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Chapter VII. Decisions and advisory opinions of international tribunals

Chapter VII

DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

International Court of Justice

ADVISORY OPINION[1]

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947[2]

On 2 March 1988, the General Assembly of the United Nations adopted resolution 42/229 whereby it requested the International Court of Justice to give an advisory opinion on the following question:

> "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?"

The letter of the Secretary-General, transmitting to the Court the request for an advisory opinion and certified copies of the English and French texts of the said resolution, was received in the Registry by facsimile on 4 March 1988 and by post on 7 March 1988.

By an Order of 9 March 1988 (*I.C.J. Reports 1988*, p. 3) the Court, having regard to the fact that the decision to request an advisory opinion was made "taking into account the time constraint" (cf. resolution 42/229 B), in accordance with Article 66, paragraph 2, of its Statute, applying Article 103 of its Rules, accelerated its procedure and fixed 25 March 1988 as the time limit for the submission of written statements by the United Nations and the United States, as well as by any other State party to the Statute of the Court which desired to do the same (ibid.). By the same Order the Court decided to hold a hearing, opening on 11 April 1988, at which oral comments on written statements might be submitted by the United Nations, the United States and such other States as might have presented written statements. Judge Schwebel appended a separate opinion to the Order (ibid., pp. 6-7).

In accordance with Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations transmitted to the Court a dossier of documents likely to throw light upon the question.

Written statements were filed, within the time limit fixed, by the United Nations, the United States of America, the German Democratic Republic and the Syrian Arab Republic.

On 11 April 1988, a public sitting was held, at which the United Nations Legal Counsel, Mr. Carl-August Fleischhauer, made an oral statement to the

Court on behalf of the Secretary-General. Certain Members of the Court put questions to Mr. Fleischhauer, which were answered at a further public sitting held on 12 April 1988.

At a public sitting held on 26 April 1988, the Court delivered its advisory opinion (*I.C.J. Reports 1988*, p. 12), of which a summary outline and the complete text of the operative paragraph are given below:

Submission of the request and subsequent procedure (paras. 1-6)

The question upon which the Court's advisory opinion had been sought was contained in United Nations General Assembly resolution 42/229 B, adopted on 2 March 1988. This resolution read in full as follows:

"*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?' "

In an Order dated 9 March 1988, the Court found that an early answer to the request would be desirable (Rules of Court, Art. 103), and that the United Nations and the United States of America could be considered likely to furnish information on the question (Statute, Art. 66, para. 2), and, accelerating its procedure, fixed 25 March 1988 as the time limit for the submission of a written statement from them, or from any other State party to the Statute which desired to submit one. Written statements were received from the United Nations, the United States of America, the German Democratic Republic and the Syrian Arab Republic. At public sittings on 11 and 12 April 1988, held for the purpose of hearing the comments of any of those participants on the statements of the others, the Court heard the comments of the Legal Counsel of the United Nations and his replies to questions put by certain Members of the Court. None of the States having presented written statements expressed a desire to be heard. The Court also had before it the documents provided by the Secretary-General in accordance with Article 65, paragraph 2, of the Statute.

Events material to the qualification of the situation (paras. 7-22)

In order to answer the question put to it, the Court had first to consider whether there existed between the United Nations and the United States a dispute as contemplated by section 21 of the Headquarters Agreement, the relevant part of which was worded as follows:

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

For that purpose the Court set out the sequence of events which led first the Secretary-General and then the General Assembly to conclude that such a dispute existed.

The events in question centred round the Permanent Observer Mission of the Palestine Liberation Organization (PLO) to the United Nations in New York. The PLO had on 22 November 1974 been invited, by General Assembly resolution 3237 (XXIX), to "participate in the sessions and the work of the General Assembly in the capacity of observer". It had consequently established an Observer Mission in 1974 and maintained an office in New York City outside the United Nations Headquarters District.

