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REPORT OF THE COMMITTEE ON RELATIONS WITH THE HOST COUNTRY

Applicability of the Obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947: Advisory Opinion of the International Court of Justice

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the advisory opinion given by the International Court of Justice on 26 April 1988 in response to the request of the General Assembly contained in resolution 42/229 B of 2 March 1988.

ANNEX

26 APRIL 1988

ADVISORY OPINION

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

INTERNATIONAL COURT OF JUSTICE

YEAR 1988

1988
26 April
General List
No. 77

26 April 1988

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

Headquarters Agreement between the United Nations and the United States - Dispute settlement clause - Existence of a dispute - Alleged breach of treaty - Significance of behaviour or decision of party in absence of any argument by that party to justify its conduct under international law - Implementation of contested decision and existence of a dispute - Whether dispute concerns "the interpretation or application" of the Agreement - Whether dispute one "not settled by negotiation or other agreed mode of settlement" - Principle that international law prevails over national law.

ADVISORY OPINION

Present: President RUDA; Vice-President MBAYE; Judges LACHS, NAGENDRA SINGH, ELIAS, ODA, AGO, SCHWEBEL, Sir Robert JENNINGS, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN; Registrar VALENCIA-OSPINA.

Concerning the applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947,

The COURT,

composed as above,

after deliberation,

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been asked was contained in resolution 42/229 B of the United Nations General Assembly, adopted on 2 March 1988. On the same day, the text of that resolution in English and French was transmitted to the Court, by

facsimile, by the United Nations Legal Counsel. By a letter dated 2 March 1988, addressed by the Secretary-General of the United Nations to the President of the Court (received by facsimile on 4 March 1988, and received by post and filed in the Registry on 7 March 1988) the Secretary-General formally communicated to the Court the decision of the General Assembly to submit to the Court for advisory opinion the question set out in that resolution. The resolution, certified true copies of the English and French texts of which were enclosed with the letter and included in the facsimile transmission, was in the following terms:

"The General Assembly,

Recalling its resolution 42/210 B of 17 December 1987 and bearing in mind its resolution 42/229 A above,

Having considered the reports of the Secretary-General of 10 and 25 February 1988 [A/42/915 and Add.1],

Affirming the position of the Secretary-General that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, dated 26 June 1947 [see resolution 169 (II)], and noting his conclusions that attempts at amicable settlement were deadlocked and that he had invoked the arbitration procedure provided for in section 21 of the Agreement by nominating an arbitrator and requesting the host country to nominate its own arbitrator,

Bearing in mind the constraints of time that require the immediate implementation of the dispute settlement procedure in accordance with section 21 of the Agreement,

Noting from the report of the Secretary-General of 10 February 1988 [A/42/915] that the United States of America was not in a position and was not willing to enter formally into the dispute settlement procedure under section 21 of the Headquarters Agreement and that the United States was still evaluating the situation,

Taking into account the provisions of the Statute of the International Court of Justice, in particular Articles 41 and 68 thereof,

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 [A/42/915 and Add.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 [see resolution 169 (II)], under an obligation to enter into arbitration in accordance with section 21 of the Agreement?'"

A copy of resolution 42/229 A, referred to in the above resolution, was also enclosed with the Secretary-General's letter.

2. The notice of the request for an advisory opinion prescribed by Article 66, paragraph 1, of the Statute of the Court, was given on 3 March 1988 by telegram from the Registrar to all States entitled to appear before the Court.

3. By an Order dated 9 March 1988 the Court found that an early answer to the request for advisory opinion would be desirable, as contemplated by Article 103 of the Rules of Court. By that Order the Court decided that the United Nations and the United States of America were considered likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute, and fixed 25 March 1988 as the time-limit within which the Court would be prepared to receive written statements from them on the question; and that any other State party to the Statute which desired to do so might submit to the Court a written statement on the question not later than 25 March 1988. Written statements were submitted, within the time-limit so fixed, by the Secretary-General of the United Nations, by the United States of America, and by the German Democratic Republic and by the Syrian Arab Republic.

4. By the same Order the Court decided further to hold hearings, opening on 11 April 1988, at which oral comments on written statements might be submitted to the Court by the United Nations, the United States and such other States as should have presented written statements.

5. The Secretary-General of the United Nations transmitted to the Court, pursuant to Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments between 11 and 29 March 1988.

6. At a public sitting held on 11 April 1988, an oral statement was made to the Court by Mr. Carl-August Fleischhauer, the United Nations Legal Counsel, on behalf of the Secretary-General. None of the States having presented written statements expressed a desire to be heard. Certain members of the Court put questions to Mr. Fleischhauer, which were answered at a further public sitting held on 12 April 1988.

* *

7. The question upon which the opinion of the Court has been requested is whether the United States of America (hereafter referred to as "the United States"), as a party to the United Nations Headquarters Agreement, is under an obligation to enter into arbitration. The Headquarters Agreement of 26 June 1947 came into force in accordance with its terms on 21 November 1947 by exchange of letters between the Secretary-General and the United States Permanent Representative. The Agreement was registered the same day with the United Nations Secretariat, in accordance with Article 102 of the Charter. In section 21, paragraph (a), it provides as follows:

> "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."

There is no question but that the Headquarters Agreement is a treaty in force binding the parties thereto. What the Court has therefore to determine, in order to answer the question put to it, is whether there exists a dispute between the United Nations and the United States of the kind contemplated by section 21 of the Agreement. For this purpose the Court will first set out the sequence of events, preceding the adoption of resolutions 42/229 A and 42/229 B, which led first the Secretary-General and subsequently the General Assembly of the United Nations to conclude that such a dispute existed.

8. The events in question centred round the Permanent Observer Mission of the Palestine Liberation Organization (referred to hereafter as "the PLO") to the United Nations in New York. The PLO has enjoyed in relation to the United Nations the status of an observer since 1974; by General Assembly resolution 3237 (XXIX) of 22 November 1974, the Organization was invited to "participate in the sessions and the work of the General Assembly in the capacity of observer". Following this invitation, the PLO established an Observer Mission in 1974, and maintains an office, entitled office of the PLO Observer Mission, at 115 East 65th Street, in New York City, outside the United Nations Headquarters District. Recognized observers are listed as such in official United Nations publications: the PLO appears in such publications in a category of "organizations which have received a standing invitation from the General Assembly to participate in the sessions and the work of the General Assembly as observers".

9. In May 1987 a Bill (S.1203) was introduced into the Senate of the United States, the purpose of which was stated in its title to be "to make unlawful the establishment or maintenance within the United States of an office of the Palestine Liberation Organization". Section 3 of the Bill provided that

"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 Act -

(1) to receive anything of value except informational material from the PLO or 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) not withstanding any provision of the 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."

10. The text of this Bill was repeated in the form of an amendment, presented in the United States Senate in the autumn of 1987, to the "Foreign Relations Authorization Act, Fiscal Years 1988 and 1989". From the terms of this amendment it appeared that the United States Government would, if the Bill were passed into law, seek to close the office of the PLO Observer Mission. The Secretary-General therefore explained his point of view to that Government, by a letter to the United States Permanent Representative dated 13 October 1987. In that letter he emphasized that the legislation contemplated "runs counter to obligations arising from the Headquarters Agreement". On 14 October 1987 the PLO Observer brought the matter to the attention of the United Nations Committee on Relations with the Host Country.

11. On 22 October 1987, the view of the Secretary-General was summed up in the following statement made by the Spokesman for the Secretary-General (subsequently endorsed by the General Assembly in resolution 42/210 B):

"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 personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters."

In this respect, it may be noted that section 11 of the Headquarters Agreement 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: (1) representatives of Members ... or the families of such representatives ..., ... (5) other persons invited to the headquarters district by the United Nations ... on official business ..."

Section 12 provides that "The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States". Section 13 provides (inter alia) that "Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11".

12. When the report of the Committee on Relations with the Host Country was placed before the Sixth Committee of the General Assembly on 25 November 1987, the Representative of the United States noted:

> "that the United States Secretary of State had stated that the closing of that mission would constitute a violation of United States obligation under the Headquarters Agreement, and that the United States Government was strongly opposed to it; moreover the United States representative to the United Nations had given the Secretary-General the same assurances" (A/C.6/42/SR.58).

When the draft resolution which subsequently became General Assembly resolution 42/210 B was put to the vote in the Sixth Committee on 11 December 1987, the United States delegation did not participate in the voting because in its opinion:

> "it was unnecessary and inappropriate since it addressed a matter still under consideration within the United States Government".

The position taken by the United States Secretary of State, namely:

> "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"

was cited by another delegate and confirmed by the Representative of the United States, who referred to it as "well known" (A/C.6/42/SR.62).

13. The provisions of the amendment referred to above became incorporated into the United States "Foreign Relations Authorization Act, Fiscal Years 1988 and 1989" as Title X, the "Anti-Terrorism Act of 1987". At the beginning of December 1987 the Act had not yet been

adopted by the United States Congress. In anticipation of such adoption the Secretary-General addressed a letter, dated 7 December 1987, to the Permanent Representative of the United States, Ambassador Vernon Walters, in which he reiterated to the Permanent Representative the view previously expressed by the United Nations 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. Consequently, it was said, the United States was under a legal obligation to maintain the current arrangements for the PLO Observer Mission, which had by then been in effect for some 13 years. The Secretary-General sought assurances that, in the event that the proposed legislation became law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected.

14. In a subsequent letter, dated 21 December 1987, after the adoption on 15/16 December of the Act by the United States Congress, the Secretary-General informed the Permanent Representative of the adoption on 17 December 1987 of resolution 42/210 B by the General Assembly. By that resolution the Assembly

> "Having been apprised of the action being considered in the host country, the United States of America, which might impede the maintenance of the facilities of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York, which enables it to discharge its official functions,
>
> ...
>
> 1. Reiterates that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations 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;
>
> 2. Requests the host country to abide by its treaty obligations under the Headquarters Agreement and in this connection to refrain from taking any action that would prevent the discharge of the official functions of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations;
>
> ..."

15. On 22 December 1987 the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, was signed into law by the President of the United States. Title X thereof, the Anti-Terrorism Act of 1987 was, according to its terms, to take effect 90 days after that date. On 5 January 1988 the Acting Permanent Representative of the United States to the United Nations, Ambassador Herbert Okun, in a reply to the Secretary-General's letters of 7 and 21 December 1987, informed the Secretary-General of this. The letter went on to say that

> "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 ninety-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter."

16. On 14 January 1988 the Secretary-General again wrote to Ambassador Walters. After welcoming the intention expressed in Ambassador Okun's letter to use the ninety-day period to engage in consultations with the Congress, the Secretary-General went on to say:

> "As you will recall I had, by my letter of 7 December, informed you that, in the view of the United Nations, the United States is under a legal obligation under the Headquarters Agreement of 1947 to maintain the current arrangements for the PLO Observer Mission, which have been in effect for the past 13 years. I had therefore asked you to confirm that if this legislative proposal became law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected, for without such assurance, a dispute between the United Nations and the United States concerning the interpretation and application of the Headquarters Agreement would exist ..."

