COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

# APPLICABILITÉ DE L'OBLIGATION D'ARBITRAGE EN VERTU DE LA SECTION 21 DE L'ACCORD DU 26 JUIN 1947 RELATIF AU SIÈGE DE L'ORGANISATION DES NATIONS UNIES

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# APPLICABILITY OF THE OBLIGATION TO ARBITRATE UNDER SECTION 21 OF THE UNITED NATIONS HEADQUARTERS AGREEMENT OF 26 JUNE 1947

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# WRITTEN STATEMENT OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

## I. INTRODUCTION

1. By its resolution 42/229 B adopted on 2 March 1988, the General Assembly decided to request an advisory opinion of the International Court of Justice on the following question:

> "In the light of facts reflected in the reports of the Secretary-General [1], is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [2], under an obligation to enter into arbitration in accordance with section 21 of the Agreement?"

2. The present statement will examine the facts and the legal issues to which this question gives rise. In view of the time constraints inherent in the request, and to which reference is made by the General Assembly in resolution 42/229 B, every effort has been made to present the information contained in this statement as succinctly as possible. The documents transmitted to the Court by the Secretary-General in accordance with Article 65 of its Statute provide, of course, a comprehensive background to this Statement [3].

3. The meaning and scope of the question requested by the General Assembly emerge from the statements made in its meetings leading to the formal adoption of the resolution on 2 March 1988 [4]. Section 21 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (the "Headquarters Agreement [5]") provides that:

> "*(a)* Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.
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> *(b)* The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the

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[1] Docs. 1 and 2. All document numbers in this Statement refer to the Dossier submitted to the Court by the Secretary-General. See note 3 below.

[2] Doc. 89.

[3] Documents relating to the Question on which an Advisory Opinion is requested by General Assembly resolution 42/229 B of 2 March 1988, transmitted to the International Court of Justice by the Secretary-General of the United Nations in accordance with Article 65, paragraph 2, of the Statute of the Court.

[4] Docs. 11 to 15.

[5] Doc. 89.

receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court."

The Court, in the question put before it, is requested to give an advisory opinion on whether, in the light of certain facts, as reflected in two reports of the Secretary-General to the General Assembly[6], the United States as a party to the Headquarters Agreement is under an obligation to enter into arbitration with the United Nations, the other party to the Agreement, in accordance with section 21 thereof.

4. In formulating this question, the General Assembly has confined itself to a relatively narrow issue, namely, whether the parties to the Headquarters Agreement have undertaken an obligation with respect to the manner in which disputes arising from the interpretation or application of the Headquarters Agreement must be settled and whether, in the light of the particular facts referred to in the Secretary-General's reports to the General Assembly, the necessary conditions have been met to place on the United States an obligation to arbitrate. The procedural nature of this question, however, cannot disguise its fundamental importance for the United Nations Organization, its member States and international law, the development of which is one of the principal functions of the United Nations under the Charter. The primary purpose of the Headquarters Agreement, as stated in section 27, is to "enable the United Nations at its headquarters in the United States, *fully and efficiently* to discharge its responsibilities and fulfill its purposes" (emphasis added). The integrity and viability of this Agreement is of paramount importance not only as a legal framework for relations between the United Nations and the United States as host country, but also as an international treaty whose obligations must be carried out in good faith.

5. The question referred to the Court for its advisory opinion requires the consideration of a number of factual and legal issues which will be examined in greater detail in the following pages. Since no question exists in a vacuum, the present statement will, in the first place, summarize the pertinent facts which have given rise to the question. Having provided the factual framework, the Statement will then take up the legal issues that in the opinion of the Secretary-General fall to be considered in relation to the question. The statement will show that the Headquarters Agreement is a valid treaty in force between the United Nations and the United States, that section 21 is the applicable law for the settlement of disputes concerning the interpretation or application of the Agreement, that such a dispute exists and that the United Nations has made every effort to settle this dispute by means of negotiation or any other agreed mode of settlement, that such efforts have not been successful and that, consequently, the United Nations has the right to request and the United States has an obligation to enter into arbitration.

## II. SUMMARY OF THE FACTS GIVING RISE TO THE REQUEST FOR THE ADVISORY OPINION

6. The central legal fact which has given rise to the request for the present advisory opinion is Title X — Anti-Terrorism Act of 1987 (the "Anti-Terrorism Act" or ATA)[7] of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, which was signed into law by the President of the United States on 22

[6] Docs. 1 and 2.
[7] Doc. 38.

December 1987, with Title X to take effect 90 days after the date of enactment[8], i.e., on 21 March 1988. Section 1003 of the Act provides:

> "It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this title —
>
> (1) to receive anything of value except informational material from the PLO of any of its constituent groups, any successor thereto, or any agents thereof;
>
> (2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or
>
> (3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof."

It is not in dispute that the intent of this legislation is to obtain the closure of the Palestine Liberation Organization (PLO) Permanent Observer Mission to the United Nations, which has functioned in New York since 1975, soon after the General Assembly, by resolution 3237 (XXIX) of 22 November 1974, granted observer status to the PLO and extended to it an invitation to participate in the sessions and the work of the General Assembly, and of all international conferences convened under the auspices of the General Assembly or of other organs of the United Nations[9]. This intent is confirmed by the fact that on 11 March 1988 the Secretary-General was informed by the Acting Permanent Representative of the United States that the Attorney General of the United States had determined that he was required by the Anti-Terrorism Act (ATA) to close the office of the PLO Observer Mission to the United Nations in New York, "irrespective of any obligations the United States may have under the [Headquarters Agreement]"[10].

7. Anticipating the adoption of the Anti-Terrorism Act by the United States Congress — a legislative process that took several months[11] — the Secretary-General wrote to the Permanent Representative of the United States to the United Nations on 13 October 1987 to express his concern, and that of a number of delegations to the United Nations, that the proposed legislation (which he noted was opposed by the Secretary of State) ran counter to United States obligations arising from the Headquarters Agreement and to underline the serious and detrimental consequences that such legislation would entail[12]. In his reply on 27 October 1987, the Permanent Representative of the United States assured the Secretary-General that the Administration of the United States remained opposed to the proposed legislation, that it intended to raise the matter with Congress and that it was hopeful that its efforts would produce a satisfactory resolution of the issue[13].

