# EXPOSÉS ORAUX

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

*tenues au palais de la Paix, à La Haye, les 11, 12 et 26 avril 1988, sous la présidence de M. Ruda, Président*

# ORAL STATEMENTS

MINUTES OF THE PUBLIC SITTINGS

*held at the Peace Palace, The Hague, on 11, 12 and 26 April 1988, the President, Judge Ruda, presiding*

## PREMIÈRE AUDIENCE PUBLIQUE (11 IV 88, 10 h)

*Présents:* M. RUDA, *Président*; M. Kéba MBAYE, *Vice-Président*; MM. LACHS, NAGENDRA SINGH, ELIAS, ODA, AGO, SCHWEBEL, sir Robert JENNINGS, MM. BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, *juges*; M. VALENCIA-OSPINA, *Greffier*.

*Présents également:*

*Pour l'Organisation des Nations Unies:*

M. Carl-August Fleischhauer, secrétaire général adjoint, conseiller juridique;
M. Ralph Zacklin, juriste principal, bureau du conseiller juridique;
Mme Marcia Constable, assistante administrative, bureau du conseiller juridique.

## OUVERTURE DE LA PROCÉDURE ORALE

Le PRÉSIDENT : La Cour est aujourd'hui réunie pour entendre, en application de l'article 66, paragraphe 4, de son Statut, des observations orales afférentes à la demande d'avis consultatif dont l'Assemblée générale des Nations Unies a décidé de la saisir par une résolution 42/229 B en date du 2 mars 1988 (ci-dessus p. 7-8). Je prierai le Greffier de bien vouloir donner lecture de la question sur laquelle l'avis consultatif de la Cour est demandé aux termes de cette résolution.

The REGISTRAR :

> "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 [resolution 169 (II)], under an obligation to enter into arbitration in accordance with Section 21 of the Agreement?"

Le PRÉSIDENT : Ainsi que le prescrit l'article 66, paragraphe 1, du Statut, le Greffier a immédiatement notifié la requête pour avis consultatif (ci-dessus p. 3-8), transmise à la Cour par une lettre du Secrétaire général datée du 2 mars 1988, à tous les Etats admis à ester en justice devant la Cour.

Dans une ordonnance du 9 mars 1988[1], la Cour a considéré, à la lumière des indications fournies par l'Assemblée générale, qu'une prompte réponse à ladite requête était désirable, selon les termes de l'article 103 de son Règlement, et qu'elle devait en conséquence prendre toutes mesures utiles pour accélérer la procédure. Par la même ordonnance, la Cour a prié le Secrétaire général de fournir à une date aussi rapprochée que possible les documents « pouvant servir à élucider la question » qui sont visés à l'article 65, paragraphe 2, du Statut de la Cour ; ces documents sont parvenus à la Cour en plusieurs envois (ci-dessus p. 13-161). La Cour a en outre décidé, par cette ordonnance : que l'Organisation des Nations Unies et les Etats-Unis d'Amérique étaient jugés, conformément à l'article 66, paragraphe 2, de son Statut, susceptibles de fournir des renseignements sur la question qui lui avait été soumise pour avis consultatif, la date d'expiration du délai pendant lequel la Cour serait disposée à recevoir d'eux des exposés écrits sur la question étant fixée au 25 mars 1988 ; que les autres Etats parties au Statut de la Cour qui en auraient exprimé le désir pourraient soumettre un exposé écrit sur la question, le 25 mars 1988 au plus tard ; et que des audiences s'ouvriraient aujourd'hui 11 avril 1988, au cours desquelles des observations sur les exposés écrits pourraient être faites devant la Cour par l'Organisation des Nations Unies, les Etats-Unis d'Amérique et les Etats qui auraient déposé des exposés écrits.

Dans les délais fixés à cet effet, des exposés écrits ou des communications assimilées à des exposés écrits ont été présentés par le Secrétaire général de l'Organisation des Nations Unies et par le Gouvernement des Etats-Unis d'Amérique, ainsi que par les gouvernements de la République arabe syrienne et de la République démocratique allemande (ci-dessus p. 165-188). Seul le Secrétaire général de l'Organisation des Nations Unies a manifesté l'intention de formuler des observations orales en l'espèce, et je constate que son représentant est présent à l'audience. Je donne donc la parole à M. Fleischhauer, conseiller juridique de l'Organisation des Nations Unies.

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[1] *C.I.J. Recueil 1988*, p. 3.

## ORAL STATEMENT BY MR. FLEISCHHAUER

### LEGAL COUNSEL OF THE UNITED NATIONS

Mr. FLEISCHHAUER: Mr. President, I am most grateful to be given the opportunity to make a brief statement to the Court in addition to the Written Statement which has been submitteed on behalf of the Secretary-General on 25 March 1988.

I

1. The Court will have seen from the Written Statement that the United Nations urges it to declare that indeed, in the light of the pertinent facts, there is an obligation for the United States of America to enter into the arbitration procedure provided for by section 21 of the Headquarters Agreement of 1947. As we have endeavoured to demonstrate in the Written Statement, the Headquarters Agreement is a treaty in force and a dispute exists between the United Nations and the United States concerning the implementation or application of that treaty. The dispute arises out of the United States Anti-Terrorism Act of 1987, the intent of which is to obtain the closure of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations. We have also endeavoured to demonstrate that the United Nations has made a good-faith effort to reach a settlement of the dispute by means of negotiation or to agree on another method of settlement, which attempts however have failed.