Then, referring to the letter of 5 January 1988 from the Permanent Representative and to declarations by the Legal Adviser to the State Department, he observed that neither that letter nor those declarations

> "constitute the assurance I had sought in my letter of 7 December 1987 nor do they ensure that full respect for the Headquarters Agreement can be assumed. Under these circumstances, a dispute exists between the Organization and the United States concerning the interpretation and application of the Headquarters Agreement and I hereby invoke the dispute settlement procedure set out in Section 21 of the said Agreement.
>
> According to Section 21 (a), an attempt has to be made at first to solve the dispute through negotiations, and I would like to propose that the first round of the negotiating phase be convened on Wednesday, 20 January 1988 ..."

17. Beginning on 7 January 1988, a series of consultations were held; from the account of these consultations presented to the General Assembly by the Secretary-General in the Report referred to in the request for advisory opinion, it appears that the positions of the parties thereto were as follows:

> "the [United Nations] Legal Counsel was informed that the United States was not in a position and not willing to enter formally into the dispute settlement procedure under section 21 of the Headquarters Agreement; the United States was still evaluating the situation and had not yet concluded that a dispute existed between the United Nations and the United States at the present time because the legislation in question had not yet been implemented. The Executive Branch was still examining the possibility of interpreting the law in conformity with the United States obligations under the Headquarters Agreement regarding the PLO Observer Mission, as reflected in the arrangements currently made for that Mission, or alternatively of providing assurances that would set aside the ninety-day period for the coming into force of the legislation." (A/42/915, para. 6.)

18. The United Nations Legal Counsel stated that for the Organization the question was one of compliance with international law. The Headquarters Agreement was a binding international instrument the obligations of the United States under which were, in the view of the Secretary-General and the General Assembly, being violated by the legislation in question. Section 21 of the Agreement set out the procedure to be followed in the event of a dispute as to the interpretation or application of the Agreement and the United Nations had every intention of defending its rights under that Agreement. He insisted, therefore, that if the PLO Observer Mission was not to be exempted from the application of the law, the procedure provided for in section 21 be implemented and also that technical discussions regarding the establishment of an arbitral tribunal take place immediately. The United States agreed to such discussions but only on an informal basis. Technical discussions were commenced on 28 January 1988. Among the matters discussed were the costs of the arbitration, its location, its secretariat, languages, rules of procedure and the form of the compromis between the two sides (ibid., paras. 7-8).

19. On 2 February 1988 the Secretary-General once more wrote to Ambassador Walters. The Secretary-General took note that

> "the United States side is still in the process of evaluating the situation which would arise out of the application of the legislation and pending the conclusion of such evaluation takes the position that it cannot enter into the dispute settlement procedure outlined in section 21 of the Headquarters Agreement".

The Secretary-General 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."

20. On 11 February 1988 the United Nations Legal Counsel, referring to the formal invocation of the dispute settlement procedure on 14 January 1988 (paragraph 16 above), informed the Legal Adviser of the State Department of the United Nations' choice of its arbitrator, in the event of an arbitration under section 21 of the Headquarters Agreement. In view of the time constraints under which both parties found themselves, the Legal Counsel urged the Legal Adviser of the State Department to inform the United Nations as soon as possible of the choice made by the United States. No communication was received in this regard from the United States.

21. On 2 March 1988 the General Assembly, at its resumed Forty-Second session, adopted resolutions 42/229 A and 42/229 B. The first of these resolutions, adopted by 143 votes to 1, with no abstentions, contains (inter alia) the following operative provisions:

"The General Assembly

1. Supports the efforts of the Secretary-General and expresses its great appreciation for his reports;

2. Reaffirms that the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations in New York is covered by the provisions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations [see resolution 169(II)] and that it 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 of America to carry out their official functions;

3. Considers that the application of Title X of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, in a manner inconsistent with paragraph 2 above would be contrary to the international legal obligations of the host country under the Headquarters Agreement;

4. Considers that a dispute exists between the United Nations and the United States of America, the host country, concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure set out in section 21 of the Agreement should be set in operation;

..."

The second resolution 42/229 B, adopted by 143 votes to nil, with no abstentions, has already been set out in full in paragraph 1 above.

22. The United States did not participate in the vote on either resolution; after the vote, its representative made a statement, in which he said:

> "The situation today remains almost identical to that prevailing when resolution 42/210 B was put to the vote in December 1987. The United States has not yet taken action affecting the functioning of any Mission or invitee. As the Secretary-General relayed to the Assembly in the 25 February addendum to his report of 10 February, the United States Government has made no final decision concerning the application or enforcement of recently passed United States legislation, the Anti-Terrorism Act of 1987, with respect to the Permanent Observer Mission of the Palestine Liberation Organization (PLO) to the United Nations in New York.
>
> For these reasons, we can only view as unnecessary and premature the holding at this time of this resumed forty-second session of the General Assembly ...
>
> The United States Government will consider carefully the views expressed during this resumed session. It remains the intention of this Government to find an appropriate resolution of this problem in light of the Charter of the United Nations, the Headquarters Agreement, and the laws of the United States."

*

23. The question put to the Court is expressed, by resolution 42/229 B, to concern a possible obligation of the United States, "In the light of [the] facts reflected in the reports of the Secretary-General [A/42/915 and Add.1]", that is to say in the light of the facts which had been reported to the General Assembly at the time at which it took its decision to request an opinion. The Court does not however consider that the General Assembly, in employing this form of words, has requested it to reply to the question put on the basis solely of these facts, and to close its eyes to subsequent events of possible relevance to, or capable of throwing light on, that question. The Court will therefore set out here the developments in the affair subsequent to the adoption of resolution 42/229 B.

24. On 11 March 1988 the Acting Permanent Representative of the United States to the United Nations wrote to the Secretary-General, referring to General Assembly resolution 42/229 A and 42/229 B and stating as follows:

"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. If the PLO does not comply with the Act, the Attorney General will initiate legal action to close the PLO Observer Mission on or about March 21, 1988, the effective date of the Act. This course of action will allow the orderly enforcement of the Act. The United States will not take other actions to close the Observer Mission pending a decision in such litigation. Under the circumstances, the United States believes that submission of this matter to arbitration would not serve a useful purpose."

This letter was delivered by hand to the Secretary-General by the Acting Permanent Representative of the United States on 11 March 1988. On receiving the letter, the Secretary-General protested to the Acting Permanent Representative and stated that the decision taken by the United States Government as outlined in the letter was a clear violation of the Headquarters Agreement between the United Nations and the United States.

25. On the same day, the United States Attorney-General wrote to the Permanent Observer of the PLO to the United Nations to the following effect:

"I am writing to notify you that on March 21, 1988, the provisions of the 'Anti-Terrorism Act of 1987' (Title X of the Foreign Relations Authorization Act of 1988-89; Pub. L. No. 100-204, enacted by the Congress of the United States and approved Dec. 22, 1987 (the 'Act')) will become effective. 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 March 21, 1988, maintaining the PLO Observer Mission to the United Nations in the United States will be unlawful.

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."

26. Finally, on the same day, in the course of a press briefing held by the United States Department of Justice, the Assistant Attorney-General in charge of the Office of Legal Counsel said as follows, in reply to a question:

"We have determined that we would not participate in any forum, either the arbitral tribunal that might be constituted under Article XXI, as I understand it, of the UN Headquarters Agreement, or the International Court of Justice. As I said earlier, the statute [i.e., the Anti-Terrorism Act of 1987] has superseded the requirements of the UN Headquarters Agreement to the extent that those requirements are inconsistent with the statute, and therefore, participation in any of these tribunals that you cite would be to no useful end. The statute's mandate governs, and we have no choice but to enforce it."

27. On 14 March 1988 the Permanent Observer of the PLO replied to the Attorney-General's letter drawing attention to the fact that the PLO Permanent Observer Mission had been maintained since 1974, and continuing:

"The PLO has maintained this arrangement in pursuance of the relevant resolutions of the General Assembly of the United Nations (3237 (XXIX), 42/210 and 42/229 ...) The PLO Observer Mission is in no sense accredited to the United States. The United States Government 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. The General Assembly was guided by the relevant principles of the United Nations Charter (Chapter XVI ...). I should like, at this point, to remind you that the Government of the United States has agreed to the Charter of the United Nations and to the establishment of an international organization to be known as the 'United Nations'."

He concluded that it was clear that "the U.S. Government is obligated to respect the provisions of the Headquarters Agreement and the principles of the Charter". On 21 March 1988, the United States Attorney-General replied to the PLO Permanent Observer as follows:

"I am aware of your position that requiring closure of the Palestine Liberation Organization ('PLO') Observer Mission violates our obligations under the United Nations ('UN') Headquarters Agreement and, thus, international law. However, among a number of grounds in support of our action, the United States Supreme Court has held for more than a century that Congress has the authority to override treaties and, thus, international law for the purpose of domestic law. Here Congress has chosen, irrespective of international law, to ban the presence of all PLO offices in this country, including the presence of the PLO Observer Mission to the United Nations. In discharging my obligation to enforce the law, the only responsible course available to me is to respect and follow that decision.

Moreover, you should note that the Anti-Terrorism Act contains provisions in addition to the prohibition on the establishment or maintenance of an office by the PLO within the jurisdiction of the United States. In particular, I direct your attention to subsections 1003 (a) and (b), which prohibit anyone from receiving or expending any monies from the PLO or its agents to further the interests of the PLO or its agents. All provisions of the Act become applicable on 21 March 1988."

28. On 15 March 1988 the Secretary-General wrote to the Acting Permanent Representative of the United States in reply to his letter of 11 March 1988 (paragraph 24 above), and stated as follows:

"As I told you at our meeting on 11 March 1988 on receiving this letter, I did so under protest because in the view of the United Nations the decision taken by the United States Government as outlined in the letter is a clear violation of the Headquarters Agreement between the United Nations and the United States. In particular, I cannot accept the statement contained in the letter that the United States may act irrespective of its obligations under the Headquarters Agreement, and I would ask you to reconsider the serious implications of this statement given the responsibilities of the United States as the host country.

I must also take issue with the conclusion reached in your letter that the United States believes that submission of this matter to arbitration would not serve a useful purpose. The United Nations continues to believe that the machinery provided for in the Headquarters Agreement is the proper framework for the settlement of this dispute and I cannot agree that arbitration would serve no useful purpose. On the contrary, in the present case, it would serve the very purpose for which the provisions of section 21 were included in the Agreement, namely the settlement of a dispute arising from the interpretation or application of the Agreement."

29. According to the written statement of 25 March 1988 presented to the Court by the United States,

"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 Court has been supplied, as part of the dossier of documents furnished by the Secretary-General, with a copy of the summons addressed to the PLO, the PLO Observer Mission, its members and staff; it is dated 22 March 1988 and requires an answer within 20 days after service.

30. On 23 March 1988, the General Assembly, at its reconvened Forty-Second session, adopted resolution 42/230 by 148 votes to 2, by which it reaffirmed (inter alia) that

> "a dispute exists between the United Nations and the United States of America, the host country, concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure provided for under section 21 of the Agreement, which constitutes the only legal remedy to solve the dispute, should be set in operation"

and requested "the host country to name its arbitrator to the arbitral tribunal".

