INTERNATIONAL COURT OF JUSTICE: RECENT CASES

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I. RECENT CASES

APPLICABILITY OF ARTICLE VI, SECTION 22, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS[1]

A. The Background

As a result of a decision at the San Francisco Conference in 1944 the General Assembly was empowered to authorise other United Nations organs to request advisory opinions from the International Court of Justice.[2] The General Assembly proceeded to exercise this discretion swiftly and liberally, but although the Economic and Social Council received its authorisation as early as 1946,[3] this is the first instance in which it has sought to utilise it.

The case arose out of the appointment of Mr Dumitru Mazilu, a Romanian national, as Special Rapporteur by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. He had the task of completing a report on "human rights and youth"; the report was to be presented in August 1987 but at the opening of that session no report had been received from Mazilu, nor was he present. As it appeared that he had been unwell, the Sub-Commission deferred consideration of his report until 1988, notwithstanding the scheduled expiration of his term in December 1987. At the opening of the 1988 session Mazilu was again absent and efforts by the UN Centre for Human Rights in Geneva and the UN Centre at Bucharest to contact him had met with resistance from the Romanian authorities.[4] Mazilu himself informed the Under-Secretary

* This is a new section in the I.C.L.Q. and will appear on an annual basis. It aims to provide a guide to the current work of the ICJ by summarising the essential aspects of recent cases and highlighting points of particular significance.

1. *Advisory Opinion*, I.C.J. Rep. 1989, 177.

2. The suggestion came from the United Kingdom (UNCIO Documents, 9: 357–59) and became Art.96(2) of the Charter.

3. G.A.Res. 89(1), 11 Dec. 1946.

4. The Romanian position was that "any intervention by the United Nations Secretariat or any form of investigation in Bucharest would be considered interference in Romania's internal affairs" I.C.J. Rep. 1989, para.19.

General for Human Rights that he had not received the Centre's communications, that the Romanian authorities were refusing him permission to travel to Geneva and had asked him voluntarily to decline to submit his report; furthermore, strong pressure had been exerted on him and his family. As attempts to obtain the co-operation of Romania had failed, the Sub-Commission requested the Secretary General to invoke the applicability of Article VI section 22[5] of the Convention on Privileges and Immunities of the United Nations. Romania denied the applicability of the Convention, and the Secretary General referred the matter to the Commission of Human Rights, which in turn referred it to the Economic and Social Council where the resolution to request the Court's opinion was adopted.[6]

The Court's unanimous opinion of 15 December 1989 that Article VI section 22 was applicable in the case of Mr Mazilu dealt with a number of significant points concerning its competence and discretion to give an advisory opinion, the concept of "binding" advisory opinions, the relevance of a State's consent to the proceedings, the meaning of a "legal question",[7] the Court's relationship to other United Nations organs and the status of international civil servants. Separate opinions were given by Judges Oda and Shahabuddeen.

B. Romania's Reservation to the Court's Jurisdiction

The Convention on Privileges and Immunities contains an "advisory compromissory clause" whereby disputes as to its interpretation or application must be referred to the International Court, whose opinion on the matter shall be accepted as "decisive".[8] Although it is doubtful whether such provisions invest advisory opinions with the same authority as decisions in contentious cases,[9] Romania had sought to guard itself against that eventuality by entering a reservation[10] to section 30. In view of similar reservations made by other States,[11] and the presence of such provisions in other treaties, a judicial consideration of their effect would have been welcome. The Court, however, decided that it was unnecessary to determine the effect of Romania's reservation: it noted that the Council's request for the Opinion did not invoke section 30 but was made under the Organisation's general power to request, and its own general power to give,

5. Art.VI, s.22 provides: "Experts (other than officials coming within the scope of Article V) performing such 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."

6. 1989/75, 24 May 1989.

7. UN Charter, Art.96; Statute of the International Court of Justice, Art.65.

8. Section 30.

9. Rosenne, *The Law and Practice of the International Court* (1985), pp.683–685.

10. "The Romanian People's Republic does not consider itself bound by ... Section 30 ... for the submission of any dispute whatsoever to the Court ... the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions which stipulate that the advisory opinion of the International Court is to be accepted as decisive" I.C.J. Rep. 1989, para.29.