2. In the discussions between the United Nations and the United States, prior to the adoption of resolution 42/229 B of 2 March 1988, the question whether a dispute had already arisen with the adoption and signing into law of the Anti-Terrorism Act of 1987 played a particular role. The point is dealt with in paragraph 39 of the Written Statement submitted by the United Nations, but I would like to make some additional remarks on it. I would also like to come back briefly to the question of the completion of the negotiating stage of the procedure foreseen for the settlement of disputes in section 21 of the Headquarters Agreement, a matter which is dealt with in paragraph 42 of our Written Statement. Finally, I would like to explain briefly to the Court the position of the Secretary-General with respect to the proceedings which have in the meantime been instituted before a domestic court in the United States.

II

Mr. President, with respect to the existence of a dispute, the additional remarks which I would like to make are the following:

1. The notion of a dispute was defined by the Permanent Court of International Justice, in its decision in the *Mavrommatis* case, as being a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. The International Court of Justice in its Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* held not only that the existence of an international dispute is a matter for objective determination, but also that a dispute is a situation "in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations". At no point has the International Court of Justice or its

predecessor linked the notion of a dispute to an injury suffered. Nor does it follow from the general practice of States or literature that the existence of a dispute presupposes, of necessity, that an injury, a violation of existing rights, must have occurred. But even if a difference of viewpoints would not yet constitute a dispute, in spite of the wording of the definitions which I have just mentioned, the concrete threat of a violation or an injury is certainly sufficient to establish the existence of a dispute. In the present case, not only did the two sides hold clearly opposite views concerning the interpretation of the Headquarters Agreement, but there existed, with the signing into law of the Anti-Terrorism Act, a concrete threat of a violation of existing rights.

2. In connection with the case at issue, Mr. President, the United Nations has not sought to determine the earliest possible moment of the existence of a dispute. Needless to say, the United Nations is extremely concerned that the dispute has arisen and that the United Nations would have preferred to avoid it. The United Nations wishes to maintain harmonious relations with its Host Country, but at the same time the United Nations is determined and has an obligation to maintain its position under the Headquarters Agreement. Thus, the United Nations deliberately deferred any determination that a dispute existed up to the last possible moment in time from which an effective defence of the United Nations legal position would still have been possible. That stage was certainly reached by mid-January 1988. By that time, the President of the United States had signed the Anti-Terrorism Act into law and the United States had officially informed the United Nations of this. The Secretary-General, with a view to avoiding a confrontation between the Organization and the Host Country, had warned time and again that the entry into force of the law would lead to a dispute and had asked for assurances that the obligations of the Host Country under the Headquarters Agreement would be respected. No such assurances had been forthcoming, however, and when the Acting Permanent Representative of the United States, Ambassador Okun, informed the Secretary-General in his letter of 5 January 1988 (doc. No. 33 of the dossier), that the President had signed the Anti-Terrorism Act into law on 22 December 1987, the Ambassador also indicated that the law would take effect 90 days after that date. He also stated that because the provisions concerning the PLO Observer Mission, if implemented, would be contrary to the international obligations of the United States under the Headquarters Agreement, the Administration intended, during the 90-day period before this provision was to take effect, to engage in consultations with the Congress in an effort to resolve this matter. However, the Acting Permanent Representative did not give any assurances to the Secretary-General as to the maintenance of the arrangements concerning the Observer Mission. So the situation remained that an automaticism had been set in motion which would lead to the applicability of the Act after 90 days, which is, Mr. President, a very short time even if the dispute settlement procedure provided for in section 21 of the Headquarters Agreement was to be implemented only to the point of the interim decision provided for in section 21 *(b)*.

3. The uncertainty of whether, when and in what precise way the United States would interrupt the functioning of the PLO Mission under the Anti-Terrorism Act does not alter the fact that the United Nations had to rely on the official communication of 5 January 1988 that the Act was to take effect 90 days after signature by the President; after the signing of the law, the mere lapse of 90 days would permit the United States Government under the domestic law of the United States to act in violation of the Headquarters Agreement. Nor does the fact that the United States Government, in order to enforce the law, had to have recourse to an American court, put off the existence of a dispute. This is so because after 90

days, the defence mechanism of section 21 would be rendered ineffective; court action by the United States would become immediately possible, the duration and outcome of which would be unpredictable. Besides, the action taken in the domestic court under the Act is not intended on the part of the United States to secure a re-interpretation of the law or a delay in its implementation, but it is for the specific purpose of closing the Mission.

4. Mr. President, all that might have been different and indeed the Secretary-General would have been spared the need to invoke a dispute, had the United States been in a position to give the assurances asked for by the Secretary-General in his letter of 7 December 1987 (doc. No. 31 of the dossier). The invoking of the dispute could at least have been postponed if the running of the 90 days had been suspended for such a span of time as was necessary for the United States Government to clarify its own position, for example by undertaking to give the United Nations no less than 60 days notice before any action was taken under the law, thus enabling the United Nations to initiate the dispute settlement procedure foreseen under section 21. But such assurances were not given, although they were repeatedly requested and discussed between the United Nations and the United States.

5. When the meeting of 12 January 1988 between the Legal Adviser of the State Department and myself again did not produce any assurances, then the Secretary-General decided that he had to declare that a dispute existed. The threat of the impossibility of reaching at least the interim measures phase of the section 21 procedure guided the Secretary-General in this choice of the point in time when he stated that a dispute existed. For the reasons indicated in paragraph 19 of the Written Statement, the United Nations had calculated that 60 days would be the minimum time to reach the interim measures stage and with that in mind, the Secretary-General asked to have the first meeting under section 21 on 20 January 1988.

6. Mr. President, this is why the United Nations has been and still is of the opinion that a dispute existed as far back as 14 January 1988, even before the situation had ripened into an accomplished, perfected violation of the Headquarters Agreement. The General Assembly, for its part, recognized in its resolution 42/229 B of 2 March, at the time the question was addressed to the Court on the basis of the reports submitted by the Secretary-General to the General Assembly, that a dispute existed.