31. The representative of the United States, who voted against the resolution, said (inter alia) the following in explanation of vote. Referring to the proceedings instituted in the United States courts, he said:

> "The United States will take no further steps to close the PLO office until the [United States] Court has reached a decision on the Attorney General's position that the Act requires closure ... Until the United States courts have determined whether that law requires closure of the PLO Observer Mission the United States Government believes that it would be premature to consider the appropriateness of arbitration." (A/42/PV.109, pp. 13-14-15.)

He also urged:

> "Let us not be diverted from the important and historic goal of peace in the Middle East by the current dispute over the status of the PLO Observer Mission." (Ibid., p. 16.)

32. At the hearing, the United Nations Legal Counsel, representing the Secretary-General, stated to the Court that he had informed the United States District Court Judge seised of the proceedings referred to in paragraph 29 above that it was the wish of the United Nations to submit an amicus curiae brief in those proceedings.

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* *

33. In the present case, the Court is not called upon to decide whether the measures adopted by the United States in regard to the Observer Mission of the PLO to the United Nations do or do not run counter to the Headquarters Agreement. The question put to the Court is not about either the alleged violations of the provisions of the Headquarters Agreement applicable to that Mission or the interpretation of those provisions. The request for an opinion is here directed solely to the determination whether under section 21 of the Headquarters Agreement the United Nations was entitled to call for arbitration, and the United States was obliged to enter into this procedure. Hence the request for an opinion concerns solely the applicability to the alleged dispute of the arbitration procedure provided for by the Headquarters Agreement. It is a legal question within the meaning of Article 65, paragraph 1, of the Statute. There is in this case no reason why the Court should not answer that question.

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34. In order to answer the question put to it, the Court has to determine whether there exists a dispute between the United Nations and the United States, and if so whether or not that dispute is one "concerning the interpretation or application of" the Headquarters Agreement within the meaning of section 21 thereof. If it finds that there is such a dispute it must also, pursuant to that section, satisfy itself that it is one "not settled by negotiation or other agreed mode of settlement".

35. As the Court observed in the case concerning Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, "whether there exists an international dispute is a matter for objective determination" (I.C.J. Reports 1950, p. 74). In this respect the Permanent Court of International Justice, in the case concerning Mavrommatis Palestine Concessions (P.C.I.J., Series A, No. 2, p. 11), had defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". This definition has since been applied and clarified on a number of occasions. In the Advisory Opinion of 30 March 1950 the Court, after examining the diplomatic exchanges between the States concerned, noted that "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations" and concluded that "international disputes have arisen" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950, p. 74). Furthermore, in its Judgment of 21 December 1962 in the South West Africa case, the Court made it clear that in order to prove the existence of a dispute

> "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute

any more than a mere denial of the existence of the dispute proves its non-existence .. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." (South West Africa, I.C.J. Reports 1962, p. 328.)

The Court found that the opposing attitudes of the parties clearly established the existence of a dispute (ibid.; see also Northern Cameroons, I.C.J. Reports 1963, p. 27).

36. In the present case, the Secretary-General informed the Court that, in his opinion, a dispute within the meaning of section 21 of the Headquarters Agreement existed between the United Nations and the United States from the moment the Anti-Terrorism Act was signed into law by the President of the United States and in the absence of adequate assurances to the Organization that the Act would not be applied to the PLO Observer Mission to the United Nations. By his letter of 14 January 1988 to the Permanent Representative of the United States, the Secretary-General formally contested the consistency of the Act with the Headquarters Agreement (paragraph 16 above). The Secretary-General confirmed and clarified that point of view in a letter of 15 March 1988 (paragraph 28 above) to the Acting Permanent Representative of the United States in which he told him that the determination made by the Attorney-General of the United States on 11 March 1988 was a "clear violation of the Headquarters Agreement". In that same letter he once more asked that the matter be submitted to arbitration.

37. The United States has never expressly contradicted the view expounded by the Secretary-General and endorsed by the General Assembly regarding the sense of the Headquarters Agreement. Certain United States authorities have even expressed the same view, but the United States has nevertheless taken measures against the PLO Mission to the United Nations. It has indicated that those measures were being taken "irrespective of any obligations the United States may have under the [Headquarters] Agreement" (paragraph 24 above).

38. In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty. In the case concerning United States Diplomatic and Consular Staff in Tehran, the jurisdiction of the Court was asserted principally on the basis of the Optional Protocols concerning the Compulsory Settlement of Disputes accompanying the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations, which defined the disputes to which they applied as "Disputes arising out of the interpretation or application of" the relevant Convention. Iran, which did not appear in the proceedings

before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a "dispute"; in order to determine whether it had jurisdiction, it stated:

> "The United States' claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the personnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran ... By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions." (I.C.J. Reports 1980, pp. 24-25, para. 46.)

39. In the present case, the United States in its public statements has not referred to the matter as a "dispute" (save for a passing reference on 23 March 1988 to "the current dispute over the status of the PLO Observer Mission" - paragraph 31 above), and it has expressed the view that arbitration would be "premature". According to the report of the Secretary-General to the General Assembly (A/42/915, para. 6), the position taken by the United States during the consultations in January 1988 was that it "had not yet concluded that a dispute existed between the United Nations and the United States" at that time "because the legislation in question had not yet been implemented". Finally, the Government of the United States, in its written statement of 25 March 1988, told the Court that:

> "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."

40. The Court could not allow considerations as to what might be "appropriate" to prevail over the obligations which derive from section 21 of the Headquarters Agreement, as "the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency" (Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 15).

41. The Court must further point out that the alleged dispute relates solely to what the United Nations considers to be its rights under the Headquarters Agreement. The purpose of the arbitration procedure envisaged by that Agreement is precisely the settlement of such disputes as may arise between the Organization and the host country

without any prior recourse to municipal courts, and it would be against both the letter and the spirit of the Agreement for the implementation of that procedure to be subjected to such prior recourse. It is evident that a provision of the nature of section 21 of the Headquarters Agreement cannot require the exhaustion of local remedies as a condition of its implementation.

42. The United States in its written statement might be implying that neither the signing into law of the Anti-Terrorism Act, nor its entry into force, nor the Attorney-General's decision to apply it, nor his resort to court proceedings to close the PLO Mission to the United Nations, would have been sufficient to bring about a dispute between the United Nations and the United States, since the case was still pending before an American court and, until the decision of that court, the United States, according to the Acting Permanent Representative's letter of 11 March 1988, "will not take other actions to close" the Mission. The Court cannot accept such an argument. While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts.

43. The Anti-Terrorism Act was signed into law on 22 December 1987. It was automatically to take effect 90 days later. Although the Act extends to every PLO office situated within the jurisdiction of the United States and contains no express reference to the office of the PLO Mission to the United Nations in New York, its chief, if not its sole, objective was the closure of that office. On 11 March 1988, the United States Attorney-General considered that he was under an obligation to effect such a closure; he notified the Mission of this, and applied to the United States courts for an injunction prohibiting those concerned "from continuing violations of" the Act. As noted above, the Secretary-General, acting both on his own behalf and on instructions from the General Assembly, has consistently challenged the decisions contemplated and then taken by the United States Congress and the Administration. Under those circumstances, the Court is obliged to find that the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement.

44. For the purposes of the present advisory opinion there is no need to seek to determine the date at which the dispute came into existence, once the Court has reached the conclusion that there is such a dispute at the date on which its opinion is given.

* *

45. The Court has next to consider whether the dispute is one which concerns the interpretation or application of the Headquarters Agreement. It is not however the task of the Court to say whether the enactment, or the enforcement, of the United States Anti-Terrorism Act would or would not constitute a breach of the provisions of the Headquarters Agreement; that question is reserved for the arbitral tribunal which the Secretary-General seeks to have established under section 21 of the Agreement.

46. In the present case, the Secretary-General and the General Assembly of the United Nations have constantly pointed out that the PLO was invited "to participate in the sessions and the work of the General Assembly in the capacity of Observer" (resolution 3237 (XXIX)). In their view, therefore, the PLO Observer Mission to the United Nations was, as such, covered by the provisions of sections 11, 12 and 13 of the Headquarters Agreement; it should therefore "be enabled to establish and maintain premises and adequate functional facilities" (General Assembly resolution 42/229 A, para. 2). The Secretary-General and the General Assembly have accordingly concluded that the various measures envisaged and then taken by the United States Congress and Administration would be incompatible with the Agreement if they were to be applied to that Mission, and that the adoption of those measures gave rise to a dispute between the United Nations Organization and the United States with regard to the interpretation and application of the Headquarters Agreement.

47. As to the position of the United States, the Court notes that, as early as 29 January 1987, the United States Secretary of State wrote to Senator Dole 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."

He added 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. ... we therefore are under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at UN Headquarters ..." (US Congressional Record, Vol. 133, No. 78, S6449.)

After the adoption of the Anti-Terrorism Act, the Acting Permanent Representative of the United States to the United Nations indicated to the Secretary-General that the provisions of that Act "concerning the PLO Observer Mission ..., if implemented, would be contrary to ... [the] international legal obligations" of the host country under the Headquarters Agreement (paragraph 15 above). The United States then envisaged interpreting that Act in a manner compatible with its

obligations (paragraph 17 above). Subsequently, however, the Acting Permanent Representative of the United States, in a letter dated 11 March 1988 (paragraph 24 above), informed the United Nations Secretary-General that the Attorney-General of the United States had determined that the Anti-Terrorism Act required him to close the PLO Observer Mission, "irrespective of any obligations the United States may have under" the Headquarters Agreement. On the same day, an Assistant Attorney-General declared that the Act had "superseded the requirements of the United Nations Headquarters Agreement to the extent that these requirements are inconsistent with the statute ..." (paragraph 26 above). The Secretary-General, in his reply of 15 March 1988 to the letter from the United States Acting Permanent Representative, disputed the view there expressed, on the basis of the principle that international law prevails over domestic law.

48. Accordingly, in a first stage, the discussions related to the interpretation of the Headquarters Agreement and, in that context, the United States did not dispute that certain provisions of that Agreement applied to the PLO Mission to the United Nations in New York. However, in a second stage, it gave precedence to the Anti-Terrorism Act over the Headquarters Agreement, and this was challenged by the Secretary-General.

49. To conclude, the United States has taken a number of measures against the PLO Observer Mission to the United Nations in New York. The Secretary-General regarded these as contrary to the Headquarters Agreement. Without expressly disputing that point, the United States stated that the measures in question were taken "irrespective of any obligations the United States may have under the Agreement". Such conduct cannot be reconciled with the position of the Secretary-General. There thus exists a dispute between the United Nations and the United States concerning the application of the Headquarters Agreement, falling within the terms of section 21 thereof.

50. The question might of course be raised whether in United States domestic law the decisions taken on 11 and 21 March 1988 by the Attorney-General brought about the application of the Act of 22 December 1987, or whether the Act can only be regarded as having received effective application when or if, on completion of the current judicial proceedings, the PLO Mission is in fact closed. This is however not decisive as regards section 21 of the Headquarters Agreement, which refers to any dispute "concerning the interpretation or application" of the Agreement, and not concerning the application of the measures taken in the municipal law of the United States. The Court therefore sees no reason not to find that a dispute exists between the United Nations and the United States concerning the "interpretation or application" of the Headquarters Agreement.