8. The first occasion on which the proposed legislation was raised in an intergovernmental body of the United Nations was during a meeting of the Committee

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[8] *Ibid.*, section 1005 of the Public Law.
[9] Doc. 66.
[10] Doc. 105. See para. 30 below.
[11] For the legislative history of the Act, see docs. 39 to 55.
[12] Doc. 29.
[13] Doc. 30.

on Relations with the Host Country, which took place on 14 October 1987. At that meeting, the Permanent Observer of the PLO drew the attention of the Committee to the proposed legislation and referred in this connection to a letter addressed to the Chairman of the Senate Foreign Relations Committee on 29 January 1987 by the Secretary of State, Mr. George Shultz, in which the latter stated, *inter alia*, that:

> "The PLO Observer Mission in New York was established as a consequence of General Assembly resolution 3237 (XXIX) of November 22, 1974, which invited the PLO to participate as an observer in the sessions and work at the General Assembly. The PLO Observer Mission represents the PLO in the UN; it is in no sense accredited to the US. The US has made clear that PLO Observer Mission personnel are present in the United States solely in their capacity as invitees of the United Nations within the meaning of the Headquarters Agreement[14]."

While the letter textually recognized that the United States was under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters, the Observer of the PLO stated that his Organization would welcome any move that would prevent the entry into force of the legislation and sought a clarification of the situation.

9. Several members of the Host Country Committee expressed similar concerns and the Legal Counsel of the United Nations stated that the Organization shared the legal opinion expressed in the Secretary of State's letter. The core point of that letter was that the United States was under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters. The representative of the United States sympathized with the concerns expressed by the members of the Committee but noted that it was premature to speculate on the outcome of the legislative process. He did, however, state that in the opinion of the Executive Branch of the United States Government, the closing of the PLO Mission would not be consistent with the host country's obligations under the Headquarters Agreement[15].

10. The General Assembly itself first became seized of the questions arising from the proposed legislation with the consideration of the Report of the Host Country Committee by the Sixth Committee of the General Assembly on 24 November 1987. The Sixth Committee subsequently devoted all or part of five meetings to a consideration of the Report of the Host Country Committee[16], including the question of the proposed legislation concerning the PLO Observer Mission. At its 62nd meeting at the 42nd session, on 11 December, the Sixth Committee adopted, by a recorded vote of 100 to 1 with no abstentions (the United States not participating), a draft resolution in which it: reiterated that the Permanent Observer Mission of the PLO to the United Nations in New York is covered by the Headquarters Agreement and should be enabled to establish and maintain premises and adequate functional facilities, and that the personnel of the Mission should be enabled to enter and remain in the United States to carry out their official functions; requested the host country to abide by its treaty obligations under the United Nations Headquarters Agreement and to refrain from taking any action that would prevent the discharge of the official functions

[14] Doc. No. 17, para. 46.
[15] Doc. 17, paras. 46-54.
[16] Docs. 18 to 22.

of the Permanent Observer Mission of the PLO to the United Nations; and requested the Secretary-General to take effective measures to ensure full respect for the Headquarters Agreement and to report, without delay, to the General Assembly on any further developments in the matter[17].

11. At the 98th plenary meeting of its 42nd session, on 17 December 1987, the General Assembly adopted the draft resolution submitted by the Sixth Committee, without change, by a recorded vote of 145 votes to 1[18]. Resolution 42/210 B was the first decision taken by a deliberative organ of the United Nations on the question of the proposed legislation which, although at a very advanced stage of the United States legislative process (having just been adopted by both houses of Congress[19]), had not yet been submitted to the President for signature. In view of this, and particularly in the light of the statements of representatives of the host country in the Host Country Committee and the General Assembly to the effect that the proposed legislation would not be consistent with the Headquarters Agreement, the General Assembly confined itself to reiterating its position of principle (operative para. 1), addressing a request to the host country to abide by its treaty obligations under the Headquarters Agreement (operative para. 2) and requesting the Secretary-General to take effective measures to ensure full respect for the Headquarters Agreement (operative para. 3)[20]. The Assembly also decided to keep the matter under active review (operative para. 4).

12. Concurrently with the deliberations in the General Assembly, the Secretary-General on 7 December 1987 once again wrote to the Permanent Representative of the United States. After noting that the proposed legislation in the United States Congress was far advanced and would, if adopted, signed into law and enforced, entail the closure of the PLO Observer Mission, the Secretary-General reiterated the legal position of the United Nations to the effect that

> "the members of the PLO Observer Mission are, by virtue of General Assembly resolution 3237 (XXIX), invitees to the United Nations and that the United States is under an obligation to permit PLO personnel to enter and remain in the United States to carry out their official functions at the United Nations under the Headquarters Agreement[21]".

In the view of the United Nations the United States was under a legal obligation to maintain the existing arrangements for the PLO Observer Mission, which had been in effect for the past 13 years. The main purpose of this letter, however, was twofold. Firstly, to urge the United States Government, even at this late stage, to act to prevent the adoption of the legislation by Congress, in line with the Government's own legal position, which was similar to that of the United Nations. Secondly, in the event that the proposed legislation became law, to request that the United States provide an assurance that the arrangements for the PLO Observer Mission would not be curtailed or otherwise affected. Without such assurance, the Secretary-General noted that

> "a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement would exist and I would be obliged to enter into the dispute settlement procedure foreseen under section 21 of the United Nations Headquarters Agreement of 1947[22]".

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[17] Doc. 25.
[18] Doc. 27. The United States did not participate in the vote.
[19] Docs. 52 and 53.
[20] Doc. 28.
[21] Doc. 31.
[22] *Ibid.*

13. The Secretary-General's letter of 7 December is of particular importance because for the first time a formal reference is made to the international legal consequences of the adoption of the proposed legislation. It is relevant to note in this connection that in the view of the Secretary-General even if the proposed legislation were to be adopted by Congress and signed into law by the President, a dispute would only exist if the United States Government would fail to provide an assurance that the existing arrangements for the PLO Observer Mission would not be curtailed or otherwise affected. Such an assurance would preclude a determination by the Secretary-General of the existence of a dispute arising from the Headquarters Agreement. However, it follows clearly from the Secretary-General's letter of 7 December that in the absence of any such assurance, the adoption and signing into law of the proposed legislation would create the conditions for the existence of a dispute within the meaning of section 21 of the Headquarters Agreement and that the dispute settlement procedure foreseen therein would then become applicable.

14. Following the adoption of General Assembly resolution 42/210B of 17 December 1987, the Secretary-General on 21 December requested the Permanent Representative of the United States to inform him of any further developments regarding the pending legislation which would affect the PLO Mission to the United Nations, in particular the signing into law of the legislation, so that he might discharge the responsibilities placed upon him by operative paragraph 3 of the resolution, to take effective measures to ensure full respect for the Headquarters Agreement and to report, without delay, to the General Assembly on any further developments in this matter[23].