## *III*

As to the good faith attempts of the United Nations to resolve the dispute by negotiation or other agreed mode of settlement, I would like to say the following:

1. As was pointed out in paragraph 42 of the Secretary-General's statement, in order to find that the United States is under an obligation to enter into arbitration under section 21 of the Headquarters Agreement, it is necessary to show that the United Nations has made a good faith attempt to resolve the dispute through prior negotiation or some other agreed mode of settlement.

2. The summary of facts contained in paragraphs 19-29 of the Secretary-General's written Statement provides a concise account of the attempts made by the United Nations to achieve such a negotiated settlement of the dispute or to reach agreement on another mode of settlement. I believe that the Secretary-General's Written Statement and the documents submitted to the Court (in particular the reports of the Secretary-General to the General Assembly — contained in documents 1, 2 and 105 of the dossier) speak largely for themselves in this regard, but it may, nevertheless, be useful that I expand on the Written

Statement and provide the Court with the United Nations perspective of the negotiations in which it engaged with the United States following the signing into law of the Anti-Terrorism Act, and indeed already before that signature.

3. Mr. President, from the United Nations point of view, these negotiations constituted a continuous dialogue between the two sides conducted on three levels: between the Secretary-General and the Permanent Representative or Acting Permanent Representative of the United States to the United Nations, between myself, as Legal Counsel of the United Nations, and my counterpart, the State Department Legal Adviser, Mr. Sofaer; and between myself and the legal Adviser of the United States Mission to the United Nations, Mr. Robert Rosenstock. The object of this dialogue, with a greater or lesser degree of technicality depending on the interlocutors, was the same: to achieve a negotiated resolution of the dispute arising from the proposed application and enforcement of the Anti-Terrorism Act to the Palestine Liberation Organization Observer Mission to the United Nations, or alternatively to resolve the dispute through the wording specified in section 21 of the Headquarters Agreement. For purposes of considering this issue, that is the attempt to reach a negotiated solution, as has been pointed out in the Secretary-General's Written Statement, it appears unnecessary to show that the negotiations were held formally within the framework of section 21, but rather that negotiations actually took place.

4. The Secretary-General's personal involvement in these negotiations actually pre-dated the adoption of the Anti-Terrorism Act (cf. para. 7 of the Written Statement). The intervention of the Secretary-General at that stage might be described as *preventive* inasmuch as it sought the exclusion of the PLO Observer Mission from the scope of the legislation or alternatively to obtain assurances that the legislation if passed would not be implemented in a manner detrimental to the existing arrangements for the PLO Observer Mission. The Secretary-General's involvement in the *negotiation* phase of the dispute might be said to have commenced on 14 January 1988 with his letter to the United States Acting Permanent Representative (cf. doc. No. 34 of the dossier). From that time forward the Secretary-General maintained an on-going dialogue, formal and informal, with the Permanent Representative and other high officials of the United States Government, both in New York and Washington.

5. At the level of the respective Legal Advisers of the United Nations and the United States, the contacts beween myself and Mr. Sofaer were initiated on 12 January 1988 and continued through two personal meetings, telephone conversations and correspondence until 11 February 1988, when I informed him of the United Nations choice of an arbitrator (cf. doc. No. 36 of the dossier). In my contacts, I sought clarification of the intentions of the United States Government given its continued expressions of a willingness to seek a resolution of the problem. I pressed for the application of the Act in conformity with the international obligations of the Host Country towards the United Nations or alternatively the suspension of the 90-day period in order to allow time for the dispute settlement procedure especially agreed upon as foreseen in section 21 *(b)*.

6. The third, and in some respects most active level of negotiations, was conducted in New York between the Legal Counsel of the United Nations and the Legal Adviser of the United States Mission to the United Nations. A detailed dialogue took place on all aspects of the dispute in the period between the signing into law of the Anti-Terrorism Act and the report of the Secretary-General to the General Assembly of 10 February 1988. These negotiations may be described as working level discussions since they often concerned detailed technical aspects of the dispute settlement procedure outlined in section 21 of the Headquarters Agreement, particularly the time-table for a possible arbitration and its rules of procedure.

7. There can be little doubt that the United Nations made every effort within its means to resolve the dispute through negotiation or other agreed mode of settlement. The negotiations took many forms and were held in many different fora and were considered by the United Nations as a matter of the highest priority. As I have already stated, they were, on the part of the Secretary-General, motivated by a strong desire to avoid a painful confrontation with the Host Country.

IV

1. Finally, Mr. President, in order to given the Court a full picture of the situation with which we are confronted, I should mention briefly that, as appears in Part IV of the dossier submitted to the Court, pursuant to section 1004 of the Anti-Terrorism Act, the Attorney General of the United States has instituted proceedings in the Federal District Court for the Southern District of New York to obtain an injunction to close the PLO Observer Mission. The PLO, its Observer Mission and its members have been summoned to present their views by today, 11 April. The defendants, of course, intend to contest the injunction sought by the Attorney General.

2. By a letter dated 31 March, I informed the United States District Judge dealing with this matter of the wish of the United Nations to submit an *amicus curiae* brief at, or shortly after the time that the Palestine Liberation Organization files its own response. I have informed the District Judge that the United Nations is most concerned with the international legal issues raised in this case and that it is anxious to present its views as *amicus curiae* to assist the court in resolving these issues. I have also stated that among those international legal issues, the United Nations has a particular concern relating to the obligation of the United States to enter into arbitration to settle a dispute that exists between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement, using the agreed settlement of disputes provisions of that agreement, as contained in section 21. In this respect, I have informed the District Court Judge of the request made by the General Assembly to this Court for an advisory opinion on the issue of whether the United States of America is under an obligation to enter into arbitration in accordance with section 21 of the Headquarters Agreement and I have stated that the United Nations believes it would be useful to be able to present to the District Court the advisory opinion of this Court at such time as the opinion becomes available.