* *

51. The Court now turns to the question of whether the dispute between the United Nations and the United States is one "not settled by negotiation or other agreed mode of settlement", in the terms of section 21 (a) of the Headquarters Agreement.

52. In his written statement, the Secretary-General interprets this provision as requiring a two-stage process.

> "In the first stage the parties attempt to settle their difference through negotiation or some other agreed mode of settlement ... If they are unable to reach a settlement through these means, the second stage of the process, compulsory arbitration, becomes applicable." (Para. 17.)

The Secretary-General accordingly concludes that

> "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." (Para. 42.)

53. In his letter to the United States Permanent Representative dated 14 January 1988, the Secretary-General not only formally invoked the dispute settlement procedure set out in section 21 of the Headquarters Agreement, but also noted that "According to section 21 (a), an attempt has to be made at first to solve the dispute through negotiations" and proposed that the negotiations phase of the procedure commence on 20 January 1988. According to the Secretary-General's report to the General Assembly, a series of consultations had already begun on 7 January 1988 (A/42/915, para. 6) and continued until 10 February 1988 (ibid., para. 10). Technical discussions, on an informal basis, on procedural matters relating to the arbitration contemplated by the Secretary-General, were held between 28 January 1988 and 2 February 1988 (ibid., paras. 8-9). On 2 March 1988, the Acting Permanent Representative of the United States stated in the General Assembly that

> "we have been in regular and frequent contact with the United Nations Secretariat over the past several months concerning an appropriate resolution of this matter" (A/42/PV 104, p. 59).

54. The Secretary-General recognizes that "The United States did not consider these contacts and consultations to be formally within the framework of section 21 (a) of the Headquarters Agreement" (written statement, para. 44), and in a letter to the United States Permanent Representative dated 2 February 1988, the Secretary-General noted that the United States was taking the position that, pending its evaluation of the situation which would arise from application of the Anti-Terrorism Act, "it cannot enter into the dispute settlement procedure outlined in section 21 of the Headquarters Agreement".

55. The Court considers that, taking into account the United States attitude, the Secretary-General has in the circumstances exhausted such possibilities of negotiation as were open to him. The Court would recall in this connection the dictum of the Permanent Court of International Justice in the Mavrommatis Palestine Concessions case that

> "the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation" (P.C.I.J., Series A, No. 2, p. 13).

When in the case concerning United States Diplomatic and Consular Staff in Tehran the attempts of the United States to negotiate with Iran "had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter", the Court concluded that "In consequence, there existed at that date not only a dispute but, beyond any doubt, a 'dispute ... not satisfactorily adjusted by diplomacy' within the meaning of" the relevant jurisdictional text (I.C.J. Reports 1980, p. 27, para. 51). In the present case, the Court regards it as similarly beyond any doubt that the dispute between the United Nations and the United States is one "not settled by negotiation" within the meaning of section 21 (a) of the Headquarters Agreement.

56. Nor was any "other agreed mode of settlement" of their dispute contemplated by the United Nations and the United States. In this connection the Court should observe that current proceedings brought by the United States Attorney-General before the United States courts cannot be an "agreed mode of settlement" within the meaning of section 21 of the Headquarters Agreement. The purpose of these proceedings is to enforce the Anti-Terrorism Act of 1987; it is not directed to settling the dispute, concerning the application of the Headquarters Agreement, which has come into existence between the United Nations and the United States. Furthermore, the United Nations has never agreed to settlement of the dispute in the American courts; it has taken care to make it clear that it wishes to be admitted only as amicus curiae before the District Court for the Southern District of New York.

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57. The Court must therefore conclude that the United States is bound to respect the obligation to have recourse to arbitration under section 21 of the Headquarters Agreement. The fact remains however that, as the Court has already observed, the United States has declared (letter

from the Permanent Representative, 11 March 1988) that its measures against the PLO Observer Mission were taken "irrespective of any obligations the United States may have under the [Headquarters] Agreement". If it were necessary to interpret that statement as intended to refer not only to the substantive obligations laid down in, for example, sections 11, 12 and 13, but also to the obligation to arbitrate provided for in section 21, this conclusion would remain intact. It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the Alabama case between Great Britain and the United States, and has frequently been recalled since, for example in the case concerning the Greco-Bulgarian "Communities" in which the Permanent Court of International Justice laid it down that

> "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty" (P.C.I.J., Series B, No. 17, p. 32).

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* *

58. For these reasons,

THE COURT,

Unanimously,

Is of the opinion that 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 of 26 June 1947, is under an obligation, in accordance with section 21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the United Nations.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of April, one thousand nine hundred and eighty-eight, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) José Maria RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge ELIAS appends a declaration to the Advisory Opinion of the Court.

Judges ODA, SCHWEBEL and SHAHABUDDEEN append separate opinions to the Advisory Opinion of the Court.

(Initialled) J.M.R.

(Initialled) E.V.O.

DECLARATION BY JUDGE ELIAS

I agree with the Advisory Opinion but only in so far that I consider that for the purposes of the legal question before the Court, within the meaning of Article 65 of the Statute of the Court and Article 96 of the Charter, a dispute came into being between the United Nations and the United States when the Congress of the United States passed the Anti-Terrorism Act, signed on 22 December 1987. I do not think that that dispute will only become crystallized when and if the Congress legislation is confirmed by the New York District Court - as has been maintained by the United States. Nor do I accept that the efficacy in that respect of the Congress Act as signed by the President depends on the giving or withholding of the assurances sought by the United Nations Secretary-General from the Administration. The Secretary-General's purpose can only be achieved if Congress adopts further legislation to amend the Anti-Terrorism Act. That Act of 22 December 1987 is, in itself, sufficient to bring about a dispute, since "the General Assembly's request arose from the situation which had developed following the signing of the 1987 Anti-Terrorism Act adopted by the United States Congress" (I.C.J. Press Communiqué No. 88/10, 14 April 1988).

(Signed) T. O. ELIAS

SEPARATE OPINION OF JUDGE ODA

1. I voted in favour of the Advisory Opinion, but only after some hesitation, which I consider it my judicial duty to explain. The reason lies in my conviction that one important aspect of the issues outstanding between the United Nations and the United States should, in my view, have been more clearly highlighted both in the request submitted by the General Assembly and in the reasoning of the Court.

2. The important point to note at the outset is that, so far as the relevant substantive provisions of the 1947 Headquarters Agreement are concerned, that is to say, sections 11-13, there does not exist much difference of views between the United Nations and the United States. Although, in the present controversy, express reference to sections 11, 12 and 13 was first made, at least to the Court's certain knowledge, in the statement made by the spokesman for the Secretary-General on 22 October 1987 (United Nations daily press briefing), it may reasonably be assumed that not only the United Nations but also the United States have always had those provisions in mind when considering the implications for the interests of the United Nations of the legislation introduced in order to make unlawful the establishment or maintenance within United States jurisdiction of any office of the Palestine Liberation Organization.

3. As early as January 1987, Secretary of State Shultz indicated his interpretation of the Headquarters Agreement in his letter of 29 January 1987 to Senator Dole (and in a letter of the same date to Representative Kemp) that:

> "The U.S. 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 ... [W]e therefore are under an obligation to permit PLO Observer Mission Personnel to enter and remain in the United States to carry out their official functions at U.N. headquarters." (Congressional Record, Vol. 133, No. 78.)

In a letter to the Permanent Representative of the United States on 13 October 1987, the United Nations Secretary-General, referring to the position of the Secretary of State (as quoted above) expressed the strong view that "the legislation [contemplated] runs counter to obligations arising from the Headquarters Agreement". In his response, the United States Permanent Representative to the United Nations wrote a letter to the United Nations Secretary-General on 27 October 1987 stating that:

> "[T]he Administration has vigorously opposed closure of the Palestine Liberation Organization Observer Mission to the United Nations. I want to assure you that the Administration remains opposed to the proposed legislation."

In a letter of 7 December 1987 to the United States Permanent Representative, the United Nations Secretary-General reiterated the Organization's position and took note that it "coincided" with that taken by the United States Administration in the letter of the Secretary of State on 29 January 1987.

4. When the PLO Observer on 14 October 1987 brought the matter to the attention of the United Nations Committee on Relations with the Host Country, the representative of the United States immediately responded by stating -

> "that in the opinion of the Executive Branch, closing of the PLO Mission would not be consistent with the host country's obligations under the Headquarters Agreement" (A/42/26: Report of the Committee on Relations with the Host Country, p. 12).

So far as the report of the Committee shows, no mention was made of any specific provisions of the Headquarters Agreement which might have been at stake. Yet one can reasonably assume that the Representative of the United States in his response implicated sections 11, 12 and 13 of the Agreement.

5. When, in resolution 42/210 B of 17 December 1987, the General Assembly expressed its view that -

> "the action being considered in ... the United States of America ... might impede the maintenance of the facilities of the [PLO] Observer Mission ... which enables it to discharge its official functions",

it also voiced the opinion that the PLO Observer Mission was covered by the provisions of the Headquarters Agreement and requested the United States -

> "to abide by its treaty obligations under the Headquarters Agreement and ... to refrain from taking any action that would prevent the discharge of the official functions of the [PLO] Observer Mission".

When the draft of that resolution was under consideration in the Sixth Committee, the United States Representative said, on 25 November 1987, that:

> "the United States Secretary of State had stated that the closing of that mission would constitute a violation of United States obligations under the Headquarters Agreement" (A/C.6/42/SR.58, p. 2).

As recently as January 1988, the Acting Permanent Representative of the United States, in his letter of 5 January to the United Nations Secretary-General, did not hesitate to state that the provisions

concerning the PLO Observer Mission - "if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement".

6. Thus it was quite clear that, regarding "the interpretation or application" of sections 11-13 of the Agreement, there was no difference of opinion, in that both sides understood that the forced closure of the PLO office would conflict with international obligations undertaken by the United States under the Agreement. What brought about a differentiation between the position of the United States and that of the United Nations was that the two Houses of Congress finally adopted the Anti-Terrorism Act, as Title X of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, on 15 and 16 December 1987, and that the President of the United States signed it into law, along with other Titles of the latter Act, on 22 December 1987. I must repeat that the difference between the United Nations and the United States was thus not the issue whether the forced closure of the office would or would not violate the Headquarters Agreement, but rather the issue as to what course of action within the United States domestic legal structure would be tantamount to the forced closure of the PLO's New York office, in which both parties would see a violation of the Agreement. This difference seems to have emerged towards the end of 1987 or in early 1988.

7. When a draft resolution (which later became General Assembly resolution 42/210B) was put to the vote in the Sixth Committee on 11 December, the United States representative expressed his reasons for not participating in the voting, namely, that the resolution - "was unnecessary and inappropriate since it addressed a matter still under consideration within the United States Government" (A/C.6/42/SR.62, p. 3). When the draft proposed by the Sixth Committee was adopted in the Plenary Meetings on 17 December 1987 as resolution 42/210 B, the United States Representative, who again did not participate in the voting, reiterated the United States' position (A/42/PV.98, p. 8). On the other hand, in a letter on 7 December 1987 to the United States Permanent Representative, referred to above, the United Nations Secretary-General requested confirmation -

> "that even if this proposed legislation becomes law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected".