15. The President of the United States signed the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, of which the Anti-Terrorism Act of 1987 forms a part, on 22 December 1987[24]. The legislation became law on that date, although the effective date of implementation of the Anti-Terrorism Act was, by the terms of that Act, 90 days later, i.e., 21 March 1988. In the view of the Secretary-General, in the absence of any assurance as to the maintenance of the existing arrangements for the PLO Observer Mission, *the incompatibility of this* Act with the obligations of the host country under the Headquarters Agreement created a dispute within the meaning of section 21 of the Agreement.

16. It was not, however, until 5 January 1988 that the Secretary-General was formally notified of the signing into law of the Act. In a letter of that date, the Acting Permanent Representative of the United States confirmed that the legislation to which the Secretary-General had referred in his letters of 7 and 21 December 1987 had been signed into law on 22 December. The letter then went on to say

> "Because the provisions concerning the PLO Observer Mission may infringe on the President's constitutional authority and, if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement, the Administration intends, during the 90-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter[25]."

17. The parties to the Headquarters Agreement had foreseen that from time to time disputes might arise concerning its interpretation or application and had, therefore, made provision for the settlement of such disputes through negotiation

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[23] Doc. 32.
[24] Doc. 55.
[25] Doc. 33.

or other agreed mode of settlement, failing which disputes would be referred for final decision to a tribunal of three arbitrators[26]. The procedure envisaged in paragraph *(a)* of section 21 of the Headquarters Agreement therefore consists of a two-stage process. In the first stage the parties attempt to settle their difference through negotiation or some other agreed mode of settlement on which they might agree. If they are unable to reach a settlement through these means, the second stage of the process, compulsory arbitration, becomes applicable.

18. Though an arbitral tribunal established pursuant to paragraph *(a)* of section 21 might be given, by the parties, the power to make binding interim decisions, this is not explicitly provided for in that paragraph. Indeed, the only provision for such decision appears in paragraph *(b)* of section 21, which allows the General Assembly, at the initiative of either of the parties, to request an advisory opinion of the Court on any legal question arising in the course of such proceedings, and specifies that pending the receipt of such an opinion, the arbitral tribunal may issue an interim decision that must be observed by both parties.

19. The particularity of the dispute engendered by the adoption and signing into law of the Anti-Terrorism Act was that because the legislation in question was to become effective 90 days after signature on 22 December 1987, the effective utilization of the dispute settlement procedure foreseen in section 21 of the Headquarters Agreement was correspondingly subject to the time constraints imposed by the Act. Unless the United States agreed to an extension of the 90-day limit or agreed to some special procedure whereby an extension might be ordered as part of an agreed mode of settlement, either a negotiated or other agreed settlement or a final arbitral award would have to be achieved no later than 21 March 1988; otherwise an interim order would have to be secured from a tribunal, which required that before that date the tribunal be set up and functioning and an advisory opinion have been requested of the Court. With this time factor in mind, the Secretary-General immediately sought clarification of the letter addressed to him on 5 January 1988[27].

20. Beginning on 7 January, consultations were held between the two sides and on 12 January the Legal Counsel of the United Nations met with the Legal Adviser of the United States State Department. However, that meeting did not provide the necessary assurance sought by the Secretary-General that the existing arrangements for the PLO Observer Mission would be maintained, and therefore on 14 January the Secretary-General in a letter to the Permanent Representative of the United States formally invoked the dispute settlement procedure set out in section 21 of the Headquarters Agreement[28]. The letter proposed that the first round of the negotiating phase be convened on 20 January at the United Nations Secretariat Building and named Mr. Carl-August Fleischhauer, the Under-Secretary-General for Legal Affairs and Legal Counsel, as the negotiator for the United Nations. The United States did not formally respond to the Secretary-General's letter or to his proposal that the first round of the negotiating phase foreseen by section 21 of the Headquarters Agreement take place on 20 January. At the request of the United States side the date of the proposed meeting was postponed until 27 January. The reason for the reluctance of the United States to respond officially to the Secretary-General's letter became clear in the course of that meeting.

21. On 27 January the United Nations Legal Counsel and members of his staff

[26] Section 21 *(a)* of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations. Doc. 89.

[27] Doc. 33. *Supra*, para. 16.

[28] Doc. 34.

met with the Legal Adviser of the United States State Department, Mr. Abraham D. Sofaer, who was accompanied by the Assistant Attorney General for the Office of the Legal Counsel of the Department of Justice, Mr. Charles Cooper, a Deputy State Department Legal Adviser and the Legal Adviser of the United States Mission to the United Nations.

22. As far as the substance of the dispute was concerned, the United Nations raised the question of the possible non-implementation of the legislation either by repeal or by obtaining a ruling of the Attorney General based on the conflict of domestic law with international law or on the doctrine of the separation of powers in the conduct of foreign affairs. These latter suggestions in fact derived from the statements made by the Secretary of State and various United States representatives in the General Assembly and the Host Country Committee[29] and by the President of the United States on signing into law the Act[30]. For the United Nations, the negotiating phase of the procedure contained in section 21 of the Headquarters Agreement was the proper forum for a consideration of such suggestions, which could provide a basis for a negotiated settlement of the dispute and thus obviate the need to resort to arbitration.

23. The response of the United States side, however, to these suggestions was confined to setting out the position of the Attorney General in this matter, as the officer responsible for the implementation of the legislation in question[31]. The Assistant Attorney General stated that the Department of Justice was examining whether the Attorney General had any discretion with regard to the enforcement of the legislation. If the Attorney General concluded that he had no discretion as to its enforcement and application, he would be governed by and would be obliged to implement it. The Attorney General would have the last word in determining whether, in this matter, international or domestic law prevailed[32].

24. *The United Nations Legal Counsel responded that the United Nations* would assert and defend its rights as it perceived them under international law and by the means agreed upon in a binding international treaty which it had concluded with the United States. He referred in this respect to the Headquarters Agreement and the Secretary-General's letter of 14 January 1988 formally invoking the dispute settlement procedure contained in section 21.

25. The State Department Legal Adviser, however, stated that the United States had not acknowledged that a dispute within the meaning of section 21 of the Headquarters Agreement existed because the legislation in question had not yet been implemented and the Executive Branch was still evaluating the situation with a view to the possible non-application and non-enforcement of the law.

26. The meeting confirmed that not only was minimal progress being made with regard to the substance of the dispute but that serious differences existed between the two sides with regard to the procedural framework within which the matter should be settled. At the insistence of the United Nations Legal Counsel, however, the State Department Legal Adviser agreed that preliminary discussions of an informal nature on a contingency basis could commence between the two sides regarding technical points relating to a possible arbitration. Such technical discussions were held on 28 January, at which the United Nations made known its views regarding such matters as the costs of the arbitration, its location, rules of procedure and the form of the *compromis*.

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[29] See paras. 9 and 11 above.

[30] Doc. 55.