In May 1987, a bill had been introduced into the Senate of the United States, the purpose of which was "to make unlawful the establishment and maintenance within the United States of an office of the Palestine Liberation Organization"; section 3 of that bill provided, *inter alia*, that it would be unlawful after

its effective date:

> "notwithstanding 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 …"

The text of that bill became an amendment, presented in the Senate in the autumn of 1987, to the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989. From the terms of that amendment it appeared that the United States Government would, if the bill became law, seek to close the office of the PLO Observer Mission. On 13 October 1987, the Secretary-General accordingly emphasized, in a letter to the United States Permanent Representative to the United Nations, that the legislation contemplated ran counter to obligations arising from the Headquarters Agreement, and the following day the PLO Observer brought the matter to the attention of the United Nations Committee on Relations with the Host Country. On 22 October a spokesman for the Secretary-General issued a statement to the effect that sections 11 to 13 of the Headquarters Agreement placed a treaty obligation on the United States to permit the personnel of the Mission to enter and remain in the United States in order to carry out their official functions.

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. During consideration of that report 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".

The position taken by the 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 also cited by another representative and confirmed by the representative of the United States.

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 amendment had not yet been adopted by Congress. On 7 December, in anticipation of such adoption, the Secretary-General reminded the Permanent Representative of the United States of his view that the United States was under a legal obligation to maintain the longstanding arrangements for the PLO Observer Mission and sought assurances that, in the event the proposed legislation became law, those arrangements would not be affected.

The House and Senate of the United States Congress adopted the Anti-Terrorism Act on 15 and 16 December 1987, and the following day the General

Assembly adopted resolution 42/210 B whereby it called upon the host country to abide by its treaty obligations and to provide assurance that no action would be taken that would infringe on the arrangements for the official functions of the Mission.

On 22 December, the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, was signed into law by the President of the United States. The Anti-Terrorism Act forming part thereof was, according to its own terms, to take effect 90 days later. In informing the Secretary-General of this development, the Acting Permanent Representative of the United States, on 5 January 1988, stated 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."

The Secretary-General responded, however, by observing that he had not received the assurance he had sought and did not consider that the statements of the United States enabled full respect for the Headquarters Agreement to be assumed. He went on:

> "Under the 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."

The Secretary-General then proposed that negotiations should begin in conformity with the procedure laid down in section 21.

While agreeing to informal discussions, the United States took the position that it was still evaluating the situation which would arise from the application of the legislation and could not enter into the dispute settlement procedure of section 21. However, according to a letter written to the United States Permanent Representative by the Secretary-General on 2 February 1988:

> "The section 21 procedure is the only legal remedy available to the United Nations in this matter and … 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."

On 11 February 1988, the Legal Counsel of the United Nations informed the Legal Adviser of the Department of State of the United Nations' choice of its arbitrator, in the event of an arbitration under section 21, and, in view of the time constraints, urged him to inform the United Nations as soon as possible of the United States' choice. No communication in that regard was, however, received from the United States.

On 2 March 1988, the General Assembly adopted two resolutions on the subject. In the first resolution 42/229 A, the Assembly, *inter alia*, reaffirmed that the PLO should be enabled to establish and maintain premises and adequate

facilities for the purposes of the Observer Mission; and expressed the view that the application of the Anti-Terrorism Act in a manner inconsistent with that reaffirmation would be contrary to the international legal obligations of the United States under the Headquarters Agreement, and that the dispute-settlement procedure provided for in section 21 should be set in operation. The other resolution, 42/229 B, already cited, requested an advisory opinion of the Court. Although the United States did not participate in the vote on either resolution, its Acting Permanent Representative afterwards made a statement pointing out that his Government had made no final decision concerning the application or enforcement of the Anti-Terrorism Act with respect to the PLO Mission and that it remained its intention "to find an appropriate resolution of this problem in the light of the Charter of the United Nations, the Headquarters Agreement, and the laws of the United States".