3. The District Judge has not yet pronounced himself on the admission of the United Nations as an *amicus curiae*, but the Secretary-General has every reason to believe that his decision will be a positive one. The United Nations has been careful to limit itself to being an *amicus curiae* because in that role the Organization can offer expert advice to the court without becoming a party to the proceedings and without waiving its immunity. The Organization indeed sees its place before a domestic court of a member State in a matter concerning the Headquarters Agreement, if at all, as an *amicus curiae* and not in the role of the party to a proceeding, who would then be bound by the outcome of the domestic litigation. For reasons of principle and practice, the United Nations does not consider it appropriate to submit itself to the judgments of domestic courts in matters concerning the interpretation or application of its Headquarters Agreement.

4. Mr. President, following the filing by the Attorney General of the summons against the PLO on 22 March, another lawsuit has been instituted before the same domestic court in the United States — the Federal District Court for the Southern

District of New York — dealing with essentially the same issues. This lawsuit, denominated *Mendelsohn* v. *Meese*, was instituted by 65 private American citizens and organizations and is directed against the application of the Anti-Terrorism Act as such and not only against its application to the PLO Observer Mission to the United Nations. In my letter to the United States District Judge of 31 March, I made it clear that the request of the United Nations to be admitted as an *amicus curiae* relates solely to the complaint filed by the United States against the Palestine Liberation Organization. Our request does not concern *Mendelsohn* v. *Meese*, and I have stated that the United Nations takes no position and wishes to express no views with respect to the First Amendment or other United States constitutional arguments which predominate in the latter case.

Again, Mr. President, I am grateful to have had this opportunity through this statement to give the Court additional information.

Le PRÉSIDENT: Je constate que la Cour a entendu les observations qui avaient été annoncées. Au nom de la Cour je voudrais remercier le Secrétaire général de l'Organisation des Nations Unies de l'aide qu'il a apportée à la Cour en participant à la phase orale en cette espèce. Je remercie également son représentant, M. Fleischhauer, à la présente audience.

## QUESTIONS BY JUDGES SCHWEBEL, GUILLAUME, SHAHABUDDEEN AND ODA

### QUESTIONS BY JUDGE SCHWEBEL[1]

Judge SCHWEBEL: 1. You have emphasized the importance of appropriate assurances from the United States. Particularly in view of the letter of the Ambassador of the United States to the Netherlands to the Registrar of 25 March 1988 which 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."

has the United States provided assurances that the functioning of the PLO Observer Mission will not be curtailed pending a decision in that litigation? Why do not these assurances suffice for the time being?

2. I appreciate the position of the United Nations as to the inappropriateness of its submitting a difference over the Headquarters Agreement to a domestic court. Nevertheless, has the United Nations tacitly "agreed" to United States Court settlement of the application of the Anti-Terrorism Act to the PLO Observer Mission as an alternative means of settlement — not necessarily as a final means but an alternative means? In that regard, it may be observed that you have informed us that the United Nations contemplates submitting a brief *amicus curiae* to the District Court.

3. How do you interpret the statement — particularly the last sentence — in the letter of the Acting Permanent Representative of the United States to the United Nations to the Secretary-General of 11 March 1988 that the Attorney General of the United States had determined that he was required to close the PLO Observer Mission

> "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 ... 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."?

4. In a related vein, may I ask how you interpret the statement in Ambassador Shad's letter of 25 March 1988 to the Registrar 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."?

[1] See pp. 202–204, *infra*.

5. Let us assume, for the purposes of argument, that the United States District Court were to hold that the Anti-Terrorism Act cannot lawfully be enforced against the PLO Observer Mission, on the ground that enforcement would conflict with the international obligations of the United States, or would be unconstitutional, or otherwise unlawful. Would a dispute then exist between the United Nations and the United States? If not, is not the United Nations request for arbitration premature?

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### Question de M. Guillaume[1]

M. GUILLAUME: L'*Attorney General* des Etats-Unis a décidé d'assurer en droit américain l'application de la loi du 22 décembre 1987 en saisissant le juge américain d'une demande d'injonction. Cela étant dit, il résulte de certaines pièces du dossier que vous nous avez communiquées, notamment de la conférence de presse du département de la justice du 11 mars 1988 (ci-dessus p. 155), que l'*Attorney General* aurait peut-être eu d'autres moyens à sa disposition pour assurer l'application de la loi. La question est la suivante: quels seraient, s'il y en a, ces autres moyens et ceux-ci sont-ils encore ouverts à l'*Attorney General*?

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### Question by Judge Shahabuddeen[2]

Judge SHAHABUDDEEN: Mr. Fleischhauer, my question will relate to your discourse on the concept of the dispute as followed through by some of the questions put by Judge Schwebel. I understand from the documentation and from the way you cast your case this morning that you apprehend that the opposing legal position, if it were advanced here this morning by Counsel for the United States, would be that the law has not been enforced specifically, consequently there could be no breach of the Headquarters Agreement and consequently there could be no dispute that I would feel is the case that you apprehend you have to meet on this question to what is a legal dispute. Do you tackle it by saying that you have encountered no case in which the concept of a dispute has been linked to the concept of an injury. I find that, without committing myself, to be an attractive proposition for which I believe positive support can be found in the dissenting judgment of the learned and distinguished Chief Justice of Australia, sitting in this Court as a Judge *ad hoc* in the *Nuclear Tests* case which carefully distinguished between a dispute and the merits of a claim generating the dispute.