[31] Section 1004 of the Public Law cited *supra*, note 7. Doc. 38.

[32] The positions were later set forth by the Assistant Attorney General at a press conference on 11 March. Doc. 116.

27. Although contacts between the United Nations and the United States continued, particularly regarding the decision of the United States on whether it would implement the legislation, it became increasingly clear to the Secretary-General that an impasse had been reached. In the light of this unsatisfactory situation the Secretary-General again wrote to the Permanent Representative of the United States, on 2 February[33]. The Secretary-General noted that while he had not received an official response to his letter of 14 January (para. 20 above), consultations between the United Nations and the United States were nevertheless being conducted on various levels. In these consultations the United States side asserted that it was still in the process of evaluating its position and that it did not believe that a dispute within the framework of section 21 of the Headquarters Agreement existed at that time. The Secretary-General's letter then went on to say that

> "The section 21 procedure is the only legal remedy available to the United Nations in this matter and since the United States so far has not been in a position to give appropriate assurances regarding the deferral of the application of the law to the PLO Observer Mission, the time is rapidly approaching when I will have no alternative but to proceed either together with the United States within the framework of section 21 of the Headquarters Agreement or by informing the General Assembly of the impasse that has been reached[34]."

On 4 February the Secretary-General spoke in the same sense to the Permanent Representative of the United States.

28. The United States side continued to postpone a decision regarding the implementation of the legislation and when the Secretary-General learned on 10 February that a decision had once more been postponed he submitted a report to the General Assembly[35]. In the view of the Secretary-General, the only conclusion to be drawn from the multiple consultations, contacts, meetings and correspondence that had taken place between 5 January (when the United States had confirmed the signing into law of the legislation) and 10 February, and from the refusal of the host country to enter into negotiations was that the dispute did not lend itself to a negotiated settlement nor had the parties agreed on another mode of settlement. In the light of the time constraints imposed by the legislation (see para. 19 above), the Secretary-General concluded that a stage in the negotiations had been reached where he was obliged to inform the General Assembly of the impasse reached. On 11 February the Legal Counsel of the United Nations informed the State Department Legal Adviser of the United Nations choice of arbitrator in accordance with section 21 of the Headquarters Agreement and urged the United States to inform the United Nations of its choice as soon as possible[36].

29. In a second report to the General Assembly on 25 February[37], the Secretary-General informed the General Assembly that no further communications had been received from the United States either on the substance of the matter or on the procedure. It was in these circumstances that the reconvened General Assembly on 2 March 1988 adopted resolution 42/229A as well as resolution 42/229 B which contained its request for the present advisory opinion

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[33] Doc. 35.
[34] *Ibid.*
[35] Doc. 1.
[36] Doc. 36.
[37] Doc. 2.

on the obligation of the United States to enter into arbitration in accordance with section 21 of the Headquarters Agreement[38].

30. It may be of interest for the Court to know that following the adoption of resolution 42/229A on 2 March 1988, the Secretary-General, on 4 March, communicated the text of that resolution to the United States, *inter alia*, expressing the hope that it would still prove possible for the United States to reconcile its domestic legislation with its international obligations, failing which it would agree to utilize the procedure contained in section 21 of the Headquarters Agreement[39]. On 11 March, the Acting Permanent Representative of the United States informed the Secretary-General that the Attorney General of the United States had determined that he was required to close the PLO Observer Mission irrespective of the United States obligations under the Headquarters Agreement and that under the circumstances submission to arbitration would serve no useful purpose[40]. Whereupon the Secretary-General submitted his third report to the General Assembly[41]. A further report of the Secretary-General to the General Assembly was issued on 16 March[42] containing the text of the Secretary-General's reply to the United States letter of 11 March[43]. The General Assembly reconvened to consider the question on 18 March and on 23 March 1988 adopted, by a vote of 148 to two with no abstentions, resolution 42/230[44]. During the session of the Assembly, on 22 March, the United States Attorney filed a summons against the PLO in an action for declaratory and injunctive relief to enjoin defendants from continuing violations of the ATA[45].

## III. LEGAL ISSUES ARISING IN RELATION TO THE REQUEST FOR THE ADVISORY OPINION

31. The first legal issue that arises in relation to the question placed before the Court is whether the Headquarters Agreement is a valid treaty in force between the United Nations and the United States of America with all the legal consequences which this entails. The Headquarters Agreement was signed by the Secretary-General of the United Nations and the Secretary of State of the United States on 26 June 1947 and approved by the General Assembly by resolution 169 (II) of 31 October 1947[46].

32. Section 28 of the Agreement provided that it be brought into effect by an exchange of notes between the Secretary-General and the appropriate executive officer of the United States, which exchange was effected on 21 November 1947, after the United States Congress had approved the Agreement by Public Law No. 80-357[47]. The Headquarters Agreement was duly registered with the Secretariat of the United Nations and published by it in accordance with Article 102, paragraph 1, of the Charter[48]. Thus, from the point of view of international law, unless it has been denounced by either party, has ceased to be in force by operation of law or has otherwise been invalidated, the Headquarters Agreement

[38] Doc. 16.
[39] Doc. 105.
[40] *Ibid.*, Annex I.
[41] Doc. 105.
[42] Doc. 106.
[43] *Ibid.*, Annex I.
[44] Doc. 115.
[45] Doc. 117.
[46] For the legislative history of the Agreement, see docs. 78 to 88. For the text of resolution 169 (II), see doc. 89.
[47] Doc. 96. The history of that legislation appears in docs. 90-95.
[48] UN *Treaty Series*, Vol. 11, p. 11.

came into force on 21 November 1947 and remains a treaty in force as between the United Nations and the United States.

33. The Headquarters Agreement has not been denounced by either party nor has it ceased to be in force by operation of section 24 of the Agreement, since the seat of the United Nations remains within the territory of the United States. No other claim of invalidity has been made. In particular, no such claim has been asserted on the basis of the Anti-Terrorism Act of 1987 (ATA). Firstly, a careful scrutiny of the ATA demonstrates that it does not purport to invalidate or to override the Headquarters Agreement. However, even if the ATA purported to do so, this would not be possible under international law. Although international treaties can be abrogated or terminated by supersession, such action can only be brought about effectively in international law by an international instrument and not by domestic legislation. Article 27 of the Vienna Convention on the Law of Treaties of 1969 (and paragraph 1 of the same-numbered provision of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986) provides, *inter alia*, that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty[49]". While the United States has not yet ratified the 1969 Vienna Convention on the Law of Treaties and the 1986 Convention has not yet entered into force, the Conventions and the quoted provision express generally accepted principles of customary international law generally recognized as the authoritative guide to current treaty law and practice. The United States is on record as sharing this position[50].