In the view of the Secretary-General:

> "Without such assurance, a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement would exist."

He warned that, in the absence of that assurance, he "would be obliged to enter into the dispute settlement procedure foreseen under Section 21 [of the Agreement]". This position was reiterated by the United Nations

Secretary-General in a letter of 14 January 1988 to the Permanent Representative of the United States.

8. The United Nations has stated that negotiations, which are a prerequisite for bringing a dispute to compulsory arbitration under section 21 of the Headquarters Agreement, were initially held on 7 January 1988, but their content remains unclear. What is apparent is that a meeting on 12 January 1988 did not provide, in the view of the Secretary-General, the necessary assurance that the existing arrangements for the PLO Observer Mission would be maintained. This may doubly justify the inference that, rather than there being any negotiations on "the interpretation or application" of sections 11, 12 and 13, there were simply consultations in which the United Nations, or so it appears, repeatedly sought the assurance of the United States that, given the parties' common ground in relation to those sections, the PLO office would not be closed notwithstanding the enactment of the Anti-Terrorism Act. On the other hand, the United States' position in these consultations was that -

> "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 or non-enforcement of the law" (written statement of the United Nations Secretary-General).

In a series of consultations, the United States thus interpreted the situation then existing as not being one falling under section 21 of the Agreement; while the United Nations maintained that the dispute settlement procedure provided for in section 21 should be implemented. The discussions centred on the applicability, hence the application of Section 21; in other words the compromissory clause itself.

9. There was accordingly never any apparent dispute between the United Nations and the United States as to how sections 11-13 of the Agreement should be "interpreted or applied". Though the possibility may not be excluded that the United States might in future argue that forced closure would not be in conflict with those sections, there was virtual agreement between them in understanding that the forced closure of the PLO Observer Mission office would constitute a breach of these provisions of the Agreement. Yet "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 PLO Observer Mission (letter dated 11 March 1988 from the Acting Permanent Representative of the United States to the United Nations Secretary-General). The actual issue the United Nations faced concerned the constitutional structure of the United States, which ostensibly enabled domestic legislation to be carried into effect in breach of the rights of another party to a treaty which the United States had concluded; and for this to happen "irrespective of any obligations the United States may have under the Agreement" (letter as stated above), or "irrespective of any international legal obligation that the United States might have under the Headquarters Agreement" (written statement of the United States); or irrespective of "the interpretation

or application of the Agreement"; allegedly on the ground that "Congress has the authority to abrogate treaties and international law for the purpose of domestic law" or that, in this particular case, "Congress has chosen irrespective of international law, to ban the presence of all PLO offices in this country including the presence of the PLO Observer Mission to the UN" (Justice Department briefing on 11 March 1988).

10. I am not suggesting that the Court was asked in the present case to address that issue, which constitutes a cardinal problem of maintaining the supremacy of international law in the context of its internal application. However, it should be realized that, by asking the question now before us, based on the belief that "Section 21 of the [Headquarters] Agreement ... constitutes the only legal remedy to solve the dispute" (General Assembly Resolution 42/230 of 23 March 1988; emphasis added), the General Assembly has deferred the real issues with which the United Nations has been faced and, I am sure, will not in the outcome be satisfied by the mere submission of a dispute - limited to the interpretation or application of sections 11-13 of the Headquarters Agreement - to arbitration. This is because the real issues of the dispute turn not on the interpretation or application of the Headquarters Agreement, but on whether, in operative effect, precedence will be given to the uncontested interpretation or application of that Agreement or to the Anti-Terrorism Act as interpreted by the Attorney-General of the United States. My problem is that the question the Court has had to tackle is not the one which it would have been the most useful for the Court to answer if the underlying concern of the General Assembly was to be met. As it happens, the Court has asserted the priority, in the circumstances, of international law, but has neither heard nor had to consider any through argument on that crucial point.

(Signed) Shigeru ODA

SEPARATE OPINION OF JUDGE SCHWEBEL

I have voted in favour of the Court's Advisory Opinion because I think that its essential conclusion - that there is a dispute between the United Nations and the United States over the interpretation or application of the Headquarters Agreement - is tenable. In my view, however, the question put to the Court admits of more than one answer. The answer given by the Court is not the answer which I believe in all respects to be required.

As the Court records in paragraph 1 of its Opinion, the General Assembly, in requesting the Court's advisory opinion as to whether the United States is under an obligation to enter into arbitration in accordance with section 21 of the Headquarters Agreement, affirmed the position of the Secretary-General "that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement ..." (resolution 42/229 B). In its companion resolution 42/229 A, also adopted on 2 March 1988, the General Assembly considered

> "that a dispute exists between the United Nations and the United States ... concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure set out in section 21 of the Agreement should be set in operation".

That is to say, the General Assembly, after twice answering the question on which it seeks the advice of the Court, the principal judicial organ of the United Nations, requested the Court's opinion on that question. Thereafter, on 23 March 1988, while proceedings in the Court were pending, the General Assembly reaffirmed its answer by holding

> "that a dispute exists between the United Nations and the United States ... concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure provided for under section 21 of the Agreement ... should be set in operation ..." (resolution 42/230).

In responding to the General Assembly's question posed in this fashion, the Court makes holdings of unchallengeable cogency. It is axiomatic that, on the international legal plane, national law cannot derogate from international law, that a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations. It is evident that a party to an agreement containing an obligation to arbitrate any dispute over its interpretation or application cannot legally avoid that obligation by denying the existence of a dispute or by maintaining that arbitration of it would not serve a useful purpose. It is accepted that a provision of a treaty (or a contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies. I agree not only with these restatements of legal principle but also with the findings in this case that the dispute between the United Nations and the United States

has not been settled by such negotiation as has taken place, and that the parties have not agreed upon a mode of settlement other than arbitration.

My difference of perspective with the Court turns on whether the dispute between the United Nations and the United States at this juncture concerns "the interpretation or application" of the Headquarters Agreement. The nub of my appreciation of the facts of the case is that there is essential agreement between the United Nations and the United States on the interpretation of the Headquarters Agreement. Whether there currently is a dispute over its application is not so clear.

It can be concluded, as the Court concludes, that, by the course of conduct which the Government of the United States has followed with respect to the continued functioning of the office in New York City of the Observer Mission to the United Nations of the Palestine Liberation Organization, a dispute has arisen between the United Nations and the United States "concerning the ... application of this Agreement ...". But, in my view, the facts of the case alternatively allow the conclusion that, since the effective application of the United States Act at issue - the Anti-Terrorism Act - to the PLO's New York office has been deferred pending the outcome of litigation now in progress in the United States District Court for the Southern District of New York, a dispute over the application of the Headquarters Agreement will arise if and when the result of that litigation is effectively to apply that Act to the PLO's office. Explanation of this alternative conclusion, as well as of the parties' coincidence of views on the interpretation of the Headquarters Agreement, requires an exposition of some salient facts of the case.

The Anti-Terrorism Act of 1987, in addition to the central provisions quoted by the Court in paragraph 9 of its Opinion, contains "findings" of the United States Congress about activities of the PLO and "determinations" that the PLO is a "terrorist organization" which "should not benefit from operating in the United States"; directs the Attorney-General to take the necessary steps and institute the necessary legal action to "effectuate" the Act; and gives appropriate courts of the United States authority, at the Attorney-General's instance, to "enforce" the Act.

When legislation of this substance was initially introduced, Secretary of State Schultz on 29 January 1987 wrote Senator Dole 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 U.N.; it is in no sense accredited to the U.S. The U.S. 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 ... we therefore are under an obligation to permit PLO Observer Mission Personnel to enter

and remain in the United States to carry out their official functions at U.N. headquarters ..." (Congressional Record, Vol. 133, No. 78, 14 May 1987, p. S6449.)

At the 126th meeting of the United Nations Committee on Relations with the Host Country, on 14 October 1987, the Observer for the PLO drew attention to an amendment to the State Department authorization bill containing provisions later to be reflected in the Anti-Terrorism Act. He quoted the letter of the Secretary of State of 29 January. The representative of the United States responded that, "in the opinion of the Executive Branch, closing of the PLO Mission would not be consistent with the host country's obligations under the Headquarters Agreement". The Legal Counsel of the United Nations then declared that "the Organization shared the legal opinion expressed in the letter of Secretary of State Shultz of 29 January 1987" (A/42/26, pp. 11-12).

Senator Dole did not agree with the position of the Secretary of State, and opinion in the Senate and House was divided. When a conference report on the Foreign Relations Authorization Act was introduced to the Senate, containing the title embodying the Anti-Terrorism Act, the Chairman of the Committee on Foreign Relations, Senator Pell, declared:

> "the administration has expressed concern that the language on the PLO might require the closing of the Observer Mission to the United Nations in violation of U.S. obligations under international law. The bill language, as I read it, does not necessarily require the closure of the PLO Observer Mission to the United Nations, since it is an established rule of statutory interpretation that U.S. courts will construe congressional statutes as consistent with U.S. obligations under international law, if such construction is at all plausible.
>
> The proponents of closing the PLO mission argue that the United States is under no legal obligation to host observer missions. If they are right as a matter of international law, then the language in this bill would require the closure of the PLO Observer Mission.
>
> On the other hand, if the United States is under a legal obligation as the host country of the United Nations to allow observer missions recognized by the General Assembly, then the language in this bill cannot be construed, in my opinion, as requiring the closure of the PLO Observer Mission. The bill makes no mention of the PLO Mission to the United Nations and the proponents never indicated an intent to violate U.S. obligations under international law. Rather, they asserted that closure of the New York PLO office was not a violation of international law and that they were proceeding on this basis." (Congressional Record, Vol. 133, No. 200, 16 December 1987, pp. S18185-S18186.)

Before developments had reached this stage, the Secretary-General on 13 October 1987 wrote to the Permanent Representative of the United States expressing his serious concern at the adoption by the Senate of an amendment which sought to make unlawful the maintenance within the United States of any office of the PLO. He recalled the terms of the letter of 29 January 1987 of the Secretary of State, and declared that, "I am in agreement with the views expressed by the Secretary of State in this matter ..."

On 7 December 1987, the Secretary-General wrote to Ambassador Walters in the following terms:

> "it is the legal position of the United Nations 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. This position ... coincides with the position taken by the United States Administration in the letter ... by the Secretary of State on 29 January 1987 ...
>
> Even at this late stage, I very much hope that it will be possible for the Administration, in line with its own legal position, to act to prevent the adoption of this legislation. However, I would be grateful if you could confirm that even if this proposed legislation becomes law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected. Without such assurance, 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 UN Headquarters Agreement ..."