We regard this intention as sound. It perhaps has implications for judicial propriety in economy as to how far this Court can entertain the substance of the case. Suppose you are wrong. I don't say wrong. Suppose you are wrong. Would you then be thinking of shifting on the other leg and approaching the matter this way. You referred to a threat. You said that with the signing of an act there came into being a concrete threat of a violation and somewhere in your learned brief, I think it is at page 174, *supra*, you also refer to that concept. Let me read a few lines, at page 177, paragraph 39. You see:

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[1] Voir ci-après p. 204-205.
[2] See p. 205, *infra*.

"The automaticity of the process of bringing the ATA into force which was initiated with the signing of the ATA into law, objectively constitutes an immediate threat to bring about the closure of the facility from which PLO representation to the United Nations is accomplished, and this immediate threat is itself (particularly when considered in the context of the time factor described in para. 18 above) sufficient to create a dispute in the absence of an assurance", etc.

May I invite you to consider whether the Court should be concerning itself with two questions of interpretation. The first question would be whether under the Headquarters Agreement the United Nations is entitled not only to ensure that its invitees maintain an office but also that they should be able to do so free from unnecessary harassment or interference at all times during their tenure. And if you give an affirmative answer to that question, the second and consequential question of intepretation which I will put to you for your response is whether the enactment of the ATA as from the time of assent constituted a threat which interfered with the right of the PLO Observer Mission to function without unnecessary interference and was consequently productive of present injury constituting a present violation of the Treaty as from the time of the signing of the Act. Should I understand you, from your reporting this morning and from your brief, that your case as presented so far did not quite reach this point.

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## Question by Judge Oda[1]

Judge ODA: My question is more or less related to the question put by Judge Shahabuddeen, but I would put the following question to Mr. Fleischhauer.

Section 21 of the 1946 Headquarters Agreement reads:

> "Any dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement which is not settled by negotiation or other agreed mode of settlement shall be referred for final decision to a tribunal or three arbitrators."

Mr. Fleischhauer are you aware that at the time of the request for an advisory opinion there was such a dispute between the United Nations and the United States. My question is rather simple, whether the dispute between the United Nations and the United States is the one concerning the interpretation of the agreement or the application of the agreement or concerning both the interpretation or application of the Headquarters Agreement. In other words I would like to be informed of the views of the Legal Counsel of the United Nations concerning the interpretation or the wording of "the interpretation or application" of the Headquarters Agreement under section 21 of the 1946 Headquarters Agreement.

The PRESIDENT: There are no other questions Mr. Fleischhauer. You have received many questions from the bench and we do not expect you to reply immediately. We are going to receive them in writing and you will have sufficient time to reflect on them and then to reply as soon as possible because we want to be in the deliberation of the Court as soon as possible. So, I think, Mr. Fleischhauer, you will have some work to do this afternoon. Therefore I think there is no other business before the Court and I declare the meeting closed.

*The Court rose at 11.10 a.m.*

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[1] See p. 205, *infra*.

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## SECOND PUBLIC SITTING (12 IV 89, 10 a.m.)

*Present:* [See sitting of 11 IV 88.]

## ORAL STATEMENT BY MR. FLEISCHHAUER

LEGAL COUNSEL OF THE UNITED NATIONS

Mr. FLEISCHHAUER: Mr. President, I am grateful for having been given this opportunity to respond orally to the questions put to me in yesterday's sitting of the Court. I would like to take the questions in the order in which they were presented to me.

I

Judge Schwebel put to me in all five questions. His first question is reproduced in paragraph 1 on page 199, *supra*, which is, as I have been told, before the Members of the Court.

1. My reply to this question is as follows:

The statement made by the United States Ambassador to the Netherlands contained in the third paragraph of his letter to the Registrar of the Court of 25 March 1988 indicating that the United States will take no action to close the PLO Observer Mission to the United Nations pending a decision in the litigation between the United States and the Palestine Liberation Organization in the American domestic court, does not constitute the assurance sought by the Secretary-General. As I said in my statement yesterday morning, and as you will see from the exchange between the United Nations and the United States, and in particular from the letter of the Secretary-General to the Permanent Representative of the United States of 7 December 1987 (i.e., doc. 31 of the Dossier), the assurance sought by the Secretary-General was to the effect that "the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected" by the legislation in question.

Now, the communication of the United States Ambassador to the Registrar of the International Court of Justice dated 25 March 1988, to which Judge Schwebel refers, contains, at the end of its second paragraph, the statement that: "By letter dated 11 March 1988, the Attorney General accordingly directed the PLO Observer Mission to close by 21 March 1988, the effective date of the Act." This communication constitutes, in the view of the United Nations, a violation by the Host Country of its obligations under the Headquarters Agreement. The United Nations has constantly taken the position that the present arrangements regarding the PLO Observer Mission in New York correspond to the Host Country's obligations under the Headquarters Agreement. As I pointed out in my oral statement yesterday, the action taken in the domestic court is for the specific purpose of closing the Mission, thus giving effect to the letter of the Attorney General of 11 March to the PLO Observer Mission. Under these circumstances, the fact that the United States Government, for the time being, does not intend to take any other action to close the Mission, pending a decision in that litigation, does not heal the breach of the obligations of the Host Country and, therefore,

does not constitute the assurance sought by the United Nations with respect to the dispute. Nor is the existence of the dispute itself in any way affected by the statement in the Ambassador's letter.

2. Mr. President, the second question put to me by Judge Schwebel is reproduced in paragraph 2 of page 199, *supra*.

My reply is as follows:

There is no tacit agreement on the part of the United Nations that the court proceedings actually underway before the Federal District Court for the Southern District of New York constitute an alternative means of settlement in the sense of section 21 *(a)* of the Headquarters Agreement. As I informed the Court yesterday the United Nations has deliberately chosen to become in these proceedings an *amicus curiae* of the court, and not an intervening party. The dispute here in question is a dispute between the United States and the United Nations and therefore of necessity, the United Nations would have to be a party to any other alternative dispute settlement procedure.