34. Since the Headquarters Agreement thus is a treaty in force, the question arises whether international law places an obligation upon the parties to comply with its terms in general and section 21 in particular. States as well as other international entities are bound by treaties they have properly concluded and that have entered into force, and these treaties must be performed by them in good faith. This principle, which is affirmed in the third preambular paragraph of the Charter of the United Nations and is commonly expressed by the maxim *pacta sunt servanda*, is incorporated in and codified by Article 26 of both the 1969 and the 1986 Vienna Conventions on the Law of Treaties. These Articles provide: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"[51]. Furthermore, since the Headquarters Agreement was concluded pursuant to Article 105, paragraph 3, of the Charter in order to implement the enjoyment by the United Nations in the territory of each of its members of such privileges and immunities as are necessary for the fulfilment of its purposes (Art. 105, para. 1), the special duty of member States to "fulfil in good faith the obligations assumed by them in accordance with the present Charter" expressed in Article 2, paragraph 2, is directly applicable to the Headquarters Agreement.

35. Having regard to the nature and content of section 21, reference may also be made to Article 33, paragraph 1, of the Charter and to Part I, paragraph 11, of the Manila Declaration on the Peaceful Settlement of International Disputes[52],

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[49] United Nations Conference on the Law of Treaties — First and Second Session — *Official Documents* (United Nations Publication, Sales No. E.70.V.5). See also UN doc. A/Conf.39/11/Add.2.

[50] Restatement of the Foreign Relations Law of the United States (Revised), section 321, Comment *(a)*, as approved by the American Law Institute. To be published in April 1988.

[51] United Nations Conference on the Law of Treaties — First and Second Sessions — *Official Documents* (United Nations publication, Sales No. E.70.V.5). See also UN doc. A/Conf.39/11/Add.2; and UN doc. A/Conf.129/15.

[52] General Assembly resolution 37/10 of 15 November 1982.

which underline the importance of the good faith implementation of agreed dispute settlement procedures. Although these obligations are stated to apply primarily to inter-State relations, the wording of these instruments does not so limit them and the principles underlying them may be regarded as having equal relevance and significance to relations between States and international organizations.

36. In relation to the question before the Court it is, however, not sufficient to establish that the Headquarters Agreement is a treaty in force and that international law places an obligation on the parties to comply with its terms, including, in particular, section 21. It is also necessary to address the question whether the United States is under an obligation to enter into arbitration in accordance with section 21 of the Agreement. In order for the United States to be placed under an obligation to do so, it must be shown that a dispute exists, that it arises from the interpretation or application of the Headquarters Agreement and that good faith attempts by the United Nations to resolve the dispute by negotiation or other agreed mode of settlement have failed to do so. Each of these issues will be addressed in the following paragraphs.

37. As may be seen from the summary of the facts, in the view of the United Nations a dispute within the meaning of section 21 of the Headquarters Agreement existed from the moment the legislation in question was signed into law by the President of the United States on 22 December 1987, unless the Organization received adequate assurances as to non-implementation[53]. The United States, on the other hand, apparently contended that no dispute existed unless and until the legislation was implemented[54].

38. The existence of a dispute is an objective question. As this Court observed in its Advisory Opinion on the *Interpretation of Peace Treaties* of 30 March 1950,

> "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. ... [In] a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations ... the Court must conclude that international disputes have arisen[55]."

The denial of the existence of a dispute in such cases would frustrate the commitment to arbitrate. As the United States argued in the *Peace Treaties* Opinion: "Such a result could only operate to further the purposes of a State not prepared to live according to the law and carry out its responsibilities as a member of the community of nations[56]."

39. In the present case, can it be said that as a matter of objective determination a dispute concerning the interpretation or application of the Headquarters Agreement had arisen with the adoption and signing into law of the ATA of 1987? There can be no doubt that the intent of this legislation is to bring about the closure of the Observer Mission of the PLO and to prevent the representatives of the PLO from carrying out their official functions to the United Nations, although the organization has been invited to participate as an observer by the principal deliberative organ of the United Nations, as well as by other principal organs[57]. The legislation makes it unlawful to receive anything of value from the PLO, to

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[53] Doc. 31.
[54] See para. 16, *supra*.
[55] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, *I.C.J. Reports 1950*, p. 65 at p. 74.
[56] *Ibid.*, Second Phase, *I.C.J. Pleadings*, p. 213 at pp. 238-239.
[57] Docs. 63-72.

expend any funds from the PLO and to establish or maintain an office, headquarters, premises or other facilities or establishments of the PLO within the jurisdiction of the United States[58], and this purpose was repeatedly and clearly stated in the Congress when it considered the adoption of the ATA[59]. The automaticity of the process of bringing the ATA into force which was initiated with the signing of the ATA into law, objectively constitutes an immediate threat to bring about the closure of the facility from which PLO representation to the United Nations is accomplished, and this immediate threat is itself (particularly when considered in the context of the time factor described in para. 18 above) sufficient to create a dispute in the absence of an assurance from the Executive Branch that the legislation will not be enforced or that the existing arrangements for the PLO Observer Mission in New York will not be affected or otherwise curtailed. Indeed, instead of giving such assurance, the Acting United States Permanent Representative informed the Secretary-General on 11 March that the Attorney General would close the office of the PLO Observer Mission to the United Nations in New York "irrespective of any obligations the United States may have under the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations", and that "Under the circumstances, the United States believes that submission of this matter to arbitration would not serve a useful purpose"[60]. Indeed, as noted in paragraph 30 above, on 22 March the Attorney General of the United States filed a summons to close the PLO office[61].

40. If a subjective element in establishing the existence of a dispute is required, it is sufficient to note that the United Nations Secretary-General formally declared the existence of a dispute and invoked section 21 of the Headquarters Agreement in his letter of 14 January 1988 to the Permanent Representative of the United States[62] and that the General Assembly expressly endorsed this position in operative paragraph 4 of resolution 42/229A of 2 March 1988[63]. The continued denial of the existence of a dispute in these circumstances by the United States constitutes a violation of its good faith obligations arising from Article 2, paragraph 2, of the Charter of the United Nations, Articles 26 of both Vienna Conventions on the Law of Treaties and Part I, paragraph 11, of the Manila Declaration referred to above[64].