Material events subsequent to the submission of the request (paras. 23-32)

The Court, while noting that the General Assembly had requested it to give its opinion "in the light of facts reflected in the reports" presented by the Secretary-General prior to 2 March 1988, did not consider in the circumstances that that form of words required it to close its eyes to relevant events subsequent to that date. It therefore took into account the following developments, which had occurred after the submission of the request:

On 11 March 1988, the United States Acting Permanent Representative informed the Secretary-General that the Attorney General had determined that the Anti-Terrorism Act required him to close the office of the PLO Observer Mission, but that, if legal actions were needed to ensure compliance, no further actions to close it would be taken

> "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."

The Secretary-General took strong issue with that viewpoint in a letter of 15 March. Meanwhile the Attorney General, in a letter of 11 March, had warned the Permanent Observer of the PLO that, as of 21 March, the maintenance of his Mission would be unlawful. Since the PLO Mission took no steps to comply with the requirements of the Anti-Terrorism Act, the Attorney General sued for compliance in the District Court for the Southern District of New York. The United States' written statement informed the Court, however, that no action would be taken

> "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."

Limits of the Court's task (para. 33)

The Court pointed out that its sole task, as defined by the question put to it, was to determine whether the United States was obliged to enter into arbitration under section 21 of the Headquarters Agreement. It had in particular not to decide whether the measures adopted by the United States in regard to the PLO Observer Mission ran counter to that Agreement.

Existence of a dispute (paras. 34-44)

Given the terms of section 21(*a*), quoted above, the Court was obliged to determine whether there existed a dispute between the United Nations and the United States and, if so, whether that dispute concerned the interpretation or application of the Headquarters Agreement and had not been settled by negotiation or other agreed mode of settlement.

To that end, the Court recalled that the existence of a dispute, that is to say, a disagreement on a point of law or a conflict of legal views or interests, is a matter for objective determination and cannot depend upon the mere assertions or denials of parties. In the present case, the Secretary-General was of the view, endorsed by the General Assembly, that a dispute within the meaning of section 21 existed from the moment the Anti-Terrorism Act was signed into law and in the absence of adequate assurances that the Act would not be applied to the PLO Observer Mission; he had moreover formally contested the consistency of the Act with the Headquarters Agreement. The United States had never expressly contradicted that view, but had taken measures against the Mission and indicated that they were being taken irrespective of any obligations it might have under that Agreement.

However, in the Court's view, the mere fact that a party accused of the breach of a treaty did not advance any argument to justify its conduct under international law did not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the treaty's interpretation or application. Nonetheless, the United States had during consultations in January 1988 stated that it "had not yet concluded that a disputed existed" between it and the United Nations, "because the legislation in question had not yet been implemented", and had subsequently, while referring to "the current dispute over the status of the PLO Observer Mission", expressed the view that arbitration would be premature. After litigation had been initiated in the domestic courts, its written statement had informed the Court of its belief that arbitration would not be "appropriate or timely."

The Court could not allow considerations as to what might be "appropriate" to prevail over the obligations which derived from section 21. Moreover, the purpose of the arbitration procedure thereunder was precisely the settlement of disputes between the United Nations and the host country without any prior recourse to municipal courts. Neither could the Court accept that the undertaking not to take any other action to close the Mission before the decision of the domestic court had prevented a dispute from arising.

The Court deemed that the chief, if not the sole, objective of the Anti-Terrorism Act was the closure of the office of the PLO Observer Mission and noted that the Attorney General considered himself under an obligation to take steps for that closure. The Secretary-General had consistently challenged the decisions first contemplated and then taken by the United States Congress and Administration. That being so, the Court was obliged to find that the opposing attitudes of the United Nations and the United States showed the existence of a dispute, whatever the date on which it might be deemed to have arisen.

Qualification of the dispute (paras. 45-50)

As to whether the dispute concerned the interpretation or application of the Headquarters Agreement, the United Nations had drawn attention to the fact that the PLO had been invited to participate in the sessions and work of the General Assembly as an observer; hence the PLO Mission was covered by the provisions of sections 11 to 13 and should be enabled to establish and maintain premises and adequate functional facilities. In the United Nations' view, the measures envisaged by Congress and eventually taken by the United States Administration would thus be incompatible with the Agreement if applied to the Mission, and their adoption had accordingly given rise to a dispute with regard to the interpretation and application of the Agreement.