Moreover, it follows from the letter which I addressed to the District Judge on 31 March and which I mentioned yesterday, that the United Nations does not agree in any way with the proceedings in the American court. As I informed the Court yesterday, I have stated in that letter that among the international legal issues involved, the United Nations has a particular concern relating to the obligation of the United States to enter into arbitration to settle a dispute that exists between the United Nations and the United States concerning the interpretation and application of the Headquarters Agreement using the agreed mode of dispute settlement provisions of that Agreement contained in its section 21.

Furthermore, in our internal deliberations on the question of whether there might be a possibility of becoming more than an *amicus curiae* and to intervene in the proceedings, the question that such an intervention might then be construed as a tacit agreement to alternative means of dispute settlement was on our minds. And one of the reasons which clearly spoke against our going beyond the role of an *amicus curiae* was precisely that we wanted to avoid a misperception of our intentions in this respect.

Finally, the notion that by entering an appearance as *amicus* in the Federal District Court, the United Nations has tacitly agreed to that forum as an alternative means of settlement, would not be consistent with the position of the United States regarding the applicability of section 21.

3. Mr. President, the third question presented to me by Judge Schwebel is reproduced in paragraph 3 on page 199, *supra*.

I think that the parts of the letter of the Permanent Representative of 11 March cited by Judge Schwebel shows a misconception on the part of the sender of the letter of the relationship between international law and domestic law. This letter seems to overlook the fact that while in any democratic country the legislative branch of government has the power to prevent the executive branch and all other branches of government internally from complying with an international obligation, that does not do away with the existence of the international obligation under international law. Even if compliance with an international obligation is prevented internally, the obligation remains; an international responsibility ensues, and such international dispute settlement procedure as may be foreseen remains in place. Therefore, I could not accept the statement contained in the letter to the effect that the Attorney General was required to close the Office of the PLO Observer Mission, irrespective of any obligations the United States may have under the Headquarters Agreement as being justified.

With respect to the statement to the effect that the United States will not take other actions to close the Observer Mission pending a decision in such domestic litigation, I should like to refer to my answer to the first question of Judge Schwebel which was to the effect that this sentence does not provide the assurance sought with respect to the dispute by the Secretary-General. Under the circumstances, I cannot see why the submission of this matter to arbitration would not serve a useful purpose. Since the dispute settlement clause and the ensuing obligation to arbitrate have not been removed by the enactment of the Anti-Terrorism Act, arbitration remains the only way in which the dispute must be resolved. In this respect, Mr. President, I would like to refer to the letter dated 15 March 1988 from the Secretary-General addressed to the Acting Permanent Representative of the United States to the United Nations. That letter is contained in Annex 1 to document 106 of the Dossier.

4. Mr. President, the fourth question put to me by Judge Schwebel is reproduced in paragraph 4, on page 199, *supra*.

My answer is as follows:

The statement in Ambassador Shad's letter of 25 March to the Registrar mentioned by Judge Schwebel's question, appears to indicate that once the matter is no longer pending in the United States courts, arbitration might become appropriate and timely. However, it follows from the presentation of the United Nations that we regard arbitration as having been both timely and appropriate ever since the attempts to find a negotiated solution or other agreed means of dispute settlement remained unsuccessful.

5. The fifth question put to me by Judge Schwebel is reproduced in paragraph 5, on page 200, *supra*.

The United Nations request for arbitration is not premature. If the domestic courts of the United States, as I sincerely hope, were to hold that the Anti-Terrorism Act cannot lawfully be enforced against the PLO Observer Mission on the ground that enforcement would conflict with the international obligations of the United States, or would be unconstitutional or otherwise unlawful, that would not automatically put an end to the dispute. The law itself, the enactment of which is the basis of the dispute, would remain. And it would remain to be seen whether the pronouncement of the domestic court makes the law become totally moot. But even if that were the case, that would not mean that the dispute has never existed, that the dispute would merely be terminated. Since the dispute existed the dispute settlement procedure was applicable and the dispute settlement procedure foreseen for the present case foresees arbitration.

I would like to add this: if one were to hold that as long as a return to legality is possible, arbitration is premature, then, I am afraid, that arbitration could very rarely take place.

II

Mr. President, I would like to come now to the question asked of me by Judge Guillaume and which is to be found on page 200, *supra*.

While I am not very familiar with the domestic law of the United States, I know that my colleagues dealing with the domestic law aspects of this matter were apprehensive that the Attorney General might choose a speedier procedure. And, in this connection, I note that the Palestine Information Office in Washington was closed, albeit under a different Act, namely, the Foreign Missions Act, after a court procedure which was certainly shorter and speedier than the

proceedings underway in New York. So I must suppose that there are other means open to the Attorney General, but I cannot comment on this matter with certainty.

III

I would next turn to the questions put to me by Judge Shahabuddeen and which are to be found on pages 200 and 201, *supra*.

My reply is as follows:

Yes, indeed, Mr. President, I think that Judge Shahabuddeen's point is well taken. The United Nations has endeavoured to show in our written statement and in our additional remarks of yesterday, that a dispute existed in the present matter even before the divergence of views on a point of law or fact had led to actual injury, to an actual violation of a legal right. While we have argued this point, we had not gone further and looked into the question raised by Judge Shahabuddeen, namely, what would be the position if one assumed that "present injury" was regarded as constituting a precondition for the determination of a dispute. My colleagues and I have given thought since yesterday to this matter and we have indeed come to the conclusion that if one regards "present injury" as a necessary precondition for the determination of the dispute, then one would, first of all, to a certain degree, be obliged to go into the substance of the matter in order to determine whether in part there exists a dispute.