The legislation nevertheless having been adopted, and, having been made part of the State Department's authorization to expend funds, signed into law by the President, the Acting Permanent Representative of the United States, Ambassador Okun, wrote to the Secretary-General on 5 January 1988:

> "The legislation to which your letters refer is part of the 'Foreign Relations Authorization Act, Fiscal Years 1988 and 1989', signed by President Reagan on December 22. Section 1003 of this law, relating to the Palestine Liberation Organization (PLO), is to take effect ninety days after that date. 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 ninety-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter."

On 14 January 1988, the Secretary-General wrote to Ambassador Walters restating terms of previous exchanges and stating:

> "I, of course, welcome the intentions of the US Administration to make use of the 90-day period in the way described by Ambassador Okun, and explained in greater detail by the Legal Adviser of the State Department, Judge Sofaer, in his meeting with the Legal Counsel on 12 January. Nevertheless, neither the letter of Ambassador Okun nor the statements made by Judge Sofaer constitute the assurance I had sought in my letter of 7 December 1987 nor do they ensure that full respect for the Headquarters Agreement can be assumed. Under these circumstances, a dispute exists between the Organization and the United States concerning the interpretation and application of the Headquarters Agreement and I hereby invoke the dispute settlement procedure set out in Section 21 of the said Agreement."

On 2 February 1988, the Secretary-General wrote again to Ambassador Walters, in the terms set out in paragraph 19 of the Court's Opinion.

On 11 February 1988, the Legal Counsel of the United Nations, Mr. Fleischhauer, wrote to Judge Sofaer, informing him that the United Nations had chosen Eduardo Jiménez de Aréchaga, former President and Judge of the International Court of Justice, to be its arbitrator "in the event of arbitration under Section 21 ..." and, in view of the governing time constraints, urged that the United States inform the United Nations as soon as possible of its choice of an arbitrator.

Resolution 42/229 B was adopted by a vote of 143 to none. The United States did not participate in the vote. Ambassador Okun gave the explanation which is quoted in paragraph 22 of the Court's Opinion.

On 4 March 1988, following the adoption of resolutions 42/229 A and 42/229 B, the Secretary-General wrote to Ambassador Walters observing that he had not received an official response to his letters in which he had sought

> "assurances regarding the non-application or the deferral of the application of the Anti-Terrorism Act of 1987 to the PLO Observer Mission nor ... a response ... regarding the choice of an arbitrator by the United States".

He continued that

> "it is my hope that it will still prove possible for the United States to reconcile its domestic legislation with its international obligations. Should this not be the case then I trust that the United States will recognize the existence of a dispute and agree to the utilization of the dispute settlement procedure provided for in Section 21 of the Headquarters Agreement, and that in the interim period the status quo will be maintained."

On 11 March 1988, Ambassador Okun wrote to the Secretary-General in the terms quoted in paragraph 24 of the Court's Opinion. The Secretary-General protested Ambassador Okun's letter of 11 March 1988 and by letter of 15 March replied in the following terms:

> "In the view of the United Nations the decision taken by the United States Government as outlined in the letter is a clear violation of the Headquarters Agreement between the United Nations and the United States. In particular, I cannot accept the statement contained in the letter that the United States may act irrespective of its obligations under the Headquarters Agreement, and I would ask you to reconsider the serious implications of this statement given the responsibilities of the United States as the host country.
>
> I must also take issue with the conclusion reached in your letter that the United States believes that submission of this matter to arbitration would not serve a useful purpose. The United Nations continues to believe that the machinery provided for in the Headquarters Agreement is the proper framework for the settlement of this dispute and I cannot agree that arbitration would serve no useful purpose. On the contrary, in the present case, it would serve the very purpose for which the provisions of Section 21 were included in the Agreement, namely the settlement of a dispute arising from the interpretation or application of the Agreement."

The Attorney-General of the United States wrote the Permanent Observer of the PLO Mission to the United Nations on 11 March 1988 in the terms set out in paragraph 25 of the Court's Opinion. The PLO Observer replied on 14 March in the terms contained in paragraph 27 of the Court's Opinion. Attorney-General Meese responded by letter of 21 March as quoted in paragraph 27 of the Court's Opinion.

In its written statement submitted to the Court in the current proceedings, the United States repeated the substance of Ambassador Okun's letter of 11 March. It observed that, since the PLO Mission had not complied with the Attorney-General's order, a lawsuit had been filed to compel compliance. The Statement continued:

> "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."

In the written statement of the Secretary-General, the Secretary-General, in recounting the factual history of the matter, recalled the terms of his letter of 7 December 1987 and stated that

"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 ...".

Once the Act had become law, the written statement continued,

"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."

The Secretary-General further argued that:

"The automaticity of the process of bringing the ATA [Anti-Terrorism Act] 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 ... 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."

The Secretary-General at the same time concluded:

"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, and the Secretary-General has repeatedly taken the position that the ATA is inconsistent with the Headquarters Agreement. Thus, the formal conditions for invoking Section 21 of the Headquarters Agreement are clearly established and the procedural obligations of the parties, therefore, have become effective."

On the basis of this record, what conclusions may be drawn as to the current existence of a dispute between the United Nations and the United States over the interpretation or application of the Headquarters Agreement?

As the Court rightly emphasizes in its Opinion, whether there exists an international dispute is a matter for objective determination. The mere assertion or denial of the existence of a dispute by one (or both) sides is not dispositive. The Court also recalls its classic definition of a dispute as "a disagreement on a point of law, a conflict of legal views or interests between two persons". Is there such disagreement or conflict in this case over the interpretation of the Headquarters Agreement?

I do not believe so. On the contrary, throughout there has been and remains a striking concordance of view between the authorized representatives of the United Nations and the United States on the interpretation of the Headquarters Agreement. Thus the Secretary of State at the outset declared that the United States is 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 Legal Counsel of the United Nations announced that "The Organization shared" that "legal opinion ...". The Secretary-General then declared that, "I am in agreement with the views expressed by the Secretary of State in this matter ...". He subsequently specified that the position of the United Nations "coincides with the position taken by the United States ...". For its part, the United States, after the signing into law of the Act, reiterated that, "if implemented," the Act "would be contrary to our international legal obligations under the United Nations Headquarters Agreement ...".

The United States has not retreated from that position nor, of course, has the United Nations. This is not my singular conclusion; it is one which has been widely and recurrently affirmed in the course of General Assembly debate of the matter, and as recently as 23 March 1988.

Thus on 29 February 1988, the representative of Zimbabwe declared that, "The legal opinion expressed in the letter from Mr. Shultz was shared by the Secretary-General and the United Nations Legal Counsel ..." (A/42/PV.101, p. 33). The representative of the Federal Republic of Germany, speaking on behalf of the 12 States members of the European Community, stated that

> "they fully share the views already expressed by both the Secretary-General of the United Nations and the United States Secretary of State ... to the effect that the United States is 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" (ibid., pp. 51-52).

The representative of Czechoslovakia, using virtually identical language, recalled that "those facts were recognized unreservedly ... by Mr. George Shultz, Secretary of State ..." (ibid., p. 82). The representative of Denmark, speaking on behalf of the five Nordic countries, declared that "The Nordic countries fully share the views on this question already expressed by both the Secretary-General and the Secretary of State ..." (ibid., p. 101).

Similarly, on 1 March 1988, the representative of Austria declared:

> "It is our understanding from the discussion of the matter during the work of the Sixth Committee that the applicability of the relevant provisions of the Headquarters Agreement to the PLO Observer Mission and its personnel is not being disputed by any delegation, including the delegation of the host country."

The representative of Bangladesh the day before put it in the following terms:

> "The Secretary of State of the United States, in a letter to the Senate, stated as early as 29 January 1987 that the host country 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.'
>
> That view is shared by 145 Members of the United Nations, which voted in favour of General Assembly resolution 43/210 B, which was adopted on 17 December 1987 - with the sole exception of a single Member State. Such unanimity of opinion on the interpretation of a legal provision is truly unprecedented." (A/42/PV.102, p. 68.)

Finally, on 23 March 1988, at the last resumed session of the General Assembly, the representative of Burma concluded that:

> "The subject under dispute cannot be seen as relating to the substantive interpretation of this issue in respect of the Headquarters Agreement, for it is evident from what has been expressed by the relevant authorities of the United States Administration that it cannot be said that there is a controversy over such an interpretation between the position taken by them and the views of the Secretary-General and the virtually unanimous views expressed by Member States." (A/42/PV.107, pp. 28-30.)

In view of the demonstrated consistency of the views of the United Nations and the United States on the interpretation of the Headquarters Agreement, I am unpersuaded by the Court's conclusion that "the opposing attitudes of the parties" gives rise to a dispute "concerning the interpretation or application" of the Headquarters Agreement. Insofar as that conclusion relates to application, it is not without force; insofar as it relates to interpretation, the above recitation of the facts of the case in my view demonstrates that it is not wholly convincing.

It is of course true that, where the breach by a State of its obligations under a treaty is manifest and undenied, such breach does not escape a jurisdictional clause which affords a court - such as this Court - the authority to decide disputes over that treaty's interpretation or application. Counsel for the United States so argued in the case of United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings, page 279, and that argument, apparently accepted by the Court, remains persuasive. But it does not follow that, in a particular case, the existence or non-existence of a dispute over the interpretation of a treaty is unaffected by the articulated concordance of views of the parties concerning its interpretation. In the case before the Court, if the question of application of the Headquarters Agreement is for purposes of analysis put aside, it does appear that the views of the parties on its interpretation "coincide" (to use the term employed by the Secretary-General).

That being said, I nevertheless recognize that there is logic in and authority for the position that every allegation by a party of a breach of a treaty provision - however manifest and admitted by the other party - necessarily entails elements of interpretation (by the parties and by any court adjudging them), because an application or misapplication of a treaty, however clear, is rooted in an interpretation of it. But when a party actually alleges, if not in form then in substance, only a failure to apply the treaty, and makes clear that there is no dispute over its interpretation, is there, for purposes of dispute settlement, a dispute over the treaty's interpretation? I have my doubts.

The essential question at issue in this case is whether there is a dispute over the application of the Headquarters Agreement. The Court acknowledges that there may be question about whether the Anti-Terrorism Act has been applied or whether the Act will only have received effective application when or if, on completion of current United States judicial proceedings, the PLO Mission is in fact closed. It maintains, however, that this is not decisive as regards section 21 of the Headquarters Agreement, since that Agreement refers to any dispute concerning its interpretation or application and not the application of measures taken in the municipal law of the United States.

The Court is of course correct in pointing out that the issue before the Court is that of the application of the Headquarters Agreement and not that of the application of the Anti-Terrorism Act. But if the Act is not effectively applied to the PLO Observer Mission, what content is there to a dispute over the application of the Headquarters Agreement?

It should be recalled that the Secretary-General did not consistently treat the signing into law of the Act as giving rise of itself to a dispute over the application of the Headquarters Agreement. This is made clear by the terms of his letter of 7 December 1987, in which he requested of the United States confirmation that, even if the then proposed legislation were to become law,

> "the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected. Without such assurance, a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement would exist ..."

Thereafter, finding statements made by the United States not to constitute the assurances which he had sought, on 14 January 1988 he declared a dispute to exist. However, on 2 February, the Secretary-General wrote that:

> "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".