41. For the reasons set out in the preceding paragraphs, the United Nations believes that a dispute has existed between the United Nations and the United States from the moment of the signing into law of the ATA. Nor can there be any doubt that this dispute concerns the interpretation or application of the Headquarters Agreement. The Secretary of State of the United States and various representatives of the United States in the Host Country Committee and the General Assembly have clearly and consistently recognized that the PLO Observer Mission personnel are present in the United States in their capacity as invitees of the United Nations within the meaning of the Headquarters Agreement[65], and the Secretary-General has repeatedly taken the position that the ATA is inconsistent with the Headquarters Agreement[66]. Thus, the formal conditions for

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[58] Doc. 38.
[59] Docs. 39-55.
[60] Doc. 105, Annex I.
[61] Doc. 117.
[62] Doc. 34.
[63] Doc. 16.
[64] *Supra*, paras. 34 and 35.
[65] *Congressional Record*. See note 13, *supra*. See also doc. 17 and doc. 22.
[66] Docs. 29, 31, 32, 34, 35 and 37.

invoking section 21 of the Headquarters Agreement are clearly established and the procedural obligations of the parties, therefore, have become effective.

42. As has already been pointed out in paragraph 17, *supra*, the dispute settlement procedure envisaged in section 21 consists of two stages: negotiation or other agreed mode of settlement, and arbitration. In order to find that the United States is under an obligation to enter into arbitration, it is necessary to show that the United Nations has made a good faith attempt to resolve the dispute through negotiation or some other agreed mode of settlement and that such negotiations have not resolved the dispute.

43. The summary of facts contained in paragraphs 19 to 29 above shows conclusively that after first seeking clarification of the United States intentions through contacts and consultations held between 5 and 14 January 1988, the Secretary-General on 14 January formally invoked the dispute settlement procedure in section 21 of the Headquarters Agreement and proposed that the two sides enter into negotiations. Such contacts and consultations continued until 10 February, on which date the Secretary-General felt that, given the time-constraints imposed by the legislation in question and the evident lack of progress in reaching a negotiated settlement, he was obliged to inform the General Assembly.

44. The United States did not consider these contacts and consultations to be formally within the framework of section 21 *(a)* of the Headquarters Agreement. However, the United Nations considers that it is only required to show that it attempted in good faith to enter into negotiations as foreseen by section 21 *(a)*. Whether or not these efforts are characterized by the United States as falling within section 21 *(a)*, this can not alter the fact that the negotiations actually took place. In the light of the facts as described in paragraphs 19 to 29 above, the United Nations was under no further obligation to negotiate before engaging in the second, arbitration phase, of the agreed dispute settlement procedure, no other mode of settlement having been agreed upon[67]. The inability of the parties to resolve the dispute by negotiation or other agreed mode of settlement created a clear obligation on the parties to arbitrate, all the more so since, as the Secretary-General has pointed out, the section 21 procedure is the only legal remedy available to the United Nations in this matter[68].

## IV. CONCLUSION

45. For the purpose of examining whether, in the light of the facts reflected in the reports of the Secretary-General to the General Assembly, the United States as a party to the Headquarters Agreement is under an obligation to enter into arbitration in accordance with section 21 of the Agreement, this Statement has sought to briefly identify and elucidate upon the legal issues to which the question gives rise.

46. It has accordingly been shown that the Headquarters Agreement, under which an obligation to arbitrate arises, is a valid treaty in force between the United Nations and the United States. The treaty has not been denounced nor has it ceased to be in force by operation of law. The ATA as domestic law does not purport to nor could it, under international law, invalidate or override the Headquarters Agreement.

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[67] Cf. case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Judgment of 26 November 1984, *I.C.J. Reports 1984*, pp. 427-428.

[68] Doc. 35.

47. It has also been shown that section 21 is the applicable law for the settlement of disputes concerning the interpretation or application of the Headquarters Agreement, that such a dispute in fact exists and that the United Nations has attempted in good faith to reach a settlement of the dispute by means of negotiation or to agree on some other mode of settlement.

48. Since all prior formal and procedural conditions under the Headquarters Agreement have been met, in the view of the United Nations the United States is under an obligation to enter promptly into the arbitration proceedings provided for by section 21 of the Agreement.

49. In reaching these conclusions, the United Nations is obliged to reiterate the fundamental importance which it attaches to the respect for the good faith implementation of international obligations in general and to the Headquarters Agreement in particular. The question at issue goes far beyond the particular dispute and has far-reaching consequences for the orderly and efficient discharge of the responsibilities of the United Nations in the world at large.

# WRITTEN STATEMENT OF THE SYRIAN ARAB REPUBLIC

"In the light of facts reflected in the reports of the Secretary-General.

(1) Is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, under an obligation to enter into arbitration in accordance with section 21 of the Agreement?"

Due to the time constraint requested by the General Assembly of the United Nations in its resolution A/RES/42/229B of 2 March 1988, and,

Due to the time-limit of Friday 25 March 1988 fixed by Order of the International Court of Justice rendered on 9 March 1988, asking States so desiring to submit written statements relating to the question, and,

As no document has been received by the Syrian Arab Republic likely to throw light upon the question, and,

Due to the necessity of submitting a statement exposing the views of the Syrian Arab Republic in a question relating to the essence of the functions of the United Nations Organization, and,

Taking into account the freedom of the Organization in discharging its duties according to its Charter and in fulfilling the noble aims to which it has devoted the last forty years of its existence, and,

As the time afforded the Syrian Arab Republic for the presentation of its Statement is very short,

This statement shall be concise and limited to the question asked by the General Assembly in its Advisory Opinion of 2 March 1988, and to the legal points related thereto.

In its 104th plenary session, on 2 March 1988, the General Assembly of the United Nations adopted the following resolution No. A/RES/42/229 in which it said:

"Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, in pursuance of Article 65 of the Statute of the Court, for an advisory opinion on the following question, taking into account the time constraint:

'In the light of facts reflected in the reports of the Secretary-General, is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, under an obligation to enter into arbitration in accordance with section 21 of the Agreement'."

On 9 March 1988, the International Court of Justice held a sitting to consider this request and delivered an Order that the Registrar of the Court communicated to the States Members of the United Nations. This Order states that the United Nations and the United States of America are entitled to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, as to the applicability of arbitration obligations in pursuance of section 21 of the Agree-

ment signed on 26 June 1947 between the United Nations and the United States of America. (This Agreement was, later on, called the Headquarters Agreement.) Member States can, if they so desire, submit written statements to the Court on 25 March at the latest.

The Court has also decided to hear, at a public sitting to be held on 11 April, for this purpose, oral statements and comments on written statements already submitted to the Court by the United Nations and the United States of America.

The General Assembly of the United Nations addressed its request to the Court for an advisory opinion in pursuance of Article 96 of the Charter of the United Nations which reads in its first paragraph:

"*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."

Chapter V of the Statute of the International Court of Justice on the basis of which the General Assembly of the United Nations has requested the advisory opinion states in its Article 65:

"*Article 65*

1. The Court may 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 to make such a request."

In its request for an advisory opinion, the General Assembly of the United Nations referred to the following pertinent disposition in section 21 of the Headquarters Agreement signed on 26 June 1947.