I would agree with Judge Shahabuddeen that then the point could validly be made that the obligations of the Host Country to ensure adequate working facilities for the invitees of the Organization comprise not only that the Permanent Observers must be allowed to have an office, but also that they should be free from unnecessary harassment or interference at all times during their tenure. And, I also believe that it can be validly claimed that the enactment of a law that is designed to lead to the closure of the Mission through a court proceeding that can be initiated after 90 days in the domestic courts of the Host Country would be at variance with the said obligation.

IV

Finally, Mr. President, I come to the question asked by Judge Oda and which is to be found on page 201, *supra*.

My answer is that the present dispute concerns both the interpretation and the application of the Headquarters Agreement. Interpretation is, according to the rule laid down in Article 31 of the Vienna Convention on the Law of Treaties of 1969, the meaning a State gives to the terms of a treaty in good faith and in accordance with their ordinary meaning, in their context and in the light of their object and purpose. As far as the present dispute is concerned, it is one of interpretation, inasmuch as the Host Country puts into question that the Headquarters Agreement places upon it the obligation to maintain the arrangements in regard to the PLO Observer Mission as they have existed for the past 14 years.

The application of the Headquarters Agreement is concerned inasmuch as the Host Country has arrogated for itself, with the enactment of the Anti-Terrorism Act, the possibility to unilaterally infringe upon the obligations it has towards the United Nations regarding the PLO Mission after the lapse of 90 days claiming supercession of that international treaty by a simple enactment of domestic law.

V

Mr. President, these are the answers which I would like to give on behalf of the United Nations to the questions put to me at yesterday's hearing.

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## CLOSING OF THE ORAL PROCEEDINGS

The PRESIDENT: On behalf of the Court I thank Mr. Fleischhauer for the replies given to the questions put yesterday by Members of the Court.

With these replies the Court closes the oral proceedings foreseen in the Order of 9 March 1988. The Court will now begin its deliberation on this advisory opinion and according to the terms of the resolution adopted by the General Assembly, the Court will work expeditiously to finish as soon as possible and to give the reply that has been asked by the General Assembly.

*The Court rose at 10.35 a.m.*

## TROISIÈME SÉANCE PUBLIQUE (26 IV 88, 10 h)

*Présents:* M. RUDA, *Président*; M. MBAYE, *Vice-Président*; MM. NAGENDRA SINGH, ELIAS, ODA, AGO, SCHWEBEL, sir Robert JENNINGS, MM. BEDJAOUI, NI, EVENSEN, TARASSOV, *juges*; M. VALENCIA-OSPINA, *Greffier.*

### LECTURE DE L'AVIS CONSULTATIF

Le PRÉSIDENT: La Cour se réunit aujourd'hui pour rendre en audience publique, conformément à l'article 67 de son Statut, l'avis consultatif concernant l'*Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies*, que l'Assemblée générale des Nations Unies l'a priée de donner aux termes de sa résolution 42/229 B en date du 2 mars 1988. La question posée à la Cour par l'Assemblée était la suivante:

[Le Président lit la question[1].]

Je rappelle qu'en l'espèce la Cour, à la lumière des indications fournies par l'Assemblée générale dans cette résolution, a décidé, ainsi qu'il est prévu à l'article 103 de son Règlement, d'accélérer la procédure.

MM. Lachs, Guillaume et Shahabuddeen, qui ont tous trois pris part au délibéré et au scrutin final, ont malheureusement été empêchés de siéger aujourd'hui.

Les premiers paragraphes de l'avis retracent le déroulement de la procédure en l'affaire. Selon l'usage, je ne donnerai pas lecture de ces paragraphes. Je ne lirai pas non plus les paragraphes qui contiennent l'exposé des faits. Toutefois, avant de procéder à la lecture des paragraphes suivants, et aux fins d'en permettre une meilleure compréhension, je rappellerai quelques-uns de ces faits. L'avis en comporte un résumé beaucoup plus complet.

Les faits concernent la mission permanente d'observation de l'Organisation de libération de la Palestine auprès de l'Organisation des Nations Unies à New York. Par la résolution 3237 (XXIX) du 22 novembre 1974 de l'Assemblée générale, l'OLP a été invitée à participer aux sessions et aux travaux de l'Assemblée générale en qualité d'observateur; en conséquence, elle a installé une mission d'observation en 1974 et possède un bureau à New York, hors du district administratif du Siège de l'Organisation des Nations Unies.

En mai 1987, une proposition de loi a été présentée au Sénat des Etats-Unis d'Amérique, ayant pour objet de «rendre illégaux la création ou le maintien aux Etats-Unis d'un bureau de l'Organisation de libération de la Palestine». Cette proposition de loi fut présentée à l'automne 1987 au Sénat comme amendement au *Foreign Relations Authorization Act, Fiscal Years 1988 and 1989* (loi d'ouverture de crédits pour les affaires étrangères, exercices budgétaires 1988 et 1989). Les termes de ce texte laissaient craindre que le Gouvernement américain chercherait à fermer le bureau de la mission d'observation de l'OLP si la loi était promulguée. En conséquence, le 13 octobre 1987, le Secrétaire général a souligné dans une lettre

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[1] Voir ci-dessus p. 9.

adressée au représentant permanent des Etats-Unis auprès de l'Organisation des Nations Unies que la législation envisagée était contraire aux obligations qui découlent de l'accord de siège.