11. The Soviet Union and other Eastern bloc States had entered similar reservations: see 173 U.N.T.S. 369.

advisory opinions in Articles 96 and 65 of the Charter and the International Court of Justice Statute respectively:[12]

> in case of a request made under Section 30, the Court would of course have to consider any reservation which a party to the dispute had made to that Section. . . . But in the present case. . . . the request is not made under that Section, and the Court does not therefore need to determine the effect of the Romanian reservation to that provision.

Romania had argued that if disputes could be brought before the Court on a basis other than section 30 then the content and extent of the obligations which States entered into when signing the Convention would be modified. The Court, however, rejected this argument: "as the present proceedings are a request for advice, not the bringing of a dispute for determination, the obligations entered into by member States are not modified by the request".[13]

The Court's decision to treat the request as emanating from provisions in the Charter rather than the Convention on Privileges and Immunities enabled it to draw from its previous jurisprudence in dealing with the remaining issues in the case.

C. The Court's Competence and Discretion to Give an Opinion

The Court determined that the request here concerned a "legal" question, following its earlier opinions that the interpretation of a treaty is "by its very nature"[14] a legal question and therefore within its competence.[15]

As to Romania's lack of consent to the proceedings, the Court reiterated earlier opinions to the effect that the consent of States is not a condition precedent to its advisory jurisdiction: "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 relates to a legal question actually pending between States."[16] This reasoning, the Court continued, is equally valid when the question is pending not between two States but between the United Nations and a member State.

A State's lack of consent was, however, deemed relevant to the question whether it was "proper" for the Court to give an opinion in the exercise of its judicial discretion.[17] In line with its previous jurisprudence, the Court weighed the principle that no State can be compelled to submit disputes to adjudication without its consent against the Court's own desire, and duty, to co-operate with the other organs of the Organisation:[18] "the Court's Opinion is given not to the

12. I.C.J. Rep. 1989, para.34.

13. *Idem*, para.35. Judge Shahabuddeen in his separate opinion also finds support from the *Nuclear Tests* case to rebut the suggestion that a reservation to one treaty may operate also as a reservation to another treaty, *idem*, p.41.

14. *Peace Treaties* case, I.C.J. Rep. 1950, 71.

15. I.C.J. Rep. 1989, para.28.

16. *Idem*, para.31, quoting from *Peace Treaties* case, I.C.J. Rep. 1950, 71.

17. Art.65 is permissive: "the Court may give an advisory opinion".

18. The principle of State consent to the proceedings was used to deny jurisdiction in the *Eastern Carelia* case but was rejected in *Interpretation of Peace Treaties*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and *Western Sahara* cases.

State 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 Organisation and, in principle, should not be refused'.[19] Only "compelling reasons",[20] which could not be found here,[21] could lead it to refuse an organ's quest for "enlightenment" from the Court.

D. Interpretation of the Question Before the Court

The Court recognised that, in certain circumstances, lack of consent of an interested State may render the giving of an advisory opinion incompatible with its judicial character; an instance of this would be when to give a reply would, in the circumstances, have the effect of circumventing the principle that a State is not obliged to have its disputes submitted to judicial settlement without its consent.[22] However, by limiting the scope of the request, the Court was able to claim that in the present case an advisory opinion would have no such effect:[23]

> certainly the Council, in its resolution requesting the opinion, did conclude 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. But this difference, and the question put to the Court in the light of it, are not to be confused with the dispute between the United Nations and Romania with respect to the *application* of the General Convention.

Judge Oda, on the other hand, in a separate opinion, was prepared to consider the "application" as well as the "applicability" of Article VI and to deal, albeit to a limited extent, with the "material consequences" of Mr Mazilu's entitlement to the benefit of section 22.[24] As Judge Shahabuddeen put it, when the context and structure of the request are considered, "technical distinctions between the concepts of 'applicability' and 'application' do not have the effect of excluding consideration of the particular case, provided of course, the answer does not trench on the question whether any particular privilege or immunity was violated".[25]

E. The Status of "Special Rapporteurs"

The "difference" between Romania and the United Nations centred on the meaning of section 22 of the Convention and its applicability to special rapporteurs such as Mr Mazilu. Romania's view was that rapporteurs did not enjoy the same status as "experts on missions" within that section and that their immunities, if any, began to apply only when they left on a journey connected with their mission; in their home country those immunities were similarly restricted to activities performed in connection with their mission.[26]

19. I.C.J. Rep. 1989, para.31, quoting from I.C.J. Rep. 1950, 71.
20. *Western Sahara* I.C.J. Rep. 1975, 25.
21. I.C.J. Rep. 1989, para.39.
22. *Idem*, para.37, quoting from *Western Sahara* case, I.C.J. Rep. 1975, 25.
23. *Idem*, para.38.
24. *Idem*, pp.200, 206.
25. *Idem*, p.217.
26. *Idem*, para.24.