Even after the General Assembly requested an advisory opinion of the Court, the Secretary-General on 4 March 1988 referred to "assurances regarding the non-application or deferral of application" of the Act, and trusted that the United States would recognize the existence of a dispute should it not prove possible for the United States to reconcile its domestic legislation with its international obligations. In his written statement submitted to this Court, the Secretary-General contended that there is a dispute within the meaning of section 21 of the Headquarters Agreement "in the absence of any assurance as to the maintenance of the existing arrangements for the PLO Observer Mission". The Secretary-General maintained in his written statement that a threat to close the PLO Mission created a dispute "in the absence of an assurance from the Executive Branch that the legislation will not be enforced or that existing arrangements for the PLO Observer Mission in New York will not be affected or otherwise curtailed".

For its part, after the Act became law, the United States initially observed that it had not yet taken action affecting the functioning of the PLO Mission. Once the Attorney-General had determined that he was required by the Act to close the New York office of the PLO Observer Mission, and instituted action in the District Court, he declared that: "The United States will take no action to close the Mission pending a decision in that litigation." This position was reiterated by the United States more than once.

Thus it is clear that the Secretary-General repeatedly indicated that, if the United States were to provide assurances that current arrangements for the PLO Mission would be "maintained" and that application to it of the Act would be "deferred", a dispute over the interpretation and application of the Headquarters Agreement would not arise. The United States has provided assurances in this vein, though only "Until the United States courts have determined" whether that Act "requires closure of the PLO Observer Mission".

However important that condition is, it does not vitiate the utility of these assurances. It is not clear why these assurances of the United States may not be treated as sufficient assurances of the maintenance of existing arrangements for the PLO Observer Mission, pending the outcome of litigation in United States courts. Naturally it is for the Secretary-General to decide whether assurances which he seeks are sufficient or insufficient. Nevertheless, the assurances of the United States bear upon an objective determination of whether, now, a dispute exists over the application of the Headquarters Agreement.

The fact is that the PLO Observer Mission to the United Nations functions. It has not been closed; its activities give no sign of having been "affected or otherwise curtailed". It is true that it has the burden of defending itself in United Nations fora and in the United States District Court against the threat of closure. But an objective appraisal of the matter surely sustains the conclusion that the PLO, in the opinion of the members of the United Nations and in

public opinion, has not been adversely affected by the enactment of the Anti-Terrorism Act and action in pursuance of it. On the contrary, it appears to have significantly benefited.

If the PLO had closed down its office in New York City in response to the Attorney-General's determination, a dispute over the application of the Headquarters Agreement undoubtedly would have existed from the time of that closure. As it is, the issue of whether the PLO actually will be required to close its New York office has not been definitively determined by the Attorney-General; that issue rather is before the District Court for the Southern District of New York.

In oral proceedings before this Court, the Legal Counsel of the United Nations took the position in answer to a question that, if United States courts were to hold that the Anti-Terrorism Act cannot lawfully be enforced against the PLO Observer Mission, that would not mean that the dispute had never existed but would merely put an end to the dispute. That is a reasonable interpretation of the facts and one which leads me to conclude that the Court's Opinion is tenable. But it is not a necessary interpretation, particularly in view of the Secretary-General having repeatedly conditioned the existence of a dispute upon the absence of assurances from the United States of the maintenance of existing arrangements for the functioning of the PLO Observer Mission.

The question in the end comes to whether the United States now is bound to arbitrate the dispute, or whether it will only be so bound in the event that the District Court should order that the Act be enforced against the PLO Observer Mission. Should proceedings before the District Court and any appeals therefrom be maintained, the possibilities of municipal judgment are several. It could be held that the Act applies to the PLO Observer Mission, in which event the United States has inferred that it then will regard arbitration of the resultant dispute as "timely and appropriate". Alternatively, having regard to the reasoning of Senator Pell set out above or on other grounds, it could be held that the Act does not apply to the PLO Observer Mission, in which event, if a dispute requiring arbitration ever existed, it no longer will. Or it could be held that, in view of the Advisory Opinion of this Court, and in view of the fact that the Anti-Terrorism Act does not mention, and accordingly cannot be interpreted as derogating from, arbitral obligations of the United States under the Headquarters Agreement, in any event the United States is bound to arbitrate the dispute. There may be other possibilities as well.

A possible interpretation of section 21 of the Headquarters Agreement which I do not find sustainable is that, because it contains what in arbitration circles is characterized as an imperfect or incomplete clause, that clause permits a party not to appoint an arbitrator if it so chooses. Section 21 (a) provides:

> "(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this 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."

The clause is incomplete in that, while it contains provision for appointment of a third arbitrator by an appointing authority, it contains no provision for an appointing authority to appoint an arbitrator whom a party has failed to appoint. Arbitration clauses which are more prudently crafted characteristically do contain such provision.

The International Law Commission of the United Nations in its early years made a vigorous and searching effort to block loopholes in the process of international arbitration. The absence of provision for appointment by an appointing authority of an arbitrator whom a party has failed to appoint was seen as a large loophole. Despite the progressive character and technical excellence of the draft prepared by the Commission at the instance of its special rapporteur, Professor Georges Scelle, the General Assembly's majority proved in large measure unwilling to accept the Commission's work; it preferred to keep loopholes open, to maintain the diplomatic flexibility of interpretation and action which often has detracted from the judicial character of the processes of international arbitration. Bearing in mind this history, it might be argued that the arbitration provisions of the Headquarters Agreement were deliberately drafted so as to omit provision for third-party appointment of an arbitrator whom a party failed to appoint in order to afford the parties an ultimate exit from an obligation which in a particular case one or the other might find exigent.

I do not believe that such a contention would be correct in the current case, not because the Headquarters Agreement was concluded before the General Assembly reacted as described to the Commission's draft, but because the Court has decisively and soundly rejected it in analogous circumstances.

In its advisory proceedings on the Interpretation of Peace Treaties, the arbitration clause before the Court was in pertinent part essentially the same as that of the Headquarters Agreement. That is to say, while it provided for an appointing authority (in that case, the Secretary-General) to appoint the third member should the two parties fail to agree upon him, it contained no provision for the appointment by an appointing authority of an arbitrator who in the first place was to be named by a party.

In disputes between Bulgaria, Hungary and Rumania on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace on the other, the Governments of Bulgaria, Hungary and Rumania refused to appoint arbitrators in pursuance of the arbitration clause of the Treaties. The Court held that "all the conditions required for the commencement of the stage of the settlement of disputes" by the arbitral commissions "have been fulfilled", and concluded:

"In view of the fact that the Treaties provide that any dispute shall be referred to a Commission 'at the request of either party', it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commissions provided for in the Treaties would completely fail in its purpose." (I.C.J. Reports 1950, pp. 65, 77.)

(Signed) Stephen M. SCHWEBEL

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I agree with the Court's decision but propose to record some additional views directed to matters of approach and perspective in respect of two points. The first relates to the stage at which the dispute materialized. The second relates to the question whether the dispute was one concerning the interpretation or application of the Headquarters Agreement.

As to the first point, the decision of the Court has limited itself to finding that "the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement". The Court has not made any explicit findings as to when the dispute materialized. Recognizing that various dates may be eligible for consideration over a period of shifts and changes in an evolving situation, I nevertheless have difficulty in resisting the impression that it is excessive judicial economy to leave in obscurity which of these possible dates is the material one. A determination that a dispute is in existence is not made in vacuo; it is necessarily made after reviewing a dynamic course of events flowing over a period of time and determining that it ultimately eventuated in a dispute at a certain stage, however roughly this may be computed. It seems to me that the identification of this stage is an integral and inescapable part of the declarable reasoning process of the Court relating to what I regard as the central (though not sole) issue in the case, namely, whether or not a dispute existed as at the date of the General Assembly's request for an advisory opinion. Additionally, the identification of that stage supplies a useful and perhaps necessary analytical benchmark to differentiate between communications and discussions forming part of the process leading up to the birth of the dispute, and those directed to the resolution of the dispute after it had come into being.

The Bill in question had been introduced in the United States House of Representatives on 29 April 1987 and in the Senate on 14 May 1987. The United States Administration was opposed to the purpose of the Bill but recognized that that purpose was in fact to close the PLO Observer Mission. The President being charged with responsibility to enforce the laws of the State, the assent given by him to the Bill on 22 December 1987 was reasonably capable of being interpreted as a commitment by the Administration to enforce a closure of the Mission in obedience to the command of the Act.

Against these unfolding events, the Secretary-General is on record as objecting as from 13 October 1987 on the ground that such a law would lead to a breach by the United States of its international legal obligations under the Headquarters Agreement. In his letter of 7 December 1987 to Ambassador Walters, United States Permanent Representative to the United Nations, he made it clear that in his view the enactment of the legislation would give rise to a dispute unless certain assurances were given. The fair interpretation was that this looked to assurances to be given on or before the enactment of the legislation, if only because of the need to avoid any period of risk or

uncertainty. No such assurances having been given, the giving of assent to the Act on 22 December 1987 automatically operated to bring the competing interests into collision and to precipitate a dispute.

The Secretary-General's formal declaration on 14 January 1988 of the existence of a dispute was not necessary for its crystallization (see the Chorzow Factory case, P.C.I.J., Series A, No. 13, pp. 10-11, and the Certain German Interests in Polish Upper Silesia case, P.C.I.J., Series A, No. 6, p. 14). Save for Ambassador Okun's letter of 5 January 1988, advising that the assent had been given to the Act on 22 December 1987 and therefore associated in substance with that fact, there were no new developments between the date of assent and 14 January 1988 when the Secretary-General replied stating that a dispute existed and invoking the disputes settlement procedure set out in section 21 of the Agreement. The Secretary-General did not say as from when he considered that a dispute existed. His letter is not necessarily inconsistent with a dispute having automatically crystallized on 22 December 1987 in terms of the previous developments. But, if this is wrong, it is clear that a dispute did at any rate come into being on 14 January 1988. The record leaves no room for doubt that the dispute which so arose on one or the other of those two dates has continued in existence to this day.

On the second point, as to whether the dispute was one "concerning the interpretation or application" of the Headquarters Agreement within the meaning of section 21 of it, there seems to be an argument that, even though there was a dispute, the dispute did not concern the "interpretation" of the Headquarters Agreement for the reason that the Secretary of State shared the views of the Secretary-General as to the status of the PLO Observer Mission under the Agreement; and that, further, the dispute did not concern the "application" of the Agreement for the reason that a closure of the PLO Observer Mission has not as yet been effected.

As to whether the dispute in this case related to a question of interpretation of the Agreement, it was indeed the case that the views of the State Department coincided with those of the Secretary-General on the question of the status of the PLO Observer Mission under the Agreement (see the Secretary-General's letter of 13 October 1987 to United States Permanent Representative Ambassador Walters). But then different views on the subject seemingly prevailed with the United States legislature, and these would seem to have been upheld by the President when he assented to the Act adopted by it.