Les dispositions de l'amendement précité ont été incorporées dans la loi d'ouverture de crédits pour les affaires étrangères, exercices budgétaires 1988 et 1989, en tant que titre X, sous le nom de *Anti-Terrorism Act of 1987* (loi de 1987 contre le terrorisme). Le 7 décembre 1987, en prévision de l'adoption de ce texte par le Congrès des Etats-Unis, le Secrétaire général a rappelé au représentant permanent des Etats-Unis sa position, et a demandé, pour le cas où le texte proposé acquerrait force de loi, qu'on lui donne l'assurance que les arrangements en vigueur concernant la mission d'observation de l'OLP ne seraient pas affectés.

La Chambre des représentants et le Sénat des Etats-Unis ont adopté la loi contre le terrorisme les 15 et 16 décembre 1987, et le jour suivant l'Assemblée générale a adopté la résolution 42/210 B par laquelle elle priait le pays hôte de respecter les obligations que lui imposait l'accord et, à cet égard, de s'abstenir de prendre toute mesure qui empêcherait la mission de s'acquitter de ses fonctions officielles.

Le 22 décembre le président des Etats-Unis a signé et promulgué la loi d'ouverture de crédits pour les affaires étrangères, exercices budgétaires 1988 et 1989. La loi de 1987 contre le terrorisme qui en faisait partie devait, selon ses propres termes, entrer en vigueur quatre-vingt-dix jours après cette date. En informant le Secrétaire général de ce fait, le représentant permanent par intérim des Etats-Unis a déclaré le 5 janvier 1988 que le Gouvernement des Etats-Unis avait «l'intention de mettre à profit [ce] délai pour des consultations avec le Congrès afin de régler la question». Cependant, le Secrétaire général a répondu le 14 janvier 1988 en faisant observer qu'il n'avait pas reçu l'assurance qu'il avait demandée et qu'il ne considérait pas que les déclarations des Etats-Unis permettaient de compter sur le plein respect de l'accord de siège. Il a poursuivi en indiquant qu'il existait «un différend entre l'Organisation et les Etats-Unis au sujet de l'interprétation et de l'application de l'accord de siège» et qu'il invoquait la procédure de règlement des différends énoncée à la section 21 de cet accord. Le Secrétaire général a ensuite proposé que des négociations commencent conformément à la procédure établie à la section 21 de l'accord.

Tout en acceptant que des discussions officieuses aient lieu, les Etats-Unis ont fait savoir qu'ils étaient encore en train d'évaluer la situation qui résulterait de l'application de la loi et qu'ils ne pouvaient pas prendre part à la procédure de règlement des différends prévue à la section 21. Le 11 février 1988, le conseiller juridique de l'Organisation des Nations Unies a fait savoir au conseiller juridique du département d'Etat que l'Organisation des Nations Unies avait choisi son arbitre en vue d'un arbitrage aux termes de la section 21.

Le 2 mars 1988, l'Assemblée générale a adopté deux résolutions sur la question. Dans la première, la résolution 42/229 A, l'Assemblée a exprimé son opinion que l'application de la loi contre le terrorisme d'une façon qui empêcherait de maintenir les locaux et les installations de la mission d'observation de l'OLP serait contraire aux obligations juridiques internationales contractées par les Etats-Unis au titre de l'accord de siège et que la procédure de règlement des différends visée à la section 21 de l'accord devait être engagée. L'autre résolution, la résolution 42/229 B, que j'ai déjà mentionnée, priait la Cour de donner un avis consultatif.

Le 11 mars 1988, le représentant permanent par intérim des Etats-Unis a informé le Secrétaire général que l'*Attorney General* avait établi que la loi contre le terrorisme le mettait dans l'obligation de fermer le bureau de la mission d'observation de l'OLP «quelles que soient les obligations qui incombent aux Etats-Unis en vertu de l'accord entre l'Organisation des Nations Unies et les

Etats-Unis relatif au siège de l'Organisation des Nations Unies», mais que s'il était nécessaire d'intenter une action en justice pour faire appliquer la loi il ne serait pas pris d'autres mesures pour en obtenir la fermeture tant que cette action n'aurait pas abouti. Dans ces conditions, les Etats-Unis estimaient que soumettre l'affaire à l'arbitrage ne serait d'aucune utilité. Le Secrétaire général a énergiquement contesté ce point de vue dans une lettre du 15 mars. Entre-temps, dans une lettre datée du 11 mars, l'*Attorney General* avait averti l'observateur permanent de l'OLP qu'à compter du 21 mars le maintien de sa mission serait illégal. La mission de l'OLP ne s'étant pas conformée aux prescriptions de la loi contre le terrorisme, l'*Attorney General* indiquait que, pour la contraindre à s'exécuter, il avait saisi le tribunal fédéral du district sud de New York. Dans leur exposé écrit du 25 mars, les Etats-Unis ont informé la Cour que dans l'attente d'une décision judiciaire ils ne prendraient aucune mesure pour faire fermer la mission et que la question ayant été portée devant leurs tribunaux ils pensaient qu'un arbitrage ne serait pas opportun et que ce ne serait pas le moment pour y recourir.

J'entame maintenant la lecture du texte de l'avis, en commençant par le paragraphe 33, dans lequel la Cour définit sa tâche en l'espèce.

[Le Président lit les paragraphes 33 à 58 de l'avis consultatif[1].]

Je prie maintenant le Greffier de bien vouloir lire le dispositif de l'avis en anglais.

[The Registrar reads paragraph 58 of the Opinion[2].]

M. Elias joint une déclaration à l'avis consultatif; MM. Oda, Schwebel et Shahabuddeen y joignent les exposés de leur opinion individuelle.

*L'audience est levée.*

Le Président,
*(Signé)* José Maria RUDA.

Le Greffier,
*(Signé)* Eduardo VALENCIA-OSPINA.

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[1] *C.I.J. Recueil 1988*, p. 26-35.
[2] *I.C.J. Reports 1988*, p. 35.