"*Section 21*

(A) Any dispute between the United Nations and the United States concerning the incorporation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(B) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed on both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court."

A dispute has arisen between the United Nations and the United States of America concerning the application of this Agreement when the American Congress voted the "Foreign Relations Authorization Act, Fiscal Years 1988-1989" Title X which was known under the name of: "Anti-Terrorism Act 1987".

This law has enumerated several acts which it has attributed to the Palestine

Liberation Organization (PLO) during which American citizens have been killed. It has also mentioned under point (5) that: "The PLO covenant specifically states that (armed struggle is the only way to liberate Palestine, thus it is an overall strategy, not merely a tactical phase)."

The law mentioned under paragraph (B)

"*(B) Determinations*

Therefore, the Congress determines that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States."

And under the title of "Prohibitions" the law mentioned:

"*Sec. 1003. Prohibition regarding the PLO*

It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization, or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this title.

(1) . . .
(2) . . .
(3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

*Sec. 1004. Enforcement*

*(a)* Attorney General. The Attorney General shall take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of this title.

*(b)* Relief. Any district Court of the United States for a district in which a violation of this title occurs shall have authority, upon petition of relief by the Attorney General, to grant injunctive and such other equitable relief as it shall deem necessary to enforce the provisions of this title.

*Sec. 1005. Effective Date*

*(a)* Provisions of this title shall take effect 90 days after the date of enactment of this Act."

Thus in compliance with this law, the Attorney General of the United States has to request from the PLO to close its offices at the United Nations not later than 21 March 1988.

* * *

The dispute which has arisen between the United Nations and the United States concerns the closure of the Observer Mission of the Palestine Liberation Organization to the United Nations. This Mission enjoys the qualifications of "Permanent Observer Mission to the United Nations". It has acquired this qualification by the United Nations since 1974 when the General Assembly voted

*the resolution 3237 (XXIX) on 22 November 1974.* Since that date, that is, since 14 years, this Permanent Observer Mission has enjoyed the diplomatic immunities extended in accordance with the provisions of the Headquarters Agreement of 1947, to all United Nations members and Permanent Missions.

Article IV of this Agreement enumerates some of those facilities and immunities the American Authorities have to extend to members of the United Nations officials and to members of the Permanent Missions accredited to the United Nations.

Section 11 provides that the Federal, state or local authorities of the United States

> "shall not impose any impediments to transit to or from the Headquarters district of ... persons *invited* to the Headquarters district by the United Nations" (emphasis added),

and that: "The appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the Headquarters district."

Section 12 provides that section 11 is applicable *irrespective of relations between the goverments of the persons referred to in the latter section* and the host State (emphasis added).

Section 13 provides that the host State shall grant visas "without charge and as promptly as possible" to persons referred to in section 11 and also exempts such persons from being required to leave the United States on account of any activities performed by them in their official capacity.

Article 105 of the Charter of the United Nations, paragraph 2, concerning privileges and immunities of the Members of the United Nations should also be extended to the members of the Permanent Observer Mission of the PLO to the United Nations.

On behalf of the spokesman for the Secretary-General, Mr. François Giuliani read out, on 22 October 1987, a statement concerning the status of the Permanent Observer Mission of the PLO. Describing the Secretary-General's position on the Observer Mission, he said:

> "The members of the PLO Observer Mission are, by virtue of resolution 3237 (XXIX), *invitees* to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947. There is therefore a treaty obligation on the host country to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at the United Nations Headquarters."

Consequently, it appears clearly that there exists a dispute between the United Nations and the United States of America raised by the Anti-Terrorism Act of 1987 which fixes 90 days for the closure of the PLO Observer Mission to the United Nations.

The question is one of compliance with international law. The Headquarters Agreement is a binding international instrument. The Anti-Terrorism Act, if applied, violates strongly this Agreement and the United States obligations towards the United Nations.

The Secretary-General of the United Nations tried to settle this dispute in accordance with the provisions of the Headquarters Agreement (section 21), "by negotiation or other agreed mode of settlement". He did not succeed. He suggested then to refer the matter to arbitration and named his arbitrator. He chose a highly qualified judge known for his integrity and wisdom, Mr. A. J. de Aréchaga, a former judge of the International Court of Justice and former President of this Court.

The United States accepted neither the negotiations nor the arbitration stipulated in section 21 of the Headquarters Agreement.

The Acting Permanent Representative of the United States addressed on 11 March 1988 a letter to the Secretary-General of the United Nations in which he said:

> "... I wish to inform you that the Attorney General of the United States has determined that he is required by the Anti-Terrorism Act of 1987 to close the office of the Palestine Liberation Organization Observer Mission to the United Nations in New York, *irrespective of any obligations the United States may have under the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations* ...
>
> Under the circumstances, the United States *believes that submission of the matter to arbitration would not serve a useful purpose.*" (Emphasis added.)

A similar letter was addressed on the same day, 11 March 1988 by the Attorney General Edwin Meese III to the Permanent Observer of the PLO to the United Nations. The letter referred to the Anti-Terrorism Act which becomes effective 21 March 1988. It adds:

> "The Act prohibits among other things, the Palestine Liberation Organization (PLO) from establishing or maintaining an office within the jurisdiction of the United States.
>
> *Accordingly, as of 21 March 1988, maintaining the PLO Observer Mission to the United Nations in the United States will be unlawful.*" (Emphasis added.)
>
> "The legislation charges the Attorney General with the responsibility of enforcing the Act. *To that end, please be advised that, should you fail to comply with the requirements of the Act, the Department of Justice will forthwith take action in United States federal court to ensure your compliance.* (Emphasis added.)
>
> Edwin MEESE III,
> Attorney General."

As a result of these differences of attitudes between the United Nations and the United States of America, the General Assembly of the United Nations was called for more than a meeting and overwhelmingly voted resolutions reaffirming, *inter alia*:

1. The right of the Permanent Observer Mission of the PLO to the United Nations, to be covered by the Provisions of the Headquarters Agreement and maintain its mission in New York.
2. That the Anti-Terrorism Act of 1987 is contrary to the international legal obligations of the host country under the Headquarters Agreement.
3. That there exists a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement.
4. That as a consequence of this dispute, settlement procedure set out in section 21 of the agreement should be set in operation.
5. That the Host Country should abide by its treaty obligations under the Agreement and provide assurance that it will take no action to infringe on the official functions of the Permanent Observer Mission of the PLO.

Section B of this resolution 42/229 of 3 March 1988, decides to request the International Court of Justice, in accordance with Article 96 of the Charter and in

pursuance of Article 65 of the Statute of the Court, for an advisory opinion on the questions referred to previously.