This narrow definition did not find favour with the Court which, recognising the importance of rapporteurs for the UN system in general,[27] employed a teleological interpretation of the Charter and the Convention to identify the purpose for which such immunities are conferred. The Court noted that, although the Convention does not contain a definition of "experts on missions" or of the nature, duration, or place of those missions, the purpose of section 22 was to guarantee the independence of UN officials. Following the view that the Organisation's subsequent practice is as relevant as the framer's intentions when interpreting its constitution,[28] it noted that the United Nations often entrusts missions to persons who are not officials and regards them as "experts" within section 22.[29] As rapporteurs are neither representatives of members, nor UN officials, they should also be regarded as experts even if they are not, or, as in the case of Mazilu, are no longer, members of the Sub-Commission.[30] Furthermore, only the organ appointing those officials, and not their State of nationality, has the power to terminate their appointment.[31] In interpreting the scope of the immunities, the Court noted that the word "missions", unlike its Latin original, embraces tasks entrusted to a person whether or not they involve travel.[32] As Judge Shahabuddeen put it, if the expert did not enjoy any immunities *before* embarking on a journey, he would not be able to enforce a right to *begin* the journey and would therefore never be able to complete his mission.[33] The Court also noted that, unlike section 15, which explicitly restricts the immunities of representatives of members against their home State, section 22 does not include such a provision. The fact that certain States (but not Romania) felt it necessary to make reservations to Article VI further confirmed the conclusion that experts on missions enjoy those immunities against their home State.[34]

F. Conclusions

Although the advisory jurisdiction is now an established part of the Court's role in clarifying and developing international law, not all the original misgivings concerning the function and desirability of that jurisdiction have been solved: the Court still needs to contend with the view that advisory opinions are incompatible with the true function of a court of law, which is to deliver binding decisions, as well as with the danger that advisory opinions might undermine its authority in contentious cases. To do this, the Court in the present, as in previous cases, tried to strike a balance between being more than a mere "legal adviser" to the requesting organ on the one hand whilst maintaining the distinction between its advisory and contentious functions on the other. In the case of international organisations, which have no access to the Court's contentious jurisdiction, and for which advisory opinions are the *only* means of gaining judicial consideration

27. *Idem*, para.53.
28. See e.g. Judge Alvarez in *Conditions for Admission* I.C.J. Rep. 1947–1948, 68.
29. I.C.J. Rep. 1989, paras.47–48.
30. *Idem*, para.57.
31. *Idem*, paras.58–59.
32. *Idem*, paras.49–50. The effect of this may be to confer on a UN official similar immunities to those enjoyed by diplomats under the Vienna Convention.
33. *Idem*, p.219.
34. *Idem*, para.51.

of day-to-day operational problems, this task can be easier and has, in the past, met with general acceptance. However, when an interested party is objecting to the proceedings, as Romania was here, the original reservations about the advisory jurisdiction can re-emerge, and the Court's skill in not appearing to bypass the principle of consensual jurisdiction is once again put to the test.

The Court's determination to face these dangers in this case was prompted, to a considerable extent, by its desire to assert the independence of international officials: an independence that cannot be guaranteed, as in the case of State representatives, through the means of reciprocity. In the process, the Court demonstrated how the law relating to international officials, having "started as little more than a general principle resting on the questionable analogy of diplomatic immunities is now a complex body of rules"[35] in its own right. Unlike diplomats and State representatives whose duty is to represent the interests of their government, international civil servants are expected to perform "international duties" and thus to owe their first loyalty to their organisation. The immunities conferred on them are intended to guarantee their independence from any one State, including that of their home State, and are doubly important when the latter's interests conflict with those of their employer. When the official is also posted within the jurisdictional limits of his own country, as Mazilu was here, the need to guarantee this independence becomes even greater. These principles, contained in the Charter[36] and elaborated in the 1946 Convention, probably reflect customary international law[37] and the Court's Opinion in the present case has certainly reinforced this status.