I have, however, considered an argument that, even so, there is still no conflict of views between the United States and the United Nations as to the interpretation of the Agreement for the reason that the United States has taken a position which may be interpreted to mean that, although the Administration is obliged by domestic law to enforce the Act by closing the PLO Observer Mission, it at the same time recognizes that it has no right to do so under international law and will engage international responsibility accordingly if it proceeds to a closure.

The argument is interesting, as much for its refinement as for its consequences, for, if sound, it means that, provided a State is prepared to go on record as admitting that it is consciously embarking on the violation of its accepted treaty obligation - something few States are prepared to do (see S. Rosenne, Breach of Treaty, 1984, p. 11) - it can escape its obligation to submit to an agreed procedure for the settlement of disputes concerning the interpretation of the treaty on the ground that it is in fact in agreement with the other party as to the meaning of the treaty, with the consequence that there is no dispute as to its interpretation.

A proposition productive of such strange results may not unreasonably be suspected of supplying its own refutation. I would suspect that, to begin with, the superstructure of the argument bases itself too narrowly on a possibly disjointed reading of the disputes settlement formula prescribed by section 21 of the Agreement.

The phrase "interpretation and application" has occurred in one version or another in a multitude of disputes settlement provisions extending over many decades into the past. In the Certain German Interests in Polish Upper Silesia case, P.C.I.J., Series A, No. 6, page 14, it was held that it was not necessary to satisfy both elements of the phrase taken cumulatively, the word "and" falling to be read disjunctively. The phrase in this case happens to be "interpretation or application". Satisfaction of either element will therefore suffice. But, further, since it is not possible to interpret a treaty save with reference to some factual field (even if taken hypothetically) and since it is not possible to apply a treaty except on the basis of some interpretation of it, there is a detectable view that there is little practical, or even theoretical, distinction between the two elements of the formula (see L. B. Sohn, "Settlement of Disputes relating to the Interpretation and Application of Treaties", Recueil des cours de l'Académie de droit international de La Haye, Vol. 150 (1976-II), p. 271). It seems arguable that the two elements constitute a compendious term of art generally covering all disputes as to rights and duties having their source in the controlling treaty (see the language used in the Chorzow Factory case, P.C.I.J., Series A, No. 9, p. 24). It is, with much respect to the opposite view, not right to adopt an approach which would seek to avoid this conclusion by dissecting the phrase in question, focusing separately on its individual elements, and then reading them as if they did not belong together in a single formula whose force indeed derives from its constituent parts but is not coextensive with their sum[1].

Expansiveness is alien to the circumspect and cautious approach which considerations of weight and solidity have long pointed out as appropriate to a court circumstanced as this is. The construction

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[1]The problem involved is probably a familiar one in all jurisdictions. Stamp, J., considered it in Bourne v. Norwich Crematorium (1967) 2 All E.R. 576.

proposed above does not, I believe, surpass the bounds of a reasonably careful contextual appreciation of the intendment of the clause in question. But, even if it should for any reason be judged unacceptably in advance of the text on which it is based, still it does appear to me that the aim of the opposite contention distinctly exceeds its reach, falling short, as the latter does, of all the ground that needs to be covered if the contention, assuming it to be right, is to furnish a complete justification for returning a negative answer to the General Assembly's question.

This is because the contention is directed only to the situation which will be created if and when the office of the PLO Observer Mission is ultimately closed. It is only with respect to that situation that it may be said that there is no dispute between the United Nations and the United States concerning the interpretation of the Agreement, it being agreed by both of them that it will be breached in that event. But the Secretary-General's claim covers an additional matter with respect to which it is clear that the two sides are in disagreement over the interpretation of the Agreement.

The additional matter concerns the question whether, even if there is no ultimate closure, the Agreement is currently being breached by reason of a threat extended by the very enactment of the Act on 22 December 1987, taken either separately from, or cumulatively with, its subsequent entry into force on 21 March 1988, with the Attorney-General's closure directive of 11 March 1988 (issued even before the Act entered into force and described in the United States written statement to the Court as an "order"), and with the consequential institution on 22 March 1988 of an action to enforce a closure and its continuing pendency since then. It may reasonably be inferred from the material before the Court (oral proceedings included) that the Secretary-General considers that there is a question as to whether these matters are themselves currently at variance with the Agreement, in the sense of whether they are in violation of any right impliedly conferred by the Agreement on the United Nations to ensure that its permanent invitees can function from their established offices without harassment or unnecessary interference. It is equally clear from the material that the United States does not accept that there is any current violation of the Agreement, having consistently maintained that no question of a violation can arise unless and until the Act is in fact enforced by effecting an actual closure of the PLO Observer Mission's office. It seems obvious that this marked divergence of views ineluctably involves a dispute concerning the interpretation of the Agreement.

So far for the question whether the dispute concerns the "interpretation" of the Agreement. Now for a brief word on the question whether the dispute concerns the "application" of the Agreement.

There could not be any doubt that a closure of the PLO Observer Mission's office will in fact involve a question of the application of the Agreement. As to whether the existing circumstances give rise to such a question, the present position is that the office is in fact being allowed to remain open but, according to the Secretary-General, this is subject to an existing threat of interference arising from the enactment and operation of the Act. It seems obvious that the position thus taken

by the Secretary-General does raise a question as to whether the application of the Agreement is currently being affected by the suggested existence of such a present threat of interference.

There is much in the United States position which is preoccupied with the question whether any actual breach of its obligations under the Agreement has as yet occurred and as to whether, in the absence of any such breach, there could be any dispute concerning the interpretation or application of the Agreement. As the Court has pointed out, it would be exceeding its jurisdiction were it to enter into the question whether an actual breach has occurred, that being a question to be reserved for the arbitral tribunal in the event of the Court giving an affirmative answer to the preliminary question as to whether there is a dispute. Moreover, if it is correct to say that in the absence of an actual breach there can be no dispute, this inevitably involves the Court in determining whether there has been an actual breach before it can conclude whether a dispute exists as to whether there has been such a breach. So the substantive matter would be determined before the preliminary issues.

The disputes settlement procedure of section 21 of the Agreement clearly applies to disputes arising out of complaints about an actual breach of the Agreement, but equally clearly it is not limited to such cases only. It extends to disputes arising out of opposition by one party to a course of conduct pursued by the other party, or a threat by it to act, with a view to producing what the complainant considers would be a breach of the Agreement. In the view of the Secretary-General, as I interpret it, such a course of conduct or threat was represented by the enactment of the Anti-Terrorism Act of 1987, this having in fact been assented to by the host country's Head of State whose recognized duty it was to carry out the laws of the State. Failing assurances to the contrary (which were sought but never given) the Secretary-General was entitled to assume that the President, through his appropriate officers, would carry out that duty with consequences which the Secretary-General considered would be at variance with the Agreement. This conflict of both views and interests would give rise to a dispute within the established jurisprudence on the subject, whether or not any actual breach of the Agreement had as yet occurred through the enforced closure of the Mission.

The framework of the Agreement does not link the concept of a dispute to the concept of an actual breach. A claim by one party that the other party is in actual breach of an obligation under the Agreement is not a precondition to the existence of a dispute. And disputes as to the application of the Agreement comprehend disputes as to its applicability (see the Chorzow Factory case, P.C.I.J., Series A, No. 9, p. 20.)

However, if this is wrong, with the consequence that a claim that there has been an actual breach is required, then it is to be noted that, from the record, it is a reasonably clear interpretation of the Secretary-General's position that it does include a claim that the host State is in current breach of its obligations under the Headquarters Agreement by reason of the enactment of the Act considered either separately from, or cumulatively with, the subsequent actions taken pursuant to it. Such a claim may be contested but cannot be considered so wholly unarguable as to be incapable of giving rise to a real dispute (see the Nuclear Tests case, I.C.J. Reports 1974, p. 430, per Judge Barwick, dissenting).

The general approach taken above would seem to be reinforced by three considerations. First, there seems to be no disposition in the jurisprudence of the Court and of its predecessor to impose too narrow a construction on the scope of disputes settlement provisions (see inter alia the Mavrommatis Jerusalem Concessions case, P.C.I.J., Series A, No. 5, pp. 47-48; the Chorzow Factory case, P.C.I.J., Series A, No. 9, pp. 20-25; the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania case, I.C.J. Reports 1950, p. 75; and the Appeal Relating to the Jurisdiction of the ICAO Council, case, I.C.J. Reports 1972, pp. 106-107, 125-126, and 147). Arbitral jurisprudence likewise rejects the proposition that "insofar as treaties of arbitration constitute conferrals of jurisdiction upon international authority, they are to be restrictively construed". (Stephen M. Schwebel, International Arbitration: Three Salient Problems, Cambridge, 1987, p. 149, note 12, citing Interpretation of Article 181 of the Treaty of Neuilly (The Forests of Central Rhodope), Preliminary Question (1931) UNRIAA, 1391, 1403).

Second, there is the amplitude and elasticity of the word "concerning" as it occurs in the phrase "concerning the interpretation or application" of the Headquarters Agreement. The word "concern" is defined in West's Law and Commercial Dictionary in Five Languages, 1985, Volume 1, page 300, as meaning: "To pertain, relate, or belong to; to be of interest or importance to; to involve; to affect the interest of". Cited in support is the case of People v. Photocolor Corporation, 156 Misc. 47, 281, N.Y.S. 130. Referring to the same case, Black's Law Dictionary, 5th edition, 1979, page 262, gives substantially the same definition but adds: "have connection with; to have reference to ..." See too the Shorter Oxford English Dictionary, 3rd edition, Volume 1, page 389, and Webster's Third New International Dictionary, 1986, page 470. And compare the somewhat similar approach taken by Judge Schwebel to the interpretation of the words "relating to" in the Yakimetz case, I.C.J. Reports 1987, pages 113-114, where he said:

> "The terms of Article 11 of the Statute of the [United Nations Administrative] Tribunal, as well as its travaux préparatoires, make clear that an error of law 'relating to' provisions of the United Nations Charter need not squarely and directly engage a provision of the Charter. It is sufficient if such an error is 'in relationship to' the Charter, 'has reference to' the Charter, or 'is connected with' the Charter ..."

I consider that there are elements in that approach which are serviceable here.

A third supporting consideration derives from the principle of interpretation prescribed by section 27 of the Agreement which requires that the "agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently, to discharge its responsibilities and fulfil its purposes". An interpretation which effectively leaves the United Nations without any legal recourse in the circumstances presented can hardly be reconciled with that covenanted principle of interpretation (see the analogous situation in the Chorzow Factory case, P.C.I.J., Series A, No. 9, pp. 24-25). Arguments based

on cases in which parties deliberately decided to leave loopholes as expedient escape hatches in their treaty arrangements would seem misplaced in the particular context under consideration.

Certainly, then, the Court should always take care to satisfy itself of its authority to act. It is equally appropriate, however, for the Court to be mindful of the risk of wishing to be so very certain of its powers as to be astute to discover overly-refined reasons for not exercising those which it may fairly be thought to have. The Court has rightly avoided that risk in this case.

Having given my best consideration to what, in the absence of assistance from the host State, I have endeavoured to discern from the material to be or may be its position, as well as to the position of the United Nations, I can only conclude by agreeing with the decision reached.

(Signed) Mohamed SHAHABUDDEEN