Following the adoption of the Anti-Terrorism Act, the United States had first contemplated interpreting it in a manner compatible with its obligations under the Agreement, but on 11 March its Acting Permanent Representative had informed the Secretary-General of the Attorney General's conclusion that the Act required him to close the Mission irrespective of any such obligations. The Secretary-General had disputed that view on the basis of the principle that international law prevailed over domestic law. Accordingly, although in a first stage the discussions had related to the interpretation of the Agreement and, in that context, the United States had not disputed that certain of its provisions applied to the PLO Observer Mission, in a second stage the United States had given precedence to the Act over the Agreement, and that had been challenged by the Secretary-General.

Furthermore, the United States had taken a number of measures against the PLO Observer Mission. Those had been regarded by the Secretary-General as contrary to the Agreement. Without disputing that point, the United States had stated that the measures in question had been taken "irrespective of any obligations the United States may have under the Agreement". Those two positions were irreconcilable; thus there existed a dispute between the United Nations and the United States concerning the application of the Headquarters Agreement.

The question might be raised as to whether in United States domestic law the Anti-Terrorism Act could only be regarded as having received effective application when or if, on completion of the proceedings before the domestic courts, the Mission was in fact closed. That was, however, not decisive in regard to section 21, which concerned the application of the Agreement itself, not of the measures within the municipal laws of the United States.

Condition of non-settlement by other agreed means (paras. 51-56)

The Court then considered whether the dispute was one "not settled by negotiation or other agreed mode of settlement", in the terms of section 21(*a*). The Secretary-General had not only invoked the dispute-settlement procedure but also noted that negotiations must first be tried, and had proposed that they begin on 20 January 1988. Indeed, consultations had already started on 7 January and were to continue until 10 February. Moreover, on 2 March, the Acting Permanent Representative of the United States had stated in the General Assembly that his Government had been in regular and frequent contact with the United Nations Secretariat "concerning an appropriate resolution of this matter". The Secretary-General had recognized that the United States did not consider those contacts and consultations to lie formally within the framework of section 21 and had noted that the

United States was taking the position that, pending evaluation of the situation which would arise from application of the Anti-Terrorism Act, it could not enter into the dispute settlement procedure outlined in section 21.

The Court found that, taking into account the United States' attitude, the Secretary-General had in the circumstances exhausted such possibilities of negotiation as were open to him, nor had any "other agreed mode of settlement" been contemplated by the United Nations and the United States. In particular, the current proceedings before the United States courts could not constitute an "agreed mode of settlement" within the meaning of section 21, considering that their purpose was the enforcement of the Anti-Terrorism Act and not the settlement of the dispute concerning the application of the Agreement. Furthermore, the United Nations had never agreed to a settlement in the domestic courts.

Conclusion (para. 57)

The Court had therefore to conclude that the United States was bound to respect the obligation to enter into arbitration. That conclusion would remain intact even if it were necessary to interpret the statement that the measures against the Mission were taken "irrespective of any obligations" of the United States under the Headquarters Agreement as intended to refer not only to any substantive obligations under sections 11 to 13 but also to the obligation to arbitrate provided for in section 21. It was sufficient to recall the fundamental principle of international law that international law prevailed over domestic laws, a principle long endorsed by judicial decisions.

Operative paragraph (para. 58)

"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."

* * *

Judge Elias appended a declaration to the Advisory Opinion (*I.C.J. Reports 1988*, p. 36). Separate opinions were appended to the Advisory Opinion by Judges Oda (ibid., pp. 37-41), Schwebel (ibid., pp. 42-56) and Shahabuddeen (ibid., pp. 57-64).

NOTES

[1]*I.C.J. Yearbook 1987-1988*, p. 137; see also chaps. VI.A.7 and VIII.3(*a*) of this *Yearbook*.

[2]United Nations, *Treaty Series*, vol. 11, p. 11.