilu was not permanent member, so, would not get any privileges under the United Nations Convention on Privileges and Immunities 1946.

Request for advisory opinion:

The Commission requested ICJ for an advisory opinion by passing resolution 1989/75 on 24th May 1989.

Legal Issues:

The legal issues were-

- Applicability of Article VI, Section 22 of the General Convention on Privileges and Immunities 1946.
- Legal status of Mr. Mazilu as a special rapporteur of Sub-Commission.
- Non-cooperation of Romania and
- Reservation of Section 30 of the General Convention on Privileges and Immunities 1946 by Romania.

Starting Procedure of advisory opinion:

The Council made request for advisory opinion before ICJ under Article 96 (2)⁶ of the Charter of United Nations which provides rights of other organs of United Nations for advisory opinion.

Claims of Romania during procedure:

In response to the request of advisory opinion, Romania opined that it was not bound by the compulsory jurisdiction of ICJ. It had given reason that United Nations could not go for an advisory opinion without the consent of Romania because Section 30⁷ of the Immunity Convention 1946 had been reserved by it. It was also claimed that 'consents of both the parties are necessary for referring a case before ICJ'. So, ICJ did not have any jurisdiction and it was also opined that advisory opinions are only recommendatory in nature.

Claims of Secretary General of United Nations:

It was stated that Council has got authorization by the General Assembly by the resolution 89 (1) of 11 December 1946. So, Council has the right to request for an advisory opinion under Article 96 (2) of the Charter of United Nations. The Commission was the subsidiary organ of the Council and the Sub-Commission which had appointed Mr. Mazilu as special rapporteur. And the legal questions were relating to interpretation of the Convention 1946 which was fulfilling the criteria of Article 65 (1)⁸ of the Statute of ICJ.

Opinions of the ICJ:

- Court referred a previous case that was the '*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*⁹', and opined that 'the consent of State for giving advisory opinion is not the

⁶Supra note 3, Article 96 (2), '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 question arising within the scope of their activities'.

⁷Supra note 1, Section 30, "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".

⁸The Statute of International Court of Justice (1945), Article 65(1), "The Court may give 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 to make such a request".

⁹*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, (1950), 1. C.J. Reports, p. 71, 'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an

condition precedent as it is necessary for contentious cases. Court has full discretion to provide advisory opinion which has requested by the United Nations and its specialized agency'. The above reason 'is also applicable where there is dispute between United Nations and a State.'

- Court opined that 'the Section 30 of the Convention on the Privileges and Immunities of the United Nations and Article 96¹⁰ of the Charter of United Nations Work in different context. Article 30 of the General Convention only provides dispute settlement clause if any different arises between United Nations and the member States regarding the Convention and the decision or opinion of the Court will be accepted decisive by the parties of the dispute'
- Court also opined that if the dispute was between United Nations and Romania relating to the Convention on the Privileges and Immunities of the United Nations 1946, it was the duty of the Court to see whether or not Section 30 prohibits the Jurisdiction of the Court. But in this case situation was different because this case was not in between United Nations and Romania. Even Council did not have intention to invoke Section 30 of the General Convention 1946. The intention of the request was only to seek advisory opinion relating to interpretation of the provision of General Convention and not bringing the dispute between United Nations and Romania before Court. So, there was no need of the consent of Romania and the request of advisory opinion was not be affected by the Section 30 of the General Convention 1946.
- The Court stated that in the written request of advisory opinion of the Council had made clear that a difference had arisen between United Nations and Romania relating to application of the General Convention 1946 to Mr. Mazilu as a special rapporteur of the Council and it should not be confused with the question that the dispute between United Nations and Romania relating to application of the provisions of the General Conventions 1946 in the Mr. So, Court did not find any bar to proceed for giving advisory opinion.

Application of Section 22 of Article VI

In order to determine the question relating to Section 22 of Article VI the Court first ascertained the meaning of the text of the Article.

- Court opined that Article 105¹¹ of the Charter of United Nations itself provides immunities and privileges to the members of United Nations. General Assembly has approved the General Conventions 1946 in conformity with provisions of Article 105 of the United Nations Charter. There were 124 member States including Romania as the member States of the Convention.

Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused."

¹⁰Supra note 3, Article 96, "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 2. 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".

¹¹Ibid, Article 105, "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization. 3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose".

- The provisions of the General Convention 1946 (Article II, III, IV, V, VI) provide immunities and privileges to the members of the United Nations. Article VI provides immunities and privileges to the 'Experts on Mission for the United Nations.' and Section 22 of Article VI provides immunities and privileges to those who are other than the officials mentioned in Article V of the Convention 1946
- Section 23¹² of the Article VI of the General Convention provides that the immunities and privileges are only applicable when the person will be engaged with the work of United Nations and not for personal purpose.
- And finally Section 26¹³ of the Article VII provides certain facilities when the person is traveling for the work of the United Nations.
- Section 22 made it clear that experts performing mission of the United Nations will be covered under this Section but this Section does not indicate the nature, place and duration of the work by the expert of a particular mission.
- It was also made clear by the Court that the members appointed by the Sub-Commission would come under Section 22 and the person in mission may or may not having travel would get privileges and immunities under Section 22.
- The Convention provides that the expert in mission will get immunities and privileges even in the home State of the expert.
- Status of Mr. Mazilu as a special rapporteur of the Sub-Commission:
Service term of Mr. Mazilu was expired before completion of his work and it was the Sub-Commission who could determine the status of Mr. Mazilu. And in this case the Sub-Commission had accepted Mr. Mazilu as its special rapporteur even his term was ceased. So, Mr. Mazilu as a special rapporteur would come under Section 22 of Article VI of the General Convention 1946 and capable to get immunities and privileges.

Advisory opinion by the Court

Court opined that Mr. Mazilu was the special rapporteur of the Sub-Commission. So, the immunities and privileges under Article VI, Section 22 would be applicable for Mr. Mazilu.

Conclusion:

This case is important because of various reasons as- in this case ICJ has given its advisory opinion by using its advisory jurisdiction which reflects the circumstances when ICJ will be able to provide advisory opinion. The advisory opinion of this case is important in the field of law of international organizations especially United Nations. In this case it has provided that United Nations and its specialized agencies can request to ICJ for advisory opinion on legal disputes. It has also cleared that United Nations and its officials will get absolute immunity during the course of their functioning as a member of United Nations and no sovereign State can challenge it.

Though Court has only decided on the basis of legal issues but lots of political issues were involved with this case.

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¹²Supra note 1, Section 23. "Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations".

¹³Ibid, Section 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not be holders of United Nations laissez-passer, have a certificate that they are travelling on the business of the United Nations.