* * *

As required by the Charter of the United Nations, the Statute and Rules of the International Court of Justice, the request for an advisory opinion presented to the Court by the General Assembly of the United Nations, satisfies the procedural requirements.

The request has been presented in accordance with Article 96 of the Charter and in compliance with Chapter IV of the Statute (Art. 65) and with Part IV of the Rules (Arts. 102, 103 and 104).

For the substance.

An international agreement has been signed by the United Nations and the United States of America on 26 June 1947.

This agreement contains the rules and provisions which organized the relationship between the Host Country and the United Nations Organization. The Organization has set up its Headquarters in the city of New York, received Permanent Delegations and organized its work and activities during the last forty-two years in accordance with this agreement. Delegations to the United Nations have also established and maintained their missions under the auspices of its clauses.

The United States respected this Agreement and complied with its provisions since its entry into force in 1948. It has accorded members of the delegations all facilities, protection and immunities in the fulfilment of their official functions notwithstanding the political relations between their countries and the United States.

This has facilitated largely the work of the Organization and helped it to carry out its noble aims in maintaining peace and security, as it could and within its possibilities.

The Organization spared no effort in fulfilling its goals in:

> "reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small",

and in

> "establishing conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained",

and in "promoting social progress and better standards of life in larger freedom".

As a result of this endeavour, colonialism has witnessed its end, and the number of independent States has risen from 50 at the date of the establishment of the Organization to 160 now participating actively in securing peace, justice and the respect of international law in the world.

The respect of the United States to this Agreement has facilitated the work of the Organization and secured the necessary atmosphere for carrying out its responsibilities and international obligations.

Section 21 of this Agreement which implies the recourse to arbitration in case of dispute between the Organization and the United States is the one to be applied.

The security reservation which is contained in section 6 of Annex 2 of the agreement does not apply to this case because it clearly mentions:

> "... the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States *other than the Headquarters district and its immediate vicinity ... and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries* ..." (Emphasis added.)

Thus, this reservation does not apply to the district of Manhattan where Permanent Delegations have their offices and residences. This district is governed by sections 11, 12 and 13 of the Headquarters Agreement.

The Permanent Observer Mission of the Palestine Liberation Organization has benefited, during the last 14 years, of the immunities extended by the agreement to *invitees* of the United Nations in its qualification as "Observer Mission". This has been extended to it by United Nations Resolution No. 3237 (XXIX) of 22 November 1974. All or almost all member States of the Organization have recognized this status to the PLO Observer Mission. The United States, which is the Host Country, has accorded its offices and members, during those 14 years the necessary facilities, immunities and protection. It gave its members the freedom of transit to and from the United Nations without hindrance. What has changed now?

The Anti-Terrorism Act of 1987 can neither amend nor annul the international agreement which the United States has signed 42 years ago and respected for this long period.

It is universally admitted, and we do not need to go into details of theories and practice, that, in case of conflict between international law and local or national law, the first has precedence. This is one of the axioms of the long history of international law.

This precedence of international law had maintained, during the last centuries, the justice, soundness and effectiveness of international relations.

Thus in case of dispute between the Headquarters Agreement and the Anti-Terrorism Act the first has precedence and should be binding on the United States.

In this dispute, section 21 of the Agreement should be applied.

As the question formulated by the General Assembly and requested in the advisory opinion, is very precise and clear, we expect the reply of the Court to be as precise and as clear:

> That the United States, as party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, *is* under an obligation to enter into arbitration in accordance with section 21 of the Agreement.

# LETTER FROM THE AMBASSADOR OF THE UNITED STATES OF AMERICA TO THE NETHERLANDS TO THE REGISTRAR

25 March 1988.

I have the honor to refer to your letter of March 9, 1988, to Secretary of State Shultz, transmitting a copy of the Court's Order of the same date in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*. The Court has informed the Government of the United States of America that, in response to UN General Assembly resolution 42/229 B, the Court intends to consider, as an advisory opinion, whether the arbitral procedure set forth in section 21 of the United Nations-United States Headquarters Agreement is the mandatory method for resolving a dispute concerning the applicability of the provisions of the agreement to the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York. The Court has invited the United States to submit written statements by March 25 and to participate in oral hearings on April 11.

The United States wishes to inform the Court that on December 22, 1987, the President of the United States signed into law the Antiterrorism Act of 1987 (Title X of the Foreign Relations Authorization Act for Fiscal Years 1988 and 1989). The Attorney General of the United States has concluded that this statute was intended to direct the closure of the PLO Observer Mission in New York irrespective of any international legal obligation that the United States might have under the Headquarters Agreement. By letter dated March 11, 1988, the Attorney General accordingly directed the PLO Observer Mission to close by March 21, the effective date of the Act.

The PLO Mission did not comply with the March 11 order. On March 22, the United States Department of Justice therefore filed a lawsuit in the United States District Court for the Southern District of New York to compel compliance. That litigation will afford an opportunity for the PLO and other interested parties to raise legal challenges to enforcement of the Act against the PLO Mission. The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely.

The United States respectfully declines the Court's invitation to submit further views on this issue at the oral proceedings scheduled for April 11.

Please accept my assurances of my Government's highest esteem for the Court.

Sincerely,

*(Signed)* John SHAD.

# LETTER FROM THE MINISTER OF FOREIGN AFFAIRS OF THE GERMAN DEMOCRATIC REPUBLIC TO THE REGISTRAR

March 1989.

In reply to your telegram dated 9 March 1988, I have the honour to inform the International Court of Justice that in the opinion of the German Democratic Republic the United States of America as party to the agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed on 26 June 1947, had undertaken, under section 21, that any dispute between the United Nations and the United States concerning the interpretation or application of the agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred to an arbitral tribunal.

This position is based also on the legal situation described as reflected in the relevant report by the United Nations Secretary-General and confirmed in resolution 42/299A which was adopted by 143 States.

Giving effect to the provisions of the Foreign Relations Authorization Act for the Fiscal Years 1988-89, section X, of 22 December 1987 is inconsonant with the international legal obligations entered into by the Host Country under the Headquarters Agreement. Thus, a dispute has emerged between the United Nations and the United States as parties to the above-said agreement as to the interpretation or application of that agreement.

The United Nations Secretary-General's report bears out that since 7 December 1987 the United Nations has been in contact with the United States in order to ensure that the relevant provisions of the Headquarters Agreement are applied with regard to the Palestine Liberation Organization which under resolution 3237 *(XXIX) was invited to participate in the United Nations work and which has* maintained a permanent observer mission to the world organization for 13 years.

With the talks, contacts and negotiating efforts of the United Nations having produced no results, the dispute between the United Nations and the United States over the above-mentioned issue continues to exist.

*(Signed)* Oskar FISCHER.