The Court has also reaffirmed its own role as a "principal judicial organ"[38] of the Organisation whose first loyalty is with the latter rather than with any one State. Its determination to restrict itself to the "applicability" of section 22, without pronouncing on its application, was designed to avoid the accusation that it was bypassing the principle of State consent to its jurisdiction and reflects the tendency towards "abstractification"[39] of the Cold War years with the Court limiting the scope of the request in order to avoid pronouncing on thorny issues. Nevertheless, it is not too difficult to discern from the judgment how the issue of the "application" of section 22 to the facts of the case would have been decided, had the Court chosen to address it.

The events in Eastern Europe at the end of 1989 have to a large extent overtaken the decision and make it impossible to assess how the dispute between the United Nations and Romania would have been resolved. However, in the same way that a series of advisory opinions on Namibia did little to solve that issue, resolution of which had to wait for wider changes on the international scene, it is also unlikely that this opinion would have led to a change in Romania's position. That also had to wait for political changes in Romania, changes which

35. Jenks, *International Immunities* (1961), p.xxxv.
36. Arts.100, 105.
37. See e.g. Legal Counsel's opinion in (1968) 23 G.A.O.R., Supp.1 (a/7201) at 208–209.
38. Art.92 UN Charter; see also Art.7(1) and Art.1 Statute of the International Court of Justice.
39. Pomerance, *The Advisory Function of the International Court* (1973), p.309.

led to Mr Mazilu, who supposedly lacked the "intellectual capacity" to prepare a UN report,[40] becoming the country's Vice-President after the Revolution.

MARIA ARISTODEMOU

CASE CONCERNING ELETTRONICA SICULA S.p.A. (ELSI) (*UNITED STATES OF AMERICA* v. *ITALY*)[1]

On 6 February 1987, the United States filed an application with the International Court of Justice instituting proceedings against Italy in respect of a dispute arising out of the requisitioning of the plant and assets of Raytheon-Elsi S.p.A.,[2] an Italian company based in Sicily but wholly owned by two US corporations.[3] The Court's jurisdiction arose under Article XXVI of the United States–Italy Treaty of Friendship, Commerce and Navigation (FCN Treaty) of 2 June 1948 and both parties requested that the matter be referred to a Chamber of the Court in accordance with Article 26 of the ICJ Statute. The original five-judge Chamber was appointed in March 1987.[4]

The issue at the heart of the dispute was the bankruptcy of ELSI in March/April 1968[5] and its subsequent sale at a reduced price to the State-owned Industria Elettronica Telecommunicazioni S.p.A. (ELTEL). The United States claimed that the requisition had caused the bankruptcy of the company, thereby violating several substantive and procedural rights guaranteed by the FCN Treaty.[6] In its Counter-Memorial and Rejoinder, Italy raised a preliminary objection to the admissibility of the claim on the ground that local remedies had not been exhausted and, in any event, flatly denied any violation of the Treaty.[7] In the oral hearings Italy further submitted "on a subsidiary and alternative basis only" that even supposing a violation of its obligations, no injury had been caused for which payment of indemnity would be justified.[8]

A. The Exhaustion of Local Remedies

With the consent of the parties, the Chamber dealt with the "local remedies"

40. This was the view expressed by Romania's Permanent Mission to the UN in August 1989; I.C.J. Rep. 1989, para.26.

1. I.C.J. Rep. 1989, 15, Judgment 20 July 1989 ("Judgment").

2. An order of the Mayor of Palermo dated 1 Apr. 1968.

3. In 1967, Raytheon owned 99.16% of ELSI's shares and Machlett Laboratories Inc. (a wholly owned subsidiary of Raytheon) the remaining 0.84%. Judgment, para.15.

4. I.C.J. Rep. 1987, 3, Order of 2 March 1987. The members were President Nagendra Singh and Judges Oda, Ago, Schwebel and Jennings. Judge Ruda later replaced President Singh as both President of the Court and of the Chamber following the latter's death, I.C.J. Rep. 1988, 158, Order of 20 Dec. 1988.

5. The actual date of bankruptcy depends on whether one takes the date of petition to the Italian bankruptcy court, 26 Apr. 1968, or the possibly earlier date at which the obligation under Italian law to file for bankruptcy arose, this being a matter of dispute between the parties. In the Chamber's opinion, the difference was irrelevant, but see *infra* text accompanying n.45.

6. Judgment, para.10.

7. *Ibid.*

8. *Idem*, para.11. The United States claimed 12,679,000 US dollars in compensation.